



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

CRIMINAL APPLICATION (APPA) NO. 628/2023
IN
CRIMINAL APPEAL NO. 398/2023

Assu @ Yashwant s/o Hiralal Gour V/s 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. H.S. Chawhan, counsel for the applicant.

Mr. S.M. Ghodeswar, APP for the non-applicant No.1/State

Ms. A. Mishirkotkar, counsel (appointed) for non-applicant No.2.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 18/08/2023.

1. By by this application, applicant is seeking suspension of sentence and for releasing the applicant/appellant on bail.

2. The applicant/appellant was prosecuted for the offence punishable under Section 376(2)(j) and (n) and Section 506(ii) of the Indian Penal Code (for short 'the IPC') as well as under the provision of Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act'). After appreciation of the evidence, the applicant/appellant was acquitted from the offences punishable under the provision of the POCSO Act. The applicant/appellant is further acquitted for the offence punishable under Section 328 of the IPC, however, he is convicted of the offence punishable under Section

376(2)(j)(n) of the IPC and sentenced to suffer R.I. for ten years and fine of Rs. 10,000/-. He is further convicted for the offence punishable under Section 506(ii) of the IPC and sentenced to suffer R.I. for three years and to pay a fine of Rs. 5000/-.

3. The order of sentence and the judgment is challenged by the appellant by preferring this appeal, on the ground that the learned trial Court has not considered the cross-examination of the victim. The victim has already attained the age of majority. She was the consenting party. The evidence of the victim shows that she has not made her grievance to anybody. Thus, from the evidence of the victim, it appears that the alleged act is by consent, however, the learned trial Court has not considered the same. The applicant/appellant has every chance of success in the present appeal, however, the appeal will take its own time for its final decision. In the meantime, if the sentence is executed, the purpose of preferring the appeal would be frustrated.

4. The said application is strongly opposed by the State as well as learned counsel for the victim, on the ground that the learned trial Court has rightly considered the evidence. The sole testimony of the victim is sufficient to warrant the conviction against the

present appellant. The learned trial Court has rightly considered the same and convicted the applicant/appellant, no grounds are made out to suspend the sentence.

5. Learned counsel for the victim has endorsed the same contention and raised a strong objection to suspend the sentence.

6. Having heard learned counsel for the applicant, learned APP for the non-applicant No.1/State, and learned appointed counsel for the non-applicant No.2.

7. Perused the impugned judgment and deposition before the learned trial Court. From the said depositions of the victim, it is pointed out by the learned counsel for the applicant/appellant that the testimony of the victim is not sufficient to warrant conviction as it is not inspiring confidence and is not trustworthy. It is further submitted that, at this stage, the re-appreciation of the evidence is not required. However, considering the evidence of the victim, the applicant/appellant has every chance of success in the present appeal. But the appeal will take its own time, therefore, the execution of the sentence be suspended.

8. Learned APP and learned appointed counsel endorsed the same contention by reiterating that the evidence of the victim is trustworthy and inspired

confidence, no interference is called for and the application for suspension of sentence deserves to be rejected.

9. On perusal of the impugned judgment and evidence of the victim, it is apparent that some facts are not considered by the learned trial Court while passing the impugned judgment. The learned trial Court has rightly considered that the victim has attained the age of majority. Her cross-examination also discloses that she travelled along with the present applicant, however, not made any grievances. Admittedly, at this stage, the re-appreciation of the evidence is not permitted, the only fact is to be considered whether the appellant has made out the case to show that he has any chance of success in the present appeal. Admittedly, there are no fixed criteria or guidelines laid down while considering the application under Section 389 of Cr.P.C. However, this aspect is also considered by the Hon'ble Apex Court in the case of ***Omprakash Sahani V/s Jai Shankar Chaudhary in Criminal Appeal Nos. 1331-1332 of 2023, dated 02/05/2023***, wherein the Hon'ble Apex Court considered that 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, i.e. Sections 437, 437, 438, 439 and 389(1) of the Code of Criminal Procedure.

10. After referring the catena of decisions, the Hon'ble Apex Court held in para-33 that; Bearing in mind the aforesaid principals 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 chance 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 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.

11. In the light of the above observation of the Hon'ble Apex Court after going through the evidence of the impugned judgment, learned counsel for the applicant/appellant has made out the case by showing that he has many arguable points in the present appeal. However, the appeal will take its own time for its final decision. In the meanwhile, if the sentence is executed, the purpose of preferring the appeal would be frustrated. Considering the same, criminal application is allowed. Accordingly, I proceed to pass following order:

- a) Criminal Application is allowed.
- b) The execution of the sentence be suspended till disposal of the appeal.

- c) The applicant be released on bail on executing PR. Bond of Rs. 25,000/- with one solvent surety of the like amount.
- d) The applicant shall furnish his cell phone number with address along with address proof.
- e) Fees of the learned appointed counsel for the Non- applicant No.2 is quantified as per Rules.

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1. Appeal is already admitted. The record and proceedings is already received.
2. Appeal be placed before the Court after preparation of paper-book.

JUDGE