

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 2279 OF 2023

IN CRIMINAL APPEAL NO. 560 OF 2023

Vishal @ Rocky s/o Milind Pardhe

Age : 25 yrs, occ : labour

R/o Triveni Nagar, N-7, Cidco,

Aurangabad

Applicant

Versus

1. The State of Maharashtra
Through CIDCO Police Station,
Aurangabad

2. XYZ
Under guardianship of grand-
mother

Respondents

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Mr. Chaitanya C. Deshpande, Advocate for the applicant.

Mrs. D.S. Jape, A.P.P. for respondent No.1.

Ms. A.N. Pedgaonkar, Advocate for respondent No.2.

(appointed through Legal Aid)

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CORAM : SANDIPKUMAR C. MORE, J.

Dated : 29th September 2023

Order :

1. The applicant, who is the original accused in Special Case (POCSO) No.113/2019, is seeking suspension of his substantive sentence of imprisonment imposed upon him by the Special Judge (POCSO), Aurangabad in the aforesaid case under various sections of Indian Penal Code and the Protection of Children from Sexual Offences Act, 2012 (POCSO) vide judgment and order dated 16.05.2023

2. Admittedly, the learned Special Judge, Aurangabad has convicted the applicant/accused as under :

- A] For commission of offence punishable under Section 376-AB of I.P.C., the accused shall suffer rigorous imprisonment for twenty years and to pay a fine of Rs. 10,000/- (Rupees Ten Thousands only), in default to suffer S.I. for two months.
- B] For commission of offence punishable under Section 506 of I.P.C., he shall suffer rigorous imprisonment for six months and to pay a fine of Rs. 1000/- (Rupees One Thousand only), in default to suffer S.I. for a week.
- C] For commission of offence punishable under Section 4 (2) of the POCSO Act, he shall suffer rigorous imprisonment for twenty years and to pay a fine of Rs. 25,000/- (Rupees Twenty Five Thousands only), in default to suffer S.I. for four months.
- D] For commission of offence punishable under Section 8 of the POCSO Act, he shall suffer rigorous imprisonment for three years and to pay a fine of Rs. 5,000/- (Rupees Five Thousands only), in default to suffer S.I. for one month.
- E] For commission of offence punishable under Section 12 (2) of the POCSO Act, he shall suffer rigorous imprisonment for one year and to pay a fine of Rs. 1,000/- (Rupees One Thousand only), in default to suffer S.I. for a week.

Thus, it appears that maximum punishment of imprisonment of 20 years is imposed upon the present applicant.

3. Learned Counsel for the applicant submits that

the learned Special Judge, Aurangabad has definitely erred in convicting the applicant/accused despite there being variance between the versions of complainant i.e. the grandmother of the victim and the victim herself. He pointed out that the victim has changed her version from time to time and every time she stated differently as to what happened prior to the incident. He pointed out that there was no ejaculation and penetration established under the scientific evidence, but still the learned Special Judge has convicted the applicant. He relied on various orders passed by this Court as well as the Hon'ble Apex Court as follows :

- 1] **Bhagwan Rama Shinde Gosai & ors vs State of Gujrat**
AIR 1999 (SC)1859
- 2] **Criminal Application No. 237 of 2021 (Ravindra**
Vishwanath Bhalerao vs The State of Maharashtra)
- 3] **Criminal Application No.854 of 2022**
(Shahadev Dilip Huse vs State of Maharashtra)
- 4] **Criminal Application No.1422 of 2023**
Rashid Sardar Baig vs State of Maharashtra
- 5] **Mackvin Fernandes vs The State of Goa**
MANU/MH/0566/2023

4. On the contrary, the learned A.P.P. as well as learned Counsel for the victim strongly opposed the submissions made on behalf of the applicant. The learned Counsel for the victim submitted that though there were

minor contradictions between the versions of the complainant and victim, but those contradictions were not on material aspects. Moreover, she pointed out that the facts of the orders on which reliance is placed by the applicant, are different than this case, and therefore, cannot be made applicable in this case. She pointed out that the victim was aged about only 10 years, whereas the applicant was 25 years old, and therefore, considering the serious nature of the offence no case for suspension of sentence is made out. Learned A.P.P. also pointed out that there is presumption under Section 29 of the POCSO Act and the medical evidence clearly established the fact that hymen of the victim was torn.

5. Heard rival submissions. Also perused documents on record.

6. Admittedly, there are certain contradictions between the versions of complainant i.e. the grandmother of victim and the victim herself. However, those contradictions are not on material aspects. Further, though it appears that the victim changed her version from time to time, but that was only in respect of what happened prior to the incident. About the main incident the testimony of the victim remained unshattered. Moreover, as per medical evidence,

hymen of the victim was found torn when she was immediately examined after the incident. Medical Officer PW-4 Dr. Swati Badgire, who had examined the victim after the incident, has also stated candidly in her chief-examination that though there were no signs of use of physical force, but sexual assault on the victim could not be ruled out. Though in the cross-examination this Medical Officer has stated that there were other reasons also causing damage to the hymen, but the victim has clearly narrated the incident before the learned Special Judge at the time of trial.

7. It is extremely important to note that the Medical Officer, despite being shown the C.A. reports wherein absence of semen was found, stated that there was possibility of sexual assault on the victim. Further, the age of victim appears to be of ten and half years at the time of incident, whereas the applicant was 25 years old at the relevant time. Thus, there cannot be any possibility of love affair between the applicant and victim. On the contrary, the act of applicant escalates the seriousness of the crime.

8. Learned Counsel for the applicant though relied on the aforesaid orders, but on going through those orders, it appears that suspension of sentences of the accused therein

was done mainly because it was found that there was love affair between the victim and and accused. Moreover, in some of the orders the punishment of imprisonment was upto 5 years and therefore, such suspension was done. It is not so in the present cast. In the instant case, the victim as well as her grandmother have corroborated each other on the material aspects, and therefore, the aforesaid orders cannot be made applicable specially in the light of the peculiar facts of this case. Therefore, I am not inclined to suspend the substantive sentence of imprisonment of the applicant/ accused. In the result, the application stands dismissed. The fees of the learned Counsel for respondent No.2 appointed through Legal Services Committee be quantified as per rules.

(SANDIPKUMAR C. MORE, J.)