

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

**CRIMINAL APPLICATION (APPA) NO. 1166/2022**  
**IN**  
**CRIMINAL APPEAL NO. 898/2022**

SHUBHAM S/O RAMDAS DHOBALE  
VS  
STATE OF MAH. THR. PSO PS KARANJA (GHADGE) DIST.WARDHA

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

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Court's or Judge's Order

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Mr H.D.Dangre, counsel for the applicant/appellant.  
Mr S.M.Ghodeswar, APP for the non-applicant.

**CORAM : URMILA JOSHI-PHALKE, J.**  
**DATED : 22/06/2023.**

1. Present application is for suspension of sentence and releasing the appellant for grant of bail.
2. The present appellant has preferred this appeal against the order of sentence by which the present appellant is sentenced to suffer R.I. for ten years and fine of Rs. 10,000/- in default, he shall suffer S.I. for one year for the offence punishable under Section 376 of the Indian Penal Code.
3. The appellant is charged for the offence punishable under Section 376 on an allegation that victim girl who was studying in 12<sup>th</sup> Standard and residing with his family members was subjected her sexual assault forcefully by the present appellant. On

the basis of the said report, Police have registered the offence. After due investigation, the charge-sheet was submitted. The learned trial Court after appreciation of the evidence held the appellant guilty and convicted him in the above crime.

4. Being aggrieved and dissatisfied with the said judgment, present appeal is preferred by the appellant on the ground that though there was a clear admission by the victim that, there was previous enmity between her family and the accused, the learned trial Court failed to appreciate that out of the previous enmity, the appellant has falsely implicated in the alleged offence. Learned trial Court also failed to appreciate that forensic report as well as medical evidence nowhere supports the prosecution case. The entire evidence of the victim as well as the prosecution is not inspiring confidence but the learned trial court has ignored the same. Further ground raised by the appellant is that even the real sister of the victim has not supported the allegation levelled against the present appellant but the learned trial Court has ignored the same and erroneously convicted the present appellant.

5. Learned APP waives service of notice on behalf of non-applicant and objected the application on the ground that if the appellant is released on bail then if the appeal is decided against the appellant would not

be available for execution of the sentence. It is further submitted that learned trial Court has rightly appreciated the evidence and convicted the appellant.

6. Heard Mr H.D. Dangre, learned counsel for appellant. He reiterated the contention and submitted that there are arguable points and the appellant has every chance of success in the present appeal. He pointed out from the evidence that victim girl has admitted during her cross-objection that there was previous dispute between the appellant and the family members of the victim. He further pointed out that medical evidence and forensic evidence has not supported the allegations. Moreover, the real sister of the victim has not supported the allegations but the learned trial Court has completely ignored the same. Thus, he pointed out that considering the evidence on record which is not at all inspiring the confidence. He accepted the legal position that sole evidence of the victim is sufficient to convict the accused, if it inspires the confidence. However, from the evidence admittedly, it reveals that the evidence is not sufficient to convict the present appellant. However, the appeal will take its own time for its final decision, in the meanwhile, if the sentence is executed then appeal would become infructuous. There is variance in the initial report and the subsequent report recorded of the victim.

7. Learned APP reiterated the contentions and submitted that application deserves to be rejected.

8. Heard both the sides. Perused the impugned judgment as well as the evidence adduced by the prosecution. Admittedly the mother of the victim has admitted during her cross-examination regarding the previous dispute. Sister of the victim has not supported the prosecution case. The Medical Officer has not noted any external injury on the person of the victim, though alleged incident has taken place in the house. As per the allegation, the accused has tied handkerchief to her mouth and he pushed her and thereafter, subjected for sexual assault. The internal injuries are also not revealed during the examination of the genitals. Thus, learned counsel has pointed out that there are arguable points in the present appeal and he has every chance of success in the present appeal.

9. 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 para-maters which is to be applied while considering the application under Section 389 and observed 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.

10. After referring the several judgments on the issue, 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.

11. In the light of the principals laid down by the Hon'ble Apex Court and after considering the submissions made by the learned counsel, who has pointed out the infirmities which definitely make out the case in favour of the appellant that, appellant has every chance of success in the present appeal and therefore, opportunity is to be given to the appellant to raise the said issues in the present appeal. At the same time, it is to be taken into consideration that appeal will take its own time for its final decision and in the meanwhile if the sentence is executed then appeal will become infructuous.

12. In the above said circumstances, application deserves to be allowed. Accordingly, I proceed to pass following order:

- a) Criminal Application is allowed.
- b) The execution of the 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 like amount.
- d) The applicant shall attend the learned trial Court on 5<sup>th</sup> of every month and the learned trial Court shall record his presence.
- e) The applicant shall furnish his cell phone number with address proof. The applicant shall further furnish the names of his two close relatives and their address proof before the learned Trial Court.
- f) Application is disposed of.

**JUDGE**