

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO.197/2022

Akshay s/o Manohar Vaidya

...Versus...

**The State of Maharashtra, Through Police Station Officer, Police Station :
Tirora, Tq. Tirora, District Gondia and another**

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Mr. R.P Joshi, Advocate for appellant/applicant
Mr. N.S. Rao, APP for respondent no.1/State
Ms Radha Mishra, Advocate (appointed) for respondent no.2/victim

CORAM : AVINASH G. GHAROTE, J.

DATE : 18/07/2022

1. Heard Mr. Joshi, learned counsel for the appellant/applicant, Mr. Rao, learned Additional Public Prosecutor for the respondent No.1/State and Ms Mishra, learned counsel appointed for the respondent No.2/victim.

2. Criminal Application No.245/2022 seeks suspension of sentence and grant of bail. By an order dated 04/04/2022, the criminal appeal has been admitted and the notices have been issued on this application for suspension of sentence and grant of bail.

3. The applicant has been convicted for the offence punishable under Section 376 (3) of IPC and under Section 4 of the Protection of Children from Sexual Offences, Act, 2012 and has been sentenced to undergo Rigorous Imprisonment for a period of 20 years and fine of Rs.2,00,000/-, in default, Rigorous Imprisonment for five years. The fine has not been deposited.

4. Mr. Joshi, learned counsel for the applicant submits that the appellant, who is 23 years of age, runs a grocery shop in village Chandori Khurd, Tah. Tirora, which is interior part of District Gondia and therefore, is not a person who can be said to be capable of having means to pay the fine amount and therefore the fine has not been deposited.

5. Mr. Joshi, learned counsel for the applicant by inviting my attention to the medical evidence (Exh.38) and the evidence of PW-6 Dr. Dhawal Sawant submits that the medical evidence is not supportive of the allegation under sections 376 (3) of IPC. He further submits by relying upon the evidence of PW - 2, mother of the victim, that the age of the victim from her cross-examination (para 17 pg.10) of the pursis dated 11.4.2022 can be calculated as 23 years on account what has been stated by her regarding the birth of the victim. Insofar as the evidence regarding the age of the victim is concerned, he submits that Exh.32 is the birth certificate

(pg.28 of the pursis), which does not bear the signature of the informant, who is the father of the victim. Relying upon Sections 8, 11 and 22 (2) of the Births, Deaths and Marriages Registration Act, 1886 and Rule 5 and Form-I of the Maharashtra Registration of Births and Deaths Rules, 2000, it is contended that the signature of the informant is mandatory. Reliance is placed upon *Gangadhar s/o Gonduram Tadme Vs. Trimbak s/o Govindrao Akingire and others, 2005 (1) Mh.L.J. 94* (para 7 and 8) and *Vinayak s/o Narhari Kolshikwar Vs. State of Maharashtra and others, 2008 (2) Mh.L.J. 179* (para 21 and 23) and the evidence of PW-5 Deorao Milakram Bhandare the Gram Sevak of Grampanchayat Chandori Khurd, who contends that the age has not been conclusively proved. He further submits that no ossification test has been carried out, which is indicated by absence of any medical evidence in that regard. It is further contended that the first statement of the victim was recorded by S.D.P.O. Radha Late, who is claimed to have videographed the entire proceedings, however, neither Radha Late has been examined nor the pendrive containing recording of the video proceedings of her statement has been proved, though the panchanama has been proved at Exh.43. According to him, the pendrive was a material evidence which was necessary to have been proved, failure to do which entitles the applicant for bail.

6. Mr. Joshi, learned counsel for the applicant further submits that the evidence of PW-1/victim, would indicate that her mental condition was not appropriate as is spelt out from what is recorded by the learned Sessions Court at the end of her deposition (pg.5 of the pursis) and therefore her examination by a competent practitioner ought to have been prior to recording of her deposition and not subsequent in point of time after it was over. He therefore submits that the aforesaid contentions, entitle the applicant for suspension of sentence and release of him on bail, though during the course of trial the application for bail filed by the applicant was rejected and he continued in incarceration, from the date of his arrest which was on 16.10.2020.

7. Mr. Rao learned APP for the respondent no.1/ State as well as Ms Mishra learned counsel for the respondent no.2/victim, vehemently oppose the application. It is contended that though the Form -I at Exh.32 does not contain the signature of the informant, however, the name of the informant being the father of the victim is already there (pg. 29 of the pursis). It is contended that the evidence of PW-2 would not be material in determining the age of the victim considering Exh.32 having already been brought on record. It is contended that Exh.32, the birth certificate, does not require the signature of the informant and therefore, absence of the same cannot be said to be a non-fulfillment of

the requirement of law.

8. It is also contended that though Exh.38 does not indicate any recent injury, that by itself cannot be a ground to hold that the applicant has not committed the act, more so, in light of the finding rendered by the learned Special Court in the judgment in question. It is, therefore, contended that the application needs to be rejected.

