



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.4036 OF 2023
IN CRIMINAL APPEAL NO.1060 OF 2023

ARJUN @ ABHISHEK ANIL JOSHI ... APPLICANT

VERSUS

THE STATE OF MAHARASHTRA & ANOTHER... RESPONDENTS

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Advocate for the Applicant : Mr K. N. Shermale
A.P.P. for Respondent No.1-State : Mr. S. B. Narwade
Advocate for Respondent No.2 : Ms. Namita Thole

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CORAM : SANDIPKUMAR C. MORE, J.
DATED : 20/12/2023.

P. C. :

1. The applicant / accused is seeking suspension of his substantive sentence of imprisonment of 10 years for the offence punishable under Section 376(2)(i) of the Indian Penal Code. During pendency of this application, the learned counsel for the applicant / accused submits that though the sentence of imprisonment imposed upon the applicant / accused is of 10 years, but he is already in jail for about 5 years as he was under trial prisoner.

2. The learned counsel for the applicant / accused also submits that the learned trial court did not appreciate the evidence on record properly and despite the C.A. report being negative, the learned trial court arrived at a conclusion that the applicant / accused committed rape on the prosecutrix i.e. respondent No.2. He pointed out that when an imprisonment of a fixed term is imposed and half of it is undergone, then the applicant / accused needs to be released on bail specially when the appeal is not likely to be heard in near future. He pointed out that the age of the applicant / accused at the time of incident was of only 19 years and therefore, considering his future prospects he needs to be released on bail by suspending his substantive sentence of imprisonment. The learned counsel for the applicant also relied on following judgments:

- I) ***Satyendra Kumar Mehra @ Satendra Kumar Mehra vs. State of Jharkhad, reported in (2018) 15 SCC 139;***
- II) ***Bhagwan Rama Shinde Gosai and others vs. State of Gujarat, reported in (1999)AIR (SCW) 1462;***
- III) ***Ratan Singh vs. The State of Madhya Pradesh and others in Special Leave to Appeal (Cril.) No(s.) 4041 of 2018, decided on 21/10/2022;***
- IV) ***Ramnik Singh Vs. Intelligence Officer, Dir. of Revenue Intelligence, reported in (2017) 349 ELT 388 and***

V) Dinesh Kumar Sinha vs. State of Jharkhand through CBI, reported in (2009) Sup AIR (SC) 1084.

3. On the contrary, the learned APP as well as the learned appointed counsel for respondent No.2, strongly opposed this application on the ground that the applicant / accused had committed rape on the prosecutrix, who was mentally challenged and therefore, considering the societal aspect, the applicant / accused should not be released on bail otherwise a wrong message would go to the society. The learned counsel for respondent No.2 relied upon the following judgment.

Omprakash Sahni vs. Jai Shankar Chaudhary and others, reported in MANU/SC/0511/2023.

Whereas, the learned APP has also relied upon following judgment.

B. C. Deva @ Dyava vs. State of Karnata, reported in 2007 DGLS(SC) 860.

4. Heard rival submission. Also perused documentary evidence on record alongwith copies of depositions and the impugned judgment and order.

5. The first objection raised by the learned APP is that the applicant / accused has not deposited the fine amount of Rs.10,000/-, which is also given to the victim girl as a compensation by the learned trial court. However, the Hon'ble Supreme Court in the judgment in the case of **Satyendra Kumar Mehra** (*supra*), has observed that the appellate court while suspending the sentence of imprisonment and fine, can direct for deposit of fine or part of it. Therefore, from such observation there cannot be any bar for granting suspension of sentence subject to deposit of fine amount or part of fine. Further, the observation of Hon'ble Apex Court in the case of **Bhagwan Rama Shinde Gosai and others** (*supra*), is also acceptable that when the convict is sentenced to a fixed period of sentence, his sentence of imprisonment can be suspended if his appeal is not likely to be heard expeditiously. However, the Hon'ble Supreme Court has cautioned while suspending such sentence that the nature of allegations against the applicant / accused needs to be scrutinized and such suspension must be done unless there are exceptional circumstances. The Hon'ble Apex Court in the case of **Dinesh Mumar Sinha** (*supra*), has also observed that if it is found that the convict has undergone half of the imprisonment and the appeal is not likely to be disposed of in near future, the convict is entitled for

to be released on bail. Thus, on going through the aforesaid observation of the Hon'ble Apex Court, it appears that unless there are exceptional circumstances, the suspension of substantive sentence of imprisonment for a fixed term needs to be dealt liberally.

