

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO.3110 OF 2021
WITH
INTERIM APPLICATION NO.3111 OF 2021
IN
CRIMINAL APPEAL NO.924 OF 2021

Rajaram Chaban Lilake

Applicant

versus

The State of Maharashtra and another

Respondents

Mr.Rajendra Tajane, Advocate for applicant.

Mr.Irfan Sait, Advocate for respondent no.2.

Mr.S.V.Gavand, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 22nd March 2022

PC :

1. Both these applications are preferred by applicant for suspension of sentence and grant of bail during pendency of Criminal Appeal No.924 of 2021.

2. The applicant is convicted vide judgment and order dated 8th October 2021 passed by Additional Sessions Judge-IV, Nashik for the offences under Section 376 of Indian Penal Code and sentenced to suffer imprisonment for 10 years and fine of Rs.7,000/-. He is also convicted for the offence under Section 420 of Indian Penal Code and sentenced to suffer imprisonment for 5 years with fine of Rs.3,000/-. He is acquitted for the offence u/s.4 of POCSO Act.

3. The case of prosecution is that the victim got acquainted with accused. They developed friendship which turned into love affair.

They went out on several occasions. Accused gave assurance of marriage to victim and subjected her for physical relationship. The incidents were repeated on several occasions at several places. The victim was in love with accused and she expected that accused would perform marriage with her. In September-2012 the victim had conceived and she had informed the accused about pregnancy. Thereafter accused started avoiding her. He refused to take her calls. The mother of victim questioned her. She was taken to doctor for medical examination. The doctor confirmed pregnancy. She delivered baby boy. The child was abandoned by victim and her mother. Since one social worker had noticed the victim and her mother while returning home after abandoning the child, they were taken to police station. The FIR was registered. The child was kept in orphanage. The victim then started searching accused. FIR was registered under Section 376(2)(i)(j), 420 of Indian Penal Code.

4. The applicant was arrested. Investigation proceeded. Statements of witnesses recorded. On completing investigation charge sheet was filed.

5. The applicant was granted bail pending trial. On conviction he has been taken into custody and since then he is in jail.

6. Learned counsel for applicant submitted that evidence on record would disclose that relationship was of consensual nature. According to victim there was physical relationship between her and accused on several occasions at several places which indicate consent of victim. The prosecution has not established that victim was minor at the time of incident. The victim is silent about the age. The

documents produced by prosecution to determine age of victim are not sufficient enough to prove the age. There were discrepancies in the DNA report. Applicant has not misused the facility of bail granted during trial. Learned counsel for applicant has relied upon decision of Division Bench of this Court in case of **State of Maharashtra Vs. Vishnu Tulshiram Karwate and others**¹ in support of his submission that prosecution has not proved the age of victim girl.

7. Learned APP submitted that there is sufficient evidence on record to show that victim was below 16 years of age at the time of incident. The prosecution has produced on record register from school as well as school leaving certificate to prove that age of victim was below 16 years. The documents relied upon by prosecution are not created or brought on record post incident. They were in existence. The DNA report supports prosecution case which establish that accused was the biological father of child. The child born to the victim is in orphanage. The evidence brought on record indicate that accused had subjected the victim to sexual relationship by false assurance of marriage. The Trial Court has rightly acquitted applicant u/s.376 as well as 420 of IPC.

8. Learned advocate for respondent no.2 supported submissions of learned APP. It is submitted that there was physical relationship between accused and the victim which cannot be denied. The victim had conceived. Accused had made false promise of marriage. The victim had surrendered herself for physical relationship on false promise of marriage. She was below age of 16 years. There was no cross-examination to disbelieve the documents brought on record by prosecution to prove the age of victim. The DNA report supports

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prosecution case. There was repeated physical relationship. As a result of that the victim had conceived.

9. It is not disputed that applicant was on bail during trial. There is no adverse report about misuse of the facility of bail. The evidence of victim indicate that she got acquainted with accused. There was intimate relationship between accused and victim. She was subjected to physical relationship. Accused had promised that he would marry. She was taken to various places wherein there was physical relationship between them. In her evidence victim has not disclosed her age or date of birth. From the tenor of evidence it is apparent that relationship was of consensual nature. PW-2 is the mother of victim. She has deposed that victim was acquainted with accused. He used to meet her without her knowledge. Victim was pregnant. From her evidence also it can be seen that she has not stated anything about the date of birth of victim and her age at the time of incident. She has, however, stated that victim had studied up to 7th standard. PW-3 is the aunt of victim. She has stated that on account of abdominal pain she was taken for medical examination and it was revealed that she was pregnant. PW-4 is aunt of victim. She has referred to the nature of relationship between accused and victim. All witnesses have not disclosed the age of victim. PW-5 is PSI who conducted investigation. He stated that he did not take any efforts to secure birth certificate of the victim. He collected school leaving certificate of the victim. The victim or her parents did not file any complaint prior to 21st June 2020. He did not collect CDR of the cell phone of accused. PW-6 is the headmaster of school. He has produced the register from school and the school leaving certificate. In the cross-examination he stated that information given in the said

document is based on oral information given by parents of child. It is pertinent to note that documents relating to the proof of birth of the victim were not pointed out to the mother of victim. They were not conflicting with the said documents. The Investigating Officer did not collect the birth certificate. In the decision of Division Bench of this Court relied upon by learned counsel for applicant it was observed that to prove age of prosecutrix the prosecution had produced school leaving certificate. The victim did not disclose her age or date of birth. She did not state that she was below 16 years of age when the accused committed sexual intercourse with her. Source of entry of date of birth in the school leaving certificate is also not relied by prosecution. School leaving certificate is also not produced.

10. The appeal preferred by the applicant is pending. There was amendment to Section 375 of IPC. The incident had occurred prior to amendment of said penal provision. It is debatable whether victim was below 16 years of age at the time of incident. The evidence of prosecutrix otherwise discloses that relationship was consensual. Considering all these circumstances, sentence of imprisonment can be suspended.

ORDER

- (i) Interim Application is allowed and disposed of;
- (ii) Sentence of imprisonment imposed vide judgment and order dated 8th October 2021 by Additional Sessions Judge-4, Nashik in Sessions Case No.39 of 2015 is suspended and applicant is directed to be released on bail on executing PR bond in the sum of Rs.20,000/- with one or more sureties in the like amount;
- (iii) The applicant is permitted to furnish cash bail in the sum of

Rs.20,000/- for eight weeks in lieu of sureties;

(iv) The applicant shall not approach the victim or her family members in any manner;

(v) The applicant shall attend Trial Court once in six months on First Saturday of the month till disposal of the Criminal Appeal;

(vi) In the event there are two consecutive defaults in attending the Trial Court, the Trial Court shall submit report to this Court;

(vii) In the event of default committed by the applicant in attending the Trial Court, the prosecution will be at liberty to prefer application for cancellation of bail.

(PRAKASH D. NAIK, J.)

MST