

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION NO. 914 OF 2019 IN
CRIMINAL APPEAL NO. 698 OF 2019

Chetan s/o Suresh Ninave
..vs..
State of Maharashtra, thr. P.S.O.

WITH

CRIMINAL APPLICATION NO. 389 OF 2020 IN
CRIMINAL APPEAL NO. 675 OF 2019

Sagar s/o Ramesh Hukare
..vs..
State of Maharashtra, thr. P.S.O.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri K.S. Motwani, Advocate for applicant/appellant in Cri.
Application No. 914 of 2019.
Shri R.M.Daga, Advocate for Applicant/appellant in Cri.
Application No. 389 of 2020.
Mrs. Geeta Tiwari, A.P.P. for respondent-State.

CORAM : VINAY JOSHI, J.
DATED : 29/09/2020

Hearing was conducted through Video Conferencing and the learned Counsel agreed that the audio and visual quality was proper.

2. Two accused convicted in Special Case No. 23 of 2017 of the offences punishable under Section 6 of the Protection of Children from Sexual Offences, 2012 (hereinafter referred as "the POCSO Act") and Section 363 and 506 of the Indian Penal Code have challenged the order of conviction by exercising their statutory right of appeal in terms of Section 374 of Code of Criminal Procedure. By these two applications a prayer has been made on behalf of the convicted accused namely Chetan

Ninave and Sagar Hukare to grant bail after suspending a sentence as provided under Section 389(1) of the Code of Criminal Procedure.

3. Both the applicants have been found guilty for the aforesaid offences and they are sentenced to undergo rigorous imprisonment for ten years with fine of Rs. 25,000/- for the offence punishable under Section 6 of the POCSO Act. Besides that minor punishments were awarded for the offences punishable under Sections 363 and 506 of the Indian Penal Code and directions were issued that all sentences shall run concurrently. Learned Counsel for the applicants, in order to justify prayer for grant of bail till pendency of instant appeals has taken to the evidence of each of the witnesses, analyzed the evidence on the basis of which it is submitted that on account of deficiencies, infirmities, discrepancies, absence of medical evidence and other improbabilities, the appeal would not end into dismissed, and therefore bail has been sought.

4. Primarily, it is argued that though the charge of gang rape under Section 376(D) of the Indian Penal Code was framed, the accused were acquitted for said charge, however, the said act which is punishable under Section 6 of the POCSO Act, the conviction is recorded on the strengths of statutory presumption envisaged under Section 29 of the Act. It is argued that there is considerable delay in lodgement of F.I.R. which creates serious doubt regarding genuineness of the case. Learned Counsel for the applicant would argue that the medical evidence is totally absent to support the sole testimony of

the victim who was 17 years of age. It is brought to the notice that though it is alleged that video recording was done, however, the same was not seized. Besides that certain vital omissions and improvements from the evidence of victim were pointed out.

5. Per contra, learned Additional Public Prosecutor strongly resisted to exercise discretion in favour of the applicants, having regard to the gravity of offences. It is submitted that since the accused after commission of crime were moving around the house of victim and as they threatened there happened to be delay in lodgement of F.I.R. It is submitted that since the medical examination of victim was done after 15 days from the occurrence, the medical evidence was absent. According to the prosecution the Medical Officer has not ruled out the possibility of sexual intercourse since the hymen found to be torn. Moreover, some images of the victim were captured and seen during the course of evidence. It is argued that in the catena of decisions the Supreme Court has expressed that there is no difficulty in basing conviction on the sole testimony of victim. Having regard to the atrocities committed by the accused and taking into account seriousness of the offence, the prosecution opposed for exercising the discretion of suspending sentence and releasing applicants on bail.

6. No doubt, during the pendency of trial the applicants / accused were on bail and they have not misused the liberty, however, per se that cannot be a decisive factor. While exercising jurisdiction under Section 389 of the Code of Criminal Procedure the vital

circumstances like gravity of offence, under which circumstances offence was committed, nature and quality of evidence, chances of repetition of crime and so many factors are to be looked upon.

7. From perusal of Section 389 of Code of Criminal Procedure, it is evident that save and accept the matter falling under category of Sub Clause 3 of Section 389 of the Code of Criminal Procedure neither there happens to be any principle laid down nor criteria has been fixed for consideration of the prayer of the applicant. The only statutory requirement is to record the reasons while exercising the jurisdiction. Though exhaustive submissions are made to impress that how conviction is not justifiable, however, at this juncture deeper scrutiny is not permissible since it would affect the merits of appeal. However, certainly to some extent broadly the submission needs consideration which could be a base for use of discretion in either way.

8. The prosecution case in nutshell is that a victim aged 17 years was taken by other persons (juvenile in conflict with law) at secluded place where both convicted accused were present. According to prosecutrix at said place all of them had raped her on 25.02.2017. After the alleged act the prosecutrix was again brought back to her original place and left there. The prosecutrix maintained silence about the incident for longer period. It reveals from her evidence that on 11.03.2017 a video clipping about her was shown to her parents and thereafter the complaint has been lodged on 12.03.2017. The prosecution tried to explain the long delay of 15 days by

stating that the prosecutrix was under fear. However, there appears to the substance in the submission that only when the video clipping was made known to the parents, she went to police station to lodge a report. The submission that the trial court though acquitted accused from the charge of gang rape has ventured into convicting the accused for aggravated penetrative sexual assault. Having regard to the said fact that the trial court held that the accused were not found guilty for the offences of gang rape, the submission that only on the basis of statutory presumption he was convicted requires consideration. With the assistance of both sides I have gone through the medical report which *prima facie* does not support the evidence of the victim.

9. From the record it appears that there are arguable grounds which ARE to be decided on merits at the time of final hearing. The accused have suffered imprisonment around a year and a reasonable prediction of time of the hearing of the appeal may take few years ahead, which means that incarceration during the period may possibly prove irrevocable injury if the appeal ends in their favour. Both the applicants are near about of 20 years of age. Having regard to the overall circumstances without expressing much it can be said that it is a case where judicial discretion can be used in favour of the accused.

10. Execution of substantive sentence passed against the applicants / accused stands suspended till final disposal of appeal on condition that they should deposit entire fine amount in trial Court.

11. Both the applicants / accused namely Chetan Ninave and Sagar Hukare are released on bail on their furnishing P.R. bond of Rs. 25,000/- each with one or two sureties in the like amount.

12. Both the applications are allowed and disposed of accordingly.

13. This order be communicated to the Counsel appearing for the parties, either on the email address or on WhastApp or by such other mode, as is permissible in law.

JUDGE

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