

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

CRIMINAL APPLICATION NO.573 OF 2021

IN

CRIMINAL APPEAL NO.414 OF 2021

(Mukesh s/o Jaipal Kuttarmare and ors. Vs. State of Maharashtra and anr.)

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri A.C. Jaltare, Advocate for the appellants.
Shri A.M. Kadukar, APP for the State.

CORAM : URMILA JOSHI-PHALKE, J.
RESERVED ON : JUNE 12, 2023.
PRONOUNCED ON : JUNE 20, 2023

Heard.

2. Present application is filed under Section 389 of the Code of Criminal Procedure for suspension of sentence and grant of bail.

3. Present appellants were prosecuted for the offence punishable under Sections 376(2)(j), 376(3), 363 read with Section 34 of the Indian Penal Code and for the offence punishable under Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act' for short). The trial Court after appreciation of the evidence held the appellants guilty for the offence punishable under Sections 376(2)(j) and 376(3) read with Section 34 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for 20 years each and directed to pay fine of Rs.5000/- each. Accused Nos.1 to 3 further held guilty for

the offence punishable under Sections 4 and 6 read with Section 17 of the POCSO Act. However, no separate sentence has been passed. The accused are further held guilty for the offence punishable under Section 363 read with Section 34 of the Indian Penal Code and sentenced to suffer imprisonment for 5 years each and pay fine of Rs.5000/- each.

4. Being aggrieved with the quantum of sentence present appeal is preferred by the appellants on the ground that the learned trial Court had not considered the evidence on record and erroneously held the appellants guilty. The evidence of the victim girl shows that she herself joined the company of the accused persons. Therefore, the offence under Section 363 of the IPC is not made out. There is no material to prove the offence punishable under Section 376 of the IPC however, learned trial Court had not considered the same and wrongly convicted the appellants.

5. It is pertinent to note that the medico-legal report does not support the case of the prosecution. Thus, considering the evidence on record absolutely there is no evidence against him to held him guilty. He has every chance of success in the appeal however the appeal will take its own time for its final decision. In the meanwhile if sentence is executed the appeal will become infructuous and hence he be released on bail by suspending the sentence.

6. Said application is strongly opposed by the State on the ground that the appellants were prosecuted in Crime No.127/2019 registered under Section 363 and 376 of the Indian Penal Code. At the relevant time the victim was below 18 years of age. When she was proceeding to Vihirgaon, the present appellants abducted her and took her along with them. She was forcibly subjected for sexual intercourse and other co-accused facilitated the accused Mukesh in commission of the above crime.

7. Considering the evidence of record they were convicted, and therefore, no case is made out to release them on bail by suspending the sentence.

8. Heard learned Counsel Shri A.C. Jaltare for the appellant. He submitted that if the evidence of the victim girl is taken into consideration it shows that on 07/05/2019 she communicated with the accused Mukesh. It is alleged by her that the accused Mukesh promised her for marriage and on the promise of marriage there was sexual intercourse between her and the accused Mukesh. The only allegation against the other two accused that they facilitated the accused Mukesh in the commission of the crime. Thereafter other two accused returned at their home and she went at the house of the accused Mukesh. She stayed at the house of the Mukesh overnight. Her evidence further shows that on the next day Tulsidas came at the house of Mukesh and she proceeded on his medical. She was witnessed by her brother and her brother chased

her and she disclosed that she had been to village Moharna along with accused Mukesh and his friends. Thereafter accused Mukesh and other accused were called by her parents. There was a meeting of Tanta Mukti Samiti in the village and she has disclosed about the same before the members of the Tanta Mukti Samiti also. He further invited my attention the cross-examination and submitted that from her evidence it reveals that she went along with the accused at her own and there was no sexual relationship between them. Her contention regarding sexual relationship is not supported by the medical certificate.

9. The learned trial Court had not considered the said evidence and wrongly convicted the present applicant. He further invited my attention towards the C.A. report and submitted that even C.A. report have not supported the prosecution case regarding the sexual assault on victim girl. The Medical Officer has also not observed any injury on her person. Thus, the entire material brought on record by the prosecution is not sufficient to held the accused guilty. The appellants are having every chance of success in the present appeal. If the sentence is executed then appeal will become infructuous.

10. Said application is strongly opposed by the State on the ground that the victim was 16 years of age. Her consent is irrelevant. Learned trial Court had considered the same and held that the accused is guilty for

the offence punishable under Section 376 of the IPC. If appellants are released on bail then they would not be available if appeal is decided against them.

11. Learned Additional Public Prosecutor in support of the contention placed reliance on the order passed by the Hon'ble Apex Court in Criminal Appeal Nos.1331-1332/2023 and submitted that in view of the observation of the Hon'ble Apex Court, the application filed by the appellants for suspension of sentence deserves to be rejected.

12. Having heard both the sides and on perusal of the impugned judgment, the learned trial Court held that there is ample evidence against the present appellants and held all the appellants guilty for the offence punishable under Sections 376(2)(j) and 376(3) read with Section 34 of the IPC and sentenced to suffer rigorous imprisonment for 20 years each.

