

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

**CRIMINAL APPLICATION NO.1983 OF 2023
IN APEAL/472/2023 WITH APEAL/472/2023**

**SHUBHAM S/O KESHAV GAIKWAD
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER**

...
Advocate for Applicant : Mr. Parghane Madhukar M.
APP for Respondent No.1: Mr. Y. G. Gujarathi
Advocate for respondent No.2 : S. B. Chavan
...

CORAM : S. G. MEHARE, J.

DATE : 07.07.2023

PER COURT :

1. Heard the learned counsel for the applicant, learned A.PP for the respondent State and learned counsel for the victim.
2. The applicant is seeking suspension of sentence imposed upon him, to suffer imprisonment for 20 years for the offences punishable under Sections 6 of the Protection of Children From Sexual Offences Act, 2012 and to suffer imprisonment for 10 years under sections 4(1) of the Protection of Children From Sexual Offence Act, 2012 and for 10 years under section 376 (2)(n) of the Indian Penal Code and the total fine of Rs. 70,000/-, by the impugned judgment and orders.

3. The learned counsel for the applicant would submit that child has been born out of the wedlock of the applicant and the victim. Therefore, she is not claiming compensation of Rs. 70,000/- awarded to him by the Special Court. He would further argue that the learned Special Judge (POCSO) Basmathnagar, did not consider the candid admission of the victim that she herself eloped with the applicant to perform the marriage and they were living as husband and wife. Once they married, there would be no question of sexual assault as prescribed under the POCSO Act and the Indian Penal Code. At the most they may be guilty under The Prohibition of Child Marriage Act 2006. Nobody has serious objection, but only on the ground that the victim was below 18 years, the applicant has been erroneously held guilty. In view of the specific facts of the case, the applicant has a good case on merits. Beside the above legal aspects, the victim is residing with the parents' of the applicant with a newly born child. The victim has also conceded the fact that she is residing with the parents of the applicant and they intend to live their marital life, together in view of these facts, the sentence may be suspended.

4. The victim suo moto appeared and filed an affidavit. It is

taken on record and marked as Annexure 'A' and 'B". She also narrated that a child was born out of their wedlock. She is residing at the house of the applicant with his parents. He never enticed her to flee away. The learned counsel for the victim would submit that they voluntarily married and living as husband and wife. However, when she went to the hospital, her age was found less than 18 years, since then the husband was put to the trial.

4. The learned A.P.P would submit that the prosecution has proved that on the date of the alleged incident the victim was a child as defined under the POCSO Act. She was pregnant. Their marriage was also in breach of the The Prohibition of Child Marriage Act, 2006. Their age was below 18 years and 21 years respectively. The facts have been proved beyond a reasonable doubt. The offence is serious. Therefore, the applicant does not deserve the suspension of the sentence.

5. It is a really different story in this case. When she went to hospital for treatment, it was learnt that she was below 18. Then the report was lodged and the criminal law was put into action. It seems that the victim and applicant were living as husband and wife. Even if the case of prosecution is believed, on the date of the incident, the

exact age of the victim was 17 years and four months. She was seen mentally fit to take the appropriate decision. The question for determination would be whether in the facts and circumstances of the case, the applicant would be held guilty for the serious offence under the POCSO Act and The Indian Penal Code. The candid admission of the victim making no allegation of enticing her to elope and residing together happily and voluntarily shall also be weighed during the course of the hearing. Normally a long term sentence is not suspended, but it may be suspended if the situation permits. The peculiar facts, as discussed above appears to be a good ground for suspending the sentence. Hence the following order.

ORDER

- (i) The application is allowed.
- (ii) The execution, implementation effect and operation of the impugned order of conviction passed by the learned Special Judge (POCSO) at Basmathnagar in Special (POCSO) No.9/2023 dated 8.5.2023 has been suspended till conclusion of the appeal.
- (iii) The applicant shall be released on bail on executing RB. and S.B. of Rs. 50,000/- with one solvent surety of the like amount.

- (iv) Bail before the learned Special Judge (POCSO) Act,
Basmathnagar
- (iv) It is made clear that the applicant has not been directed to
deposit the fine amount which was directed to be paid to the
victim as compensation, as the victim did not claim that amount.

(S. G. MEHARE)
JUDGE

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