

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO.3712 OF 2022
IN
CRIMINAL APPEAL NO.5 OF 2023**

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Akash Jitendra Gaikwad

..Applicant

Versus

The State of Maharashtra & Anr.

..Respondents

Mr. A. R. Avachat a/w S. H. Deshpande, for the Applicant.

Mr. B. V. Holambe Patil, APP for the Respondent/State.

Ms. Janvi Karni, Appointed advocate for the Respondent No.2.

CORAM : KISHORE C. SANT, J.

**RESERVED ON : 23rd APRIL, 2024
PRONOUNCED ON : 25th APRIL, 2024**

P C.

1. This Application is filed seeking suspension of sentence awarded by learned Additional Sessions Judge, Pune in Special (POCSO) Case No.67 of 2018 vide judgment and order dated 24.06.2022. Applicant is held guilty for the offence punishable under Sections 363 and 376 of IPC and Section 4 of POCSO Act. For the offence under Section 376 of IPC and Section 4 of POCSO Act, Applicant is sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs.10,000/- and in default to undergo simple imprisonment for six months. For the offence under Section 363 of IPC, Applicant is sentenced to undergo rigorous imprisonment for one year and in default to suffer simple imprisonment for three months.

2. It is the allegation of the prosecution that the victim girl of 17 years of age eloped with the Applicant. They both left Pune on 29.11.2017. Since she was not found, her parents lodged missing report. It was later-on transpired that the Applicant had taken the victim to Kurduwadi, district Solapur and stayed there till 09.12.2017 till Police found them. The Police brought them back and it is thereafter a complaint came to be lodged. The victim girl thereafter stated that when she was staying with the accused, he committed rape on 2 – 3 occasions.

3. The prosecution examined in all five witnesses in support of its case. The victim in her deposition though stated that the accused has committed forcible sexual intercourse during the period from 29.11.2017 till 08.12.2017, in the cross-examination she accepted that she had eloped with the accused. She also accepted that during the said period, there was no physical relation between the accused and the victim. Learned advocate thus vehemently argued that from the evidence of PW-1, it is seen that there was no physical relation between the applicant and the victim. Though there is medical evidence and the same is admitted by the Applicant under Section 294 of the CrPC, in it, it has come that there was hymen injury present, but the same was old and healed. The victim was examined on 10.12.2017. He thus submits that this medical report will not be of any help to the prosecution. The FIR came to be lodged by the father of the victim.

4. Learned counsel for the Applicant relied upon the judgment passed by this Court in the case of ***Ashik Ramjan Ansari Vs. The State of Maharashtra & Anr.*** decided by this Court in Criminal Appeal No.1184 of 2019. In the said case, the victim was of 17 years and six months old. This Court considered that it may happen that the girl is 17 years and 364 days indulge into relation with boy of 20 years, still it would be considered a rape despite the admission of the girl that she was equally involved in the act of sex. Considering the facts of the case, this Court acquitted the accused from the charge under POCSO Act. Learned advocate thus submits that in this case also the girl is of 17 years and capable of understanding the nature of sexual relation. Even the accused at the time of the offence was only of 22 years of age. The other circumstances would show that the victim never resisted the Applicant and stayed with him for 8 – 10 days at different places. He also submits that the prosecution has not satisfactorily proved the age of the victim. The birth certificate is not proved by the school authority. Even the mother of the victim is not examined in the Court. He further relied upon the judgment in the case of ***Ajay Vs. State of Maharashtra*** reported in ***2020 SCC OnLine Bom 783***. The division bench of this Court has held that though the medical report is admitted by the accused, still it is for the prosecution to examine the doctor. It is his submission that in the present case the doctor is not examined and thus the medical evidence is not proved. He also further relied upon the judgment in the case of ***Shivaji***

Shankara Zagade Vs. State of Maharashtra reported in **2022(2) Bom.C.R.(Cri.) 213** in support of his submission in respect of Section 294 of CrPC.

5. Learned advocate for the Respondent No.2 vehemently opposes the bail application submitting that the date of birth as stated by the victim girl is 24.11.2000. The Investigating Officer has proved the birth certificate. As per the date of birth, the victim was exactly 17 years of age when the alleged incident took place. She strenuously argued that once the medical report is accepted, it is clear that the accused has admitted the medical evidence and consequently the offence is proved. She submits that the judgment on which reliance is placed by learned advocate for the accused in the case of ***Ashik Ramjan Ansari (cited supra)*** is challenged before the Hon'ble Apex Court, therefore, same could not be of any help to the Applicant. In support of her submission or admission of documentary evidence under Section 294(3) of CrPC, she relied upon the judgment of Orissa High Court in the case of ***Leven Kerketta Vs. State of Orissa in JCRLA No.43 of 2008***. She further relied upon the judgment in the case of ***Satish Kumar Jayantilal Dabgar Vs. State of Gujarat*** reported in **[2015] 2 SCR 751**. In that case the prosecutrix was less than 16 years of age. In that case, considering the definition of rape under Section 375 of IPC, the Court considered that consent of girl below 16 years cannot be taken as consent and it also cannot be taken as mitigating circumstances while giving punishment. She submits that now

consent age is increased to 18 years in Section 375 of IPC. The consent in this case therefore cannot be taken to be a consent. She further relied upon the judgment of Hon'ble Apex Court in the case of ***Anurag Soni Vs. State of Chhattisgarh in Criminal Appeal No.629 of 2019***. The Court has held that to have sexual relations by giving promise of marriage to the prosecutrix, when accused had no intention to marry, it cannot be said to be consent. She submits that in this case also the Applicant had taken the victim under the pretext of getting married, when he had no intention to marry. She thus submits that it is clearly a case of rape.

6. The parties though have relied upon the other judgments, it is not necessary to discuss those judgments here. It is seen that the Applicant has not deposited the fine amount. In the present case, what is found that the girl was of 17 years of age and was well aware of the consequences and given consent. She never resisted the Applicant. Secondly, that the punishment awarded is for a fixed term. The Appeal is not likely to be heard in near future. The Applicant is in jail since 24.06.2022. Even during the trial he was in custody from 10.12.2017 till 19.04.2018 and thereafter again from 16.03.2022. As such, Applicant has suffered more than two years and four months sentence. Considering above, this Court is inclined to allow the Application. Hence, the following order :-

- i) The Applications stands allowed.

- ii) The substantive sentence awarded by learned Additional Sessions Judge, Pune in Special (POCSO) Case No.67 of 2018 stands suspended.
- iii) Applicant is directed to be released on bail in connection with judgment and order dated 24.06.2022 passed by learned Additional Sessions Judge, Pune in Special (POCSO) Case No.67 of 2018 on furnishing PR bond and one solvent surety in the sum of Rs.15,000/-, subject to deposit of fine amount, if already not paid.
- iv) Applicant shall not enter in Pune city, except for attendance of Police Station.
- v) Applicant shall not contact the victim or any of her family members or any of the witnesses.
- vi) Applicant shall furnish his contact details to the concerned Police Station. If there is any change in the contact details, the same shall be immediately informed to the concerned Police Station.
- vii) Applicant shall attend the concerned Police Station once in a month i.e. first Sunday of each month between 11:00 a.m. to 01:00 p.m.

7. The Application stands disposed of.

[KISHORE C. SANT, J.]