

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

**CRIMINAL APPLICATION NO.3542 OF 2022 IN
CRIMINAL APPEAL NO.150 OF 2023**

Ashok Gulabrao Waghmare

... **APPLICANT**

VERSUS

The State of Maharashtra & anr.

... **RESPONDENTS**

.....
Mr. S.S. Kazi, Advocate for applicant

Ms. R.P. Gaur, A.P.P. for respondent No.1.

Ms. Sayali S. Kulkarni, Advocate for respondent No.2 (appointed)

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CORAM : R.G. AVACHAT, J.

DATE : 26th APRIL, 2023

PER COURT :

Heard. The applicant has been convicted for the offence punishable under Sections 363, 376 of the Indian Penal Code and Section 3 read with 4 of the Protection of Children from Sexual Offences Act and has been directed to undergo a maximum sentence of ten years rigorous imprisonment. The Criminal Appeal filed by the applicant has been admitted.

2. Learned counsel for the applicant would submit that, it was a consensual relationship. The victim was of the age of

understanding. She herself eloped with the applicant. The victim testified in her evidence that she would maintain sexual relationship with the applicant. He would further submit that the appeal is of this year. The appeal is not likely to have its turn to come up for hearing, at least during next 7 – 8 years. The applicant has a wife and three minor children to look after. If the applicant is not granted bail, suspending his substantive sentence of imprisonment, there would be no option for his family members but to beg. He, therefore, urged for grant of the application.

3. The learned A.P.P. and learned counsel representing the respondent No.2 would submit that, although it was a consensual relationship, the victim's consent was immaterial in view of she being a child. Reliance on the judgment of this Court in case of **Aaditya Vs. The State of Maharashtra [MANU/MH/1876/2020]** was placed. It was also submitted that, the applicant was married. He lured and took the victim away with him. The victim and her father gave the date of birth of the victim. Her school admission register was also produced in proof of her date of birth. They would further submit that, hearing the appeal may be expedited and even it could be taken out of turn. Both the learned counsel ultimately urged for

rejection of the application.

4. Considered the submissions advanced. Perused the judgment under appeal. The applicant was residing in the neighbourhood of the victim. Admittedly, it was a consensual relationship. The victim herself eloped with the applicant and stayed in a room taken on rent at Nizamabad. The landlord was informed that they have marital relationship inter-se. The victim even admitted that, both the applicant and herself maintained sexual relationship. The only question, therefore, is whether the victim's consent was immaterial in view of she being below 18 years of age. The evidence as regards the date of birth given by the victim is necessarily hearsay. A person who gave her date of birth for admission in the school has not been examined in proof of her date of birth appearing in the school record. The father appears to be rustic. True, he gave the victim's date of birth. This being an appeal from conviction, the entire evidence will have to be scrutinised threadbare during the appeal. The applicant was behind bars for little over 8 months during enquiry and investigation of the crime and trial. He is also in jail for close to one year post his conviction. The appeal is not likely to come up for hearing by its turn even during next 7 – 8 years. Three minor children and a wife are

dependent on the applicant. It was the submission of learned counsel that the applicant is the sole bread winner in the family. If he is not granted bail, the family members would have no option but to beg. All these facts lead this Court to grant 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 by the applicant by learned Special Judge (POCSO), Ambad by judgment and order dated 21/6/2022, passed in Special Case (Child Prot.) No.41/2021 to stand suspended and the applicant be released on bail on his executing P.R. bond in the sum of Rs.15,000/- (Rupees fifteen thousand) with one surety in the like amount.

(iii) Fees of Ms. Sayali S. Kulkarni, appointed Advocate for respondent No.2 is quantified at Rs.6000/- (Rupees six thousand) for the purpose of this application.

(R.G. AVACHAT, J.)

fmp/-