

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.2134 OF 2023 IN APEAL/516/2023

NARAYAN SUPADSING MANADAVAT
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

...
Advocate for Applicant : Mr. Satish A. Gaikwad
APP for Respondent No.1/State : Mr. S. P. Deshmukh
Advocate for Respondent No.2 : Mr. Kiran D. Jadhav
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CORAM : S. G. MEHARE, J.

DATE : 01-08-2023

PER COURT :-

1. Heard the learned counsel for the applicant, the learned A.P.P. for respondent No.1/State and the learned counsel appointed for respondent No.2/victim.

2. The applicant seeks suspension of sentence imposed upon him to suffer rigorous imprisonment (for short, "RI") for ten years for the offence punishable under Section 376(2) of the Indian Penal Code (IPC), RI for three months for the offence punishable under Section 342 of the IPC, RI for twenty years each for the offence punishable under Section 4(2) and 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 and RI for three years for the offence punishable under Section 8 of the POCSO Act, by the learned Special Judge (POCSO), Aurangabad, by its judgment and order passed in Special Case (POCSO) No.169 of 2019, dated 12.06.2023.

3. The learned counsel for the applicant would submit that the incident occurred on 29.05.2014. The trial went on and decided in 2023. Section 4 of the POCSO Act has been amended by Act No.25 of 2019, Section 3(b) w.e.f. 06.08.2019. The punishment has been enhanced for a term which shall not be less than twenty years, which may extend to imprisonment for life. However, before the amendment of 2019, the minimum punishment under Section 4 of the POCSO Act was ten years and under Section 6, not less than ten years. He would point out that the learned Judge convicting the accused has not considered this legal aspect. Since the amendment of Act 2019 came into force in 2019, it has no retrospective effect. The penal laws are not retrospective unless specifically expressed by the amended law.

4. Secondly, he would submit that the prosecution, though he had objected, has utterly failed to prove that on the day of the incident, the victim was below the age of 18 years. There was no documentary proof. For that purpose, a certificate of matriculation or equivalent certificate shall be preferred to the birth certificate issued by the Municipal authority. In the absence of the above documents, the age may be proved by an ossification test. This vital aspect has also not been considered, and oral evidence of the witnesses have been erroneously believed.

5. He also referred to the evidence of the witnesses and argued that the sister of the victim was allegedly the eyewitness to the incident. The spot pancanama falsified her evidence that she peeped insider the room where the incident happened through window and the spot panchanama does not show the house had any window. Such factual aspect supports the defence of the applicant that he had been falsely implicated in the crime.

6. He would also argue that the learned trial Court did not consider the juvenile claim of the applicant. There were material discrepancies in the prosecution evidence. The ample material was brought in the cross-examination of the prosecution witnesses but it was not appreciated properly. The Court passed the order mechanically without appreciating the material evidence. Hence, re-appreciation of evidence is essential. The applicant has roots in the village. He never misused the liberty granted to him. He never threatened the witnesses. Hence, the sentence imposed on him may be suspended.

7. The learned A.P.P. and the learned counsel for the victim have strongly opposed the application. They submitted that at the time of the incident the victim was eight years old. She had no reason to lie against the accused. The applicant has committed a heinous crime. The evidence has been properly appreciated. Merely imposing a wrong sentence may not be a ground to

suspend the sentence. This Court has declined the juvenile claim of the applicant. Hence, he has no voice to claim juvenility again. They prayed to dismiss the application.

8. The parameters deciding the application under Section 389 of the Code of Criminal Procedure (for short, "Cr.P.C.") are different from the parameters for granting bail under Sections 436, 438 and 439 of the Cr.P.C. The Hon'ble Supreme Court in *Preet Pal Singh v The State of U.P* (2020) 8 SCC 645, has in paragraph no. 35 held that reads thus;

"35. There is a difference between grant of bail under Section 439 Cr.P.C in case of pre-trial arrest and suspension of sentence under Section 389 Cr.P.C and grant of bail post conviction. In the earlier case, there may be presumption of innocence which is fundamental postulate of criminal jurisprudence and the Courts may be liberal depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in *Dataram vs State of U.P.* [2018] 3 SCC 22]. However, in the case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise, nor is the principle of the bail being a rule and jail an exception attracted, once there is conviction upon trial. Rather the Court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail,

notwithstanding in order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) of the Cr.P.C.”

9. In a case of suspension of sentence, the Court has to look into the evidence and other materials to determine the eligibility of the accused to get the sentence suspended and released on bail. The Court may look in to the legal and other aspects involved in the case. In the case at hand, admittedly, the incident was of the year 2014, at that time, the punishments for the offences punishable under Sections 4 and 6 of the POCSO Act were lesser. By way of amendment in 2019, as discussed above, terms of imprisonment have been enhanced. The question has been raised whether the retrospective effect can be given to the term of imprisonment. The normal rule giving effect to the amended law is unless specifically expressed, is prospective.

10. Secondly, it appears that the age of the victim has been believed barely on the oral evidence of the victim and her mother, though it was specifically objected. Age is an essential requirement to deal with matters under the POCSO Act. In the absence of documentary proof, the learned Trial Court believed the oral evidence. That is another ground to consider the suspension of sentence and bail. There were no complaints against the applicant during the trial when he was on bail.

11. For the reasons mentioned above the Court is of the view that the accused has a good case for suspension of the sentence.

Hence, the order:-

- i) Application is allowed.
- ii) The execution, implementation, effect and operation of the sentence imposed upon the applicant, in a judgment and order passed in Special Case (POCSO) No.169 of 2019, dated 12.06.2023, by the learned Special Judge (POCSO), Aurangabad, to suffer rigorous imprisonment (RI) for ten years for the offence punishable under Section 376(2) of the Indian Penal Code, RI for three months for the offence punishable under Section 342 of the IPC, RI for twenty years each for the offence punishable under Section 4(2) and 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 and RI for three years for the offence punishable under section 8 of the POCSO Act, has been suspended till conclusion of the appeal.
- iii) Applicant Narayan Supadsing Manadavat be released on bail on furnishing P.B. and S.B. of Rs.50,000/-, with one solvent surety of like amount.
- iv) Bail before the learned Special Judge (POCSO), Aurangabad.

- v) Applicant shall attend the appeal through his counsel by remaining in his contact and shall provide his cell phone number to the concern police station with an undertaking that he shall not change his cell phone number till the conclusion of the appeal.
- vi) The applicant shall deposit a compensation amount of Rs.40,000/- in three equal instalments in four months. The victim or her guardian may withdraw the same with an undertaking that the same would be redeposited in case this Court reverses the impugned judgment and order.
- vii) The Secretary, High Court Legal Services Sub-Committee, Aurangabad, do pay the fee to the learned counsel appointed for respondent No.2/victim as per the schedule.

(S. G. MEHARE)
JUDGE

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