

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

CRIMINAL APPLICATION (APPA) NO.572 OF 2023 IN
CRIMINAL APPEAL NO.864 OF 2022

Mithun S/o Natthuji Sawasakade 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 M.V. Rai, Advocate for appellant.
Shri I.J. Damle, APP for respondent no.1/State.
Shri Amit Kukday, Advocate appointed for respondent no.2.

CORAM : URMILA JOSHI-PHALKE, J.
DATE : AUGUST 09, 2023.

This application is for suspension of sentence and for releasing the appellant on bail. The appellant was prosecuted for the offence punishable under Section 376(2)(j) of the Indian Penal Code and under Section 6 of the Protection of Children from Sexual Offences Act (for short 'POCSO Act').

2. The learned trial Court has appreciated the evidence and held that the appellant is guilty of the offence punishable under Section 6 of the POCSO Act and sentenced to suffer rigorous imprisonment for twenty years and to pay fine of Rs.5,000/- in default to suffer further six months.

3. It is submitted by the learned counsel for the appellant Shri Mahesh Rai that the learned trial Court has not considered that there was a love affair between the victim and the present appellant. Out of the said love affair, there was a physical relationship. At the relevant time, the victim

was 15 years old and the victim and the appellant are relatives of each other. The appellant is the son of the victim's father's sister. As per the contention of the learned counsel for the appellant that there is a tradition of performing the marriage of daughter with sister's son. The victim has admitted all these facts in her evidence however the trial Court has not considered the same. The appellant has every chance of success in the present appeal. In view of that the execution of the sentence be suspended and the appellant be released on bail.

4. Said application is strongly opposed by the learned APP Shri Damle as well as the learned appointed counsel for respondent no.2 Shri Kukday. It is submitted that the consent of the victim is irrelevant and the learned trial Court has rightly considered the evidence on record and rightly convicted the appellant. No grounds are made out to suspend the sentence and hence application deserves to be rejected.

5. Perused the impugned judgment and deposition of the victim as well as the other witnesses. There is no dispute that out of the love relationship, there was a physical relationship between them, which resulted in the pregnancy of the victim. The pregnancy was terminated the blood sample of the victim as well as the fetus was referred for a DNA examination. As per the DNA examination, the victim and the appellant are the biological parents of the said fetus.

Thus, there is no dispute that there was a physical relationship between the appellant and the victim. As far as the contention regarding the love affair is concerned, the victim has admitted during her cross-examination that there was love relationship between them and out of that love relationship, they come together and the alleged incident has taken place. Thus, the learned counsel for the appellant has made out the case that appellant has every chance of success in the present appeal and prays for suspension of sentence.

6. Whereas, the learned APP vehemently submitted that the consent of the victim is not relevant though she has admitted that there was a love affair and she has consented to the physical relationship. He further submitted that the learned trial Court has considered that the victim was a minor at the relevant time and the appellant, who is a grown-up man aware of the consequences has not thought about the consequences and subjected the victim to sexual assault. Thus, no grounds are made out to suspend the sentence. Hence, the application deserves to be rejected.

7. Having heard both sides, on perusal of the impugned judgment and the evidence on record, it is crystal clear that there was a relationship between the victim and the appellant. They developed a love relationship and out of that love relationship there was a physical relationship, which resulted in the pregnancy of the victim. The DNA also supports to said contention. As far as the suspension of

sentence is concerned, it is to be taken into consideration in what circumstances the alleged incident has taken place. It is apparent that the victim and the appellant both are similar in age and out of the love affair, they are attracted towards each other and there was a physical relationship. Admittedly, the incidents which are arising out of a love relationship are to be considered differently. As far as the suspension of the sentence is concerned, the grounds are made out to show that the appellant has an opportunity to show that there are grounds that can substantiate his contention that he has every chance of success in the present appeal. As far as the suspension of the sentence under Section 389 is concerned, no fixed criteria or considerations are laid down. However, the Hon'ble Apex recently in the case of ***Omprakash Sahni Vs. Jai Shankar Chaudhary & Anr*** in Criminal Appeal No.1331 – 1332 of 2023 had considered the said aspect and 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.

8. After referring the catena of decision in paragraph no.33 the Hon'ble Apex Court further 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.

9. In light of the above observations of the Hon'ble Apex Court, at this stage, it is to be seen whether the convicts or the appellant has any fair chance of acquittal. Considering the evidence of the victim, which is pointed out by the

learned counsel, the appellant has made out grounds to show that he has a chance of success in the present appeal. At this stage, admittedly, the evidence cannot be re-appreciated, the only thing which is to be considered that whether the appellant has any fair chance of acquittal. The learned counsel for the appellant has pointed that the grounds in the appeal and also pointed from the evidence that the appellant has every chance of success in the present appeal. In view of that, the application deserves to be allowed. Accordingly, I proceed to pass the following order:

ORDER

- i. The criminal application is allowed.
- ii. The execution of sentence awarded by the Additional Sessions Judge (Special Judge, POCSO Court), Nagpur in Special Criminal (Child) Case No.56/2022 dated 16.11.2022 is hereby suspended pending appeal.
- iii. The appellant be released on bail furnishing PR bond in the sum of ₹25,000/- with one solvent surety of like amount.
- iv. The appellant shall put his presence before the trial Court on 1st day of every month and the trial Court shall record his appearance.
- v. The appellant shall furnish his cellphone number and

his address with address proof.

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

The application is disposed of.

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

JUDGE

Wagh

Signature Not Verified

Digitally Signed By: SURESH RAOSAHEB
WAGH
Personal Assistant to Hon'ble
Judge, High Court of Bombay, Nagpur
Bench, Nagpur.
Signing Date: 11.08.2023