

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

CRIMINAL APPLICATION NO.273 OF 2023

IN

CRIMINAL APPEAL NO.155 OF 2023

(Rupchand s/o Dilip Shende 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 V.B. Gawali, Advocate for the appellant.
Shri M.J. Khan, APP for the State.

CORAM:- URMILA JOSHI-PHALKE, J.
DATED :- JULY 03, 2023.

Heard.

2. Present application is preferred for suspension of sentence and releasing the applicant on bail under Section 389 of the Code of Criminal Procedure.

3. The applicant has challenged the judgment and order whereby the Additional Sessions Judge hold the appellant guilty of the charges under Section 376(2)(h) of the Indian Penal Code and Section 5(j)(ii) and 6 of the Protection of Children from Sexual Offences Act, 2012 ("the POCSO Act" for short) and sentenced him to suffer rigorous imprisonment for 10 years for each offence and to pay fine of Rs.2000/- for each offence in default rigorous imprisonment for two months for each offence.

4. Said judgment and order of sentence is challenged by the appellant before this Court on the ground that the learned trial Court has not considered the prosecution measurably failed to prove the age of the

victim girl that she was child within the meaning of definition given under the provisions of POCSO Act. Further ground raised by the appellant is that there was love affair between the victim and the present appellant and the allegation against the present appellant is that he subjected her for sexual assault on the promise of marriage and subsequently, denied for the marriage. Thus, alleged incident has taken place as per the prosecution is out of love affair. So it is a consensual act by the victim. But the learned trial Court had not considered the same. It is submitted on behalf of the appellant that the appellant has every chance of success in the present appeal however, if the sentence is executed then appeal will become infructuous.

5. Said application is strongly opposed by the State on the ground that the prosecution has adduced the evidence of the victim, her mother and PW-12 who is the officer of Bhandara Municipal Council who specifically testified about the birth date of the victim girl which shows that at the relevant time she was minor. Thus, the prosecution has proved the charges against the present applicant that she was child within the meaning and definition under the POCSO Act, therefore, the consent of the victim is not relevant. Moreover, the DNA report inculcate the applicant as it determines that the applicant is the biological father of the child born out of the said incident.

6. Learned Additional Public Prosecutor further submitted that in view of the judgment of 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 has considered the parameters under Section 389 of the Code of Criminal Procedure. Thus, in view of that parameters the application deserves to be rejected.

7. Having heard the learned Counsel for the appellant and the learned Additional Public Prosecutor for the State and bearing in mind the principles enumerated by the Hon'ble Apex Court wherein the Hon'ble Apex Court has held that from perusal of Section 389 of Cr.P.C., it is evident that save and except the matter falling under the category of sub-section 3 neither 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. It is further held by the Hon'ble Apex Court bearing in mind the 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.

8. In the case in hand if the evidence is considered in the light of the above principles, there is sufficient evidence on record to show that the victim was minor at the time alleged incident. The DNA report shows the involvement of the present applicant in the alleged offence. No ground is made out by the appellant to show that the appellant has every chance of success in the present appeal, and therefore, at this stage considering the evidence on record not case is made out for suspension of

sentence. At the same time, it is pertinent to note that the appeal can be disposed of expeditiously as record and proceedings is already received. In view of that application is rejected.

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Heard.

2. R. & P. is already received.
3. Place the matter before the court after preparation of the paper book. As the appellant is in jail, the Registry is directed to prepare the paper book expeditiously within one month.
4. The fees of the appointed Counsel be quantified as per rules.

(URMILA JOSHI-PHALKE, J.)

**Divya*