



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

**CRIMINAL APPLICATION NO. 1497 OF 2024
IN
CRIMINAL APPEAL NO. 386 OF 2024**

Sunil Sakarya Gavit

...Applicant

Versus

The State of Maharashtra & Anr.

...Respondents

.....

Mrs. Anagha V. Rotte – Advocate (appointed through Legal-Aid) for the
Applicant

Mr. N. R. Dayma – APP for respondent/State

Mrs. Ashwini A Lomte – Advocate (appointed) for Respondent No. 2

.....

**CORAM : R. G. AVACHAT
AND
NEERAJ P. DHOTE, JJ.**

RESERVED FOR ORDERS ON : 09TH JULY, 2024
ORDER PRONOUNCED ON : 18TH JULY, 2024

ORDER [Per Neeraj P. Dhote, J.] : -

1. By the present application, the Applicant, who is convicted by the learned Special Judge, Nandurbar, for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 [hereinafter referred to as 'POCSO Act'] vide Judgment and Order dated 27.09.2021 passed in Special Case No. 25/2021 and sentenced to suffer imprisonment for remainder of natural life and fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for one year, has prayed for suspension of substantive sentence and bail.

2. The Prosecution's case as revealed from the Police report is as follows : -

- [a] The Informant, a lady Police Constable, who was posted in District Thane, had gone to her matrimonial house situated at Jamanpada in Nandurbar District on long leave due to sickness along with her minor daughter (victim). The Applicant is also resident of Jamanpada and used to visit her house in connection with agricultural work.
- [b] On 01.06.2021, the Applicant had come to her house for sharing Mutton. The informant's husband and mother-in-law were present in the house. Informant and her husband went to their field, however, the applicant stayed at her home.
- [c] On 02.06.2021, the victim suffered urinal infection, which was ignored by the informant for 2-3 days. On 05.06.2021, she took her at one hospital at Navapur where the doctor examined her and prescribed medicine, however, the victim did not get any relief.
- [d] On 10.06.2021, the informant took the victim to the Gynecologist at Navapur where doctor examined her medically. Victim's pain did not subside.
- [e] On 14.06.2021, when the informant was applying ointment on the private part of the victim, the victim told her that when the informant had gone to the agricultural field and she was playing with her friends, the applicant caught hold of her hands and took her to the staircase. The Applicant

asked the victim to sit on the sack of Sorghum (Jowar) and pressed her mouth and put off his pant & her nicker and committed aggravated penetrative sexual intercourse. When the victim started crying, the Applicant fled away.

[f] The Informant went to the Police Station along with the victim and lodged report and crime came to be registered against the Applicant.

[g] On completion of investigation, the applicant came to be charge-sheeted. The learned Special Judge framed the charge for the offence punishable under Section 6 of the POCSO Act and in the alternative, 376(a)(b) of the Indian Penal Code. To prove the Charge, the Prosecution examined in all eight (8) witnesses including the victim and brought on record the relevant documents. Thereafter, on evaluation of the evidence on record, the learned trial Court passed the aforesaid Judgment and Order.

3. Learned advocate Mrs. Anagha Rotte appointed through the Legal Aid to represent the Applicant submits that, the victim, who was seven [7] years of age at the relevant time, did not understand the sanctity of oath and was of such age that she could be easily tutored and hence her testimony was required to be appreciated with extra care and caution. She narrated incident to her mother after fourteen (14) days. Under such circumstances, sole reliance on the victim's testimony without corroboration would be fatal. The victim's mother who was the informant was in Police Department and was well aware about the law

in relation to the sexual abuse. Though she noticed infection to the private part of the victim, she did not lodge the report till 15.06.2021 and the said delay show that concocted story is created. Though the Informant deposed that the victim was examined by one lady Gynecologist, the said doctor has not been examined and also the medical treatment papers of said Gynaecologist are not brought on record in the evidence. The story of sexual assault in the afternoon at 02:00 p.m. on the staircase, when the grandmother of the victim was very much present in the house creates serious doubt about the prosecution's case. Had really such an incident taken place, the victim would not have gone to play with her friends after she deposed of crime. The informant's report was an afterthought act.

3.1. It is further submitted by learned advocate for the Applicant that, had there been really aggravated penetrative sexual assault, there would have been injuries on the person of victim, however, no such injuries were found on her person during her medical examination. The medical evidence and the reports of the Chemical Analysis do not corroborate the victim's version. The medical report has been issued without any final opinion and consideration of the earlier medical treatment. Though prosecution examined one doctor who examined the victim at the first instance did not find any signs of sexual assault on the victim. The redness or discomfort to the private part of the victim could

be due to fungal infection as per opinion given by the said doctor. The medical evidence show that the ultra-sonography test of the victim was normal.

