

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

CRIMINAL APPLICATION (APPA) NO. 261/2023
IN
CRIMINAL APPEAL NO. 146/2023

Suresh s/o Moreshwar Selokar
V/s
The 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 B.M. Kharkate, counsel for the applicant/appellant.
Mr A.M.Kadukar, APP for the non-applicant No.1.
Mr Sumit G. Joshi, counsel (appointed) for the non-applicant No.2.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 10/07/2023.

1. Heard.
2. Present application is for suspension of sentence and for releasing on bail.
3. By this appeal, the appellant has challenged the judgment dated 16/02/2023 passed by the Additional Sessions Judge and Special Court at Chandrapur in Special (Atrocity) Case No. 22/2015, whereby the appellant stands convicted for the offence under Section 376(1), 376(2)(n) of the Indian Penal Code and sentenced to suffer R.I. for 10 years and to pay a fine of Rs. 2,000/- in default to undergo S.I. for one month, and for the offence punishable under Section 3(1)(w)(i) of the Scheduled Caste and Scheduled

Tribe (Prevention of Atrocities) Act, 1989 (for short 'the Act of 1989') and sentenced to suffer S.I. for 6 months and to pay a fine of Rs. 1000/- in default to undergo S.I. for 15 days.

4. The appellant has challenged the judgment and order of sentence on various grounds, including the grounds that there is an inordinate delay in lodging the FIR, which is not considered by the learned trial Court. The further ground raised by the appellant is that there was previous enmity between the present appellant and the family of the victim and therefore, the present appellant is falsely implicated in the alleged crime is also not considered by the learned trial Court. There is no medical evidence to connect the present appellant with the alleged offence. The Investigating Officer has not collected the sample and a DNA test is not carried out. Thus, the appellant has every chance of success in the present appeal. But, if the sentence is executed then the purpose of preferring the appeal will be frustrated, therefore the execution of the sentence be suspended.

5. The said application is strongly opposed by the learned APP as well as the learned counsel for the respondent No.2 on the ground that the learned trial Court has considered the entire evidence and held that the prosecution has proved the charge against the present appellant beyond reasonable doubt and held him guilty and

convicted him. Thus, there is no ground for suspension of sentence and releasing the appellant on bail.

6. Heard Mr B.M. Kharkate learned counsel for the appellant. He invited my attention towards the evidence of the victim as well as the medical evidence. Admittedly, the accused has taken various defence, including the previous enmity as well as the Act was consensual one. As far as the medical evidence is concerned, no injuries are found on the person of the victim and therefore, it is argued that the appellant has every chance of success in the present appeal, but the appeal will take its own time for the final decision. In the meanwhile, if the sentence is executed then the purpose of preferring this appeal would be frustrated.

7. Per contra, learned APP and learned counsel for the victim submitted that, admittedly the investigation carried out by the Investigation Officer is a faulty investigation. He has not collected the samples and not forwarded to the DNA test. However, the evidence of the victim supported by the evidence of the medical officer which shows that victim is of a low IQ. She was subjected for the sexual assault by the present appellant. The learned trial Court has appreciated the evidence and convicted the present appellant. There is no reason made out by the present appellant to suspend the sentence, hence the application deserves to be rejected.

8. The present application is filed by the appellant for suspension of sentence. From the perusal of Section 389 of the Code of Criminal Procedure, it is evident that no principles are laid down while considering the application under Section 389 for suspension of sentence. As far as the submission of the learned counsel for the appellant is concerned, he pointed out that as per the medical evidence, no injuries are found on the person of the deceased. Though it was found that she is pregnant, the samples of the victim, samples of the fetus, and samples of the accused though collected and not forwarded to the DNA. So, it is not ascertained, who is the biological father of the said child. The Investigating Officer has also not carried out the investigation as to the maintainability of the victim, though the medical officer has opined that a Psychiatrist opinion is required. Thus it is apparent that the investigation is carried out is a faulty investigation, however, the well-settled principle is that the sole testimony of the victim if inspires confidence is sufficient to warrant the conviction of the accused.

9. The learned trial Court has considered the same and convicted the present appellant. As far as the grounds of the appeal is concerned, learned counsel for the appellant has pointed out that the evidence of the victim and the other evidence adduced by the prosecution is not sufficient to warrant the conviction against the present appellant.

Thus, the present appellant has every chance of success in the present appeal and therefore, the sentence be suspended.

10. The aspect i.e. principles underlying under Section 389 are recently discussed by the Hon'ble Apex court in the case of ***Omprakash Sahni Vs Jai Shankar Chaudhary & Anr. Etc*** in ***criminal appeal nos. 1331-1332/2023 decided on 02/05/2023***, wherein the Hon'ble Apex Court has held that principle underlying the theory of criminal jurisprudence in our country is that an accused is presumed to be innocent till he is held guilty by a Court of the competent jurisdiction. Once the accused is held guilty, the presumption of innocence gets erased. In the same manner, if the accused is acquitted, then the presumption of innocence gets further fortified.

11. 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.

12. After referring the catena of decisions, the Hon'ble Apex Court 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 the 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.

13. In the light of the above principles laid down by the Hon'ble Apex Court, if the facts and evidence of the present case is taken into consideration, admittedly, the re-appreciation of the evidence is not possible at this stage. However, considering the grounds raised by the appellant that there is no material on record to show that the victim was of low IQ, as no investigation and no evidence is adduced to that effect, there is no medical evidence to corroborate the version of the prosecutrix as well as he has pointed out from the cross-examination of the victim, which shows that there are arguable points in the present appeal. The appeal will take its own time for its final decision, in the meanwhile, if the sentence is executed then the purpose of preferring the appeal would be frustrated. Considering the same, criminal application deserves to be allowed. Accordingly, I proceed to pass the following order:

- a) Criminal Application is allowed.
- b) The execution of the sentence be suspended till final disposal of the appeal.
- c) The appellant be released on bail on executing P.R. Bond of Rs. 25,000/- with one solvent surety of the like amount.
- d) The appellant shall put his presence before the learned Trial Court on every 3rd of each month

and the learned trial Court shall record his presence before it.

- e) The appellant shall furnish his cell phone number with address along with address proof.
- f) The applicant shall furnish the names of his two relatives and their address with address proof.
- g) Fees of the learned counsel for the Non-applicant No.2 is quantified as per Rules.

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Criminal Appeal be placed before the Court after preparation of the paper-book.

JUDGE