

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

35 CRIMINAL APPLICATION NO.265 OF 2023
IN APEAL/44/2023 WITH APEAL/44/2023 WITH
APEAL/87/2023

NILESH SUNIL UMAP
VERSUS
THE STATE OF MAHARASHTRA

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Advocate for Applicant : Mr. Magre Sunil G., Mr. Ubale S. P.
APP for Respondent-State : Mr. S. P. Deshmukh.
Advocate for Respondent No.2 : Ms. Rani Tandale-Appointed.

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CORAM : S. G. MEHARE, J.
DATE : 26.06.2023

PER COURT :-

1. Heard the learned counsel for the applicant, learned APP for the respondent-State and the learned counsel appointed for the victim/respondent No.2.
2. The applicant has been convicted for the offences punishable under Sections 363, 342, 323, 376(2)(n) read with Section 34 of the IPC and under Section 4 of the POCSO Act. However, under Clause (5), the conviction has been imposed under Section 376(2)(n) read with Section 34 of the IPC. The learned Additional Sessions Judge, Ahmednagar, in Special

Case No.167 of 2021, dated 02.12.2022, sentenced the applicant to suffer R.I. for ten years and fine of Rs.3,000/-.

3. The applicant is seeking suspension of sentence imposed on him.

4. Learned counsel for the applicant would submit that there is serious doubt about the age of the victim. There was no evidence except the ossification test to prove her age. There was margin of two years in case of ossification test. As per the ossification test, she was between the age of 16 to 17 years. So, considering the margin of two years, she would not be less than 18 years old. The case law relied upon by the learned Additional Sessions Judge is not applicable to the facts of the case. There was inordinate delay of 2 to 3 months in lodging the FIR. The learned Additional Sessions Judge has erroneously expressed that the delay was caused due to Covid-2019 pandemic and she was residing at Mumbai. She was in the safe custody of CWC. Therefore, it was possible for her to lodge the report immediately. When she was admitted to the Children Home, the story has been developed. There are no

supporting circumstances to believe that she was physically and sexually assaulted at the hands of the accused.

5. The prosecution did not prove the case beyond reasonable doubt. She never complained of the sexual harassment till she was produced before CWC and sent to Children Home. These material facts have been completely ignored while imposing the sentence. The age of the victim is under the shadow of doubt. Therefore, the applicant cannot be held an accused under the POCSO Act. The fine amount has been deposited. Considering the discrepancies in the prosecution case and insufficient evidence, his sentence may be suspended.

6. Learned APP and the learned counsel for the victim have vehemently argued that the victim was the abandoned child. She had no parents. The accused took disadvantage of the situation of victim with his wife/co-accused. She was physically and mentally abused and sexually assaulted. The learned Additional Sessions Judge has correctly appreciated the evidence and believed that she was below 18 years at the time of the incident. The Court has correctly accepted the

explanation about delay. There is apprehension at the hands of the accused that she may be again sexually assaulted as she is an abandoned child. The offence is serious. The appropriate conviction has been imposed. Therefore, the applicant has no good case for suspension of sentence.

7. The prosecution did not have the age proof, as there were no entries recorded either in the school record or in the birth or death certificate. Therefore, the prosecution was to rely on the ossification test. The expert opined that she was between 16 to 17 years of age. There is plus minus margin of 2 years and the benefit should be given to the applicant. Whether the ratio laid down by the learned Additional Sessions Judge in the case of *State of Karnataka Vs. Bantara Sudhakara @ Sudha and another* is applicable or not is a matter of hearing on merit. Age of the victim goes to the roots of the cases under the POCSO Act as well as the IPC. Whether the delay is properly explained is also the another question to be considered. There are no antecedents to the discredit of the applicant. The conviction is for not a longer period. The applicant has good points to argue in the appeal on merits. The appeal may take its time. Considering the facts and the law as

regards to suspension of sentence, the Court is of the view that the applicant deserves suspension of the sentence. Hence, the following order :

ORDER

- (i) Criminal Application stands allowed.
- (ii) The execution, implementation, effect and operation of the sentence imposed upon the applicant by the learned Additional Sessions Judge, Ahmednagar in Special Case No.167 of 2021 by its judgment and order dated 02.12.2022 stands suspended till conclusion of the appeal.
- (iii) The applicant be released on bail on executing PB. and S.B. of Rs.50,000/- (Rupees Fifty Thousand only) with one solvent surety of the like amount.
- (iv) Bail before the learned Additional Sessions Judge, Ahmednagar.
- (v) List the matter in due course.

- (vi) The Secretary, High Court Legal Services, Sub-Committee, Aurangabad do pay the legal charges to advocate Ms. Tandale as per the schedule.

(S. G. MEHARE, J.)

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vmk/-