

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO.2700 OF 2022
IN
CRIMINAL APPEAL NO.656 OF 2022**

Jaydeep Dipak Walvi Applicant
Versus
The State of Maharashtra & Anr. Respondents

Mr. Satyavrat Joshi, Advocate for the Applicant.
Mr. S.R. Agarkar, APP for the Respondent No.1-State.
Mr. Abhishek H. Khare, Advocate (appointed) a/w. Anusya
Raghavan, for the Respondent No.2.

CORAM : SARANG V. KOTWAL, J.

DATE : 22nd FEBRUARY, 2023

P.C. :

1. This is an application for bail pending the applicant's Criminal Appeal No.656/2022.

2. The applicant has challenged the judgment and order dated 24.5.2022 whereby the Special Judge (POCSO) and Additional Sessions Judge, Islampur convicted and sentenced the applicant in Special POCSO Case No.24/2019.

The applicant was convicted for commission of offences punishable under Section 376(2)(n) of IPC and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act') and was sentenced to suffer RI for ten years and to pay fine of Rs.1,000/- and in default of payment of fine to suffer SI for one month. The applicant was granted set-off for the period which he had undergone as under-trial prisoner.

3. Heard Shri Satyavrat Joshi, learned counsel for the applicant, Shri S.R. Agarkar, learned APP for the respondent No.1-State and Shri Abhishek Khare, learned appointed advocate for the respondent No.2.

4. The prosecution story is that the victim's date of birth was 17.1.2002. On 4.6.2019, she had left her house to attend the class at 8.00 a.m.. She did not return home. Therefore, her mother lodged an FIR at Islampur police station. On 9.6.2019, the victim and the applicant were brought to the police station and the investigation was carried out. According to the prosecution case, the applicant

took the victim to various places and established physical relations on some occasions.

5. Learned counsel for the applicant submitted that the victim's date of birth is not proved by the prosecution through admissible evidence. The birth certificate produced on record at Exhibit-40 mentions a different name than the victim's name. The father of the victim has produced an affidavit showing that he had applied for correction of the name in the records. Shri Joshi submitted that the said affidavit is not properly proved and it does not indicate that the birth certificate produced on record was that of the victim.

6. He submitted that the victim's evidence itself shows that it was a clear case of consent and that it is not established that she was below 18 years of age. Therefore, no offence is committed by the applicant. He submitted that the applicant was 19 years of age at the time of incident and, therefore, in any case some leniency can be shown to him for consideration of bail pending appeal.

7. Learned counsel for the respondent No.2 as well as learned APP submitted that there is no reason to disbelieve the birth certificate which is produced on record. Though the name of the victim is different, the parents' names and the address is the same. They submitted that the victim's father had taken steps to correct the name in the birth certificate. They further submitted that in any case the victim had deposed that the applicant has established physical relations against her wish, therefore, the offence was complete and, therefore, bail should not be granted to him.

8. I have considered these submissions. At the outset, it must be noted that both the victim and the applicant himself were quite young. The applicant was 19 years of age at the time of incident. The victim's evidence mentions that they had developed close friendship. In February, 2019 they had their physical relations on the first occasion in the applicant's house. At that time the victim had gone to his house. Though she has stated that the physical

relations on the first occasion was against her wish, she has further mentioned that they had physical relations on other occasions as well. On 20.5.2019, the victim went to reside at Islampur. On 4.6.2019, the applicant met her at Islampur. Then they went to Kolhapur, Mumbai, Vapi and Meghwad. During that time they had physical relations. On 8.6.2019, the victim's father and the police officers came there and took them back to Islampur police station. Thus, from her evidence there are sufficiently strong indications that there was consensual relationship between the applicant and the victim. Therefore, her age is a crucial factor in this appeal.

9. The prosecution has produced the birth certificate issued by the Grampanchayat on record at Exhibit-40. But as pointed out by Shri Joshi, the name appearing in that certificate is different. The victim's father was examined as PW-3 and he has produced a copy of the affidavit at Exhibit-39. The said affidavit mentions that the victim's name was wrongly mentioned in the register and a prayer was made for correction. The admissibility of this document

and the effect of the wrong name in the birth certificate will have to be taken into consideration at the final hearing stage. These issues are important.

10. The victim's mother in answer to the Court question had mentioned that the victim's date of birth was 17.1.2001. If that is so, the victim was above 18 years of age at the time of the first physical relationship in February, 2019. Thus, some serious doubt is created about the victim's age and there is substance in the argument that the victim could be more than 18 years at the time of incident.

11. Considering all these aspects, the applicant has made out a case for his release on bail during pendency of his appeal. All these aspects will have to be decided at the final hearing stage. The applicant is quite young and he was on bail during trial. Though, there are indications that he was again arrested after being released on bail, the fact remains that this appeal is not likely to be decided in a reasonable short period and that he is still young.

12. Hence, the following order :

:: O R D E R ::

- i. During pendency and final disposal of Criminal Appeal No.656/2022, the applicant is directed to be released on bail on his furnishing P.R. bond in the sum of Rs.30,000/- (Rupees Thirty Thousand Only) with one or two sureties in the like amount.
- ii. The applicant shall not harass the victim or her family in any manner.
- iii. Interim Application is disposed of accordingly.

(SARANG V. KOTWAL, J.)

Deshmane (PS)