



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

CRIMINAL APPLICATION NO. 2068 OF 2024

IN

CRIMINAL APPEAL NO. 495 OF 2024

**NAGESH VITHAL GUTTE
VERSUS
THE STATE OF MAHARASHTRA**

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Advocate for Applicant : Mr. Joydeep Chatterji

APP for Respondents/State : Mr. C.V. Bhadane

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**CORAM : SHAILESH P. BRAHME, J.
{ VACATION COURT }**

DATE : 31st MAY 2024.

Per Court :

- Heard learned Counsel Mr. Joydeep Chatterji for applicant and learned APP Mr. C.V. Bhadane for respondent/State.
- Applicant seeks suspension of substantive sentence awarded by learned Additional Sessions Judge-I, Nanded in Sessions Case No.37/2017 vide judgment and order dated 20.05.2024. Applicant has preferred an appeal challenging conviction and sentence which is admitted. Applicant is convicted for offence under Section 33 and 37 of Juvenile Justice (Care and Protection of Children) Act 2015 and for offence under Section 370(i)(e)(iv) of the Indian Penal Code. He is sentenced

to suffer rigorous imprisonment for six months and to pay fine of Rs.10,000/- and in default to payment of fine to suffer simple imprisonment for two months for offence under Section 33 and 37 of the Act of 2015. He is further sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.1,00,000/-. In default of payment of fine he is to suffer rigorous imprisonment for about three years for offence under Section 370(i)(e)(iv) of the IPC.

3. Applicant is seeking suspension of sentence on merits as well as on medical grounds for which certain medical papers are placed on record. Applicant has paid amount of fine and receipt to that effect is placed on record. On the date of conviction he is taken into custody. Applicant has placed on record relevant deposition and the record for considering his application. Learned APP has also not raised any objection regarding the sufficiency of the record and prepared to go on with the hearing of the application.

4. Learned Counsel Mr. Joydeep Chatterji submits that applicant was enlarged on bail during the course of trial and the order is placed on record. It is submitted that no offence can be made out punishable under Section 370(i)(e)(iv), as the basic ingredients of Section 370 have not been fulfilled. No case is made out for exploitation transfer, fraud or any deception. Learned Counsel would heavily rely upon the deposition of PW-6

– Dr. Waseeuddin Mujawar and especially the admission in the cross-examination to buttress that it was not a case of any fraud or deception and the presence of the infant was duly informed on 19.04.2016. It is further submitted that it has been recorded by learned Judge that it was not a case of actual physical exploitation of the infant in question. It is being submitted that *prima facie* it is a case of acquittal and at the most it would be an offence under Sections 33 and 34 of the Act of 2015.

5. Learned Counsel for the applicant seeks to rely upon the serious physical condition of the applicant as the applicant has history since 2017 of epilepsy. The medical papers of civil hospital Nanded are pressed into service to demonstrate that applicant has history of epilepsy since last eight years and immediately after surrender he was found to be serious and required to be admitted in the hospital. Considering the physical condition he is entitled to be released on bail by suspending sentence.

6. Learned APP opposes the submissions of the applicant. It is submitted that wife of the applicant is facing an investigation in C.R. No. 94/2016 registered with Tardev Police Station, wherein it is alleged that an infant was found to have been sold to a couple for Rs.1,80,000/- and the same infant was found to be trafficked at the children home in question at Nanded. Learned APP would submit that there is cogent evidence, statement

under Section 164 and further documentary evidence to bring home the guilt of the accused. He would submit that learned Judge is justified in convicting and awarding sentence to the applicant. He would submit that accused is indulged into serious offence and no leniency can be shown by suspending the sentence.

7. I have considered the submissions of the parties and also gone through the relevant record of the Sessions Case No.37/2017. Though learned Counsel for the applicant has relied upon order dated 29.08.2016 passed in Criminal Application No. 4627/2016, enlarging applicant on bail during trial, the observations and the findings recorded therein cannot enure to the benefit of the applicant. The applicant has suffered conviction and sentence after fulfledged trial. Therefore interim order of bail may not be useful to consider the claim for suspension. I propose to look into the relevant material placed on record and the findings recorded by learned Judge while awarding conviction and sentence.

8. It is the case of the prosecution that applicant is found to have surreptitiously indulged in the offence of Trafficking an infant of 9 to 10 months old. When the members of the Child Welfare Committee visited Smt. Sunita Utteshishigruhar, CIDCO, Nanded which is registered children home, on 20.04.2016, it was found that one female infant was found without there being any

record. Committee inspected relevant documents and the registers and found that intake of children home was ten children and an additional infant was found to have been unaccounted. Thereafter law was settled to motion and investigation was conducted. Prosecution examined 11 witnesses. The defence of the applicant was that a day prior to visit of the Child Welfare Committee that is on 19.04.2016, infant in question was left with the children home. Applicant had duly informed one of the members of the Committee regarding presence of the infant in question and he was directed to produce infant on the next date.

9. I have gone through the judgment impugned and relevant deposition of the witnesses. It reveals that PW Nos.7 to 10 did not support the prosecution and they were required to be cross-examined. The statements of PW Nos. 7 to 10 were recorded under Section 164 of the Cr.P.C.

