



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

**CRIMINAL APPLICATION NO.1819 OF 2024
IN
CRIMINAL APPEAL NO.420 OF 2024**

Sunil s/o. Indalsingh Dangar ..Applicant
Vs.
The State of Maharashtra and anr. ..Respondents

Mr.N.S.Ghanekar, Advocate for applicant
Mrs.U.S.Bhosale, APP for respondent no.1
Mr.N.S.Kadarale, Advocate for respondent no.2

**AND
CRIMINAL APPLICATION NO.2592 OF 2024
IN
CRIMINAL APPEAL NO.455 OF 2024**

Vitthal @ Dnyaneshwar Pandurang More ..Applicant
Vs.
The State of Maharashtra ..Respondent

Mr.S.J.Salunke, Advocate for applicant
Mrs.U.S.Bhosale, APP for respondent no.1
Mr.N.S.Kadarale, Advocate for respondent no.2

**CORAM : R.G.AVACHAT AND
NEERAJ P. DHOTE, JJ.
DATE : AUGUST 14, 2024**

ORDER :-

These applications are filed praying for suspension of substantive sentence of imprisonment imposed by learned Special Judge (POCSO Act), Aurangabad, in Special Case Child Protection

No.209 of 2019, vide the judgment dated 23.04.2024. By that judgment, the applicants/appellants and one more accused have been convicted for the offences punishable under Sections 376(2)(n) and Section 506 of Indian Penal Code and Section 5(1) read with Section 6 of the Protection of Children from Sexual Offences, 2012. They have been sentenced to suffer imprisonment for life, which means remainder of their natural life with fine of Rs.1,00,000/- each, in default, to undergo S.I. for three months for offence under Section 6 of POCSO Act. They have been further sentenced to undergo R.I. for a term of one year with fine of Rs.1,000/- each, in default, to undergo S.I. for 15 days for offence under Section 506 of I.P.C. No separate sentence has been awarded for offence under Section 376(2)(n) of IPC.

2. Learned counsel for the applicants in both the applications submit that if the evidence of the prosecutrix/victim (PW 1) is seen, there is vital inconsistency in her report and the subsequent statements, which clearly show that she cannot be believed. They submit that though there is DNA report, same does not show that any of the applicants herein is the biological father of the fetus. They submit that the applicants were on bail during trial. They submit that the applications may be allowed.

3. Learned APP for respondent no.1 – State submits that though there are inconsistencies in the report (Exh.32) and the subsequent statements of the victim, that cannot be a ground to discard her testimony. She submit that one of the convicts is the biological father of the fetus of the victim. She submit that the trial court has rightly convicted the applicants and therefore, the application may be rejected.

4. Learned counsel for respondent no.2 – victim (prosecutrix) strongly opposes the applications. He submits that the variance in the statements of the victim would not by itself be sufficient to discard her testimony. He submits that the evidence of the maternal aunt of the victim shows that the victim had informed her about the acts of the applicants and the co-convicts. He submits that the victim was consistent in respect of the role attributed to accused no.1. He submits that the victim was not an accomplice in the crime and therefore, her testimony is required to be believed. He relies on the decision of the Apex Court in the case of **State of Himachal Pradesh Vs. Shree Kant Shekari, 2004 STPL 14077 SC** and invites our attention to paragraph 21 thereof, which reads thus:-

21. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional. However, if the court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would suffice.

He further relies on the decision of the Apex Court in the case of **State of Punjab Vs. Ramdev Singh, 2003 STPL 19136 SC** and invites our attention to paragraph 9 thereof, which reads thus :-

9. Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in prosecution version on account of such delay, the same would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the Court, same cannot by itself be a ground for disbelieving and discarding the entire prosecution version, as done by the High Court in the present case.

Learned counsel, ultimately, prays for rejection of the applications.

5. We have scrutinised the evidence of the victim and other evidence on record. According to the victim, the applicants and the co-convicts committed rape on her when she was alone in her maternal uncle's home, when her maternal uncle and aunt were not present. Admittedly, in the report (Exh.32) lodged by the victim, she named only accused no.1 - Dnyaneshwar @ Vitthal (applicant) as the person who committed rape on her. It is also not in dispute that said report was lodged after her pregnancy was realised. It is further not in dispute that in her statement under Section 164 of the Code of Criminal Procedure, recorded after her report, she named accused no.1. Thereafter, the investigating machinery filed charge-sheet against accused no.1. It is further not in dispute that subsequently, the DNA report was received, which showed that accused no.2 was the biological father of the fetus. Thereafter, supplementary statement of the victim was recorded, in which she named accused nos.2 and 3 and one Gopal as the persons, who committed rape on her. Thereafter, her second statement under Section 164 of Cr.P.C. was recorded, in which she named only accused nos.2 and 3 and excluded Gopal.

6. The evidence of the Investigating Officer would show that the victim had named different accused persons at different stages.

We reproduce the relevant paragraph from the evidence of the Investigating Officer, who was examined as PW 10, as under:-

“5. I had filed charge-sheet against accused no.1. Thereafter, I had received DNA report. From the same it reveals to me accused no.1 is not biological father of baby of victim. So, I had again made enquiry from victim. I had recorded supplementary statement of victim. In it she has stated that accused no.2 and 3 and Gopal Khokad by taking advantage of her simpleton nature and by threatening her had established physical relations with her during the said period on 2-3 occasions. In view of the said statement, I made request to the court again record statement of victim under section 164 of Cr.PC. Accordingly, again her statement under section 164 Cr.PC. had been recorded. In it, she had stated names of accused no.2 and 3 only and not stated the name of Gopal Khokad.....”

7. It is further not in dispute that the victim in her cross-examination admitted that there was agricultural dispute between her maternal uncle and the parents of accused no.3 (applicant), before the incident in question.

8. In view of the above evidence on record, it is clear that there is inconsistency in respect of person involved in the act, which makes the version of the victim shaky. Admittedly, none of the applicants is shown as the biological father of the fetus as per the

DNA report. The applicants were on bail during trial, on the basis of the very material which is before us. In this view of the matter, we proceed to pass the following order:-

- (i) Both the applications are allowed.
- (ii) During pendency of the appeals, the substantive sentence of imprisonment imposed against the applicants/appellants by learned Special Judge (POCSO Act), Aurangabad, in Special Case Child Protection No.209 of 2019, vide the judgment and order dated 23.04.2024, to stand suspended.
- (iii) The applicants/appellants be released on bail, on executing P.R. Bond in the sum of Rs.15,000/- (Rupees Fifteen Thousand) each with one surety each in the like amount.

9. We quantify the fee of learned counsel appointed to represent respondent no.2 at Rs.12,000/- (Rupees Twelve Thousand), to be paid by the High Court Legal Services Sub-Committee, Aurangabad.

[NEERAJ P. DHOTE, J.]

[R.G. AVACHAT, J.]

KBP