



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

Criminal Application (APPA) No. 686 of 2023

in

Criminal Appeal No. 439 of 2023

[Shubham S/o Maniram Mahule ..vs.. State of Maharashtra, through P.S.O. Mohadi, Tah. Mohadi,
Dist. Bhandara and anr.]

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. K. S. Motwani, Advocate for the applicant/appellant
Mr. A. R. Chutake, APP for the State/non-applicant no. 1
Ms. S. S. Dhote, Advocate for non-applicant no. 2 (appointed)

CORAM : ANIL L. PANSARE J.

DATED : 3-10-2023

Heard.

The applicant has been convicted by learned Additional Sessions Judge (Special Judge, POCSO), Bhandara in Special Case (Child Protection) No. 86 of 2021, by judgment and order dated 19-5-2023, for the offence punishable under Sections 376(2) and 506 of the Indian Penal Code (IPC) and under Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). The applicant was sentenced to undergo rigorous imprisonment for one year for an offence punishable under Section 506 of the IPC and to pay fine of Rs. 500/-, in default, to undergo simple imprisonment for one month. The applicant was further sentenced to undergo rigorous imprisonment for ten years for the offence punishable under Section 4 of the POCSO Act and to pay fine of Rs. 1000/-, in default, to undergo further simple imprisonment for two months. The applicant was further sentenced to undergo rigorous

imprisonment for twenty years for an offence punishable under Section 6 of the POCSO Act and to pay fine of Rs. 3000/-, in default, to undergo further simple imprisonment for three months. As per Section 42 of the POCSO Act, no separate punishment was given under Section 376(2) of the IPC.

Learned counsel for the applicant submits that there is serious doubt about the age of the victim. He submits that the trial Court has relied upon the birth certificate issued by the office of gram panchayat. However, the issuing authority has not been examined. According to him, examination of issuing authority was necessary for the reason that the mother has admitted in cross-examination that the name of victim as registered was 'B', as against the name of child as reflected from birth certificate is 'N'. Accordingly, learned counsel submits that this certificate is not genuine certificate or is not the birth certificate of child 'B' and thus is a birth certificate of some different child.

Learned counsel for the applicant has invited my attention to the evidence led before the trial Court which is indicative of the fact that the relation between the accused, who was 19 years old at the relevant time, and the victim, who was 17 years and 6 months old, is consensual. He has further invited my attention to the evidence which shows that the victim had been to the house of applicant upon her quarrel with her parents. The applicant and his father, however, have after pacifying her anger, dropped her to her house.

Learned Additional Public Prosecutor so also learned counsel for non-applicant no. 2 submit that the medical evidence clearly indicate that hymen of the victim was torn and that the accused and victim were indulged in sexual activities for quite some time.

Thus, it appears that the applicant and the victim were in consensual relationship, however, the victim, being below the age of 18 years, her consent will be immaterial.

The most important issue here is as regards the proof of age of victim. The birth certificate has been issued in the name of 'N'. The mother of victim states that the name of victim as reported to gram panchayat was 'B'. In the circumstances, the question whether examination of the officer from gram panchayat to prove the contents of birth certificate appears to be relevant. The applicant has, therefore, an arguable case. On enquiry, learned counsel for the applicant submits that there is no criminal antecedent against the applicant. The applicant was on bail pending trial. There are no allegations of misuse of liberty.

Considering the above facts, the applicant is entitled for suspension of sentence. Hence, the following order :

ORDER

- (i) The application is allowed.
- (ii) The execution of sentence imposed upon the applicant by Additional Sessions Judge (Special Judge, POCSO), Bhandara in Special Case (Child Protection)

No. 86 of 2021, by judgment and order dated 19-5-2023, for the offence punishable under Sections 376(2) and 506 of the Indian Penal Code and under Section 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 is hereby suspended.

(iii) Applicant - Shubham S/o Maniram Mahule, shall be released on bail on his furnishing PR. bond in the sum of Rs. 50,000/- with one or two sureties in the like amount before the trial Court.

(iv) The applicant shall not contact the prosecution witnesses.

(v) The applicant shall remain present before this Court at the time of final hearing of the appeal.

The application is disposed of.

Registry to process the appeal for final hearing as per the rules.

(Anil L. Pansare, J.)