

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

**CRIMINAL APPLICATION ON.4251 OF 2022
IN
CRIMINAL APPEAL NO.59 OF 2023**

Vinod s/o. Vikram Paithankar

..Applicant

Vs.

The State of Maharashtra
and anr.

..Respondents

Mr.S.B.Deshpande, Senior Advocate along with Mr.Chetan B.
Choudhari, Advocate for applicants

Mr.A.S.Shinde, APP for respondent no.1

Mr.Shriniwas A. Kulkarni, Advocate for respondent no.2

CORAM : R.G. AVACHAT, J.

DATE : MARCH 23, 2023

ORDER :-

This is an application for suspension of substantive sentence of imprisonment. The applicant has been convicted vide judgment and order dated 26.07.2022 passed by learned Judge, Special Court, Jalna, in Spl. Case (Child) No.10 of 2018, for the offence punishable under Section 5(m) read with Section 6 and Section 3(a)(b) read with Section 4 of the Protection of Children from Sexual Offences Act and Section 376(2)(i)(j) of Indian Penal Code and therefore, sentenced to suffer rigorous imprisonment for twenty years and to pay fine of Rs.One Lakh with default stipulation.

2. Heard learned counsel for the parties.

3. Mr.S.B.Deshpande, learned Senior counsel appearing for the applicant, would submit that since the offence is serious one, it should have been proved upto the hilt. He would submit that the scene of offence punchnama has not been proved. A witness by name Bhavdya, who was in the company of the appellant at the material time, was not examined. The statement of brother of the victim, who was in the victim's company, has not been recorded. It is not known why test identification parade was conducted. The test identification parade has been conducted in breach of the directions and rules in that regard contained in the Criminal Manual. The dummies for the T.I. parade were selected randomly. The incident took place around 05.00 p.m. The First Information Report (FIR) has been lodged little past 1:00 a.m. The medical examination report of the victim does not fully support the prosecution case. The applicant was around 21 years of age when the offence took place. He is in jail for little over five years. According to learned Senior Counsel, every prisoner has a future. He would further submit that a criminal is deemed to be a patient and therefore, needs to be treated accordingly. He submits that we have adopted reformatory

theory. The applicant should be given an opportunity for reformation. The report from the Jail Superintendent may be called in that regard. Learned Senior Counsel would further submit that the appeal is not likely to come up for hearing in near future. He is, at this stage, expected only to make out *prima facie* case, that is, an arguable point in the appeal. If the applicant, ultimately, succeeds, remaining behind the bars for entire period of sentence, would be a travesty of justice. He would further submit that no fair opportunity was given to the applicant. Even on the question of sentence, he was not allowed to lead evidence to make out mitigating circumstances. Learned Senior Counsel relied on the following authorities:-

- (i) Bhagwan Rama Shinde Gosai and ors. Vs. State of Gujarat, AIR 1999 SC 1859;
- (ii) Mackvin Fernandes Vs. The State of Goa, MANU/MH/0566/2023;
- (iii) Stephen Seneviratne Vs. The King, Privy Council, Part 16 page 661;
- (iv) Shivaji Gaonkar Vs. State, LAWS(BOM)2008-8-72;
- (v) Bir Singh and ors. Vs. State of Uttar Pradesh, (1977)4 SCC 420;
- (vi) Mohammad Giasuddin Vs. State of A.P., 1977 DGLS (SC) 219

4. Learned APP and learned counsel for the respondent-informant would, on the other hand, submit that it is a serious offence. The applicant was over powered while the victim was in his custody. He was immediately taken to the police station. The FIR was lodged very promptly. The medical examination report of the victim and the C.A. report, undoubtedly, make out the complicity of the applicant in the offence. According to learned Counsel for respondent no.2, the prosecution was not under obligation to examine each and every witness. We have to see, whether based on the evidence on record, the offence has been duly proved. They would urge for expediting hearing of the appeal with an ultimate prayer of rejection of the application.

