

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

Interim Application No.2082 of 2024

In

Criminal Appeal No. 538 of 2024

1. Kadar Ali Yusuf Ali Shaikh

Age: 38 years, Adult

Indian Inhabitant of Mumbai.

2. Aaliya Kadar Ali Shaikh @

Pooja Aunty

Age: 30 years, Adult Indian

Inhabitant of Mumbai, having

their address at Room No.09,

Ground Floor, Mahada

Building No.B/2, Opp. Firebigrade,

Antop Hill, Mumbai – 400 037

(Both residing at same address.

Both the appellants/accused are

in custody in Aurangabad Jail)

... Applicants

versus

1. The State of Maharashtra

(at the instance of Antop Hill Police

Station) to be served through the

Office of the Learned Public Prosecutor,

High Court of Bombay, Mumbai

2. XYZ (Victim)

... Respondents

Mr Raees Khan, for the applicants.

Ms Sangita E Phad, APP, for respondent No.1/State.

Ms Leena Patil, for respondent No.2.

Coram: R.N. Laddha, J.
Date: 12 March 2025.

P.C.:

The applicants faced trial in POCSO Special Case No.201 of 2019 before the Special Court for Protection of Children from Sexual Offences Act, 2012, at Fort, Mumbai, for offences punishable under Sections 376, 366(a), 313, 506 read with 34 of the Indian Penal Code ('IPC'), Section 4 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act'), and Sections 4 and 6 of the Immoral Traffic (Prevention) Act, 1956 ('PITA Act'). By a judgment and order dated 27 February 2024, the applicants were acquitted of the offence punishable under Section 313 of the IPC and convicted for the offences punishable under Sections 376, 366, 506 read with 34 of the IPC, Section 4 of the POCSO Act, and Sections 4 and 6 of the PITA Act. The applicants were sentenced as follows: (i) rigorous imprisonment for ten years and a fine of Rs.5,000/- (with default stipulations) for the offence punishable under Section 366 of the IPC, (ii) rigorous imprisonment for two years for the offence punishable under Section 506 of the IPC, (iii) rigorous imprisonment for seven years and a fine of Rs.1,000/- (with default stipulations) for the offence punishable under Section 4 of the PITA Act, (iv) rigorous imprisonment for seven years and a fine of Rs.2,000/- (with default stipulations)

for the offence punishable under Section 6 of the PITA Act, and (v) in terms of Section 42 of the POCSO Act, rigorous imprisonment for ten years and a fine of Rs.10,000/- (with default stipulations) for the offence punishable under Section 4 of the POCSO Act. Applicant No.2 was also sentence to suffer rigorous imprisonment for ten years and a fine of Rs.10,000/- (with default stipulations) for the offence punishable under Section 17 of the POCSO Act. All these sentences were directed to run concurrently.

2. Aggrieved and dissatisfied, the applicants preferred an appeal before this Court and, by the present application, seek relief in terms of Section 389 of the Code of Criminal Procedure, 1973 ('CrPC').

3. Mr Raees Khan, the learned Counsel appearing on behalf of the applicants, points out the alleged shortcomings in the prosecution's case and contends that the testimony of the prosecution witnesses lack credibility and fail to inspire confidence. The learned Counsel submits that the accused were not given an opportunity to cross-examine the victim. The applicants have been in custody for six years. The applicants are ready to comply with any conditions this Court imposes and cooperate fully with the appeal proceedings if released on

bail.

4. Ms Sangita Phad, the learned Additional Public Prosecutor representing respondent No.1/ State, and Ms Leena Patil, the learned Counsel appearing for respondent No.2, opposing the applicants' request and referring to the seriousness of the charge under which the applicants are convicted, jointly submit that the evidence on record strongly supports the prosecution's case and does not warrant suspension of the sentence and the applicants' release on bail.

5. This Court has given anxious consideration to the rival contentions.

6. In ***Bhagwan Rama Shinde Gosai v. State of Gujarat***¹, the Hon'ble Supreme Court observed as follows:

“3. When a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances. Of course, if there is any statutory restriction against suspension of sentence it is a different matter. Similarly, when the sentence is life imprisonment the consideration for suspension of sentence could be of a different approach. But if for any reason the sentence of a limited duration cannot be suspended every endeavour should be made to dispose of the appeal on merits

¹ (1999) 4 SCC 421

more so when a motion for expeditious hearing of the appeal is made in such cases. Otherwise the very valuable right of appeal would be an exercise in futility by efflux of time. When the appellate court finds that due to practical reasons such appeals cannot be disposed of expeditiously the appellate court must bestow special concern in the matter of suspending the sentence so as to make the appeal right, meaningful and effective. Of course, appellate courts can impose similar conditions when bail is granted.”

7. The maximum sentence imposed upon the applicants is ten years. While this Court acknowledges the arguments presented by the learned APP and the learned Counsel for respondent No.2 regarding the gravity of the offence and the post-conviction stage of the proceedings, it is essential to recognise that the applicants have served a substantial period of the sentence imposed on them. Moreover, during the trial, the victim was not available for cross-examination. The appeal has been filed in 2024 and is unlikely to be heard in the near future due to the pendency of the older appeals. In these circumstances, the applicants are entitled to the relief of suspension of sentence pending the appeal and grant of bail. Hence, the following order:

ORDER

(i) The sentence imposed upon the

applicants vide judgment and order dated 27 February 2024 passed by the Special Court for Protection of Children from Sexual Offences Act, 2012, at Fort, Mumbai, in POCSO Special Case No.201 of 2019, stands suspended during the pendency of the appeal.

(ii) The applicants shall be released on bail upon executing a PR Bond of Rs.25,000/- each and furnishing one or more sureties in the like amount.

(iii) The applicants shall not enter the jurisdiction of the concerned Police Station where the victim resides.

(iv) The applicants shall not contact the victim or her family members in any manner.

(v) The applicants shall keep the investigating officer informed and updated about their residential address and contact details.

8. The interim application stands disposed of accordingly.

(R.N. Laddha, J.)