



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 653 OF 2024
WITH CRIMINAL APPLICATION NO. 2926 OF 2024
IN CRIMINAL APPEAL NO. 653 OF 2024

Sahebrao @ Chorbalya s/o Devidas Gajbhare,
Age 30 years, Occupation Nil,
R/o In front of Baudhvihar,
Dhanegaon, Taluka and District Nanded.
At present Harsul Central Jail at
Aurangabad.

... Applicant

Versus

1. The State of Maharashtra
Through Police Station, Rural,
Nanded, Taluka and District Nanded.

2. X Y Z

... Respondent

.....
Mr. G. A. Gadhe, Advocate for the Appellant/Applicant (appointed)
Mrs. Vaishali S. Chaudhari, APP for Respondent No.1-State.
Ms. Archana Jadhavar, Advocate for Respondent No.2 (appointed)

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CORAM : ABHAY S. WAGHWASE, J.

DATED : 13.03.2025

ORDER :

1. Present appeal was received through jail and hence learned counsel Mr. G. A. Gadhe was appointed to represent the appellant vide order dated 10.07.2024.

2. Today, learned counsel appointed for the appellant has tendered across the bar written notes of arguments and has thereby

restricted the appeal only to the extent of waiving of fine amount, in default of payment of which, further fourteen months imprisonment is awarded. The said notes of arguments dated 10.03.2025 are taken on record and marked "X" for identification.

3. Learned counsel for the appellant submitted that, the maximum sentence awarded to the appellant is of imprisonment for 10 years and he is behind bars since 10.04.2016 i.e. since almost nine years. That, appellant has no financial means and source to pay the fine amount. Therefore, prayers are confined to waiving of the payment of fine amount. Learned counsel has sought reliance on the judgment and order of this Court at its Principal Seat in ***Sikandar Govind Kale v. State of Maharashtra and another*** [Criminal Writ Petition No. 1148 of 2024 decided on 27.06.2024] as, according to him, incarceration due to inability to pay fine is violative of Article 21 of the Constitution of India, when substantive sentence is almost suffered and when there is sentence to be suffered only in default on account of non-payment of fine amount.

4. Learned APP as well as learned counsel appointed to represent respondent no.2 formally opposed. Learned APP conceded to pass appropriate order.

5. Perused the papers. It appears that present appellant was booked for commission of offence punishable under Sections 363, 366(A), 376(2)(i)(n), 377 of IPC and Sections 3, 4, 5 r/w 6 of the Protection of Children from Sexual Offences Act, 2012. By the judgment and order dated 13.03.2019 passed in Special Case [POCSO] No. 18 of 2016, the learned trial Judge has convicted the appellant as under :

“01] The accused Sahebrao @ Chorbalya S/o Devidas Gajbhare, Age 22 Yrs, Occu. Nil R/o in front of Baudhvihar Dhanegaon Tq. and Dist. Nanded is found guilty of the offences punishable under Sections 376 (2) (i) and (n), 377, 363, 366-A of the Indian Penal Code and Sections 4 and 6 of The Protection of Children From Sexual Offences Act, 2012 vide Section 235(2) of the Code of Criminal Procedure.

02] The accused Sahebrao @ Chorbalya S/o Devidas Gajbhare is convicted for the offence punishable under Section 376 (2) (i) and (n) of the Indian Penal Code vide Section 235 (2) of the Code of Criminal Procedure and sentenced to undergo rigorous imprisonment for 10 years (Ten years) and to pay a fine of Rs.25,000/- [Rs. Twenty five thousand only], in default, he shall undergo further rigorous imprisonment for six months.

03] The accused is convicted for the offence punishable under Section 363 of the Indian Penal Code vide Section 235(2) of the Code of Criminal Procedure and sentenced to undergo Rigorous Imprisonment for 1 year and to pay a fine of Rs. 500/-[Rs. Five Hundred], in default, he shall undergo further rigorous imprisonment for 02 month.

04] The accused is convicted for the offence punishable under Section 366-A of the Indian Penal Code vide Section 235(2) of the Code of Criminal Procedure and sentenced to undergo Rigorous Imprisonment

for 3 years and to pay a fine of Rs. 1,000/-[Rs. One Thousand], in default, he shall undergo further rigorous imprisonment for 06 month.

05] An amount of Rs.25,000/- (Rs. Twenty five thousand only) out of total fine of Rs.26,500/-[Rs. Twenty Six Thousand and Five Hundred] be paid to victim or her guardian vide Section 357 of Criminal Procedure Code as compensation; after appeal period is over.

