

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

Interim Application No.2889 of 2025

In

Criminal Appeal No.800 of 2025

Wajid Harun Shaikh

Aged: 43 yrs, Indian Inhabitant,

Add: Room No.16, F-Chawl,

Radha Krishnan Nagar,

Andheri Kurla road, Jarimari,

Mumbai-400 072.

(At present lodged in Nashik Road

Central Prison)

... Applicant/Org Accused.

Vs.

1) The State of Maharashtra

(through Sakinaka Police Station

CR No.258 of 2017)

2) XYZ

(through Sakinaka Police Station,

CR No.258/2017)

... Respondent.

Mr Afzal Payak for the applicant.

Mr Arfan Sait, APP for the respondent / State.

Ms Aishwarya Sharma for respondent No.2 (through Legal Aid).

PSI Sopan Bhagwat Wadkar, Sakinaka Police Station.

Coram : R.N.Laddha, J.

Date : 15 October 2025.

P.C.:

Heard Mr Afzal Payak, learned Counsel appearing on behalf of the applicant, Mr Arfan Sait, learned Additional

Public Prosecutor representing respondent No.1/ State, and Ms Aishwarya Sharma, learned Counsel appointed for respondent No.2.

2. The gravamen of the prosecution's case is that, in January 2017 and February 2017, the applicant engaged in sexual intercourse with the victim, aged about sixteen years at the relevant time, thereby committing the offence of rape. It is further alleged that the victim became pregnant as a consequence of the said acts. Pursuant to these allegations, an FIR was lodged under Sections 376(2)(n) and 506(2) of the Indian Penal Code (IPC) and for the offences punishable under Sections 4, 6, 8 and 12 of the Protection of Children from Sexual Offences Act (POCSO) by Sakinaka Police Station, Mumbai, and investigation was carried out. During trial, the prosecution examined 17 witnesses in support of its case. Upon appreciation of the oral and the documentary evidence adduced, the learned trial Court was satisfied that the prosecution had established the guilt of the applicant. Consequently, by judgment and order dated 5 July 2025, the applicant was convicted and sentenced to suffer rigorous imprisonment for 10 years and a fine of Rs.50,000/- with default stipulations for offence punishable under Section 376(2) (n) IPC, and rigorous imprisonment of 2 years and fine of

Rs.500/- for the offences punishable under Section 506(2) of the IPC with default stipulations. Since the punishment was imposed under Section 376(2)(n) of the IPC, no separate sentence was imposed on the applicant for the offence punishable under Section 4, 6, 8 and 12 of the POCSO Act. Aggrieved thereby, the applicant preferred an appeal before this Court and filed the present application seeking suspension of the sentence and release on bail.

3. Mr Afzal Payak, learned Counsel appearing on behalf of the applicant, has assailed the conviction on multiple grounds, primarily contending that the prosecution has failed to establish the age of the victim beyond reasonable doubt, *sine qua non* for invocation of the provisions of the POCSO Act. It is submitted that two birth certificates are placed on record, which are mutually contradictory. While one certificate indicates that the victim was a minor at the time of the alleged incident, the other unequivocally reflects that she had attained the age of majority. In such circumstances, it is argued that the benefit of doubt ought to have been extended to the applicant.

4. The learned Counsel further submits that the trial Court erred in placing reliance upon the ossification test to determine the age of the victim, and accepted a margin of error merely six

months, which is contrary to the settled legal position. Reliance is placed on the judgment of the Supreme Court in *Jaya Mala Vs Home Secretary, Government of J & K* (1982)2 SCC 538, wherein it was held that the ossification test carries an inherent margin of error of two years on either side.

5. It is also contended that the trial Court failed to appreciate material contradictions and procedural irregularities in the investigation, particularly in relation to the collection, preservation, and transmission of DNA samples. The learned Counsel submits that there were glaring lapses in the chain of custody and handling of forensic evidence, which rendered the DNA analysis unreliable and legally untenable. Further discrepancies in the testimonies of prosecution witnesses have not been adequately addressed, thereby vitiating the evidentiary value of the DNA report. It is also brought to the attention of this Court that the applicant has already undergone incarceration for a period of 8 years and 5 months out of the 10-year sentence imposed upon him.

6. Mr Arfan Sait, learned Additional Public Prosecutor representing respondent No.1/ State and Ms Aishwarya Sharma, learned Counsel appearing for respondent No.2, opposing the applicant's request, emphasise the gravity of the

offence. They contend that the evidence on record strongly supports the prosecution's case and does not warrant suspension of the sentence and the applicant's release on bail.

7. This Court has given anxious consideration to the rival contentions and perused the record.

8. In ***Bhagwan Rama Shinde Gosai Vs 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 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

¹ (1999) 4 SCC 421.

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.”

9. Similarly, in ***Atul Vs State of Madhya Pradesh***², the Hon’ble Supreme Court observed as follows:

“Before parting with order, we must note here that notwithstanding several decisions of this Court holding that when there is a fixed term sentence and especially when the appeal is not likely to be heard before completing entire period of sentence, normally suspension of sentence and bail should be granted. We find that in several deserving cases, bail is being denied. Such cases should never be required to be brought before this Court.”

10. In the present case, the applicant has undergone a significant term of his sentence, and the appeal challenging the conviction has been filed in 2025 and is unlikely to be heard immediately. If, at this juncture, the relief is denied, the applicant is likely to complete the entire term of the sentence before the appeal is heard. In this backdrop, a case is made out for grant of suspension of sentence pending the appeal and grant of bail. Hence, the following order:

² Cri.Appeal No.579 of 2024 dt.2/2/2024.

ORDER

(i) The sentence imposed upon the applicant vide judgment and order dated 5 July 2025 in Special POCSO Case No.279 of 2017, is suspended during the pendency of the appeal, subject to the applicant executing a PR Bond of Rs.25,000/- and furnishing one or more sureties in the like amount.

(ii) The applicant shall refrain from entering the jurisdiction of the concerned Police Station where the victim resides and making contact, in any manner, with the victim and her family members.

(iii) The applicant shall inform and update the Investigating Officer about his contact number and address.

11. The interim application stands disposed of accordingly.

[R.N. Laddha, J.]