9. The incident is alleged to have taken place on 15.10.2020 when the mother of the victim/PW-2 had sent her to purchase a pouch of fair and lovely cream. There are only two shops in the entire village and one is of the accused, the other is of Kunal Titarmare. When after considerable period of time since the victim did not return, PW-2 mother of the victim went in search of her to the shop of the accused. The door was locked but the fan inside was on. Presuming that the accused would be resting inside the shop, she went to the shop of Kunal and enquired about her daughter, but was informed that she had not turned up. On the way back to her home, she found the victim coming out of the house of the accused and upon enquiry about her belated return, the victim started crying and informed the PW-2 that the accused had taken her in the inside room of the shop, laid her on the cot, took out her clothes and inserted his finger into her vagina and later on committed rape upon her. It is also claimed by her that she had washed out the

filth on her person with her knicker. On complaint being lodged by the PW-2 on the same day the medical examination of the victim was conducted on 16.10.2020 at about 2.30 a.m by the PW6 - Dr. Dhawal Sawant (pg.20 of the pursis). Exh.38 is the report given by him. Perusal of Exh.38 would indicate in Column No.VI (f) (g) and (l) that there were no injuries present but the hymen was ruptured; the edges were normal; there was no bleeding and no edema and there was no tears and no other injury or any finding as of 16.10.2020. The opinion was given that as the hymen rupture was old and healed, victim may have had sexual intercourse but final opinion is pending till FSL report. What is material to note is that the incident is alleged to have taken place on 15.10.2020 between 2:00 to 3:00 pm and the medical examination has been done within 12 hours at 2.30 a.m. of 16.10.2020, in spite of which, there is no medical report of any fresh injury upon the victim or for that matter of any injury of whatsoever nature. The evidence of PW 6 – Dr. Dhawal Sawant supports this position, who, in his cross-examination, has stated that only age of fresh injury can be determined and as indicated above there was no fresh injury whatsoever. Though it is stated that while examining the victim one Dr. Archana Chaudhari was also present, she, however, has not been examined. The FSL report dated 28.1.2021 at Exh. 9/1, 2 and 3, does not indicate any blood or semen stains on the knicker of the victim, by which, she is alleged to have wiped filth.

There is also nothing found in the blood, nail clippings, pubic hairs and vaginal swab of the victim, in the FSL report and would be a factor, which is in favour of the applicant.

10. The age of the victim, as per the evidence of PW 2 (para 17 of the cross-examination/pg. 10 of the pursis) would be indicated by a reverse calculation as approximately 23 years. The age as per the certificate under the Births, Deaths and Marriages Registration Act, 1886 (Exh.32/pg. 28 of the pursis) would be around 13 years. *Prima facie*, Exh.32 has not been signed by the informant as per the learned APP, however, Exh.32 is merely a certificate issued by the Registrar under the Registration of Births and Deaths Act, 1969 and would not be a document, which would require the signature of the informant. The form annexed with Exh.32, is actually a document, which would require the signature of the informant, as it is the report received by the Registrar, in pursuance to Rule 5 of the Maharashtra Registration of Births and Deaths Rules, 2000. Rule 5 of the said Rules, necessarily require the signature/thumb impression of the informant. Form -I of the Forms under Rule 5 also requires the thumb impression or signature of the informant, which is missing in the report, annexed with Exh.32 (pg.29 of the pursis), which is Exh.34. The requirement of the signature/thumb impression of the informant, has been held to be mandatory in ***Gangadhar Tadme*** (supra) by the learned Division Bench of this Court. This position has been

affirmed by another learned Division Bench in ***Vinayak Kolshikwar*** (supra). In this context, if the evidence of PW 5 - Deorao Bhandare (pg.18 of the pursis) is taken into consideration, he claims ignorance in the cross-examination as to the documents in respect of which the entry has been taken in the register, however, since the birth has taken place in the house as is indicated by Exh.34, that by itself is of no consequence. However, in his cross-examination, he further admits that Exh.34/Form-I under Rule 5 of the Maharashtra Registration of Births and Deaths Rules, 2000 does not bear the signature of the informant, which would indicate that there may be a window of argument open for the applicant regarding the age of the victim/PW-1. Admittedly, no ossification test has been done.

11. Though it is stated that the first statement of the victim was recorded by S.D.P.O. Radha Late, who has recorded video of it, the said S.D.P.O. Radha Late, has not been examined, neither the pendrive containing the video recording has been exhibited, which is the position admitted by Mr. Rao learned APP.

12. In light of the discussion above, though there is a sentence imposed of 20 years upon the appellant/applicant, in my considered opinion, upon the medical evidence as well as the evidence regarding the age of the victim, which has come

on record and considering the age of the appellant/accused *prima facie*, would indicate a case being made out for suspension of sentence and release the applicant/appellant on bail. Hence the following order.

ORDER

(i) The criminal application is allowed. Subject to payment of 50% fine amount, as imposed upon the appellant/applicant being deposited in this Court, which is a condition precedent, the sentence imposed by the learned Special Court is hereby suspended and the applicant/appellant be released on bail on his executing PR. Bond in the sum of Rs.1,00,000/- (Rupees One Lakh Only) with two solvent sureties in like amount.

(ii) Hamdast granted.

(AVINASH G. GHAROTE, J.)

Sarkate..