

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 1143 OF 2023
IN CRIMINAL APPEAL NO. 369 OF 2023

Shamrao Manikrao Mokade,
Age : 36 years, Occ. : Labour,
R/o. : Harshi, Tq. Puasad, Dist. Yewatmal,
At present R/o. : Bhanudas Nagar,
Galli No.2, Aurangabad

... Applicant/Appellant
(Ori. Accused)

VERSUS

1. The State of Maharashtra
Through Police Station Jawaharnagar,
Aurangabad, Tq. & Dist. Aurangabad

2. X.Y.Z.

... Respondents
(Resp. No.2 – Complainant)

...

Ms. Manjushri V. Narwade a/w. Ms. N.V. Mirajkar – Advocate for Applicant
Mr. R.D. Sanap – APP for Respondent No.1, State
Mr. R.R. Kale – Advocate for Respondent No.2

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CORAM : SANDIPKUMAR C. MORE, J.

DATE : 14th September, 2023

ORDER :

1. The applicant i.e. original accused in Special Case (POCSO) No.173 of 2020 is seeking his release on bail during the pendency and till final disposal of this appeal. Surprisingly, the applicant has not made any prayer in respect of suspension of his substantive sentence of imprisonment during the pendency of this appeal. The

impugned judgment indicates that, the present accused has been convicted in the aforesaid case as follows :

- a) *For the offence punishable u/Sec. 363 of I.P.C. and is sentenced to suffer R.I. for the period of 3 years and shall pay a fine of Rs.1000/- in default to suffer SI for 8 days.*
- b) *For the offence punishable u/Sec. 376 (2) (i) (n) of IPC the accused shall suffer rigorous imprisonment for the period of 10 years and shall pay a fine of Rs.25000/- in default to suffer SI for 3 months.*
- c) *For commission of offence punishable u/Sec. 506 of IPC accused shall suffer rigorous imprisonment for the period of three years and shall pay a fine of Rs.1000/- in default to suffer SI for 8 days.*
- d) *For commission of offence punishable u/Sec. 4 (2) of POCSO Act accused shall suffer rigorous imprisonment for the period of twenty years and shall pay a fine of Rs.25000/- in default to suffer SI for three months.*
- e) *For commission of offence punishable u/Sec. 6 of POCSO Act accused shall suffer rigorous imprisonment for the period of twenty years and shall pay a fine of Rs.25000/- in default to suffer SI for three months.*
- f) *For commission of offence punishable u/Sec. 8 of POCSO Act accused shall suffer rigorous*

imprisonment for the period of three years and shall pay a fine of Rs.1000/- in default to suffer SI for 8 days.

2. The learned Counsel for applicant strongly submits that, the applicant – accused has been wrongly convicted by the Special Judge, POCSO, Aurangabad (hereinafter referred to as “*learned Trial Court*”) by ignoring that, there was love-affair between him and the victim, who was aged 15 years at the time of incidence. Learned Counsel further pointed out that, the victim had in fact narrated the fact of love-affair between herself and applicant to the concerned Medical Officer, who examined as P.W. – 7, Dr. Mohini Dilip Patil. She further pointed out that, the incidence had taken place in the year 2020 and the case was tried expeditiously and disposed in the year 2021, therefore, no occasion arose for seeking bail during the trial. She relied on the orders passed by this Court as under :

- (i) **Bail Application No. 997 of 2022** dated 26th April, 2023
- (ii) **Criminal Bail Application No. 130 of 2022** dated 20th October, 2022
- (iii) **Bail Application No. 3372 of 2021** dated 15th November, 2022
- (iv) **Bail Application No. 1036 of 2015** dated 3rd August, 2015

3. On the contrary, learned A.P.P. as well as learned Counsel appearing for victim strongly opposed the submissions made on behalf of applicant – accused. According to them, there was direct evidence against the applicant about the alleged acts and even if it is presumed that, the victim was consenting party at the time of act of physical relations but considering her age, her consent was not material. Both of them pointed out the presumptions under Sections 29 and 30 of Protection of Children from Sexual Offences Act, 2012 (POCSO), wherein the burden lies upon the defence to prove contrary the prosecution case. They pointed out that, applicant was around 34 years and victim was 15 years old at the time of incidence and, therefore, presumptions of culpable mental state comes into picture.

4. Heard rival submissions and perused the documents on record and also gone through the entire evidence recorded by the learned Trial Court as reflected from record and proceeding of original Special Case (POCSO) No. 173 of 2020.

5. Admittedly, the applicant – accused was an under-trial prisoner and the evidence on record indicates that, the victim and other prosecution witnesses have deposed against the accused.

Moreover, considering the age of victim about 15 years, her so called consent or love-affair is not at all material, specifically when she has clearly denied the fact of love-affair, while deposing before the Court. Admittedly, P.W. – 7, Dr. Mohini Patil has deposed before the Court that, victim narrated history of incidence at the time of her medical examination that, she had consensual physical relation with applicant – accused but while deposing before the Court the victim has deposed as per the prosecution story. Even otherwise also victim consent was not material, considering her age of 15 years.

6. Learned Counsel for applicant – accused heavily relied on the orders passed by this Court in the bail applications as mentioned above wherein the respective accused persons are released on bail, despite being involved in the offence under the provisions of POCSO Act, 2012, such as sexual assault, sexual harassment, sexual aggravated acts etc. However, all these orders are passed on the applications under Section 439 of Criminal Procedure Code i.e. at pretrial stage. It is not so in this case. The applicant – accused after considering the entire material on record has been convicted by the learned Trial Court and, therefore, his application for bail post-conviction cannot be treated as Regular Bail Applications as filed in

the aforesaid cases at pretrial stage. The maximum punishment of imprisonment imposed upon the applicant is of 20 (twenty) years and, therefore, considering the gravity of allegations and seriousness of the matter, I am not inclined to release the applicant – accused on bail during the pendency of this appeal. As such, the application stands rejected.

[SANDIPKUMAR C. MORE]
JUDGE