

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

INTERIM APPLICATION NO. 1251 OF 2023

IN

APPEAL NO. 388 OF 2023

Nagesh Hambirrao Howal

... Applicant/Appellant

Vs.

State of Maharashtra & Anr.

... Respondents

Adv. Kuldeep Nikam i/by Prasad Avhad for the Applicant/Appellant.

Adv. Yashodeep Deshmukh a/w Adv. Vaidehi Pradeep & Adv. Ameya Tawde
for the Respondent No.2.

Mrs. M.R. Tidke, APP for State.

CORAM : KISHORE C. SANT, J.

DATE : 2nd JANUARY, 2024

P.C.:-

1. Heard the parties.
2. This Application is filed seeking suspension of the sentence and release on bail by the Applicant/Accused. The Accused is sentenced for the offences punishable under Section 376(2)(n)(i) of the Indian Penal Code, 1860 and Section 06 of the Protection of Children from Sexual Offences Act, 2012. He is sentenced to suffer rigorous imprisonment for 10 years and to pay fine amount of Rs. 30,000/- and in default to suffer further rigorous imprisonment for 1 year. He is acquitted from offence punishable under Section 506 of the Indian Penal Code. The fine, after recovery, is directed to

pay to the victim of Rs. 25,000/- by judgment and order dated 16th February, 2023. It is the case of the prosecution that, the prosecutrix who was minor at the time of alleged offence was repeatedly raped by the Accused. The main defence of the Accused is that the victim had completed 18 years of age and the Sexual Act was by her consent and therefore, the Accused cannot be convicted for the offence under POCSO Act.

3. The mother of the victim lodged FIR on 17th May, 2016 naming the Applicant. It is stated that, she noticed that in the month of February, 2016 that the victim was pregnant. The victim delivered child on 17th May, 2016 and on the same date FIR came to be lodged. In support of the case the prosecution has examined total nine witnesses and PW-8 has proved the birth certificate (Exhibit-55) showing the date of birth of victim to 20th July, 2000. The prosecution also got DNA examination of the child born out of this relation and of the Accused done. As per the report the DNA of the child matches with that of the Accused/Applicant. The learned Trial Court after holding the Accused of the offence passed the judgment convicting the Applicant.

4. The main argument of the learned advocate of the Applicant is that the prosecution has not proved the birth certificate by examining a person who recorded the date of birth in the register. In view of Section 13 sub-Section 3 of Registration of Births and Deaths Act, 1969. it was necessary to show that the entry in the register was taken within a year of

birth. In this case the entry in the register is taken for the first time in 2004. He thus submits that, such certificate could not have been relied upon by the Court to hold the victim to be minor. He invited attention of this Court to the cross-examination of the mother of the victim, PW-1, that the first daughter was born on 11th August, 1994 and the victim was born after two years after the elder daughter. He further invited attention to the deposition of the victim, wherein she has stated her age to the doctor as 18 years. Thus, he submits that, it was necessary for the prosecution to specifically prove the birth certificate. He further pointed out from the judgment of the Trial Court wherein it is recorded that the relation were consensual. He thus submits that once Trial Court accepted that the relations were consensual, it was necessary prove the age of the victim in strict manner. He further pointed out that though the mother had noticed that victim was pregnant in the month of February, 2016 no offence was registered & no complaint was made by her till delivery of a child on 17th May, 2016.

5. The learned counsel for the Respondent No.2 vehemently opposes the Applicant. He submits that a stray admission of the mother cannot be considered at this stage, if the case of the accused to be accepted then age of the victim would be 20 years. He submits that at the time of incident she was studying in 10th standard and the victim was not major. The learned Trial Court has already considered the provisions of Section 13 sub-Section 3 of the Births and Deaths Registration Act. He thus strongly

opposes the bail Application.

6. The learned APP also opposes the Application. She submits that, once the birth certificate is proved by the Investigating Officer it was necessary for the Accused to prove his case specifically that victim was not minor at the time of the incident. Learned APP also drawn attention to show there is a forensic medical examination report of victim at Exh. 42 age is mentioned as 15 years. She submits that the DNA report also shows that the child born out of alleged relation is of the victim and the Accused i.e. the Accused is biological father of this child. She further submits that, this is a case under POCSO & if the Accused is released on bail this will have adverse effect on the victim girl as they are residing in the same vicinity.

7. Learned Advocate for the Applicant submits that, when a reasonable doubt is created about the age of the victim, it would not be proper to keep the Accused in jail. The Accused was on bail during the Trial. There was no complaint against the Accused that he has misused liberty. He submits that this fact also needs to be considered.

8. Having considered the arguments and the *prima facie* case this Court finds that the learned Trial Court has already taken into consideration all the facts. There is evidence to show that, the victim was minor at the time of alleged incident. At this stage, Court does not find that the Trial Court has committed in the illegality in relying upon the birth certificate, which was recorded in 2004 that is much prior to the incident and lodging

of the FIR. No *prima facie* case is made out to release the Accused on bail of suspend the sentence.

9. The Application is therefore rejected and same is disposed of.

10. Hearing expedited.

11. Needless to say that the observations in the order are *prima facie*.

(KISHORE C. SANT, J.)