6. The learned counsel for the applicant / accused pointed out that the C.A. Report on record is negative and in the cross-examination of the victim also suggested that there was no forcible sexual intercourse on the prosecutrix or there was no such incident of forcible sexual intercourse. However, in the case of ***B. C. Deva @ Dyava*** (*supra*) the Hon'ble Supreme Court has opined that even if no marks of injuries were found either on the person of the accused or on the person of prosecutrix, it does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. In the instant case, the medical officer in his report has expressly observed that there was sexual intercourse with the prosecutrix. Further, the learned counsel for respondent No.2- prosecutrix has also relied on latest judgment of the Hon'ble Apex Court, wherein the suspension order passed by the concerned High Court was challenged before it by the first

informant. The Hon'ble Apex Court has dealt with Section 389 of Cr.P.C. and referred its many observations in earlier cases.

7. The Hon'ble Apex Court in case of ***Ash Mohammad vs. Shiv Raj Singh @ Lalla Babu and another, reported in MANU/SC/0758/2012***, has made following observations:

"30. We may usefully state that when the citizens are scared to lead a peaceful life and this kind of offences usher in an impediment in establishment of orderly society, the duty of the court becomes more pronounced and the burden is heavy. There should have been proper analysis of the criminal antecedents. Needless to say, imposition of conditions is subsequent to the order admitting an accused to bail. The question should be posed whether the accused deserves to be enlarged on bail. The question should be posed whether the accused deserves to be enlarged on bail or not and only thereafter issue of imposing conditions would arise. We do not deny for a moment that period of custody is a relevant factor but simultaneously the totality of circumstances and the criminal antecedents are also to be weighed. They are to be weighed in the scale of collective cry and desire. The societal concern has to be kept in

view in juxtaposition of individual liberty. Regard being had to the said parameter we are inclined to think that the social concern in the case at hand deserves to be given priority over lifting the restriction on liberty of the accused."

Further, the Hon'ble Apex Court in the case of ***Bhagwan Rama Shinde*** (*supra*), has made following observation.

"3. When a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances. Or course, if there is any statutory restriction against suspension of sentence it is a different matter. Similarly, when the sentence is life imprisonment the consideration for suspension of sentence could be of a different approach."

Further, the Hon'ble Apex Court in the case of ***Sidhartha VAshisht alis Manu Sharma vs. State (NCT of Delhi)***, reported in ***MANU/SC/7670/2008***, has made following observation.

"30. In the above cases, it has been observed that once a person has been convicted, normally, an appellate court will proceed on the basis that such person is guilty. It is no doubt true that

even thereafter, it is open to the appellate court to suspend the sentence in a given case by recording reasons. But it is well settled, as observed in Vijay Kumar [MANU/SC/0477/2002: (2002) 9 SCC 364 : 2003 SCC (Cri) 1195: JT 2002 Supp (1) SC 60 that in considering the prayer for bail in a case involving a serious offence like murder punishable Under Section 302 Indian Penal Code, the Court should consider all the relevant factors like the nature of accusation made against the Accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, the desirability of releasing the Accused on bail after he has been convicted for committing serious offence of murder, etc. It has also been observed in some of the cases that normal practice in such cases is not to suspend the sentence and it is only in exceptional cases that the benefit of suspension of sentence can be granted."

Thus, on going through the aforesaid observations it has been settled that the sentence of imprisonment for a fixed term can be suspended liberally unless there are some exceptional circumstances. Further, while suspending sentence of imprisonment the societal concern has to be kept in view juxtaposition of individual liberty. In short, such suspension can be done by considering the totality of the evidence and gravity of

the offence. In the present case, the offence of rape is committed on the prosecutrix, who is mentally challenged person and therefore, attracts more gravity. Admittedly, there are certain admission given by the prosecutrix in her cross-examination, but the learned trial court has dealt with it in paragraph Nos.54 to 58 in the judgment itself. Therefore, considering the totality of the evidence on record and specially when the victim is a mentally challenged girl, I am not inclined to release the applicant / accused on bail by suspending his substantive sentence of imprisonment during the pendency of his appeal. The Hon'ble Apex Court has already cautioned that the matters involving atrocities to child and woman are to be dealt by observing highest sensitivity. Therefore, the present application stands rejected.

8. The fees of the appointed counsel for respondent No.2 to be quantified as per rules.

9. The application is accordingly disposed of.

(SANDIPKUMAR C. MORE, J.)