

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

**INTERIM APPLICATION NO.3033 OF 2021
IN
CRIMINAL APPEAL NO.941 OF 2019**

Umya @ Umesh Pandurang Koli .. Applicant/ Appellant
Versus
State of Maharashtra and Arn. .. Respondents

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Ms.Gulestan M. Dubash, Advocate for the Applicant/Appellant.
Mr.S.H. Yadav, APP for the Respondent – State.
Mr.Pradeep Jain, Advocate for Respondent No.2.

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CORAM : PRAKASH D. NAIK, J.

DATED : FEBRUARY 01, 2022.

P.C. :

This is an application for suspension of sentence and grant of bail during the pendency of Criminal Appeal No.941 of 2019, challenging the judgment and order dated 18th June, 2019, passed by the Special Judge Raigad-Alibag in Special (POCSO) Case No.27 of 2016.

2 The applicant is convicted for the offence punishable under Section 376(2)(n) of Indian Penal Code (“IPC”, for short) and Sections 4 and 6 of Protection of Children from Sexual Offences Act

(“POCSO Act”, for short). He has been sentenced for imprisonment of ten years.

3 The prosecution case is that the victim was aged about 17 years and eight months at the time of the incident. She was acquainted with the accused. They had exchanged their phone numbers. There was conversation between them on phone. They had developed friendship. In October 2014, the victim was taken in some premises and subjected to sexual assault. Thereafter, again there was sexual relationship between them. On account of repeated sexual relationship, the victim had conceived. Thereafter, she requested the accused to marry her. The accused disclosed that he is already married. The victim thereafter delivered the child. Offence was registered vide C.R.No.144 of 2015. Investigation proceeded. The medical examination of the victim was conducted. Statements of witnesses were recorded. D.N.A. Test was conducted. On completing investigation, charge-sheet was filed.

4 The evidence of the witnesses was recorded. The statement of the accused was recorded under Section 313 of Cr.P.C. The defence of the accused was that the relationship between the accused and the victim was consensual. The victim was more than 18 years of age.

5 This is a second application for suspension of sentence. The previous application was dismissed, as not pressed. The hearing of the Appeal was expedited.

6 Learned advocate for the applicant submitted that although the previous application was not pressed, the Appeal could not be heard. After disposal of the previous application, the applicant had continued to be in custody for more than two years. The applicant has undergone custody of around 2 and ½ years. The evidence of the victim discloses that the relationship was consensual. There was friendly relationship between the victim and the accused. The FIR was not lodged immediately after the incident. The age of the victim was not proved. She was more than 18 years. The evidence relating to proof of age adduced by the prosecution suffers from serious discrepancies. Considering these circumstances, the applicant need not be kept in custody. He was on bail during the trial. There was no misuse of facility of bail granted to the applicant. Learned advocate relied upon the decision of the Apex Court in the case of ***Sunil Kumar Vs. Bipin Kumar and Ors.***¹, and submitted that in the said decision, it was observed that the Appeal preferred by the accused is pending in the High Court. The accused was on bail during the trial, and, there was no misuse of liberty. Learned counsel also relied upon another

1 (2014) 8 SCC 868

decision in the case of *Babu Singh and Ors. Vs. State of Uttar Pradesh*², and, submitted that in the said decision the Court had considered that the accused cannot be kept in prolonged custody.

7 Learned APP submitted that the victim was minor at the time of incident. Consent is immaterial. The victim was subjected to sexual assault by the accused. He was a married person. There is sufficient evidence against the accused. The evidence brought on record during the trial establishes that the victim was minor at the time of incident.

8 Learned advocate for respondent no.2, on instructions, submitted that the respondent no.2 has no objection for suspending the sentence of imprisonment. Respondent no.2 has delivered the child. Applicant accused is the father of the child. The accused has assured that he would look-after the child and the victim. Statement of the victim was recorded by the police on 12th January, 2022. It is submitted that statement of wife of the applicant is recorded by the police on 12th January, 2022, corroborating the version of the victim.

9 Vide order dated 11th October, 2019, the previous application preferred by the applicant was disposed of. The contents of

the order indicate that the advocate representing the applicant had submitted that if Appeal is expedited, the application would not be pressed. The Court noted factual aspects of the matter and considering the facts, it was observed that Appeal is liable to be heard expeditiously. The application was disposed of, as not pressed. The Appeal was directed to be heard in January 2021. However, since last more than a year, the Appeal could not be heard.

10 The applicant is in jail for a period of about 2 and ½ years. During the pendency of trial, he was on bail. It is not reported that the applicant has misused the liberty. I have perused the evidence of P.W.1. The victim was stated that she had acquainted with the accused. They became close friends. She accompanied the accused to the premises where there was sexual relationship between them. Other incident had occurred in October 2014. Again there were incidents of physical relationship. She was pregnant. The accused told her that he is already married person. She delivered the child. The evidence of the victim does not disclose that she was subjected to forcible physical relationship by the accused. She further stated that she had given the documents to police regarding her date of birth. She has stated that her age was 17 years and 8 months. On the basis of birth certificate, she had obtained Aadhar Card. The investigating

officer (P.W.3) has deposed that she had not seen the bonafide certificate of the victim when the offence was registered. There is inconsistency in the date of birth of the victim in the school leaving certificate and the Aadhar Card. She has not produced the original school leaving certificate or the Aadhar Card. She has not obtained the school leaving certificate from the school during the investigation. She has not obtained any documents showing her age during the investigation. Trial Court had observed that what can be gathered from the entire evidence reproduced that the sexual relationship between the applicant and the victim were consensual. The victim has nowhere stated in her examination-in-chief that the relationship was forcible. The fact that the accused and the victim had repeated sexual relationship and that it was consensual, has been established.

11 Thus, the finding of the trial Court was that the relationship was consensual. The other question for consideration is about the age of victim. The defence has urged that there are discrepancies regarding the evidence adduced in respect of age of the victim. Taking into consideration, the evidence on record, the fact that the applicant was on bail during the trial, and, that he has been in custody for 2 and ½ years, the sentence of imprisonment can be suspended.

12 Hence, I pass the following order:

:: ORDER ::

- (i) Interim Application No.3033 of 2021, is allowed;
- (ii) During the pendency of Criminal Appeal No.941 of 2019, the sentence of imprisonment imposed vide judgment and order dated 18th June, 2019, passed by Additional Sessions Judge Raigad-Alibag in Special Case (POCSO) No.27 of 2016, is suspended and the applicant/appellant is directed to be released on bail on executing P.R. Bond in the sum of Rs.25,000/-, with one or more sureties in the like amount;
- (iii) Applicant/appellant is permitted to furnish cash bail security of Rs.25,000/-, for a period of eight weeks, in lieu of surety;
- (iv) Applicant/appellant shall attend the trial Court once in six months on first Saturday of the month between 11:00 a.m. to 01.00 p.m., till final disposal of the Appeal;
- (v) In the event of two consecutive defaults in attending the trial Court, the said fact may be brought to the notice of this Court. In such eventuality, the prosecution is at liberty to

prefer an application for cancellation of bail granted to the applicant/appellant;

- (vi) Interim Application No.3033 of 2021, stands disposed of accordingly.

(PRAKASH D. NAIK, J.)