



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

**CRIMINAL APPLICATION NO. 3846 OF 2024
IN
CRIMINAL APPEAL NO. 721 OF 2024**

Ajaybhai Jamanbhai Sardar

..APPLICANT

VERSUS

State of Maharashtra and Another

..RESPONDENTS

....

Mr. A.D. Sonar, Advocate for applicant

Mrs. A.S. Deshmukh, A.P.P. for respondent no.1 – State

Ms. Usha Jadhav, Advocate for respondent no.2 (appointed through Legal Aid)

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CORAM : RAJNISH R. VYAS, J.

DATE : 22nd JANUARY, 2026

PER COURT :

. Heard. This is an application for grant of bail and suspension of sentence at the instance of original Accused No.1 in Special Case No. 17 of 2016. The present applicant alongwith his wife and one another person, who was absconding, were tried by the Special Judge (POCSO), Additional Sessions Judge, Dhule and after completion of trial, were convicted for commission of offence punishable under Section 376(2)(i)(n) of the Indian Penal Code (for short, 'I.P.C.'). The applicant was directed to suffer rigorous imprisonment for ten years and pay fine of Rs.35,000/-. Default sentence was also imposed. The applicant was also convicted under Section 4 of the

Protection of Children from Sexual Offences Act, 2012 (for short, 'Act of 2012'), however, in view of Section 42 of the Act of 2012, no separate sentence was imposed.

2. The applicant was also convicted under Section 344 of the I.P.C. and sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs.5,000/-. The substantive sentences were ordered to run concurrently.

3. Learned counsel for the applicant submitted that the story advanced by the prosecution clearly reveals that it was the victim, who on her own, accompanied the appellant at various places and stayed with him, therefore, the appellant could not have been convicted for the offences charged. He invited my attention to the testimony of the victim of crime which is recorded by the trial Court and has submitted that if the said testimony is perused, it would crystal clear that the victim not only reached Surat, but thereafter both of them traveled 2-3 days at Vadodara and Ankleshwar.

4. The victim further admitted that she went to a zoo in Surat. At that time one lady alongwith a child came there. When the victim enquired, it was disclosed that the said lady was the wife of the applicant. Learned counsel for the applicant submitted that there was an opportunity for the victim to contact either to police or to her parents to inform them that she

was forcibly taken by the applicant, but no such steps were taken by her. In the light of testimony of PW 1, he submitted that the offences for which the applicant was convicted, are not made out.

5. He has also relied upon the judgment of Hon'ble Apex Court in case of *S. Varadarajan Vs. State of Madras*, reported in *AIR 1965 SC 942*. He submitted that the applicant was a minor child and was residing at the mercy of wife of the applicant. He submitted that he has already undergone more than two and half years and maximum sentence imposed upon the applicant is of ten years. He thus requested that by considering the aforesaid fact, the application for bail be allowed.

6. Per contra, learned A.P.P. submitted that testimony of the victim if holistically seen, it would reveal that though the victim had accompanied the applicant at various places, the fact remains that she was minor at the time of commission of offence. She stated that consent given by the minor is no consent in the eyes of law. She also relied upon testimony of the victim and has pointed that the applicant is a married person and he should not have exploited the minor.

7. Ms. Jadhav, learned counsel appointed to represent Respondent No.2 / victim supported the case of the prosecution.

8. With the help of learned counsels, I have gone through the record of the case. It is not disputed that the victim was minor at the time of commission of offence i.e. 14 years, 10 months and 30 days old. Thus, she was 'child' as defined under Section 2(d) of the Act of 2012. No doubt, the victim had accompanied the applicant at various places and she could have disclosed the fact of forcibly taking her to the persons available there or to her parents by making phone call, the fact remains that testimony of the victim is required to be read holistically.

9. The victim has categorically stated that since the present applicant has threatened her, she could not inform her parents. According to the testimony of victim, the applicant was a married person and thus was having wife. She further stated that the applicant and his wife did not allow her to go anywhere and did not allow to talk to anyone. It is in this background, the law laid down by the Hon'ble Apex Court in case of S. Varadarajan (supra) is required to be tested. It is further necessary to mention here that the Hon'ble Apex Court in case of *Anversinh Vs. State of Gujarat* reported in **2021 (3) SCC 12** has clearly stated that minors are deemed incapable of giving lawful consent. The Court has further dealt with the aspect of consent given by the minor and has stated that enticement under Section 361 need not be direct or immediate in time and can also be through subtle actions like winning over the affection of a minor girl. The present applicant is convicted for

commission of offence punishable under Section 376(2)(i)(n) of the I.P.C., which speaks about commission of rape repeatedly on the same woman.

Section 375 of the I.P.C. defines rape as under :-

“375. Rape.—A man is said to commit “rape” if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.”

10. The victim, in her testimony, has categorically stated that the applicant committed sexual assault upon her from time to time. She has also stated that “it is not true to say that I also participated in the said sexual intercourse”. Thus, holistic reading of the cross-examination would reveal that there was sexual intercourse. As already discussed, the question of consent would be immaterial in the light of fact that the victim was minor at the relevant time. Further, Exhibit 71 / medical report which is proved in the testimony of PW 6, shows that there were not only multiple contused abrasions over back of right shoulder and right side chest, but hymen of the victim was also torn at 4 o’clock, 7 o’clock and 11 o’clock positions.

11. It is further necessary to mention here that since the applicant is convicted, presumption of innocence which was available to him is wiped out. Further the legislature, more particularly the Act of 2012 has specifically enacted Sections 29 and 30. Perusal of record shows that the foundational facts are proved by the prosecution by leading evidence, and therefore, presumption under Section 30 has triggered. The applicant, in his defence or in order to rebut the presumption, has not examined any witness.

12. In that view of the matter, I am not inclined to allow the application and same is accordingly rejected.

13. Since Ms. Usha Jadhav, learned counsel appointed to represent Respondent No.2 / victim, has assisted without seeking any adjournment, her fees be quantified by the High Court Legal Services Sub-Committee, Chhatrapati Sambhajinagar.

14. Since the accused is in jail and the paper-book is already placed on record, the appeal can be finally heard in third week of February 2026.

(RAJNISH R. VYAS, J.)

SSD