

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

**INTERIM APPLICATION NO. 3030 OF 2022
IN
CRIMINAL APPEAL NO. 876 OF 2022**

Ganesh Sakharam Kadam ...Applicant/Appellant

Versus

The State of Maharashtra And Anr. ...Respondents

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Mr. Nitin Gaware Patil, Advocate for the Applicant/Appellant.

Ms. Dhruvi Kapadia, Advocate for Respondent No.2.

Mr. Yogesh M. Nakhwa, APP for the Respondent No.1 – State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 8th JUNE, 2023.

PER COURT:

1. This is an application for suspension of sentence and grant of bail during the pendency of appeal challenging the judgment of conviction.

2. The applicant has been convicted vide Judgment and order dated 01.08.2022 for offence punishable under Section 376 of Indian Penal Code (for short “IPC”) and Sections 3 & 4 of the Protection of Children from Sexual Offences Act, 2012 (for short ‘POCSO Act’) and sentenced to suffer imprisonment of ten years.

3. Learned Advocate for the Applicant submitted that, during the course of investigation, the statements of prosecutrix/victim were recorded under Sections 161 & 164 of Cr.PC. In the statement under Section 164 of Cr.PC. the victim had completely exonerated the applicant from the alleged charge of sexual assault. During the cross examination of the victim/PW-2 she has admitted that, her statement was recorded under Section 164 of Cr.PC. and its contents are true. It is further submitted that the age of victim has not been proved by the prosecution to determine that she was minor at the time of incident. The evidence of complainant or the Investigating Officer does not mention that the birth certificate of the victim is being produced in evidence to support the age of victim. However, in the Judgment of the trial Court it has been mentioned that the birth certificate was produced by the victim. It is submitted that the source of the said documents is not established. The contents of the said documents were not proved.

4. Learned A.P.P. submitted that the victim was minor at the time of incident. The victim has deposed before the Court that she was subjected to physical relationship by the accused. Consent of the victim, if any is immaterial.

5. Learned Advocate for Respondent No.2/victim submitted that, apart from the evidence of the prosecutrix/victim, there is

evidence of several other witnesses which indicate that the applicant and the victim were together and thus the evidence of victim that she has been subjected to physical relationship is being supported by corroborative evidence. The trial Court has also observed that the birth certificate of the victim which was adduced in evidence and exhibited as Exhibit – 35 has gone unchallenged. At this stage, the accused cannot make a grievance about the contents of the said document.

6. From the tenor of evidence it appears that the case of the prosecution is that the victim was aged around 16 years and the accused was around 22 years and they were in relationship. The victim has not stated that she was subjected to sexual intercourse under coercion or misrepresentation. On perusal of the statement recorded under Section 164 of Cr.PC., it is apparent that she has exonerated the accused having subjected her to sexual intercourse. In the cross examination she admitted the contents of the said statement recorded before the magistrate under Section 164 of Cr.PC. The statement has been exhibited in evidence as Exhibit-19. From the notes of evidence and the Judgment of the trial Court, it appears that the birth certificate has been produced subsequently. There is no reference to the said document in the examination-in-chief of the victim as well as the Investigating Officer. Be that as it

may, none from the office of the birth and death registration has been examined by the prosecution.

7. Considering these circumstance, case for suspension of sentence and grant of bail is made out.

ORDER

- i. Interim Application No. 3030 of 2022 is allowed;
- ii. The substantive sentence of imprisonment imposed vide Judgment and order dated 01.08.2022 passed by learned Extra Joint Additional Session Judge in Special Case (POCSO) No.78 of 2019 is suspended and the applicant is directed to be released on bail on executing PR. Bond in the sum of Rs.25,000/- with one or more sureties in the like amount;
- iii. The applicant shall report concerned Police Station once in six months on first Saturday of the month between 11.00 a.m. to 1.00 noon till final disposal of the appeal;
- iv. Interim Application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)