

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

CRIMINAL APPLICATION (APPA) NO.01 OF 2023

IN

CRIMINAL APPEAL NO.830 OF 2022

(Pravin s/o Prakash Ramteke Vs. State of Maharashtra and anr.)

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri R.V. Khaparde, Advocate for the appellant.
Shri I.J. Damle, APP for the State.

CORAM:- URMILA JOSHI-PHALKE, J.
DATED :- JULY 26, 2023.

Heard.

2. The application is for suspension of sentence and releasing the applicant/appellant on bail.
3. Respondent No.2 though served not appeared.
4. Shri Ashutosh Choudhary, learned Counsel is present before the Court and is appointed to represent respondent No.2.
5. Learned Counsel for respondent No.2 has strongly opposed the application.
6. The appellant was prosecuted for the offence punishable under Sections 363 and 376(2)(n) of the Indian Penal and Sections 4 and 6 of the Protection of Children from Sexual Offence Act, 2012 (hereinafter referred as 'the POCSO Act' for short).

7. The learned trial Court after appreciating the evidence held that the victim was below 18 years of age at the time of incident. Her consent is not relevant and held the appellant guilty of the offence punishable under Sections 363, 366(A), 376(2)(n) of the Indian Penal Code and Section 6 of the POCSO Act. The accused is sentenced to undergo rigorous imprisonment for three years of the offence punishable under Section 363 and fine of Rs.2000/-, in default of payment of fine, further Simple imprisonment for two months. The accused is further sentenced to undergo rigorous imprisonment for three years for the offence punishable under Sections 366(A) of the Indian Penal Code and fine of Rs.2000, in default Simple imprisonment for two months, rigorous imprisonment for 10 years for an offence punishable under Section 6 of the POCSO Act and to pay fine of Rs.3000/-, in default of payment of fine further Simple imprisonment for three months.

8. The appellant has challenged the judgment and order of sentence by this appeal on the ground that the learned trial Court has not considered that the evidence of victim shows that there was love affair between the victim and him and victim herself has left the house and joined the company of the present appellant. Out of love affair, there was physical relationship between them. However, learned trial Court has erroneously appreciated the evidence and convicted the present appellant. The appeal will take its own time for its final

decision. In the meanwhile, if sentence is executed, the purpose of preferring the appeal will not served. Hence, the appellant be released on bail by suspending the sentence.

9. Heard learned Counsel for the appellant. He reiterated the contention.

10. Learned Additional Public Prosecutor strongly opposed the application on the ground that consent of the victim is irrelevant and prays for rejection of the application.

11. After hearing both the sides and after going through the impugned judgment as well as the evidence. It reveals from the evidence of the victim that there was a love affair between her and the accused. She left the house at her own and joined the company of the present appellant. The appellant has made out an arguable points in the present appeal.

12. Admittedly, the application is under Section 389 of the Code of Criminal Procedure. At this stage, the evidence adduced by the Prosecution is not to be reappreciated and the loopholes and the lacunas are not to be addressed. However, it is to be seen whether the appellant has made out the case to suspend the sentence. There are no guidelines or the considerations laid down while considering the application under Section 389 of the Code of Criminal Procedure.

13. Recently, the Hon'ble Apex Court in the case of *Omprakash Sahni Vs. Jai Shankar Chaudhary in Criminal Appeal No.1331-1332/2023 decided on 02/05/2023* along with the connected appeals wherein the Hon'ble Apex Court held that from perusal of Section 389 of Cr.P.C. it is evident that under no any specific principle of law is laid down nor any criteria has been fixed for consideration of the prayer of the convict and further, having a judgment of conviction erasing the presumption leaning in favour of the accused regarding innocence till contrary recorded by the court of the competent jurisdiction, and in the aforesaid background, there happens to be a fine distinction between the prayer for bail at the pre-conviction as well as the post-conviction stage. The Hon'ble Apex Court further held that 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 Cr.PC. and try to pick up few lacunas or loopholes here or there in the case of the prosecution. Such would not be a correct approach. In the light of the above principles laid down by the Hon'ble Apex Court if the appeal raised by the appellant are taken into consideration. Admittedly, the appellant has made out the case to suspend the sentence and to give an opportunity to the appellant to make out the case for his acquittal.

14. In the light of the above principles at this stage, it is to be seen whether the appellant has made out the case to show that he has fair chances of acquittal. Considering the evidence pointed out by the appellant, I am satisfied that the appellant has a chance of success in the present appeal. In view of that the application for suspension of sentence deserves to be allowed. Accordingly, I proceed to pass following order :

- (i) The application is allowed.
- (ii) The execution of the sentence is hereby suspended till disposal of the appeal.

(iii) The appellant be released on bail on executing P.R. Bond in the sum of Rs.25,000/- (Rs. Twenty five thousand) with one surety in the like amount.

(iv) The appellant shall put his presence before the trial Court on 1st of every month and the trial Court shall record his presence.

(v) The appellant shall furnish his Cell-phone number and address along with address proof.

(vi) The appellant shall not contact with the victim in any manner and shall not induce, promise to the victim.

15. Fees of the learned Advocate (appointed) shall be paid as per the rules.

CRIMINAL APPEAL NO.830 OF 2022

Heard.

2. R. & P. is already received.

3. Place the matter before the Court after preparation of the paper book.

(URMILA JOSHI-PHALKE, J.)

**Divya*