

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

**INTERIM APPLICATION NO.2075 OF 2021
IN
CRIMINAL APPEAL NO.689 OF 2021**

Gajanan Madan Zare @ Gajya ...Applicant

Versus

The State of Maharashtra and Anr. ...Respondents

....

Mr. Harshad Inamdar i/b. Mr. Satyajee Dighe for the Applicant.

Mr. P.H. Gaikwad, APP for Respondent -State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 9th DECEMBER, 2021.

P.C.:-

1. This is an application under Section 389 of the Code of Criminal Procedure, 1973 for suspension of substantive sentence imposed by the judgment dated 18/06/2021 passed by the learned Additional Sessions Judge-4, Nashik in Sessions Case No.253 of 2016 and to enlarge the Applicant on bail.

2. Heard Mr. Harshad Inamdar, learned counsel for the Applicant and Mr. P.H. Gaikwad, learned APP for Respondent No.1-State. I have perused the records and considered the submissions

advanced by the learned counsel for the respective parties.

3. By the impugned judgment, the learned Judge has held the Applicant guilty of offences punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012, (POCSO Act) and Section 506 of the IPC. He has been sentenced to suffer rigorous imprisonment for 10 years and fine of Rs.10,000/- i/d to suffer simple imprisonment for six months for offence under Section 4 of the POCSO and rigorous imprisonment for one year and fine of Rs.2,000/- i/d to suffer simple imprisonment for one month for offence under Section 506 of the IPC.

4. The charge against the Applicant was that on 20/05/2016 he committed penetrative sexual assault on the prosecutrix, who was a minor girl and further threatened to kill her in case she disclosed the incident to any one. It is also alleged that the Applicant went to the house of the prosecutrix the next day and abused her and threatened her and her parents and outraged her modesty. The case of the prosecution was that the prosecutrix was below 18 years of age. The prosecution had relied upon the attested copy of the

admission form, General Register and school leaving certificate at Exhibits 77 to 79, wherein date of birth of the prosecutrix is shown as 14/08/2001. The prosecution has also examined Head Master of the School-PW6 -Sanjay Popatrao Pagar, who had brought the original school records and has stated that as per school record the date of birth of the prosecutrix is 14/08/2001. The learned Judge has not relied upon the said certificate on the ground that the birth of the prosecutrix was not recorded in the school records on the basis of any birth certificate. The learned Judge has also not relied upon the radiological examination at Exhibit-62 on the ground that radiological examination report is not accurate. Despite the above observations, however, the learned Judge recorded a finding that the prosecutrix was below 18 years of age.

5. As regards the charge of penetrative sexual assault, the learned Judge has relied upon the testimony of the victim. Perusal of the evidence of PW1- the prosecutrix, prima facie suggests that on 20/05/2016 i.e. on the relevant date at about 11.30 p.m. when she had gone to answer the nature's call, the Applicant came from behind and dragged her to the house of his sister and had forcible sexual

intercourse with her. She has stated that the Applicant had threatened her not to lodge a complaint. Her evidence further indicates that on the next day the Applicant came to her house, abused her and threatened her that in case they lodge a report, he would not allow them to stay in the vicinity. Evidence of this witness prima facie reveals that the Applicant had subjected her to forcible sexual intercourse. The medical certificate (Exhibit-37) indicates that the prosecutrix had scratch marks on her cheeks, abrasion over right elbow, hymen was absent (torn) and that these injuries were fresh. The medical evidence prima facie supports the case of the prosecutrix. The evidence on record prima facie indicates that the Applicant had subjected the prosecutrix to forcible sexual intercourse against her wish and without her consent.

6. Considering the gravity of the offence, this is not a fit case for suspension of sentence. Hence, the application is dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)