

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

**CRIMINAL APPLICATION NO.483 OF 2023 IN
CRIMINAL APPEAL NO.99 OF 2023**

Chhaban s/o Machindra Khemnar ... **APPLICANT**

VERSUS

The State of Maharashtra & anr. ... **RESPONDENTS**

.....
Mr. K.N. Shermale, Advocate for applicant
Mr. A.S. Shinde, A.P.P. for respondent No.1.
Ms. S.S. Kulkarni, Advocate for respondent No.2.
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CORAM : R.G. AVACHAT, J.

Date of reserving order : 2nd May, 2023.

Date of pronouncing order : 16th June, 2023.

ORDER :

Heard. This is an application for suspension of execution of substantive sentences of imprisonment. The applicant has been convicted for the offence punishable under Section 376(1) of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer rigorous imprisonment for 10 years on both counts and fine with default stipulation. Both the sentences

have been directed to run concurrently.

2. The learned counsel for the applicant would submit that, it is a case of fixed term sentence. The appeal is of this year. It is not likely to have its turn for hearing on merits within next 7 – 8 years. The medical examination report of the victim and C.A. report as well rule out sexual assault. Age of the victim has also not been duly proved. Relations between parents of the victim on one hand and the applicant on the other, have been strained. A defence witness, real uncle of the victim vouched for the same. Learned counsel for the applicant, therefore, urged for grant of the application.

3. The learned A.P.P. and learned counsel for the victim and the learned counsel appointed to assist the Court would, on the other hand, submit that, the victim's mother gave her date of birth. The original birth register was produced before the Court. The entry of birth taken in the register within days of the birth of the victim indicates she was below 18 years of age when the offence took place. The C.A. reports indicate the clothes of the victim and that of the applicant borne human semen stains. The victim has no reason to falsely implicate the applicant herein. The applicant is the son of parental aunt of the victim. He was in the age group of 32 – 33 years. He is

a married person, having three children. The applicant admitted the medical certificate of the victim. Mere absence of injuries on the person of the victim does not rule out sexual assault. In view of Section 29 of the POCSO Act, it was for the applicant to explain presence of semen on his clothes and the clothes of the victim. The victim's ear-top was found at the crime scene. The witness examined in defence was got up witness. While the incident took place, there was no dispute between the two families. A civil suit for partition has been filed by the mother of the applicant post incident with a view to pressurize the victim's parents to come to the terms. The learned counsel relied on the following authorities to ultimately urge for rejection of the application.

- (1) Lochan Shrivastava Vs. State of Chhattisgarh
2022 AIR (SC) 252
- (2) Sunita @ Neha Machhindra Chandne Vs. State of Maharashtra & anr. [Criminal Appeal No.794/2019]
- (3) Jarnail Singh Vs. State of Haryana
MANU/SC/0626/2013
- (4) Santosh Prasad @ Santosh Kumar
(Criminal Appeal No.264/2020)
- (5) Guddan @ Roop Narayan Vs. State of Rajasthan

4. Considered the submissions advanced. Perused

the impugned judgment, evidence and the authorities relied on. Pending the trial, the applicant was on bail. The applicant is the son of paternal aunt of the victim. Both the victim and the applicant were on talking terms. According to the victim, six months before the alleged incident, the applicant had requested her to allow him to have sex with her. She did not disclose the said incident. On the given day, the applicant had come to the house of the victim. He had asked her parents to allow her to accompany the applicant for agricultural operations in his field. The victim joined the applicant. He took her on his motorbike to a secluded place. The applicant had sexual intercourse with her there. He then brought her back to her residence.

5. The incident is said to have taken place by 8.00 in the morning. The F.I.R. has been lodged post 6.00 p.m. The place whereat the alleged offence took place, was in jungle. The victim did not take bath before she was medically examined. Her medical examination report indicates, hymen-torn. No bleeding. The medical officer, on examination of the victim, reserved his/her opinion. In his/ her opinion, evidence of sexual intercourse/ assault cannot be said. Hence, final opinion is kept pending till receipt of FSL report. The C.A.

reports as regards vaginal swab indicate no semen was detected thereon. This runs counter to the prosecution case.

6. True, the C.A. report of the clothes of the victim and the applicant indicate semen stains thereon. The blood grouping of the semen stains is inconclusive, although the clothes were seized within 10-12 hours of the alleged incident. Finding of semen stains of an unspecified blood group would not be conclusive. As such, it is a case of sole testimony of the victim. About finding of ear-top at the crime scene, it is to be stated that, no test identification regarding that article was made nor was there any evidence to indicate ear-tops of the victim had fallen at the crime scene.

7. It is the case of the applicant that a false F.I.R. was lodged since relations between his father and father of the victim were sour. The mother of the victim admitted to have good relations with her brother-in-law. The brother-in-law was examined as a defence witness. It is in his evidence that, relationship between father of the victim and the applicant were not good on account of dispute over *batai* charges. On the question of age of the victim, her evidence in that regard is hear-say. Although her birth certificate was admitted in evidence on the strength of the oral testimony of the

Gramsevak, a person on whose information the date of birth was recorded, was not examined. The victim, in her cross-examination, admitted that her elder sister was 20 - 21 years of age while she got married. The marriage of the elder sister took place about 2 – 3 years before the crime in question. She (victim) was younger by 2 ½ years or 3 years than the elder sister.

8. As such, it is a case of sole testimony of the victim, not corroborated by medical evidence. The applicant was on bail pending trial. The appeal is of this year. It is not likely to have its turn for hearing at least for next 6 – 7 years. Authorities relied on by learned counsel for the victim are quite distinguishable on facts.

9. The applicant is in jail for about 6 months. He was in jail for little over 3 ½ months during enquiry and investigation of the crime. For all these reasons, the Court is inclined to grant the application. Hence the order :

ORDER

(i) The criminal application is allowed.

(ii) Pending the appeal, the execution of substantive

sentences of imprisonment imposed upon the applicant by learned Additional Sessions Judge, Sangamner, by judgment and order dated 17/1/2023, passed in Special Case No.08/2017 to stand suspended and the applicant be released on bail on his executing P.R. bond in the sum of Rs.15,000/- (Rupees fifteen thousand) with one surety in the like amount.

(iii) The applicant shall deposit the fine amount as a condition precedent for enforcement of this order.

(iv) Fees of appointed Advocate Mrs. S.S. Kulkarni, Advocate for respondent No.2 is quantified at Rs.6000/- (Rupees six thousand).

(R.G. AVACHAT, J.)

fmp/-