

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

CRIMINAL APPLICATION (APPA) NO.871 OF 2022

IN
CRIMINAL APPEAL NO.669 OF 2022

Pramod s/o Roopchand Pawar

Vs.

State of Maharashtra through Police Station Officer, Police Station, Umred District
Nagpur and another

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

Court's or Judge's orders

Mr. A. C. Jaltare, Advocate for applicant.

Mr. S. M. Ghodeswar, APP for respondent No.1/State.

Ms. Mohini A. Sharma, appointed Advocate for respondent No.2.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : 24/07/2023

1. The present application is under Section 389 of the Code of Criminal Procedure for suspension of sentence and grant of bail.

2. The appellant was prosecuted for the offences punishable under Sections 376(2)(j)(f)(n), 376(AB), 377 and 506(2) of the Indian Penal Code and under Sections 4, 8, 12 and 21 of the Protection of Children From Sexual Offences Act, 2012.

3. The appellant was prosecuted on an allegation that he has subjected the victim for sexual assault who is his daughter, on the basis of the said report, the crime was registered. The trial Court has

recorded the evidence and on appreciation held that the offence under Section 376(AB), 376(2)(j), 376(2)(f) and 376(2)(n) of the Indian Penal Code is made out against the present appellant. The appellant is sentenced to suffer rigorous imprisonment for a period of 20 years and to pay fine of Rs.1000/- for the offence punishable under Section 376(AB), the appellant is further convicted for the offences punishable under Sections 376(2)(j), 376(2)(f) and 376(2)(n) and sentenced to suffer ten years and fine of Rs.1000/- for each offence. The appellant is further convicted for the offence punishable under section 377 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for a period of five years and to pay fine of Rs.1000/-. The appellant is further convicted for the offence punishable under Sections 4, 6 and 8 of the Protection of Children from Sexual Offences Act, however no separate punishment is provided.

4. The appellant has challenged the said order of sentence and the judgment on the ground that the learned trial Court has not considered the testimony of the victim, which is not corroborated by the medical evidence. The story narrated by the victim itself is improbable and unacceptable as the present appellant was residing along with seven members of the family. In the presence of seven members, the sexual assault on victim is improbable and unacceptable. The learned trial

Court had not considered that out of seven members, two are the grandmothers of the victim. So entire story narrated by the prosecution and subsequently testified by the victim is not probable and unacceptable. The evidence of the victim is not inspiring the confidence. The appellant has every chance of success in the present appeal however, the appeal will take its own time for final decision. In the meantime, if the sentence is executed then no purpose will be served by preferring this appeal.

5. The said application is opposed by the State as well as respondent No.2 on the ground that the learned trial Court has rightly considered the evidence of the victim. The sole testimony of the victim is sufficient to warrant a conviction. No ground is made out by the present appellant to suspend the sentence and hence, the application deserves to be rejected.

6. Heard learned Counsel Mr. Jaltare, for the appellant. He reiterated the contention and submitted that if the evidence of the victim and the medical evidence are scrutinized, it is crystal clear that the testimony of the victim is not inspiring confidence. It is not corroborated by the medical evidence also. The deposition of the Medical Officer shows that the genital is found normal, during the medical examination. There was a dispute between the mother of the victim and the

present appellant and therefore, this false complaint is lodged at the instance of the mother by the victim. The appellant has every chance of success in the present appeal and hence, the sentence be suspended.

7. The learned APP and the learned Counsel for respondent No.2 strongly opposed the application on the ground that learned trial Court has appreciated the evidence and rightly held the appellant guilty for the offence. No grounds are made for the suspension of the sentence.

8. Having heard both the sides and on perusal of the evidence on record to support the prosecution story, the reliance is placed by the prosecution on the evidence of the victim who has narrated the incident. The co-accused No.2 is the first wife of the present appellant. From the evidence of the victim, it reveals that at the time of incident, initially, she was residing with her stepmother, father, sister and brother. Thereafter, she came to the house of the present appellant and was residing with seven members. As per her allegation in November 2019, she was subjected for sexual assault by the present appellant, who is her father. On the basis of said report, police have registered the crime. During her cross-examination, she has admitted that she was residing along with the seven members of the family. She was also medically examined. Medical

Officer specifically stated that the genital was found normal and there was no evidence of any hymeneal tear. Learned counsel for the appellant submitted that except the evidence of victim, there is absolutely no material to connect the present appellant however, learned trial Court has not considered the same. I have also perused the impugned judgment. The impugned judgment reasoning shows that the report is lodged on the basis of oral complaint by the mother of the victim. The learned trial Court has considered that the sole testimony of the victim is sufficient to warrant a conviction and medical evidence is not required to prove the charges. The learned trial Court after appreciating the evidence on record and by assigning the reasons in the light of well settled legal position held that the provision of the POCSO Act, 2012 has overriding effect on general law and have presumptive value. The appellant has not rebutted the presumption and held the appellant guilty. While considering the application for suspension of sentence, admittedly, no considerations are spelt out either in Section 389 of Cr. P.C. or no considerations are determined regarding consideration of the application under Section 389 of Cr. P.C.

9. Recently the Hon'ble Apex Court has considered the aspect in **Omprakash Sahni Vs. Jai Shankar Chaudhary in Criminal Appeal Nos. 1331-1332 of 2023 decided on 02.05.2023** wherein the Hon'ble

Apex Court has held that from perusal of Section 389 of the Cr.P.C., 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.

10. After referring the Catena of decisions 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 reappreciate 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.

11. Thus, in view of the observation of the Hon'ble Apex Court, at this stage, reappreciation is not warranted at the hands of this Court. Only consideration is whether the appellant has made out the case showing that he has chances of success in the present appeal. He made out the case for the satisfaction of the Court that the application for suspension of sentence can be considered. After going through the submission of the learned counsel for the appellant and the impugned judgment as well as the evidence on record, the appellant has made out the grounds which shows that the appellant has chance of success in the present appeal and therefore, application for suspension of sentence deserves to be allowed. In view of that, I proceed to pass following order.

- (i) The application is allowed.
- (ii) The execution of the sentence is suspended till disposal of the appeal.
- (iii) The appellant **Pramod s/o Roopchand Pawar** is released on bail on executing PR bond in the sum of Rs. 25,000/- with one solvent surety in the like amount.
- (iv) The appellant shall furnish his cell phone number and address with the address proof.

The criminal application is disposed of.

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- 1. Appeal is already admitted.
- 2. Record and proceeding is already received.
- 3. The appeal be placed before the Court after preparation of the paper book.

(URMILA JOSHI-PHALKE, J.)

Sarkate