13. On perusal of the FIR, it reveals that the accused Mukesh is the resident of Moharna, Taluka Lakhapur, District Bhandara and the victim is also resident of Vihirgaon. At the relevant time, she was learning in 8th standard. On 07/05/2019, mother of the victim girl had received phone call from her relative Raju Bhute who asked her that whether victim had been to Ekalpur and mother disclosed that her daughter has not come to Ekalpur. It is further informed that the cousin brother of the victim has seen the victim with accused Tulsiram. Thereafter relatives of the victim had made an enquiry

with the victim and she informed that the accused Tulshiram, Mukesh and their one friend had been to her on 07/05/2019 and taken her on their motorcycle at the house of accused Mukesh. She further disclosed that the accused Mukesh had a sexual intercourse with her on the promise of marriage. Thereafter all the three accused had informed her to attend the marriage of brother of Mukesh on 08/05/2019. Despite of it these three persons have forcibly taken her on their motorcycle with them to the house of accused Mukesh at Moharna. On 08/05/2019, accused Mukesh had gone to Moharna when he was returning with victim one Sachin Dupare had noticed their presence at Sawangi. On the basis of said report police have registered the offence against the present appellants. After due investigation the Investigating Officer has filed charge-sheet against the present appellants. During trial the evidence of the victim was recorded. She deposed about the incident before the trial Court. As per her evidence, accused Mukesh subjected her for sexual intercourse on the promise of marriage. After going through the entire evidence on record admittedly there is no allegation that other two accused/appellants have subjected her for sexual intercourse.

14. Learned trial Court has held all the accused guilty for the offence punishable under Sections 376(2)(j) and 376(3) of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for 20 years each. To corroborate the version of the victim, prosecution has also

examined the other witnesses and also placed reliance on the medical evidence. Admittedly, the cloths of the victim are forwarded to chemical analyzer but the chemical analyzer report are negative. The evidence of PW-7 also shows that no external injuries were found on the person of the victim however, the hymen was found to be old and ruptured. Thus, as per the submission of the learned Counsel for the appellants there is absolutely no evidence to show that appellant Nos.2 and 3 also subjected the victim for sexual assault but the learned trial Court had not considered the same. It is further submitted that though the allegations are regarding the forcible sexual intercourse but the evidence of the victim shows that the alleged sexual intercourse was on the promise of marriage.

15. Learned Counsel Shri Jaltare vehemently submitted that considering the evidence on record, the appellants have every chance of success in the present appeal but if sentence is executed then the appeal will become infructuous. Considering the submissions and considering the evidence on record and on perusal of Section 389 of the Cr.P.C. it is evident that under 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 no distinction is there regarding the grant of bail at pre-conviction stage and post-conviction stage.

16. The Hon'ble Apex Court in the case of Omprakash Sahni in Criminal Appeal Nos.1331-1332/2023 relied upon by the learned Additional Public Prosecutor discussed its decision in ***Rajesh Ranjan Yadav alias Pappu Yadav Vs. CBI [(2007) 1 SCC 70]***, ***Ash Mohammad Vs. Shiv Raj Singh alias Lalla Babu and anr. [(2012) 9 SCC 446]*** etc. and in ***Vijay Kumar Vs. Narendra and others [(2002) 9 SCC 364]*** and ***Ramji Prasad Vs. Rattan Kumar Jaiswal and anr. [(2002) 9 SCC 366]*** wherein it was held by the Hon'ble Apex Court that in cases involving conviction under Section 302 of the IPC, it is only in exceptional cases that the benefit of suspension of sentence cannot be granted. In case of Vijay Kumar (supra) it was held that in considering the prayer for bail in case involving a serious offence like murder punishable under Section 302 of the IPC, the Court should consider the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder.

17. It is further held by the Hon'ble Apex Court 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 answered 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 conclusion of the appeal which usually take very long time for decision and disposal.

18. In view of the aforesaid observations, if the submissions of the learned Counsel for the appellants are taken into consideration and the evidence pointed out by the learned Counsel admittedly, the appellants have chance of success in the present appeal. From the evidence of the victim it appears that she had not alleged the sexual assault at the hands of appellant Nos.2 and 3 but they are also convicted. Thus, there is a *prima facie* satisfaction that the appellants have every chance of success in the present appeal. At this stage, this Court cannot re-appreciate the evidence and cannot pick-up lacunas or loopholes but considering the submissions and the evidence on record, it can be said that there are fair chances of the appellants to succeed in the appeal.

19. In view of that the application deserves to be allowed. Hence, I proceed to pass the following order :

- (i) The application is allowed.
- (ii) The execution of the sentence of the appellants is suspended till disposal of the appeal.

(iii) The appellant Nos.1 to 3 are released on bail on executing PR. Bond in the sum of 25,000/- (Rs. Twenty five thousand) each with one surety each in the like amount.

(iv) The appellants shall attend the trial Court on 5th of every month and the trial Court shall record their presence before it.

(v) The appellants shall furnish their cell phone numbers and detail address along with address proof. Additionally, they shall furnish the details of their two closed relatives and address along with their address proof.

(URMILA JOSHI-PHALKE, J.)

**Divya*