

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

**CRIMINAL APPLICATION NO. 1474 OF 2022
IN
CRIMINAL APPEAL NO. 326 OF 2022**

Ashok Maroti Sarwade

..APPLICANT

VERSUS

State of Maharashtra and Another

..RESPONDENTS

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Mr. C.C. Deshpande, Advocate h/f Mr. G.M. Sharma, Advocate for applicant
Mr. A.A. Jagatkar, A.P.P. for respondent no.1 - State
Mr. M.G. Kolse Patil, Advocate for respondent no.2

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**CORAM : R.G. AVACHAT, J.
DATED : 20th MARCH, 2023**

PER COURT :

1. It is informed that office objection has already been removed, still the matter is shown in the 'Order' category. Learned counsel for Respondent No.2-victim informs to have been ready to workout the matter, therefore, taken up.

2. The applicant has been convicted for the offence punishable under Sections 4 and 6 of Protection of Children from Sexual Offences Act, 2012 ('P.O.C.S.O.') and sentenced to suffer rigorous imprisonment for seven years and ten years respectively and fine of Rs.5,000/- for each offence, in default, to suffer simple imprisonment for one month. Though the applicant has also been convicted for the offence punishable under Sections 376(2) of the

Indian Penal Code, in view of rider of Section 42 of the P.O.C.S.O., no separate punishment is imposed on him. As such, the applicant has to undergo maximum sentence of imprisonment of ten years, as against the same he is in jail for little over two years.

3. Learned counsel for Respondent No.2 - victim and learned A.P.P. as well opposed the grant of application on the ground that the victim was below eighteen years of age at the relevant time and the applicant was a married person. Learned counsel for Respondent No.2 - victim also relied on order dated 15th November, 2021 passed by this Court in Criminal Appeal No. 227 of 2021. He also took this Court through history given by the victim to the medical officer at the time she was medically screened. According to him, consent of the victim is immaterial since she was below eighteen years of age at the relevant time. He also requests for expedite hearing of the appeal. He would further submit that the applicant had given threats to father of the victim. The victim is reported to have married and living a happy married life. If released, the applicant is likely to trouble her.

4. The evidence of P.W.1 - mother of the victim reads thus :-

“6. Victim has no nickname. It is true to say that, when we had been to Sugar Factory at Kadegaon, as victim was in love affair with accused and was liking him, she went with him. It is true to say that, both of them have married at Pune and resided at Pune for about four months. It is true to say that, victim and

accused resided in Sapla Shivar in grazing land for about 8 to 10 days happily as husband and wife. It is true to say that, as victim was liking accused, she wants to reside with accused. It is true to say that, as accused is belonging to some different caste, we are not ready to perform marriage of victim with him. It is true to say that, as victim used to go with accused against our wish, we are not liking it. It is true to say that, so as to teach a lesson to accused we have filed this case.”

5. The evidence of P.W.2 - victim reads thus :-

“1. I have no nickname and I know my name Neha (name changed).

2. Accused was also present there for the work of sugarcane cutting. I told him that, I like him. He also told me that, he likes me. After two to three months accused took me to Sangli Miraj. At Miraj we resided as husband and wife. We had sexual relations like husband and wife.

5. It is true to say that, in the year 2019 I alongwith my parents had gone to Karnataka for sugarcane cutting work. It is true to say that, I told accused that, I would like to marry him. It is true to say that, accused was also ready to marry him. It is true to say that, at that time accused left our gang and proceeded to work in another gang. It is true to say that, at that time I made a phone call to accused and told him to take with him. It is true to say that, at that time accused gave me understanding that, it was not possible for him to act as per my wish. It is true to say that, at that time I insisted him to take me with him. It is true to say that, I went with accused to Pune It is true to say that, thereafter we

both came to Arag, Tq. Miraj. It is true to say that, we made inquiry with Daji Gangadhar Gurav for work. It is also true to say that, accused introduced me to Daji Gurav as his wife. It is true to say that, Gurav has provided us work and we resided in his land for about 2 ½ months. It is true to say that, thereafter we resided in the agricultural land of Sahebrao Kharmate at Bedag as husband and wife for about two months. It is true to say that, I resided with accused at Arag and Bedag as his wife happily. It is true to say that I had sexual relation with accused at my own wish and there was no any force for the same.

6. *It is true to say that, thereafter on 27.09.2020 I made a phone call to accused and told him that, I still loves him and not able to forgot him. It is true to say that, I told accused to come at Borgaon Chauphala and told him that, I would come there. It is true to say that, thereafter I came at Borgaon Chouphala and went with accused. It is true to say that, thereafter I alongwith accused resided at one cattle shed in the agricultural land situated at Sabala as husband and wife.*

7. *It is true to say that, my parents are not liking relations with accused. While recording my statement, I have stated to police that, after releasing on bail accused threatened me to kill me if I fail to follow him. I cannot assign any reason for this omission.”*

6. The aforesaid evidence undoubtedly indicates that it was the victim, who was emotionally involved with the applicant and it was she, who made a phone call to the applicant and urged him to take her with him. As

such, both of them eloped and stayed together as husband and wife for not less than six months on two occasions.

7. Now the question is of age of the victim. In her deposition before the Court, the victim gave her age as nineteen years. She did not give her date of birth. The victim's evidence about her age is necessarily hit by hearsay. Her mother - P.W.1, did not give details regarding age of the victim. Admittedly, the victim has three sisters. It is also in the evidence of the victim and her mother that the victim does not have any nickname. The birth certificate of the victim placed on record shows the name of child as 'Vijaymala', whereas the victim gave her name as 'Neha' (name changed) in her examination-in-chief and cross as well. Whatever the victim has stated before the medical officer cannot be read in evidence since she did not reiterate the same in her evidence before the Court. So, the history given to the medical officer and deposed by the medical officer would in no way be termed to have corroborated the victim's statement in terms of Section 157 of the Evidence Act. Same is the case in her statement given under Section 164 of Code of Criminal Procedure before the Magistrate. Needless to mention, such statement is not substantive piece of evidence.

8. All in all, it is a case of consensual relationship. The applicant is in jail for two years as against ten years of imprisonment. Age of the victim is seriously in doubt. Although the applicant was married at the relevant time,

the record indicates that it was the victim, who called him and urged to took her with him. All these facts lead this Court to grant the application.

9. Considering these aspects and the fact that the appeal is not likely to come up for final hearing in near future by its turn, the execution of substantive sentence of imprisonment to stand suspended, pending the appeal. The applicant be released on executing P.R. bond in the sum of Rs.15,000/- (Rupees Fifteen Thousand) with one surety in the like amount.

10. Criminal application stands disposed of accordingly.

11. Fees of Mr. M.G. Kolse Patil, learned counsel appointed to represent Respondent No.2 is quantified at Rs.7,000/- to be paid by High Legal Services Sub-Committee, Aurangabad.

(R.G. AVACHAT, J.)

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