3.2. The learned advocate for the Applicant further submits that in view of the above evidence on record, the learned trial Court recorded conviction by placing more reliance on the testimony of the victim. The trial was concluded within a period of two (2) months in haste due to which the applicant lost opportunity to defend himself properly. Thus, the substantive sentence imposed upon the Applicant be suspended as the Appeal would not come up for final hearing in the near future.

4. It is submitted by the learned APP that the learned trial Court found that the victim though was minor had rationally answered the preliminary questions and so found her to be competent witness. Considering the age of the victim, it would not be possible that she did not understand the sanctity of the oath. The evidence of victim show that the accused told her that her father would beat both of them if the incident was disclosed to them. She remained unshaken though cross-examined by the defence. She did not budge an inch from her testimony given in the examination-in-chief. As the victim disclosed about the incident to her mother belatedly, the report came to be lodged

after a period of fifteen (15) days, which would not be fatal for prosecution. There is no reason to disbelieve the testimony of informant as no Mother would lodge such a false case at the cost of reputation of her minor daughter. The medical evidence on record show that there was swelling and redness around the private part of the victim. The medical evidence on record corroborate the victim's version. The provisions of Section 29 of the POCSO Act provides for presumption against the accused person and the applicant failed to discharge his burden of innocence either by examining himself or examining any other witness and failed to rebut the presumption. Considering the evidence on record, the application be rejected.

5. Learned advocate Mrs. Ashwini Lomte appointed for respondent no. 2 / informant submits that, the evidence of victim was of sterling quality and was corroborated by the testimony of her mother. The delay in lodging the report was explained by the informant. The evidence of the victim's grandmother show that the applicant left their house in a hurry and victim had come to her crying. The medical evidence show that the applicant was capable of performing sexual intercourse. The spot of incident was proved by the prosecution. The medical evidence supports the victim's version. The informant had no reason to lodge false case against the applicant. The defence's version of false implication was not acceptable for the reason that the informant

would not have waited for 15 days to lodge the report had she been told by the victim. There was no motive for the child to falsely implicate the applicant. Considering the evidence on record, the application be rejected.

6. The Application under consideration is governed by the provisions of Section 389 of the Code of Criminal Procedure. The purport of the said provision is considered by the Hon'ble Supreme Court of India in **Omprakash Sahni Versus Jai Shankar Chaudhary & Anr. Etc.** reported in **2023 LiveLaw (SC) 389**, wherein the earlier judicial pronouncements of the Hon'ble Supreme Court of India are considered and it is observed in paragraph 33 as follows : -

33. Bearing in mind the aforesaid principles of law, the endeavour on the part of the Court, therefore, should be to see as to whether the case presented by the prosecution and accepted by the Trial Court can be said to be a case in which, ultimately the convict stands for fair chances of acquittal. If the answer to the above said question is to be in the affirmative, as a necessary corollary, we shall have to say that, if ultimately the convict appears to be entitled to have an acquittal at the hands of this Court, he should not be kept behind the bars for a pretty long time till the conclusion of the appeal, which usually take very long for decision and disposal. However, while undertaking the exercise to ascertain whether the convict has fair chances of acquittal, what is to be looked into is something palpable. To put it in other words, something which is very apparent or gross on the face of the record, on the basis of which, the Court can arrive at a prima facie satisfaction that the conviction may not be sustainable. The Appellate Court should not reappreciate the evidence at the stage of Section 389 of the CrPC and try

to pick up few lacunas or loopholes here or there in the case of the prosecution. Such would not be a correct approach.

7. Coming to the case in hand, admittedly, the victim was a minor at the relevant time. She was seven [7] years of age. The evidence on record show that the applicant was acquainted with the informant and her family members. The Applicant was on visiting terms to the house of the informant in connection with agricultural work. On 01.06.2021, the Applicant had been to the house of informant where the mother-in-law, husband, informant and the victim were residing. The informant and husband went to the field at the relevant time.

8. According to the victim who is examined as PW.1, the Applicant took her to the staircase, pressed her mouth, removed her as well as his under garments (nicker) and committed penetrative sexual act with her. The Applicant as well as victim came down. She was crying. The Applicant told her not to disclose the act to anybody otherwise her parents would beat both of them. The evidence of grandmother of victim, who is examined as P.W.4 show that victim came crying towards her and when she asked the reason for crying, she did not tell anything and thereafter the victim again went for playing. This version of prosecution's witnesses that even after suffering such an act of penetrative sexual assault, the victim again went to play, is required to be taken with pinch of salt.

