

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

CRIMINAL APPLICATION (APPA) NO. 921/2022 IN
CRIMINAL APPEAL NO. 595/2022

Bhikulal s/o Chhedilal Verma 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.M. Wasnik, counsel for applicant/appellant.

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

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 25/07/2023.

1. Heard.
2. The present application is for suspension of sentence and releasing the appellant on bail. The appellant was prosecuted for the offence punishable under Section 354-A, 376, 506 of the Indian Penal Code, 1860 and Sections 4 and 8 of the Protection of Children from Sexual Offences Act, 2012.
3. As per the allegation, when the victim aged about 9 to 10 years was playing outside the house, she was subjected for sexual assault by the applicant by inserting his fingers into her genitals. After recording the evidence and after appreciating the same, the learned trial Court held the appellant guilty and sentenced him to suffer R.I. for ten years and fine of Rs. 2000/- in default to suffer R.I. for four months of

the offence punishable under Section of the Protection of Children From Sexual Offences Act, 2012.

4. Being aggrieved and dissatisfied with the said judgment, the present appeal is preferred by the appellant on the ground that the entire case is registered on evidence of CCTV Footage. The CCTV Footage nowhere shows that the involvement of the present applicant in the alleged offence. The cross-examination of the victim also shows that she is tutored witness. Thus there are sufficient grounds to held that the present appellant is not guilty for the offence charged against him. The ground raised is that the appeal will take its own time for its final decision. In the meantime, if the sentence is executed, the purpose of preferring this appeal would be frustrated.

5. The said application is strongly opposed by the State on the ground that the evidence of the victim is corroborated by the medical evidence. There is sufficient material to held the present appellant guilty. The learned trial Court has considered the same material and no grounds are made out to suspend the sentence.

6. Heard learned counsel for the applicant. He reiterated the contention and submitted that the evidence of the mother as well as the victim is not

sufficient to prove the charges against the present appellant. The cross-examination of the victim shows that she was tutored to depose against the present appellant. The CCTV Footage also not showing the involvement of the present appellant in the alleged crime. Thus, there are chances of success in the present appeal but the appeal will take its own time for its final decision. In the meantime, if the sentence is executed, the entire purpose behind preferring the appeal would be frustrated.

7. Per contra, learned APP strongly opposed the application on the ground that not only the oral evidence but the medical evidence is also supporting the prosecution case. At this stage, re-appreciation of the evidence is not permitted only consideration is, whether the appellant has made out the case to show that there are satisfactory reasons to hold that the appellant is not guilty and he would be successful in the appeal.

8. Having heard both the sides and on perusal of the impugned judgment as well as the depositions. The incident took place in the evening, the deposition of PW-1 mother and the victim girl shows that the victim was subjected for sexual assault by the appellant. Admittedly, the victim has admitted during her cross-

examination that she was asked by her parents to depose and accordingly, she is deposing. However, her evidence regarding the sexual assault remained unchallenged, during her cross-examination. Her evidence is also corroborated by the evidence of PW-6, who is the medical officer which shows that during the medical examination, he found redness on the inner aspect of labia majora by laterally on the left side. The learned trial Court in impugned judgment assigned the reasons and held that the sole testimony of the victim is also sufficient to warrant conviction if it inspires the confidence. The learned trial Court further held that the oral evidence of the victim is corroborated by the medical evidence and held the appellant guilty.

9. The appellant by this application is seeking suspension of sentence. Admittedly, no criteria is fixed under Section 389 while considering the application for suspension of sentence. One of the criteria is whether the appellant has made out the case to show that there are chances of his acquittal in the appeal. This aspect is also dealt 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*** wherein the Hon'ble Apex Court has 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, viz Sections 437, 437, 438, 439 and 389(1) of the Code of Criminal Procedure.

10. After considering the catena of decision, the Hon'ble Apex Court has held 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 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 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 observations, the Hon'ble Apex Court, admittedly, the re-appreciation of evidence, at this stage is not warranted, what is to be seen prima-facie satisfaction that the conviction may not be sustainable.

12. After going through the impugned judgment and evidence which is recorded before the learned trial Court, no ground is made out to show that the conviction in the present case will not be sustainable, as the oral evidence of the victim is corroborated by the medical evidence. There are no ground made out before the Court to held that there are chances for the present appellant, at this stage of the acquittal.

Considering the same, no case is made out for suspension of sentence.

In view of that criminal application deserves to be rejected. Accordingly, I pass the following order.

Criminal Application is **rejected**.

Criminal appeal No. 595/2022

1. The appeal is already admitted. Record and proceedings is already received.
2. Registry to prepare the paper-book expeditiously.
3. After preparation of paper-book, the appeal be placed for final disposal.

JUDGE