10. It is the defence of the applicant that the infant which was found to be unaccounted was received by children home on 19.04.2016. Infant was being left by unmarried mother at the children home. Applicant informed telephonically to PW No.6 who was one of the members of Child Welfare Committee regarding receipt of the infant and he was informed on preceding night. The applicant was being instructed to produce the child on the next date and accordingly infant was kept with the home and

produced on the next date at the time of visit of the Committee.

11. The examination in chief of PW No.6 shows that witness had received a telephonic call from the applicant that an infant was brought to the children home. His cross-examination discloses that he had instructed applicant to produce a child on the next day. Infant was brought in the children home a night earlier and was required to be kept there overnight. PW No.6 is the member of the Child Welfare Committee. There is a candid admission that there was a telephonic talk between him and the applicant on 19.04.2016.

12. I have considered statement under Section 313 of Cr.P.C. It reflects the defence of the applicant. Though learned trial Judge disbelieved PW No.6, *prima facie* there is material to show that applicant had instructed one of the members of the Child Welfare Committee and on his instruction it was kept at children home in question. It is a matter of record that PW Nos.7 to 10 did not support the prosecution case. They are caretaker, nurse and social worker. I have also considered the appreciation of deposition of PW No.10. She is a social worker and she is said to have received phone call from the accused in the night at 08:00 to 09:00 pm., informing that the child was received in the children home. On the next day, when she was about to register infant, police personnel visited and conducted inspection. The said witness is elaborately cross-examined as she did not

support the prosecution. PW No.10 was disbelieved because there is a discrepancy of date in the deposition. The purport of the depositions and the probative value of the witnesses which are hostile needs to be stayed at the hearing of the appeal, however prima facie there is a material to show that infant was received a day prior to the incident. I have considered ingredients of Section 370(1)(e)(iv). It is not a prosecution case that infant in question is exploited either psychically or sexually. On the contrary it has been recorded by learned Judge in paragraph no.96 that there was no exploitation, physical exploitation of the child in question. It is further not the case of transfer of the infant so far as fraud and deception on the part of the applicant is concerned there is no sufficient evidence to disclose that applicant is indulged in any fraud or deception. On the contrary the deposition of PW No.6 and 10 indicate that accused has informed the concerned authority for having received an infant a day earlier to the incident in question. Therefore at this juncture it is doubtful whether prima facie there is any material to satisfy the ingredients of offence under Section 370 of IPC. I have also gone through the conclusions recorded by learned Sessions Judge in paragraph no.85 of the impugned judgment. Prima facie it reveals that there is no material to indicate that infant in question was trafficked from Tardev and brought at children home in question at Nanded. It is a matter of record that offence bearing C.R. No.94/1996 was registered with Tardev Police Station in respect of illegal

transaction of illegal adoption of an infant to Mr. and Mrs. Pawar. By intervention of the Family Court at Bandra, interim custody was entrusted to the alleged adoptive parents. It further reveals that the proceeding of quashment of FIR are pending before Principal Seat and investigation has been stayed by the interim orders.

13. The findings recorded by learned Judge in paragraph no.96 discloses that the offences of human trafficking were on and learned Judge felt that it was alarming situation that several children gone missing everyday. Taking judicial notice of the scenario in the society and inference was drawn by the learned Judge that the applicant having been indulged in the trafficking an infant. Prima facie I am of the view that there is no cogent material to show cause of the offence registered at Tardev, Mumbai bearing C.R. No.94/2016 and the unaccounted presence of the infant in question at children home at Nanded. The fulfilledged hearing is required to appreciate the finding recorded in this regard.

14. Though the applicant is convicted for offences under Section 370(1)(e)(iv) and sentenced to suffer rigorous imprisonment for ten years, I have reservation for sustainability of the conviction and sentence. Applicant is also sentenced for offence under Section 33 and 34 which are comparatively of the lesser gravity. Those offences are punishable for imprisonment

for _____. The applicant was released on bail and there is no report of any misuse of liberty. Therefore I find that a case is made out to exercise jurisdiction under Section 389 of Cr.P.C. to suspend the sentence.

15. The applicant was taken into custody on 20.05.2024. He has placed on record certain medical papers to show history of epilepsy. The record is of private hospital. A discharge summary of Shri. Ganga Hospital Nanded discloses seizure disorder of the applicant and his hospitalization for 24.04.2024 to 25.04.2024. On 20.05.2024, the applicant was required to refer to civil hospital Nanded for medical checkup. Case papers show history of epilepsy for last eight years and occurrence of history of epilepsy, seizure on 20.05.2024. It also refers the appraisal of seriousness of the ailment of the applicant to son in law of the applicant namely Ramesh Shankarao Khade. Case papers shows that applicant suffered episode of epilepsy at 03:00 am in the morning. There is no reason to doubt the medical papers of the civil hospital. Applicant is the patient of the epilepsy and is not keeping good health. Therefore on medical ground also I am of the considered view that applicant needs to be enlarged on bail. Hence I passed the following order.

(Operative Order)

**SHAILESH P. BRAHME
JUDGE**

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