

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.2798 OF 2021
IN CRIMINAL APPEAL NO.909 OF 2022

Datta s/o Vitthal Balaya
Age: 39 years, Occu.: Labourer,
R/o. Dudhana Kale, At Present Harantok,
Yeldari Dam, Kawatha Shiwar,
Tq. Jintur, Dist. Parbhani

.. Applicant

Versus

1. The State of Maharashtra
Through Police Station Bamani,
Tq. Jintur, Dist. Parbhani.

2. X. Y. Z.

.. Respondents

...

Ms. Pooja V. Langhe, Advocate for applicant.

Mr. S. J. Salgare, APP for respondent No.1 – State.

Mr. Yogesh Bolkar, Advocate for respondent No.2 (Appointed).

...

CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.

DATE : 18th October, 2023

ORDER [Per Smt. Vibha Kankanwadi, J.] :-

. Present application has been filed for suspension of substantive sentence. The applicant is the original accused in Special (POCSO) Case No.32 of 2019, who has been held guilty under Section 376-AB of Indian Penal Code on 20.12.2019 by learned Special Judge, under the

POCSO Act/Additional Sessions Judge, Parbhani.

2. Heard learned Advocate Ms. Pooja V. Langhe for the applicant, learned APP Mr. S. J. Salgare for respondent No.1 – State and learned Advocate Mr. Yogesh Bolkar for respondent No.2 (Appointed).

3. Learned Advocate for the appellant has vehemently submitted that the learned Trial Judge has not appreciated the evidence properly. It is alleged that the accused has committed rape on his own daughter, who was alleged to be 11 years old on the date of incident. P.W.1 is the wife of accused and mother of the girl, who was admittedly having strained relationship. According to her, the accused had driven her out of the house on the day of incident and the four children were with him. She went to the house of her mother on the next day. The daughter went there crying. Upon inquiry, the girl disclosed that the father had sexual intercourse with her and thereafter they went to police station and lodged the report. In the cross-examination, how the relationship was strained between the husband and wife has come, but we are required to consider the testimony of the girl in priority. P.W.2 - the girl has supported the prosecution story in her examination-in-chief, but in the cross-examination she has admitted that she had relationship with one boy and when they were engaged sexually in the field of sugarcane crop, the accused had seen. The accused had then beaten her as well as the boy and thereafter the quarrel took place between

the accused and her mother, thereby the accused was saying that she is not taking care of daughter. It is the defence taken by the accused in his statement under Section 313 of the Code of Criminal Procedure also. Therefore, the possibility of implicating the accused has not been ruled out by the prosecution. The importance cannot be given to the medical evidence, as the victim has stated that she had sexual intercourse with her boyfriend and even the medical officer in his examination-in-chief has said that he had found old heal. Therefore, the appellant has good chances in appeal. It would take long time to decided his appeal and, therefore, the sentence needs to be suspended.

4. Per contra, the learned APP and learned Advocate Mr. Yogesh Bolkar, who is appointed to represent the cause of respondent No.2 – victim, strongly opposed the application and supported the reasons given by the learned Trial Judge while convicting the appellant. The girl was consistent in her allegations. She was merely 11 to 13 years of age when the incident took place. There is no substance in the defence that has been taken by the accused. Learned Advocate for the victim has relied on the decisions in **State of Rajasthan Vs. Om Prakash**, [(2002) 5 SCC 745], **State of Himachal Pradesh Vs. Sanjay Kumar Alias Sunny**, [(2017) 2 SCC 51] and **Kishor Kumar Vs. State**, [2023 SCC OnLine Del 3138], which are on the point that such cases should be dealt with utmost sensitivity by the Courts. The

alleged delay in lodging such reports or minor contradictions should not be considered. Corroboration to the victim's evidence should not be insisted and here there was no question of tutoring of the girl, as she was found to be fit to give answer to all the questions. The testimony of the victim was believable.

5. At the outset, we are considering the evidence only for a limited purpose i.e. whether the applicant – appellant can be released on bail by suspending the sentence during the pendency of appeal. Here, we would say that it would take long time to hear his appeal, as this Court is presently dealing with the jail appeals of the year 2016-2017 with the huge pendency of cases. The parameters laid down in the above said authorities relied by the learned Advocate for respondent No.2 are definitely required to be borne in mind, however, those observations/findings were arrived at after the hearing of the appeals by the Hon'ble Supreme Court. The facts definitely differ and, therefore, whether the victim in this case has withstood the cross-examination is the point which is required to be ultimately considered. We cannot consider the same in detail right now, but the fact remains is that such admissions have been given by her to state that the father had noted that she was having sexual intercourse with her boyfriend and then he had beaten the girl as well as the boy. He had quarreled with informant i.e. mother of the victim. It also appears from the

apparent scrutiny that the other three children and grandmother, who was in the house of the accused at the relevant time, have not been examined. Informant - mother was admittedly not present in the house, but because of her dispute with accused, she had gone to her mother's place. It was tried to be projected that her mother was also residing at a few distance. Perusal of the FIR would give an impression that incident had taken place on 05.06.2019 and the information about the alleged incident was given by the victim to her mother on 08.06.2019. Therefore, whether this amounts to delay is also required to be considered. Whether in the marital discord the girl has been used by the mother is also required to be considered. Therefore, we feel that this is a fit case where the sentence should be suspended and the applicant should be released on bail. Hence, the following order :-

ORDER

- (I) Application stands allowed.
- (II) The substantive sentence imposed on the applicant in Special (POCSO) Case No.32 of 2019 by the learned Additional Sessions Judge, Parbhani on 20.12.2019 stands suspended till the final hearing and disposal of Criminal Appeal No.909 of 2022.
- (III) The applicant – **Datta Vitthal Balaya** be released on PR. Bond of Rs.30,000/- with two solvent sureties of Rs.15,000/- each.

(IV) The applicant shall not commit any criminal activity.

(V) The applicant shall remain present before the learned Trial Judge once in six months, till final hearing and disposal of the Appeal, commencing from the date he tenders bail papers and thereafter, the Trial Judge to fix dates for his subsequent appearances.

(VI) In case of two consecutive defaults on the part of the applicant to remain present before the Trial Court, the Trial Court to inform this Court about the same and in that eventuality, the prosecution would be at liberty to file an application for cancellation of the bail granted to the applicant.

(VII) Bail before the Trial Court.

[ABHAY S. WAGHWASE]
JUDGE

scm

[SMT. VIBHA KANKANWADI]
JUDGE