

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

CRIMINAL APPLICATION (APPA) NO. 367 OF 2022

IN

CRIMINAL APPEAL NO. 301 OF 2022

(Santosh s/o Shankar Yele ..vs.. State of Maharashtra, through PSO Mana, District Akola and another)

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

Court's or Judge's orders

Mr. A.S. Londhe, Counsel for the applicant-appellant,
Mr. V.A. Thakare, Addl.P.P. for respondent 1-State,
Mr. B.K. Suchak, Counsel for respondent 2.

**CORAM : ROHIT B. DEO &
ANIL L. PANSARE, JJ.**

DATED : 07-09-2022

Criminal Appeal 301/2022 is preferred by the appellant-Santosh Shankar Yele assailing the judgment dated 08-3-2022 rendered by the learned Extra Joint District Judge and Additional Sessions Judge, Akola in Sessions Trial 22/2020 whereby the appellant is convicted for offences punishable under Sections 354-A(1)(i), 376(2)(f)(l)(n), 376(3) and 506 of the Indian Penal Code and Section 5 punishable under Section 6 and Section 9(1)(n) punishable under Section 10 of the Protection of Children from Sexual Offences Act (POCSO Act).

2. The child victim is the daughter of the appellant and is handicapped.

3. At the very outset, we may note that the child

victim was present in the Court and she was accompanied by her mother. In view of the submission of the learned Counsel for the appellant and the learned Counsel representing the child victim, that the child victim desires to address us, we heard her out. The child victim told us that all that her father did was to slap her. Pertinently, while in the Court, the child victim stood by her allegation that she was repeatedly sexually abused by her father-appellant herein, her mother who was also present in the Court and who escorted the child victim to the Court, did not support the prosecution.

4. We are consciously refraining from making any observation or drawing any *prima facie* inference from the manner in which the child victim is produced and presumably coaxed and cajoled into addressing us. Suffice is to observe, that we are inclined to decide the entitlement of the appellant to suspension of sentence *de hors* the statement made before us by the child victim.

5. The difference between grant of bail in exercise of power under Section 439 of the Code of Criminal Procedure (Code) and suspension of sentence is well recognized. In the former case, the undertrial is entitled to the benefit of presumption of innocence. In the latter case, such presumption is not available and the appellate Court will have to be conscious of the finding of guilt recorded. The exalted principle that 'bail and not jail' is the rule does not come into play while considering an

application for suspension of sentence.

6. The parameters for consideration of suspension of sentence cannot be spelt out as a cut and dried formula. However, if the accusation which is proved is grave, as indeed is the case at hand, a compelling case will have to be made out for suspending the sentence. While elaborate and microscopic consideration of the evidence is not necessary, an indeed may be inappropriate, considering that the merits will have to be ultimately considered at the stage of final hearing, some reference to the prosecution case and the material on record is inevitable particularly since the edifice of the application for suspension of sentence is the alleged flaws in appreciation of evidence.

7. While the mother of the child victim did not support the prosecution, she accompanied the child victim to the police station to lodge the report on 10-12-2019. The report makes a sordid reading. The sum and substance is that the handicapped child victim was sexually abused by her father-appellant herein from 2017 till 08-12-2019 and ultimately after disclosing the incident of forcible sexual intercourse on 08-12-2019 to her friend, the child victim mustered the courage to lodge the report.

8. The mother of the child victim was examined as PW 1 and she did not support the prosecution, nor did

the friend to whom the child victim disclosed the incident. The most important evidence is that of the child victim who is examined as PW 4. We have considered her testimony and are *prima facie* satisfied, that she has with stood the test of cross-examination. The child victim is born on 06-12-2005 and the Birth Certificate is proved.

9. The learned trial Judge has considered the evidence threadbare and while we do not wish to make any positive observation, we find it difficult to accept the submission of the learned Counsel for the appellant that the appreciation of evidence on record is seriously flawed. We hasten to observe, that this is only a *prima facie* observation.

10. Considering that the accusation which is proved, is that the appellant committed forcible sexual intercourse with his minor handicapped daughter and is sentenced to suffer life imprisonment, we do not consider it appropriate to suspend the sentence.

11. The application is dismissed.

12. However, the appeal will have to be heard expeditiously since we are not suspending the sentence.

13. We direct that the appeal be listed on the final hearing board immediately after the paper-book is ready.

The paper-book shall be prepared as expeditiously as possible, and in any event, within the next four months.

(ANIL L. PANSARE, J.)

(ROHIT B. DEO, J.)

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