9. As per the evidence of informant as PW.2, on the next day i.e. 02.06.2021, the victim was suffering from urinal problem which she ignored for 2-3 days. According to her, she took the victim to Aastha Hospital at Navapur on 05.06.2021 where Doctor Chandrashekhar examined her and prescribed medicine. However, as there was no relief, informant took the victim to Dr. Sneha Patil, Gynaecologist, on 10.06.2021. She examined her physically and prescribed medicine. Even after taking medicines, the pain did not subside. On 14.06.2021, while informant was applying ointment to the private part of the victim, victim informed her about the said act by the Applicant. Admittedly, the informant was not the layman. She was working in the police department as a Police Constable at the relevant time. The evidence on record show that thereafter on 15.06.2021, report came to be lodged with the concerned Police Station against the applicant.

10. Admittedly, Dr. Sneha Patil, the Gynecologist, to whom the informant had taken the victim for medical examination has not been examined. The evidence of Doctor Chandrashekhar Shivajirao Patil (PW.7), who examined the victim at the first point of time on 05.06.2021, show that the parents of victim informed him that victim was suffering pain at the time of urination and so he prescribed medicine for urinary tract infection. Since the pain did not subside,

parents again took the victim to the said doctor on 10.06.2021 and he changed the medicine. When the parents again took victim to the said doctor with the history of sexual assault, the Doctor further examined her on 14.06.2021 and noticed some inflammation, redness and swelling around her private part. He advised sonography to ascertain any internal damage. The evidence show that the sonography report was normal. The evidence show that he asked the parents and the victim to lodge the report with the Police. This *prima facie* indicate that the report was lodged at the instance of Doctor.

11. There is evidence of another Doctor, who is examined as P.W.6, who was the Medical Officer at the Rural Hospital at Visarwadi at the relevant time. She deposed that, on 15.06.2021, victim was brought to her by the Police. On physical examination of victim, she found swelling and redness around vagina and she collected samples for forensic analysis. Her cross-examination show that, she cannot assign any reason as to why she mentioned the single remark '*oedematous, redness, inflammation present*' in answer to sub column a to i of column no. 12 of the report, which is at Exh.22. She opined that the inflammation around vagina was possible due to injury.

12. The medical papers at Exh. 22 on record in the evidence of the said Medical Officer show that Column No. 11 with the heading

Examination of Injury for Bruises, Systemic Physical Torture Injury, Nail Abrasion, Teeth Bite, Cuts, Laceration, Head Injury and any other injury is blank. The Column No. 14 with the heading of Clinical Opinion show tick mark to point no. d) which reads “Opinion Reserved Pending Availability Of Reports Of The Sample Sent”.

13. The evidence of PW.3 – Dr. Pramod Goraji Valvi, Medical Officer at Rural Hospital, Visarwadi, Tal. Navapur, Dist. Nandurbar, show that on 17.06.2021, he examined the Applicant and found him to be competent for performing sex and accordingly he issued a certificate, which is at Exh. 13. The said medical paper of the Applicant show that there was no injury to Prepuce, Glance Penis, or Scrotum. The injuries noted in the said certificate are in the nature of Conjunctival Haemorrhage present in lateral medial side of both the eyes, two contusions to whole Bark, Lateral aspects of both thighs. Proximate age of injury is 72 hours. One cannot lose site of the aspect that, the profession of the Applicant is shown as a Labourer.

14. The above discussed evidence available on record if taken as it is, *prima facie* exhibit that the Applicant has a good case on merits, arguable points are involved and possibility of success cannot be ruled out. The Appeal would not come up for final hearing immediately or in near future. In this view of the matter, we are satisfied that the exercise

of powers of suspension of sentence would be just and proper. Hence, the following order.

ORDER

- [i] Application is allowed.
- [ii] The substantive sentence imposed upon the Applicant by the learned Special Judge, Nandurbar, for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 vide Judgment and Order dated 27.09.2021 passed in Special Case No.25/2021 and sentenced to suffer imprisonment for remainder of natural life and fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for one year, is suspended during the pendency of the present Appeal.
- [iii] The Applicant be released on bail on his furnishing P. R. Bond of Rs.15,000/- (Rupees Fifteen Thousand Only) with one surety in the like amount each.
- [iv] Bail before the Trial Court.

15. Criminal Application stands disposed of accordingly.

[NEERAJ P DHOTE]
JUDGE

[R. G. AVACHAT]
JUDGE

SG Punde