

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

910 CRIMINAL APPLICATION NO.3503 OF 2022
IN APPEAL/524/2020

SOPAN VITTHAL KAJALKAR

VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER

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Mr. P.P. More, Advocate for applicant

Mrs. V.S. Choudhari, APP for respondent No.1

Mr. V.P. Savant, Advocate (appointed) for respondent No.2

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CORAM : SMT. VIBHA KANKANWADI AND
Y.G. KHOBRADE, JJ.

DATE : 21st MARCH, 2023

PER COURT :

1 Present application has been filed for suspension of substantive sentence imposed on the applicant by learned Special Judge, under POCSO Act, Jalna on 11.08.2020 in Special Case (Child) No.26/2019 after holding him guilty for committing an offence punishable under Section 376(2)(i), 341, 452 of the Indian Penal Code, 1860 and under Section 4 of the Protection of Children from Sexual Offences Act, 2012. He has been sentenced thus -

1) Accused Sopan Vitthal Kajalkar is convicted for the offences punishable under Sections 376(2)(i), 341 and 452 of the Indian Penal Code as well as for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012.

2) He is sentenced to suffer imprisonment for life which shall mean imprisonment for the remainder of his natural life and to pay fine of Rs.10,000/- (Rupees Ten Thousand only) in default of payment of fine, he shall suffer rigorous imprisonment of 3 (three) years for the offence punishable under Section 376(2)(i) of the Indian Penal Code.

3) He is sentenced to suffer simple imprisonment for a term of 1 (one) month and shall pay fine of Rs.500/- (Rupees Five Hundred only), in default of payment of fine he shall suffer simple imprisonment of 10(ten) days for the offence punishable under Section 341 of the Indian Penal Code.

4) He is sentenced to suffer simple imprisonment of 5 (five) years and to pay fine of Rs.5,000/- (Rupees Five Thousand only), in default of payment of fine, he shall suffer simple imprisonment of 1 (one) year for the offence punishable under Section 452 of the Indian Penal Code.

5)

6) All the sentences shall run concurrently.

2 Heard learned Advocate Mr. P.P. More for the applicant, learned APP Mrs. V.S. Choudhari for respondent No.1 and learned Advocate Mr. V.P.

Savant for respondent No.2.

3 With the help of learned Advocate for the applicant and learned APP we have gone through the evidence that was before the learned Trial Judge.

4 The victim has deposed in this case. She has stated her age and the birth date in her examination-in-chief, however, it appears that First Information Report was silent in respect of her birth date. Any way, she has stated her age as 13 years on the date of incident. The learned Advocate appearing for the applicant has pointed out the testimony of PW 5, who was working as Village Secretary to Panchayat Samiti, Badnapur and had issued the birth certificate i.e. the certified copy Exh.34. In her cross-examination she has stated that she was not aware about who had carried out the entries in the original birth register. She was not the said person and in the original birth register there is no stamp regarding designation of the person i.e. by whom that entry was taken. The record is also silent in respect of place of birth of the victim. On the basis of the said cross-examination it was tried to be submitted that the age of the girl is not proved, so also the Medical Officer in respect of age had stated that she had referred the victim to Radiologist for determination of age. However, he had not received the report from the

Radiologist. It was then tried to be submitted that the age of the girl is not established beyond reasonable doubt. The learned Trial Judge ought not to have held the victim as child as defined in Section 2(D) of the POCSO Act. It has been further submitted on the basis of the testimony of the victim that though she had told that it was the forcible sexual intercourse by the accused, the medical report and the testimony of PW 4 Dr. Smita Gawade is not corroborating the ocular evidence. The Medical Officer has in categorical term stated that she had not found any injuries on the person of the victim when she was examined. It was stated in the examination-in-chief by the Medical Officer that except the old hymen rupture there was no other symptom to show that there was forcible sexual intercourse on the victim. Therefore, when the ocular evidence is not corroborated by the medical evidence, benefit ought to have been given to the accused. Another fact, which was not considered by the learned Special Judge, was that there was enmity or quarrel with the father of the victim and the accused and, therefore, there was reason for implication of the accused for the informant and her family members. With this evidence and the other points, those the applicant wants to canvass at the time of final hearing, he need not be kept behind bars. As it will take long time to take up the appeal he should be released on bail. His wife and minor daughter are dependent on him. It was also then submitted that taking into consideration the age of the

appellant/applicant the appeal be expedited.

5 Per contra, the learned APP strongly opposed the application and submitted that the learned Trial Judge has considered each and every aspect involved in the matter and the accused has been held guilty. When a well reasoned Judgment is given, then it need not be interfered with any manner i.e. even for considering the suspension of sentence.

6 At the outset, we would make it very clear that for a limited purpose we are considering the evidence. In other words, we will have to see whether case is made out for suspension of sentence when there is an evidence on record and also the reasoned Judgment. Here, the testimony of the victim would show that she was 13 years of age and she has given her birth date. Though it appears that in First Information Report she had not mentioned the birth date, but certainly she had mentioned her age. First Information Report is not an encyclopedia, but then at the time of collection of evidence the Investigating Officer has collected the birth certificate. If the birth certificate is issued by the local authority/the appropriate Local Body under the Registration of Births and Deaths Act, 1969 and the rules framed thereunder, then it would become the public document. Now, as regards the original Birth Register is concerned, certain things have been brought on

record in the cross-examination of PW 5 Savita, who had issued the certified copy of the original birth register. Definitely, it would be considered at the time of final hearing, but prima facie we will have to give, its due weightage to the birth certificate. Secondly, as regards the medical evidence is concerned, no doubt, in the medical examination report as well as testimony of PW 4 Dr. Smita Gawade, she has stated about the fact that she had not seen any external injury on the person of the victim, however, she had found with the hymen of the girl was ruptured and she has termed it as “old hymen rupture”. On the basis of what she had categorized it as “old” is required to be considered. But apparently her cross-examination is silent on this point. We will also have to consider as to what would be the effect of discrepancy in the ocular evidence and medical evidence, which evidence will have to be given importance. But certainly, now, there is evidence against the present appellant, and a competent Court has come to the conclusion that the appellant has committed one of the heinous crimes against a minor girl. It can be further seen that the appellant was never released on bail since the date of his arrest. Under such circumstance, we do not find this to be a fit case where the sentence should be suspended. It deserves to be rejected.

7 As regards the oral prayer by the learned Advocate for the applicant for expeditious hearing of the matter is concerned, we will have to

put it on record that at present we are dealing with the jail appeals of 2015 and 2016. There are about 280-290 jail appeals and even as regards the appeals which have been already expedited wherein the appellants are in jail are 30 in number. So, we may advice the applicant to make appropriate application after one year. Application stands rejected.

(Y.G. Khobragade, J.)

(Smt. Vibha Kankanwadi, J.)

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