

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

CRIMINAL APPLICATION (APPA) NO.370 OF 2023

IN
CRIMINAL APPEAL NO.224 OF 2023

Prakash Suresh Ingle

vs.

The State of Maharashtra, Through P.S.O. Borgaon Manju, District Akola and another

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. P. E. Chakranarayan, Advocate for appellant.
Mr. I. J. Damle, APP for respondent No.1/State.
Ms. Deepali Sapkal, appointed Advocate for respondent No.2.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : 08/08/2023

1. Not on board. Taken on board.
2. The present application is under Section 389 of the Code of Criminal Procedure for suspension of sentence and grant of bail.
3. The present appellant was prosecuted for the offences punishable under Sections 376(2)(i) and 363 of the Indian Penal Code and under Sections 3 and 4 of the Protection of Children From Sexual Offences Act. The learned trial Court has appreciated the evidence and held the present appellant guilty for the offences punishable under Sections 363 and 376(2)(i) of the Indian Penal Code and under Section 3 punishable under Section 4 of

the Protection of Children From Sexual Offences Act, 2012.

4. The appellant has challenged the said judgment and order of sentence on various grounds including the ground that two versions came before the Court. In one version, the victim has stated the name of the present applicant that he has subjected her for forceful sexual assault, whereas another version is that the co-accused Aakash has subjected her for sexual assault. There are two versions in respect of injury sustained by the victim. Before the Court, she has attributed the role of causing the injuries to the present applicant, whereas in her statement under Section 164 of the Code of Criminal Procedure she has attributed the said role to the co-accused Aakash. Admittedly, the Magistrate was not examined the prosecution before the trial Court. Thus, the appellant has every chance of success in the present appeal and therefore, the execution of the sentence be suspended and he be released on bail.

5. The said application is strongly opposed by the State on the ground that the appellant has not made out the case for suspension of sentence. The learned trial Court has rightly appreciated the evidence and rightly come to the conclusion that the present appellant is guilty for the offence punishable under Sections 376(2)

(i) of the Indian Penal Code. In view of that, application deserves to be rejected.

6. Having heard learned Counsel for the applicant, learned APP for the State and learned appointed Counsel for the respondent No.2. Perused the impugned judgment and the order of sentence as well as depositions which are produced for the perusal. After going through the evidence of the victim, it reveals that she has narrated the entire role regarding the sexual assault to the present appellant. At the same time, prosecution also placed reliance on the statement under Section 164 of the Code of Criminal Procedure. Her evidence before the Court and the statement under Section 164 of the Code of Criminal Procedure are inconsistent versions. The learned trial Court has not dealt with the same and not assigned any reason.

7. The learned Counsel for the appellant has pointed out that the learned trial Court ought to have assigned the reason why the version of the victim is accepted regarding the role of the present applicant and while another contention which she has narrated before the Magistrate is discarded. It is submitted that the present applicant is having every chance of success in the present appeal, however it will take its own time for final decision. In the meanwhile, the sentence be suspended.

8. The learned APP vehemently submitted that the use of statement under Section 164 of the Code of Criminal Procedure is only in the nature of corroboration. It is not the substantial evidence. At this stage, substantial evidence is the evidence before the Court. The learned appointed Counsel also reiterated the same and prays for rejection of the application.

9. On perusal of the impugned judgment and the deposition. The victim was also admitted certain fact which shows that the appellant has chance of success in the present appeal. There are two inconsistent versions which are not considered by the trial Court.

10. It is well settled that while considering the application under Section 389 of the Code of Criminal Procedure no specific principles of law are laid down or any criteria has been fixed for consideration of the prayer of the convict for suspension of sentence. However, the Hon'ble Apex Court in the case of **Omprakash Sahni Vs. Jai Shankar Chaudhary in Criminal Appeal Nos. 1331-1332 of 2023 decided on 02.05.2023** wherein the Hon'ble Apex Court has held that from perusal of Section 389 of the 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 i.e. Sections 437, 438, 439 and 389(1) of the CrPC.

11. The Hon'ble Apex Court further after referring the catena of decisions 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.P.C. 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.

12. In view of the observations of the Hon'ble Apex Court, the appellant has to satisfy this Court that he has fair chances acquittal in the present appeal. After going through the deposition of the victim and the impugned judgment as well as other documentary evidence, the appellant has made out the case to show that the appellant has every chance of success in the present appeal. However, the appeal will take its own time for final disposal. In the meantime, if the sentence is executed the purpose of preferring the appeal would be frustrated. In view of that, application deserves to be allowed. Accordingly, I proceed to pass following order.

ORDER

- (i) The application is allowed.
- (ii) The execution of sentence is suspended till disposal of the appeal.
- (iii) The appellant **Prakash Suresh Ingle** is released on bail on executing PR bond in the sum of Rs.25,000/- with one solvent surety in the like amount.
- (iv) The appellant shall attend before the trial Court on first day of every month and the trial Court shall record his presence.

(7)

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(v) The appellant shall furnish his cell phone number and address with the address proof.

The application is disposed of.

CRIMINAL APPEAL NO.224 OF 2023

1. The record and proceeding is already received.
2. The appeal be placed before the Court after preparation of the paper book for final disposal.

(URMILA JOSHI-PHALKE, J.)

Sarkate