

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

Criminal Application [APPA] No.647 of 2021
in
Criminal Appeal No.477 of 2021

Ashokkumar s/o Dnyaniram Thakare

vs.

The State of Maharashtra, through P.S.O. Jaripatka, Nagpur

*Office notes, Office Memoranda of
 Coram, appearances, Court's orders
 or directions and Registrar's orders.*

Court's or Judge's Orders

*Shri R.M. Daga, Advocate for the Applicant/Appellant.
 Shri A.R. Chutke, A.P.P. for the Non-Applicant/Respondent.*

CORAM : VINAY JOSHI, J.
DATE : 3rd DECEMBER, 2021.

Heard.

02] This is an application seeking suspension of execution of substantive sentence passed in Special POCSO Case No.93/2017 by the Additional Sessions Judge, Nagpur. The trial Court held the applicant-accused guilty for the offence punishable under Sections 376(2)(i)(j) and 506 (Part-II) of the Indian penal Code. The trial Court has imposed sentence to undergo rigorous imprisonment for ten years for the offence punishable under Sections 376(2)(i)(j) and to undergo rigorous imprisonment for one year for the offence punishable under Section 506 (Part-II) of the Indian penal Code. Besides that, total fine of Rs.11,000/- has been imposed. Both sentences are directed to run concurrently.

03] The applicant has claimed suspension of execution of sentence in terms of Section 389(1) of the Code of Criminal Procedure, mainly on two counts. Firstly, on merits by contending that the impugned judgment is not sustainable in the

eyes of law since the evidence adduced in trial is not sufficient to establish a guilt with a standard set out under the criminal law. Secondly, it is contended that the applicant has already undergone almost half of the term of sentence and as there is no likelihood of appeal coming for hearing in near future, he is entitled for suspension.

04] The State resisted this application by making submissions. It is argued that the offence is against woman having serious impact on the society. The evidence of victim is firm and consistent. Moreover, the victim's age is not specifically denied and, therefore, the impugned judgment is based on sound reasoning, which call no interference in appeal.

05] With the assistance of both sides, I have gone through the impugned judgment and the evidence recorded in trial. As per the prosecution case, the victim-girl was 15 years of age. While disputing the age, learned Counsel Shri Daga submitted that the trial Court has not relied on the documentary evidence on the point of age, which was pressed by the prosecution in trial. He would submit that the trial Court erred in relying oral testimony regarding date of birth. In this regard, he pointed out that the victim has not stated her date of birth in F.I.R., nor in statement recorded in terms of Section 164 of the Code. Therefore, *prima facie* it appears that the point of age of victim is arguable, which has direct impact on the result of trial.

06] Moreover, he took me through the story stated by the informant about forcible sexual intercourse in toilet and submitted that the same is improbable. Certain inconsistencies from the evidence are pointed out. Besides that, my attention is invited that though the incident occurred on 08/02/2017,

however, despite victim following her ordinary pursue, the F.I.R. was lodged after four days. In other words, he says that the possibility of emerging concocted story cannot be ruled out. Moreover, I have been taken through the medical evidence, which says that there were no external injuries on the genitals of the victim. Likewise, Medical Officer admitted that though hymen was found to be torn, the tears were very old. Having regard to tender age of the victim, medical evidence assumes significance, which is a matter of consideration.

07] It takes me to give regard to another submission which is about the applicant's pre-trial detention. It is submitted that the trial Court has imposed maximum sentence of undergoing rigorous imprisonment for ten years. The applicant was arrested on 14/02/2017 and till date i.e. for the period of four years and 10 days, he is in jail. Thus, it is the submission that the applicant has already undergone almost half of the period of sentence and thus as he served substantial period of sentence coupled with the fact that the appeal will take considerable time for hearing, he is entitled for suspension.

08] To support the said contention, the applicant has placed reliance on the decision of the Supreme Court in the case of Kamal vs. State of Haryana – (2004) 13 SCC 526. Likewise, he drew my attention to the decisions of this Court in the cases of Sanjay Dattaram Gawde & Anr. vs. State of Maharashtra – 2007 ALL MR (Cri) 669 and Garvar Ayub Habid Khan vs. State of Maharashtra – 2007 ALL MR (Cri) 656, wherein considering the period, which was already undergone, the Courts have exercised its discretion in suspending sentence. Particularly, in above referred case of Kamal, the then accused was sentenced to undergo rigorous imprisonment for seven years for the offence

punishable under Section 304-B of the Indian Penal Code. The accused had already served imprisonment for about two years and considering said fact, the Supreme Court was pleased to suspend the sentence on said ground.

09] Besides the period of sentence, which the applicant has already served, the aforesaid factors regarding the merits of case make out that the applicant has arguable point on merits. Apparently, if the applicant/appellant succeeds in the appeal, then irreversible position about his detention would occur. The trial will take considerable time for disposal.

10] On a query made to learned Counsel Shri Daga for the applicant that whether the fine amount is deposited, he expressed that he is not sure. Having regard to all these factors, the applicant has made out a case for grant of suspension. In view of that, the execution of substantive sentence passed in Special POCSO Case No.93/2017 by the Additional Sessions Judge, Nagpur is hereby suspended till final disposal of the appeal. In the meantime, the applicant-Ashokkumar Dnyaniram Thakare shall be released on bail on his furnishing P.R. Bond in the sum of Rs.25,000/- with surety of the like amount. Deposit of fine amount would be pre-condition for release. The trial Court shall ensure deposit of fine before issuing release order.

11] The application stands allowed and disposed of accordingly.

JUDGE

**sandesh*

Signed by:SANDESH DAULATRAO
WAGHMARE
Private Secretary to the Hon'ble Judge
Signing Date:04.12.2021 18:45