

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

**INTERIM APPLICATION NO.4274 OF 2022
IN
CRIMINAL APPEAL NO.1247 OF 2022**

Akshay Shivaji Gavad

..Applicant/Appellant

Versus

The State of Maharashtra & Anr.

..Respondents

Mr. Aditya S. Raktade a/w Sagar Redkar, Sumeeth Vhanbatte & Anup Kamble, for the Applicant/Appellant.

Mr. A. R. Patil, APP for the Respondent/State.

Ms. Vilasini Balasubramanian, Appointed Advocate through Legal Aid for Respondent No.2.

CORAM : KISHORE C. SANT, J.

DATE : 7th FEBRUARY, 2024

PC.

1. Heard the parties.
2. This Application is filed seeking suspension of sentence and release of the Applicant on bail. Applicant is held guilty for the offence punishable under Sections 376(2)(n),(3) and 506 of IPC and Section 3(a) r/w Section 4, 5(j)(ii),(1) r/w Section 6, 7 r/w Section 8, 9(1) r/w Section 10 of POCSO Act. Applicant is directed to suffer imprisonment of ten years and to pay fine of Rs.5000/-, in default to suffer simple imprisonment for six months for the offence punishable under Section 376(2)(n) of IPC and Section 3(a) r/w

Section 4 of POCSO Act. For the offence under Section 376(3) of IPC and Section 5(j)(ii),(l) r/w Section 6 of POCSO Act, Applicant is sentenced to suffer rigorous imprisonment for twenty years and to pay fine of Rs.5000/-, in default to suffer simple imprisonment for six months. For the offence under Section 506 of IPC, Applicant is sentenced to suffer simple imprisonment for one year and to pay fine of Rs.1000/-, in default to suffer simple imprisonment for one month. For the offence under Section 7 r/w Section 8 of POCSO Act, Applicant is directed to suffer three years rigorous imprisonment and to pay fine of Rs.2000/-, in default to suffer simple imprisonment for two months. Applicant is sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.2000/-, in default to suffer simple imprisonment for two months for the offence under Section 9(1) r/w Section 10 of POCSO Act by judgment and order dated 23.09.2022 in Special Case No.02 of 2021 by Additional Sessions Judge, Ratnagiri.

3. It is the case of the Applicant that looking to the entire evidence, it is clearly seen that it is the case of consensual relationship between the victim girl and the accused. Though as per the allegations, alleged act was going on since May, 2020 till October, 2020, still there is no complaint made by the victim. The offence has allegedly taken place at Lanja, District Ratnagiri. However, the offence for the first time came to be lodged on 24.11.2020 at Shahupuri Police Station, Kolhapur. The FIR was subsequently transferred on 03.12.2020. Applicant thereafter came

to be arrested on 03.12.2020. He has further relied on dates i.e. on 11.10.2020, the victim was taken to doctor at Lanja. On 16.11.2020, she was taken to a private hospital in Kolhapur. On 24.11.2020, she was referred for the first time to Government Hospital. It is only thereafter she disclosed the name of the accused for the first time. Her first statement came to be recorded on 24.11.2020 and the second statement came to be recorded in the hospital on 27.11.2020 and she was aborted on 27.11.2020. After lodging of FIR at Shahpuri, Kolhapur, it was transferred to Lanja Police Station. He submits that all this clearly show that the victim did not make any complaint against the present Applicant and relationship was consensual relationship. He submits that as per the evidence of Radiologist, the age of the victim is 18 to 20 years.

4. He further submits that there is discrepancy in the date of birth of the victim. He invited attention of this Court to the evidence of PW-10, who was working as Superintendent in Kolhapur Municipal Corporation. In his evidence, he deposed that in the Register, the date of birth of the victim is recorded as 14.07.2006 and the said entry though is made on 19.07.2006 it is mentioned as 18.07.2006. He further submits that during the pendency of the trial, the Applicant was on bail and there is no complaint of misuse of the liberty. He relies on the judgment of Mainpur High Court in the case of ***Sandam Bhogen Meetai Vs. State of Manipur*** reported in ***MANU/MN/0138/2022***, wherein Court has held that the cases of bail be decided by using discretion judiciously when the sentence is

for fixed period. The Court may consider the applications liberally unless there is any statutory restriction. He submits that there was sentence of twenty years in POSCO Act and still bail was granted and sentence was suspended. He further relies on the judgment of this Court in the matter of ***Ashik Ramjaji Ansari Vs. State of Maharashtra & Anr.*** reported in ***2023 SCC OnLine Bom 1390***, wherein in the case of POSCO Act, the High Court had acquitted the Accused. At this stage, this Court is only considering application for suspension of sentence.

5. Learned appointed advocate for Respondent No.2 vehemently argued the matter. She submits that in POSCO cases when there is relationship with the child, consent is immaterial. In the present case, the victim was hardly of 14 years of age and even if she has consented, it cannot be said to be the consent in the eyes of law. She submits that the victim was required to be aborted. The foetus was sent for DNA testing. The DNA report clearly matches with the DNA of the accused. This itself is sufficient to show that the accused had sexual relations with the victim. She further pointed evidence of PW-12 i.e. Chemical Analyzer. He in specific terms stated that product of conception of victim matches with the accused and is concluded to be the biological father of the conception of the victim. She relies upon the judgment of the Supreme Court in the matter of ***Kishori Lal Vs. Rupa & Ors.*** reported in ***(2004) 7 SCC 638***. In paragraphs 5 & 6, the Hon'ble Apex Court has held thus :-

- “5. The appellate Court is duty-bound to objectively assess the matter and to record reasons for the conclusion that the case warrants suspension of execution of sentence and grant of bail. In the instant case, the only factor which seems to have weighed with the High Court for directing suspension of sentence and grant of bail is the absence of allegation of misuse of liberty during the earlier period when the accused-respondents were on bail.
6. The mere fact that during the trial, they were granted bail and there was no allegation of misuse of liberty, is really not of much significance. The effect of bail granted during trial loses significance when on completion of trial, the accused persons have been found guilty. The mere fact that during the period when the accused persons were on bail during trial there was no misuse of liberties, does not per se warrant suspension of execution of sentence and grant of bail. What really was necessary to be considered by the High Court is whether reasons existed to suspend the execution of sentence and thereafter grant bail. The High Court does not seem to have kept the correct principle in view.”

6. She thus submits that while considering the application for suspension of sentence, this Court has to look into gravity of the offence and other material factors. Merely because the Applicant has not misused the liberty during trial is not sufficient to warrant suspension of sentence and grant of bail. This Court has to consider whether reasons exist to suspend the execution of sentence and thereafter grant bail.

7. Learned APP also supports case of the prosecutrix. He

submits that there is also evidence in the form of DNA report and prays for rejection of the Application.

8. Having heard arguments of both the parties and having gone through the record, it is clear that there is *prima-facie* strong evidence against the accused. No case is made out to show that *prima-facie* impugned judgment and order is not correct or illegal. In the facts of the present case, no case is made out to allow the Application.

9. The Application therefore stands dismissed.

10. Appeal expedited.

11. Learned advocate appointed through Legal Services Authority for Respondent No.2 will be entitled to receive fees as per rules.

[KISHORE C. SANT, J.]