

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

**CRIMINAL APPLICATION NO.1243 OF 2023 IN
CRIMINAL APPEAL NO.273 OF 2023**

Alim Salim Pathan

... **APPLICANT**

VERSUS

The State of Maharashtra & anr.

... **RESPONDENTS**

.....

Mr. V.P. Kadam, Advocate for applicant

Mr. K.N. Lokhande, A.P.P. for R. No.1

Ms. Karishma S. Sarin, Advocate for R.No.2 (appointed)

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CORAM : R.G. AVACHAT, J.

DATE : 19th APRIL, 2023

ORDER :

Heard. This is an application for suspension of substantive sentences of imprisonment. The applicant has been convicted for the offence punishable under Sections 376(2)(f), (i) and (n) and 506 of the Indian Penal Code and Sections 4 and 5(l) and (n) read with 6 of the Protection of Children from Sexual Offences Act and sentenced to suffer rigorous imprisonment for a maximum term of ten years and fine with default stipulation. The substantive sentences are directed to run concurrently. The applicant is in jail since 9/8/2019 i.e. about three years and 8 months.

2. In short, the case of the prosecution is that, the applicant committed rape of his real sister. Both, the learned counsel for the victim and the learned A.P.P. would submit that, it is a serious offence. The applicant spoiled a pious relationship. The victim has no reason to give evidence against her real brother. Her mother was also one of the accused in the case. The evidence of the victim was adverted to. The reasons given by the trial Court for convicting the applicant have also been reiterated with an ultimate prayer for rejection of the application.

3. The applicant, his real sister (victim) and their mother would reside together in a slum. The applicant even could not engage Advocate to represent him in this appeal. He was, therefore, given legal aid. This Court has carefully perused the evidence of the victim. She claimed to be below 18 years of age. It is in her evidence that, the applicant had sexual intercourse with her twice. First such incident took place while the mother had gone to her (mother's) place in some other town. Taking advantage of the victim to be alone home, the applicant insisted her to allow him to have sexual intercourse with her. It is further in her evidence that the applicant had sexual intercourse with her without her consent

and against her wish. She thereby experienced pain in her stomach and vagina as well. Admittedly, this incident has not been reported to anyone immediately. The victim has also not related this incident in her report to the police (F.I.R. Exh.38).

4. It is further in her evidence that, on the second occasion, the mother was away at a flour mill. The applicant did the same thing with her as before. On return of the mother (original accused No.2), she related her the incident. The mother, instead of supporting the victim, beat her up. As per the prosecution case, somebody informed one Zubaidabi (P.W.3), a social worker, about there being quarrel between the victim and her mother. Zubaidabi, therefore, visited the victim's residence. The victim related her the incident. She, therefore, took the victim to the Police Station. The victim lodged the F.I.R. there.

5. Both, the victim and P.W.3 Zubaidabi were subjected to a searching cross-examination. The victim admitted in no uncertain terms that about 8 to 10 days before the alleged incident, 2 – 3 boys from the village Pishor had taken her with them to Chalisgaon. She claimed to have stayed with those boys for 8 to 10 days at Chaligaon. During her such stay, those

boys committed rape of her. She has also admitted that, her mother has lodged a missing person's report at the police station. Her evidence would further indicate that, P.W.3 Zubaidabi had accompanied police to Chalisgaon. She was brought back to Pishor. It is further in her evidence that, on return from Chalisgaon, she stayed for 2-3 days at the house of Zubaidabi. The victim admitted that, Zubaidabi works with police.

6. It is the defence of the applicant that, since police did not investigate the crime of the victim to have been taken to Chalisgaon, the victim's mother and the present applicant had a quarrel with the police. It was also suggested that, a false report has been lodged at the behest of police and Zubaidabi. The investigating officer of the present crime was confronted with the defence version. He initially denied about registration of any such crime. He also denied to have even not known the victim. When, however, he was confronted with a particular crime number registered at the instance of victim's mother, he came around to submit that a 'C' Summary report was filed in connection therewith. It is very surprising that, when the victim was traced out at Chalisgaon and brought back, the investigating officer filed a 'C' Summary report more so when

the boys were from village Pishor itself. Be that as it may.

7. Admittedly, Zubaidabi has her residence 3 Kms. away from the house of the victim. It is surprising that, she visits the house of the victim and takes her to the Police Station and none from the neighbours. Zubaidabi has stated in her evidence that, she was a member of Mahila Dakshata Samiti. According to her, one Basheerabi had made her a phone call and informed about the victim's mother to have thrashed her. Basheerabi has not been examined as a witness.

8. P.W.6 Dr. Kaniz Fatima testified that, the victim gave her the history of the applicant to have multiple time sexual contact with her during one and half year at her residence. The history given by the victim is inconsistent with her case in the F.I.R. and before Court as well. The victim had even given the history that every such act of sexual intercourse was done by the applicant by using condom (contraceptive). The medical examination report of the victim suggests no injury at her private part. In the opinion of the Medical Officer, sexual intercourse could not be ruled out.

9. There is one more startling fact. Police had taken

the victim to Court of Judicial Magistrate, First Class to record her statement under Section 164 of the Criminal Procedure Code. Her statement dated 21/8/2019 is at Exh.78. The learned Judge put up certain questions to her. One of the questions put to the victim was, Whether the police or any other person pressurized, lured or promised her for giving a statement. She answered the said question – “Yes”. The record indicates, later on the learned Magistrate ensured presence of the victim before him and again put up the said question, to which the victim is said to have said, “No”. It is not known as to at whose instance such correction was made who noticed the alleged mistake first. In view of this Court, it should have been only at the instance of the victim who should have told that in spite of she having replied the question in the negative, the Magistrate recorded the answer “Yes”. The statement of the victim to the Magistrate, stating the police to have pressurized to make the statement goes a long way to suggest there being substance in the defence of the appellant.

10. The aforesaid evidence indicates the victim is not a reliable witness. The applicant is in jail since 9/8/2019 i.e. about three years and 8 months. The appeal is not likely to come up for hearing in immediate future. The applicant is

financially unsound. He would stay in a slum. An Advocate from the legal aid panel represented him in this application. This Court experienced during this assignment that, in at least three appeals, the appellants have undergone entire sentence of not less than ten years, still their appeals did not have turn for final hearing. In few matters, the appellants were found to have been behind the bars for more than half of the sentence of imprisonment when their appeals came to be allowed on merits. This happened after their applications for suspension of substantive sentences were rejected.

11. For all the aforesaid reasons, the Court is inclined to allow 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 Special Judge (POCSO Act), Aurangabad in Special Case Child Prot.No.181/2019, by judgment and order dated 23/12/2021 to stand suspended and the applicant be released on bail on his executing P.R. bond

in the sum of Rs.10,000/- (Rupees ten thousand), since he is unable to furnish surety bond. The same is manifest from the fact that a counsel from the legal aid panel was appointed to represent him.

- (iii) Fee of learned Advocate appointed for the victim is quantified at Rs.7000/- (Rupees seven thousand) for the purpose of this application.

(R.G. AVACHAT, J.)

fmp/-