

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

CRIMINAL APPLICATION (APPA) NO. 796/2022
IN
CRIMINAL APPEAL NO. 614/2022

Mukesh Ramesh Gaikwad 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 A.R.Fule, counsel for the applicant/appellant.
Mr S.M. Ghodeswar, APP for the non-applicant No.1.
Ms N.G. Chaubey, counsel (appointed) for non-applicant No.2.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 27/06/2023.

1. Heard.
2. The present application is filed for suspension of sentence and releasing him on bail.
3. The applicant has prosecuted for the offences punishable under Sections 376(2)(k)(n) of the Indian Penal Code and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act'). In support of the charge, the prosecution adduced the evidence by examining the victim as a material witness. After appreciating the evidence, the learned trial Court held the applicant guilty by observing that the victim was a child aged about 15 years and 9 to 10 months, her consent is not relevant and sentenced to undergo R.I. of ten years of the offence punishable under

Section 6 of the POCSO Act. The applicant is also convicted for the offences punishable under Section 363 and 366(A) of the Indian Penal Code and sentenced to suffer R.I. for three years and to pay fine of Rs. 5000/-. The fine amount is already paid.

4. The said judgment and order of sentence is challenged by the applicant on the ground that learned trial Court has not appreciated the evidence in the context that victim in her cross-examination has admitted that she at her own left the house of the parents and was not willing to join the company of her parents. She at our own resided with present applicant and performed the marriage with the present applicant. The learned trial Court has also not considered that the offence punishable under Section 363 and 366 is not made out. Thus, the applicant has every chance of success in the present appeal. However, if the sentence is executed then appeal will become infructuous and prayed for suspension of the sentence.

5. The said application is strongly opposed by the State as well as non-applicant No.2 on the ground that there is no merit in the appeal. The learned trial Court has rightly appreciated the evidence and convicted the present applicant.

6. Heard Mr A.R. Fule, learned counsel for the applicant. He pointed out from the cross-examination that, victim has admitted during her cross-examination that she herself left the house and was not willing to join the company of her parents. He submitted that the material evidence and the admissions came during the cross-examination are ignored by the learned trial Court and erroneously convicted the present applicant. The appeal will take its own time for its final decision, in the meanwhile, if the sentence is executed the appeal will become infructuous.

7. Perused the appeal memo as well as the depositions and the impugned judgment.

8. The Hon'ble Apex Court in the case of *Omprakash Sahani Vs Jai Shankar Chaudhary and another in Criminal Appeal Nos.1331-1332 of 2023 decided on 2.5.2023* has considered the aspect of suspension of sentence and held that, from perusal of Section 389 of the Code of Criminal Procedure, 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.

9. After referring the catena of decisions, the Hon'ble Apex Court further held that, bearing in mind the aforesaid principles of law, the endeavor 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 lacuna's or

loopholes here or there in the case of the prosecution. Such would not be a correct approach.

10. Considering the principals laid down by the Hon'ble Apex Court, in the present case also learned counsel for the applicant has pointed out from the evidence that material evidence is ignored by the trial Court. At this stage, I am not inclined to re-appreciate the evidence. However, considering the submissions, the applicant has made out the case that he has a fair chance of success in the present appeal. Therefore, criminal application deserves to be allowed. Accordingly, I pass the following order:

- a) Criminal application allowed.
- b) The execution of sentence is suspended till disposal of the appeal.
- c) The applicant is released on bail on executing P.R. Bond of Rs. 25,000/- with one solvent surety of the like amount.
- d) The applicant shall attend the trial Court once in a month on 5th of every month. The trial Court shall record his presence till disposal of the appeal

- e) The applicant shall furnish his cell phone number and address of the address proof before the learned trial Court.
- f) Criminal application is disposed of.
- g) Fees of the learned counsel for the non-applicant No.2 is quantified as per Rules.

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

JUDGE