



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 3653 OF 2023
IN
CRIMINAL APPEAL NO. 878 OF 2023

Karbhari Shivram Bhume,
Age: 42 years, Occu: Agriculturist,
R/o. Adgaon, Taluka Phulambri,
District Aurangabad. ... Applicant

Versus

1. The State of Maharashtra
2. XYZ ... Respondents

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Mr. Satej S. Jadhav, Advocate for the Applicant.
Mr. S. D. Ghayal, APP for Respondent No.1-State.
Mr. Ravindra Narwade Patil, Advocate for Respondent No.2.

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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

Reserved on : 18.12.2023
Pronounced on : 20.12.2023

ORDER [ABHAY S. WAGHWASE, J.] :

1. Instant application is at the behest of convict for offence under Sections 376 (2)(n) and 506 of the Indian Penal Code [IPC] by virtue of judgment passed by learned Special Judge (POCSO), Aurangabad in Special Case (POCSO) No. 160/2017 dated 22.08.2023 and prayers are for suspension of sentence and grant of bail by invoking Section 389 of the Code of Criminal Procedure [Cr.P.C.].

2. In support of relief, learned counsel for the applicant would point out that prosecution case is based on testimonies of in all 9 witnesses. He pointed out that victim alleged rape at the hands of present applicant, however, according to him, there is no clinching evidence in that regard. He also doubted the version of prosecutrix as, according to him, she had also named two other persons for raping her previously. He further submitted that victim has mentioned about several and repeated sexual encounters with those two persons also. That, only on detection of pregnancy, report is lodged and crime is registered. He would further submit that except DNA evidence, there is no other incriminating material. He emphasized that in spite of charge under the Protection of Children from Sexual Offences Act, 2012 [POCSO Act], other accused including applicant are acquitted from said charge and learned trial court has not accepted prosecution version that victim was minor. Therefore, according to him, applicant has a strong case in appeal filed herewith bearing Criminal Appeal No. 878 of 2023 which, according to him, would take much more time to be heard and decided. Hence, he prays for suspension of sentence and grant of bail.

3. Instant application is strongly opposed by learned APP as well as learned counsel for the victim. According to both of them, offence

is serious. Forensic evidence has confirmed involvement of present applicant. He is found to be the biological father of the child delivered by victim and taking into account gravity of the offence, application is sought to be rejected.

4. Heard both sides respectively.

5. We are now called upon to exercise powers under Section 389 of Cr.P.C. for suspending the sentence inflicted by trial Judge along with prayer for grant of bail during pendency of appeal. Above section permits suspension of sentence after conviction and even permits setting convict at liberty. However, it is fairly settled that such powers are to be exercised only in exceptional cases and in rare circumstances when it is palpably shown that there are fair chances of success in appeal and when appellate court is satisfied about existence of apparent and gross error on the face of record. Obviously, at this stage, there cannot be meticulous re-appreciation of the evidence but only on *prima facie* consideration and satisfaction, if the court feels that conviction may not be sustained while rejudging the case, only in such exceptional cases, sentence has to be suspended and bail can be granted to the prisoner till decision of the appeal by the appellate court. As to what are the exceptional cases and rare cases has not been defined or categorized but going by the precedents, certain

factors like gravity of offence, nature of crime, circumstances in which offence has taken place are a few considerations which are expected to be borne in mind while exercising powers under Section 389 of Cr.P.C. There are catena of judgments on above point and a few could be named as *Rama Narang v. Ramesh Narang and others* (1995) 2 SCC 513 ; *Rajesh Rajan Yadav alias Pappu Yadav v. CBI* (2007) 1 SCC 70 and *Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)* (2008) 5 SCC 230 wherein scope, object and purport of Section 389 of Cr.P.C. has been distinctly and lucidly discussed.

6. Very recently, the Hon'ble Apex Court in the case of *Omprakash Sahni v. Jai Shankar Chaudhary and another* (2023) LiveLaw SC 389 has elaborately dealt with the precedent on above provision and after dealing with above referred cases and other cases namely, *Ash Mohammad v. Shiv Raj Singh alias Lalla Babu and another* (2012) 9 SCC 446; *Bhagwan Rama Shinde Gosai and Others v. State of Gujarat* (1999) 4 SCC 421; *Hasmat* [(2004) 6 SCC 175]; *Vijay Kumar v. Narendra and Others* [(2002) 9 SCC 364]; *Atul Tripathi v. State of Uttar Pradesh and Others* (2014) 9 SCC 177; *Kishori Lal v. Rupa and Others* (2004) 7 SCC 638; *Ramji Prasad v. Rattan Kumar Jaiswal and Another* (2002) 9 SCC 366; *Vasant Tukaram Pawar v. State of Maharashtra* (2005) 5 SCC 281 and *Gomti v. Thakurdas and Others*

