

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

CRIMINAL APPLICATION (APPA) NO. 644/2023 IN
CRIMINAL APPEAL NO. 620/2022

Sachin @ Sumedh Sanjay Agame 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 R.M.Daga, counsel for the applicant.

Mr A.M.Kadukar, APP for the non-applicant No.1.

Mr Ananta Ramteke, counsel (appointed) for the non-applicant No.2.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : 06/07/2023.

1. Heard.
2. Present application is for suspension of sentence and releasing the applicant on bail.
3. The applicant has filed the appeal challenging the judgment and order of sentence dated 03/08/2022 passed by the Special Judge (POCSO), Darwha in Special (POCSO) case No. 08/2021 whereby the applicant is sentenced to suffer R.I. for 20 years and to pay fine of Rs. 50,000/- for the offence punishable under Section 4(2) of the Protection of Children from Sexual Offences Act (POCSO) and also R.I. three years and fine of Rs. 500/- for the offence punishable under Section 8 of POCSO Act and fine of Rs. 500/-

4. As per the contention of the appellant, the learned trial Court has not appreciated the evidence, especially during the examination, the victim has admitted that her birth certificate has obtained by her father. The P.W. 7 has also admitted during the cross-examination that birth certificate is false. The victim further admitted during her cross-examination that there was no relationship between her and the present applicant. Thus, the material evidence is ignored by the Special Judge while convicting the present applicant. The present applicant has every chance of success in the present appeal. In the meanwhile, if the sentence is executed then appeal will become infructuous. In view of that, the execution of the sentence be suspended and he be released on bail.

5. The said application strongly opposed by the State as well as learned counsel for the victim, on the ground that the victim was minor at the relevant time her consent is not relevant. Moreover, scientific evidence i.e. DNA Report concludes the present applicant is a biological father of a child born out from the said relationship, considering the same, the criminal application deserves to be rejected.

6. Heard Mr R.M. Daga, learned counsel for the applicant. He invited my attention towards the cross-

examination of PW-1 i.e. mother of the victim as well as the cross-examination of the victim and submitted that this cross-examination is sufficient to show that the learned trial Court has not appreciated the evidence in proper perspective. Considering the nature of the evidence adduced by the prosecution and considering the evidence is not appreciated by the learned trial Court, the present applicant be released on bail by suspending his sentence.

7. Per contra, learned APP vehemently submitted that in view of the judgment of the Hon'ble apex court in the case of ***Omprakash Sahni Vs Jai Shankar Chaudhary & Anr. Etc*** in ***criminal appeal nos. 1331-1332/2023*** ***Decided On 02/05/2023*** present application deserves to be rejected. They have further submitted that scientific evidence supports the prosecution case which concludes the applicant as a biological father. In view of that, criminal application deserves to be rejected.

8. Having heard both the sides and on perusal of the impugned judgment as well as copies of the deposition, it seems that prosecution case is dented during the cross-examination. As far as the observation in the case of ***Omprakash Sahni V/s Jai Shankar Chaudhary and another etc.*** referred (supra) relied

upon by the State is concerned, it is observed by the Hon'ble Apex Court that the principle underlying the theory of criminal jurisprudence in our country is that an accused is presumed to be innocent till he is held guilty by a court of the competent jurisdiction. Once the accused is held guilty, the presumption of innocence gets erased.

9. The Hon'ble Apex Court further held 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, 438, 439 and 389(1) of the Code of Criminal Procedure.

10. The Hon'ble Apex Court referred catena of decision to consider the principles of law and in para-33 has observed as under; 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 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 view of the above observation, if the facts and evidence of the present case is considered, the

learned counsel for the applicant has rightly pointed out towards the cross-examination to satisfy that the applicant has every chance of success in the present appeal. Admittedly, at this stage, the evidence is not to be appreciated or re-appreciated. However, considering the evidence pointed out by the learned counsel there is prima-facie satisfaction that the applicant has every chance of success in the present appeal. 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 put his presence before the learned Trial Court on 5th of every month and the learned trial Court shall record his presence before it.
- e) The applicant has furnish his cell phone number with address along with address proof.

- f) The applicant shall furnish the names of his two relatives and their address and address proof.
- g) Fees of the learned counsel for the Non-applicant No.2 is quantified as per Rules.

JUDGE