5. Considered the submissions advanced. Perused the record.

6. The only fact, which is in favour of the applicant is, his age. The evidence on record make out his involvement in the crime in question. PW 1 was the mother of the victim. She testified that on the given day, i.e. on 12.12.2017, her elder daughter told her that the victim and her brother were taken away by one unknown

boy, who was in the company of Bhavdya. The applicant had offered the victim eatables. PW 1, therefore, took search for the victim and her son in the nearby of the vicinity of the residence. By 07.30 p.m., one unknown boy came on motorbike and halted at the residence of her (PW 1) mother. The victim was with the said boy. She, therefore, took the victim into her custody. The victim was weeping. Her nicker was stained with blood. There was swelling at her private part and even bleeding as well. The applicant was over powered then and there.

7. The victim girl, little over five years of age, gave evidence attributing to have been subjected to aggravated penetrative sexual assault by the applicant. The victim was six years of age when she gave her evidence. Some inconsistency in her evidence was bound to occur. True, she testified in the evidence that Bhavdya too came back with them on the motorbike. At this stage, we have to rely on the evidence of the mother of victim.

8. PW 6 – Dr.Naresh’s evidence suggests that he examined the victim within hours of the incident. He noticed anal laceration

present. On the basis of the examination conducted, he opined that there were signs suggestive that recent forceful penetration of vagina/anus cannot be ruled out. He collected blood sample, vaginal swab nail clippings, etc. for chemical analysis.

9. Attention of this Court was adverted to the cross-examination of the witness, to suggest that PW 6 – Medical Officer was confronted with ultra-sonography report and suggested that no internal injury was noticed. The witness did not respond. The relevant portion of the evidence of PW 6 – Medical Officer is as under :-

“ I had not noticed any injury over sphincter as well as on fourchette and introitus. Witness volunteers no external injuries were noticed but internal were there on introitus. But I did not mention the same in the report. I had not noticed any external injuries on 3. No comment can be made on the basis of external examination about any internal injury. Since there was bleeding from vagina I cannot ascertain exact position of torn hymen.....”

The C.A. report also supports the case of prosecution.

10. There can be no two views over what is submitted by learned Senior Counsel, relying on the authorities relied on herein

above. In **Bhagwan Rama Shinde Gosai** (Supra), it was the case for the offences punishable under Sections 392 and 397 of Indian Penal Code. The appellants therein were sentenced to suffer ten year's imprisonment. Earlier application for suspension of sentence was turned down. When similar application was moved again that too was dismissed. The appellant therein had urged the High Court to hear their appeal expeditiously. The request was turned down. Considering the quantum of sentence and factual background of the case, the Apex Court granted suspension of sentence.

11. The facts in **Mackvin Fernandes's** case suggest that the applicant therein was sentenced to suffer rigorous imprisonment for ten years. The Court, after going through the judgment therein, was pleased to grant the applicant relief of suspension of sentence, mainly relying on the judgment of the Apex Court in the case **Bhagwan Rama Shinde Gosai** (supra).

12. Relying on the judgments in the cases of **Shivaji Gaonkar** (supra) and **Bir Singh** (supra), it was submitted that the prosecution was under obligation to examine the material witnesses to unfold the prosecution case when the witnesses examined were interested and the relations of the victim.

13. It is true that it is not known as to why Bhavdya was not examined. As per the case of prosecution, Bhavdya and the appellant had come to the vicinity together on the motorbike. The appellant took the victim and her brother with him. This Court, however, finds that the witnesses examined on behalf of the prosecution have established the charge. Unless and until the appeal is finally heard, this Court refrains itself from observing anything, as to whether Bhavdya ought to have been examined.

14. On the question of fair opportunity having not been given to the appellant, is concerned, it has to be stated that the appellant has been sentenced to imprisonment which is minimum for the offences proved. In such circumstances, failure to give opportunity to lead evidence on the question of quantum of sentence, takes back seat. The same is also not forthcoming from the facts and circumstances of the case. The appellant had not urged for permitting him to bring on record mitigating circumstances on the question of quantum of sentence.

15. Considering the nature of the offence, age of the victim and the evidence on record, this Court is not inclined to allow the

application. If the appeal could not be heard for one or the other reason within a period of three years, the applicant is at liberty to move afresh for suspension of execution of remaining sentence of imprisonment.

16. In the result, the application fails. The same is rejected.

[R.G. AVACHAT, J.]

KBP