

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

CRIMINAL APPLICATION (APPA) NO.440 OF 2022 IN
CRIMINAL APPEAL NO.457 OF 2022

Sharad S/o Mahadev Mankar Vs. State of Maharashtra and another

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

Court's or Judge's orders.

Shri Muzammil Hussain, Advocate for appellant.
Shri S.M. Ghodeswar, APP for respondent no.1/State.
Ms Falguni Badani, Advocate appointed for respondent no.2.

CORAM : URMILA JOSHI-PHALKE, J.
DATE : AUGUST 03, 2023.

The present application is for suspension of sentence and releasing the appellant on bail. The appellant has filed present appeal challenging the judgment and order of conviction dated 11.05.2022 passed by the learned Additional Sessions Judge-2, Amravati in Special Case No.5/2021 by which the present appellant is convicted of the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO") and sentenced to suffer rigorous imprisonment of twenty years and to pay fine of Rs.10,000/-, in default of payment of fine he shall suffer further rigorous imprisonment for six months. He is further convicted for the offence punishable under Section 6 of the POCSO and sentenced to suffer rigorous imprisonment for twenty years and to pay fine of Rs.10,000/-, in default of payment of fine he shall undergo further rigorous imprisonment for six months.

2. The appellant is challenging the said judgment and order of sentence on the ground that the learned trial Court has not considered the evidence of the victim not corroborated by any other evidence. The evidence of her mother is also not sufficient to hold that the offence is proved. Infact, the mother of the victim has admitted that the recitals of the FIR are narrated by the father of the victim, and the father of the victim is not examined by the prosecution. Thus, the appellant has every chance of success in the present appeal however the appeal will take its own time for its final decision and therefore the execution of the sentence be suspended and the appellant be released on bail.

3. The said application is strongly opposed by the State as well as learned appointed counsel for respondent no.2 on the ground that the learned trial Court has appreciated the evidence and held that the oral evidence of the victim is corroborated by the medical evidence. The delay in lodging the FIR is held as not fatal to the prosecution as it is properly explained by the prosecution and convicted the appellant. No grounds are made out by the present appellant to suspend the sentence and hence the application deserves to be rejected.

4. Heard learned counsel for the appellant, learned APP for the State, and learned appointed counsel for respondent no.2. Perused the impugned judgment as well as

depositions on record. At the time of the alleged incident, the victim was eight years of age. The allegation against the present appellant is that he has inserted his finger in the private part of the victim and subjected her to sexual assault in light of the definition given under section 3 of the POCSO Act, which is punishable under Section 4. The prosecution has adduced the evidence of the victim, her mother, and the medical officer. The trial Court has observed that the evidence of the victim is corroborated by the medical evidence as the laceration injury to the labia minora of the victim proves that the appellant had committed the offence of fingering in her private part due to which she has sustained the said injury. The hymen of the victim though found intact but the injury sustained by the victim on her labia minora is sufficient to prove that it is the case of fingering and held the appellant guilty punishable under Section 6 as well as under Section 376AB of the Indian Penal Code. On perusal of the evidence, it reveals that the victim has categorically narrated the act of the accused. She has denied that she has not disclosed the said incident to her mother. Merely that the father of the victim is not examined is not sufficient to discard the evidence of the victim held by the Sessions Court.

5. The present application is for suspension of sentence. Admittedly, for application under Section 389 no fixed guidelines or criteria is fixed while considering the application for suspension of sentence. Recently the Hon'ble

Apex Court has dealt with the issue in the case of ***Omprakash Sahani Vs. Jai Shankar Chaudhary & Anr*** in Criminal Appeal Nos.1331-1332 of 2023, wherein it is held that from perusal of Section 389 of the CrPC, 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.

6. After considering the catena of decision of the Hon'ble Apex Court, 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 re-appreciate 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.

7. In the case in hand, the material which is placed on record and the impugned judgment shows that the evidence of the victim is corroborated by the medical evidence. The victim has sustained the injuries labia minora and the medical evidence substantiates the allegation made against the present appellant, therefore, the learned trial Court has convicted the appellant. As far as the submission of the learned counsel for the appellant is concerned, who submitted that the father of the victim is not examined. Admittedly, at this stage, the re-appreciation of the evidence is not permitted, the only fact is to be considered whether the appellant has any case to succeed in the appeal. At this stage, considering the impugned judgment and the evidence it reveals that the learned trial Court based its judgment on the oral evidence as well as medical evidence so no case is made out by the present appellant to show that something is

very apparent and gross, which can succeed the present appellant in the present appeal. In view of that, the application deserves to be rejected. Accordingly, the criminal application is rejected.

8. Professional fees of learned counsel appointed for respondent no.2 be quantified and paid as per Rules.

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9. The appeal be placed before the Court after preparation of paper book for final hearing.

JUDGE

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Signature Not Verified

Digitally Signed By SURESH RAOSAHEB
WAGH
Personal Assistant to Hon'ble
Judge, High Court of Bombay, Nagpur
Bench, Nagpur.
Signing Date:04.08.2023