(2007) 11 SCC 160, culled out following propositions in para 33 of the judgment which is as under:

“33. Bearing in mind the aforesaid principles of law, the endeavour on the part of the Court, therefore, should be to see as to whether the case presented by the prosecution and accepted by the Trial Court can be said to be a case in which, ultimately the convict stands for fair chances of acquittal. If the answer to the above said question is to be in the affirmative, as a necessary corollary, we shall have to say that, if ultimately the convict appears to be entitled to have an acquittal at the hands of this Court, he should not be kept behind the bars for a pretty long time till the conclusion of the appeal, which usually take very long for decision and disposal. However, while undertaking the exercise to ascertain whether the convict has fair chances of acquittal, what is to be looked into is something palpable. To put it in other words, something which is very apparent or gross on the face of the record, on the basis of which, the Court can arrive at a prima facie satisfaction that the conviction may not be sustainable. The Appellate Court should not reappreciate the evidence at the stage of Section 389 of the CrPC and try to pick up few lacunas or loopholes here and there in the case of the prosecution. Such would not be a correct approach.”

7. Therefore, the legal proposition that is settled is that though it is a discretionary power, it is expected to be exercised judiciously and

in only such cases in which circumstances and reasons exist to grant such relief. Ultimately, it all depends on the facts and circumstances of each case and there is no straightjacket formula or absolute rule for grant or refusal. However, in the case of **Vijay Kumar** (supra) as well as **Atul Tripathi** (supra), it has been held that court should consider factors like nature of accusation, manner in which the crime is alleged to have been committed, gravity of offence, age, criminal antecedents of the convict, desirability of releasing the accused on bail by suspending the sentence etc.

8. Keeping in mind above legal position, if we *prima facie* go through the case in hand, it seems that in all 3 persons were chargesheeted by Wadod Bazar Police Station for offence under Sections 376(2)(n), 506 of IPC and Sections 4 and 6 of POCSO Act. We are informed that out of three, one being juvenile, is dealt separately and present applicant and another accused, namely, Kishor were made to face trial before Special Court, Aurangabad. It seems from the operative part of the order that accused Kishor and present applicant are both acquitted from charge under Sections 4 and 6 of POCSO Act, however present applicant is held guilty only for offence under Section 376(2)(n) and 506 of IPC and sentenced to suffer imprisonment for life.

9. Here, on *prima facie* consideration it is emerging that in FIR, initially victim has named acquitted accused Kishor for raping her four-five times. Thereafter she has claimed that she was raped by juvenile four-five times after issuing threats to kill. Present applicant is named for raping her by taking her in *tur* crop in his field. She has alleged that he also issued threats to kill by pushing her in the well and he also raped her four-five times. It is further emerging that only on complaint of pain in the stomach, she was referred to medical examination during which it was revealed that she is four to five months pregnant and thereafter law seems to have been set into motion. Learned trial Judge seems to have accepted prosecution version primarily on the positive DNA report.

10. *Prima facie* it also appears that victim is already married and she seems to have admitted that she was of marriageable age. Thus, here it is seen that report is lodged only on detection of pregnancy. Resultantly, we are of the considered opinion that taking into account the above crucial aspects and the above discussed law, relief as prayed deserves to be granted. Hence, we proceed to pass the following order:

ORDER

- I. The application stands allowed.
- II. The substantive sentence imposed on the applicant in Special Case (POCSO) No.160/2017 by learned Special Judge (POCSO), Aurangabad on 22.08.2023 stands suspended till final hearing and disposal of Criminal Appeal No. 878 of 2023.
- III. The applicant Karbhari Shivram Bhume be released on P.R. of Rs.50,000/- (Rupees fifty thousand only) with two solvent sureties of Rs.25,000/- (Rupees twenty five thousand Only) each.
- IV. The applicant shall not commit any criminal activity.
- V. The applicant shall remain present before the learned trial Judge once in six months, till final hearing and disposal of the appeal, commencing from the date he tenders bail papers and thereafter, the trial Judge to fix dates for his subsequent appearances.
- VI. In case of two consecutive defaults on the part of the applicant to remain present before the trial court, the trial court to inform this court about the same and in that eventuality, the prosecution would be at liberty to file an application for cancellation of the bail granted to the applicant.
- VII. Bail before the trial court.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]