

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

CRIMINAL APPLICATION (APPA) NO.517 OF 2023

IN
CRIMINAL APPEAL NO.331 OF 2023

Jagdish s/o Pardeshi Rathor

Vs.

State of Maharashtra through PSO, P.S. Umred, District Nagpur 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. R. M. Daga, Advocate with Mr. A. S. Band, Advocate for applicant.
Mr. A. M. Kadukar, APP for respondent No.1/State.
Mr. A. M. Balpande, Advocate for respondent No.2.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : 24/07/2023

1. The present application is for suspension of sentence and releasing the appellant on bail.

2. The appellant was prosecuted for the offence punishable under Section 376-AB of the Indian Penal Code and under Section 6 of the Protection of Children From Sexual Offences Act, 2012.

3. The appellant is the father of the victim. It is alleged that on 03.05.2021 the father of the victim subjected her for sexual assault. On the basis of the said report, police have registered the crime. During the investigation, the victim was referred for medical examination, and her medical certificate was obtained.

After appreciation of the evidence, the learned trial Court held that though the victim and her mother have not supported the prosecution case, but the medical evidence is on record which sufficiently shows that there was injury on the genital of the victim and held the appellant guilty and sentenced him to suffer rigorous imprisonment for 20 years and to pay fine of Rs.10,000/- in default to suffer further rigorous imprisonment for one year.

4. Being aggrieved and dissatisfied with the Judgment and order of sentence, the present appeal is preferred on the ground that the learned trial Court has not considered the victim and her mother have not supported the prosecution case. There may be other reasons for the hymeneal tear. The learned trial Court has convicted the appellant merely on the basis of medical evidence, which is erroneous. The appellant has every chance of success in the appeal but it will take its own time for final decision. In the meanwhile, if the sentence is executed then the appeal will become infructuous and prays for suspension of sentence.

5. The State has strongly opposed the application on the ground that though victim and her mother have not supported the prosecution case, but the medical evidence and the circumstantial evidence supported the prosecution case, on the basis of which, the appellant is convicted. There are no grounds to

suspend the sentence and hence, the application deserves to be rejected.

6. Heard learned Counsel for the appellant, learned APP for the State and learned Counsel for the respondent No.2.

7. After going through the impugned Judgment and the depositions which are placed on record, admittedly, the victim and her mother have not supported the prosecution case, however, medical evidence is there which shows that fresh injuries are seen on the genital of the victim. On the basis of the said, the appellant was convicted. As far as the law point regarding the suspension of sentence is concerned, there are no considerations laid down in Section 389 of the Code of Criminal Procedure, while considering the application for suspension of sentence. This aspect is dealt by the Hon'ble Apex Court in **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.

8. 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 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 CrPC 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.

9. In the light of the same, only the consideration is to be seen is that whether the appellant has made out the case that he has every chance of success in the appeal. The appellant has to satisfy the Court that the conviction may not be sustainable. Admittedly, the reappraisal of the evidence, at the stage of Section 389 of the Code of Criminal Procedure, is not warranted.

10. After hearing the learned Counsel for the appellant and after going through the impugned Judgment and the depositions, admittedly, except the medical evidence, there is no other material as victim and her mother have not supported the prosecution case. The appellant has pointed out from the grounds raised by him that except the medical evidence there is absolutely no material to connect the present appellant with the alleged offence. Thus, the appellant has fair chance of acquittal. He has satisfied to this Court that there are grounds on the basis of which the Court can arrive at the *prima facie* satisfaction that the conviction may not be sustainable. Considering the law settled by the Hon'ble Apex Court that at this stage, reappraisal

of the evidence is not warranted and the victim and her mother have not supported the prosecution case. The application for suspension of sentence deserves to be allowed. Hence, I proceed to pass following order.

ORDER

- (i) The application is allowed.
- (ii) The execution of the sentence is suspended till disposal of the appeal.
- (iii) The appellant 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 furnish his cell phone number and address with the address proof.

The criminal application is disposed of.

(URMILA JOSHI-PHALKE, J.)

Sarkate