06] All the substantive sentences shall run concurrently.

07] The accused is in jail. The period of inquiry, investigation and trial since 10-04-2016 till today undergone by the accused, be set off vide Section 428 of the Code of Criminal Procedure.

08] The seized muddmel i.e red-black coloured motorcycle[Passion pro] bearing No. MH-26-AH-8412 was already given to its registered owner is made absolute and remaining seized muddemal being worthless be destroyed; after appeal period is over.”

6. Now, concern of the appellant is his inability to pay the fine to the tune of Rs.26,500/-, and it is further case that, if he fails to pay the fine amount, he would be further required to undergo in default sentence. Recourse is taken to the judgment and order of this Court at its Principal Seat in the case of ***Sikandar Govind Kale*** (supra). After dealing with the legal precedents, this Court in the said case had passed detailed order assigning reasons for allowing the writ petition, and particularly in para 14 onward, we find discussion on the inability to deposit the fine amount. In the interest of justice, this Court in the said case, in para 16 and 17, has observed thus :

“16] Section 30 of the Code of Criminal Procedure, 1973, in addition, prescribe that the sentence of imprisonment awarded in default of fine may be in addition to a substantive sentence of imprisonment, for the maximum term which is awardable by the Magistrate under Section 29 of the Code.

Since it is not permissible to direct the concurrent running of the default sentences, and since we find that the fine imposed on recording conviction under Section 457 i.e. Rs. 10,000/- is excessive, we deem it appropriate to reduce the same to Rs.5,000/-.

In addition, taking into consideration the financial position of the Petitioner as he is unable to deposit the fine, we find that the imposition of default sentences of 3 months on each count is on higher scale and we deem it appropriate, to direct that by considering his detention in prison above May 2020 should be considered as default sentence undergone, in lieu of the fine imposed in all the 14 cases, on all three counts i.e. Section 454, 457 and 380 of the IPC.

Thus, by directing the reduction of fine amount on being convicted for offence under Section 457 to Rs.5,000/-, in the interest of justice, we deem it appropriate that the incarceration suffered by the Petitioner on undergoing substantive sentences imposed on him in 14 cases from May 2020, till the date of passing of this order, shall be considered to be the default sentence undergone by him for not paying the fine.

17] We must keep in mind that alongwith the justice, magnanimity is one of the "twin peaks" of moral virtue and "Justice is not an artificial virtue", but it necessarily embrace magnanimity and in exercise of inherent jurisdiction vested in us, to prevent the abuse of process of law, in favour of the Petitioner, who merely because of his inability to pay the huge amount of fine continue to be incarcerated, we deem it appropriate to direct his release by reducing the sentence of imprisonment, in default to the period of imprisonment already undergone by him till the date of passing of the order.

We direct release of the Petitioner from Jail forthwith and from this moment, he shall be set at liberty.

The learned APP shall communicate this order to the Jail Superintendent, Kalamba Central Prison, Karveer, Kolhapur, where the Petitioner is presently detained and the Jail Superintendent shall act upon the authenticated copy of this order and release the Petitioner forthwith.

Petition is made absolute in the aforesaid terms.”

7. Learned counsel for the applicant has made a statement across the bar that applicant was a labour and he is behind bars since almost nine years, and therefore, he is not in position to raise the fine amount. Therefore, when facts in the case in hand and the facts in the case relied upon being almost identical, there is no reason to refuse the prayer. Hence, the following order is passed :

ORDER

I. The appeal is hereby partly allowed.

II. The conviction awarded to the appellant Sahebrao @ Chorbalya s/o Devidas Gajbhare by learned Additional Sessions Judge-3 & Special Judge, Nanded in Special Case [POCSO] No. 18 of 2016 under Sections 376(2)(i) and (n), 377, 363, 366(A) of IPC and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 on 13.03.2019 is hereby maintained.

III. The Substantive sentences imposed on the appellant vide clauses [02], [03] and [04] of the operative part of the above judgment and order dated 13.03.2019 are also maintained.

HOWEVER

IV. The sentences regarding payment of fine vide clauses [02], [03] and [04] of the operative part of the above judgment and order dated 13.03.2019, and in default, to undergo further imprisonment for six months, two months and six months respectively, are hereby quashed and set aside.

V. Rest of the impugned judgment and order is kept intact.

VI. In view of disposal of the appeal, pending application also stands disposed off.

VII. Fees of the counsel appointed to represent the appellant, as well as respondent no.2, be paid by the High Court Legal Services Sub-Committee, Aurangabad as per Rules.

[ABHAY S. WAGHWASE, J.]