



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APPA) NO. 234/2023 IN
CRIMINAL APPEAL NO. 125/2023

Akash @ Akshay Raju Shinde V/s State of Maharashtra and another.

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

Court's or Judge's Order

Mr. J.S.Wankhede, counsel for the applicant/appellant.

Mr. I.J.Damle, APP for the non-applicant No.1/State

Mr. O.R. Deshpande counsel (appointed) for non-applicant No.2.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 18/08/2023.

1. By by this application, applicant is seeking suspension of sentence and releasing the applicant/appellant on bail.
2. The applicant/appellant was prosecuted for the offence punishable under Section 376 of the Indian Penal Code (for short 'the IPC') and Sections 6 and 12 of the Protection of Children from Sexual Offences Act (for short 'the POCSO Act')
3. After appreciation of the evidence, learned trial Court held that the victim was minor and therefore, her consent is not relevant and held the appellant guilty for the offence punishable Section 376 of the IPC and sentenced to suffer R.I. for ten years and pay fine of Rs. 5000/-.

4. The said judgment and the order of sentenced is challenged by the applicant/appellant in the present appeal, on the ground that there was a love affair between him and the victim. Out of the said love affair, there was physical relationship, however, learned trial Court has not considered the same and wrongly convicted the present applicant/appellant. The appellant has every chance of success in the present appeal, however, it will take its own time for its final decision. In the meantime, if the sentence is executed, the appeal will become infructuous.

5. The said application is strongly opposed by the State, on the ground that victim was minor at the relevant time, her consent is not relevant. Learned trial Court has rightly appreciated the facts and rightly convicted the appellant/applicant. Hence, application for suspension of sentence deserves to be rejected.

6. Having heard learned counsel for the applicant/appellant, learned APP for the non-applicant No.1/ State and learned appointed counsel for the victim.

7. Perused the evidence laid before the trial Court and the impugned judgment, it reveals from the evidence of the victim, that there was love affair between them. Out of the said love affair, she has called the appellant and she at her own went along with

appellant. Out of the love affair, there was a physical relationship. The learned trial Court has not considered this aspect. At this stage, only fact is to be considered, whether the appellant has any chance of success in the present appeal. The appellant has made out the case to show that he has every chance of success in the present appeal.

8. As observed by the Hon'ble Apex Court in the case of ***Omprakash Sahani V/s Jai Shankar Chaudhary in Criminal Appeal Nos. 1331-1332 of 2023, dated 02/05/2023***, wherein the Hon'ble Apex Court considered that from perusal of Section 389 of the Code of Criminal Procedure, 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, i.e. Sections 437, 437, 438, 439 and 389(1) of the Code of Criminal Procedure.

9. After referring the catena of decisions, the Hon'ble Apex Court held in para-33 that; Bearing in mind the aforesaid principals 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 re-appreciate the evidence at the stage of Section 389 of the Code of Criminal Procedure 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.

10. In view of the observation of the Hon'ble Apex Court, the only thing which is to be considered is that whether the appellant has any chance of success in the present appeal. After going through the evidence, the applicant/appellant has made out the case to show that he has every chance of success, in the present appeal. In view of that, application deserves to be allowed. Accordingly, I proceed to pass following order:

- a) Criminal Application is allowed.
- b) The execution of the sentence be suspended till disposal of the appeal.
- c) The applicant be released on bail on executing P.R. Bond of Rs. 25,000/- with one solvent surety of the like amount.
- d) The applicant shall furnish his cell phone number with address along with address proof.
- e) Fees of the learned counsel for the Non-applicant No.2 is quantified as per Rules.

Criminal Appeal No. 125/2023

Appeal is already admitted. Record and proceedings is already received.

2. Appeal be placed before the Court for final hearing after preparation of paper-book.

JUDGE