



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 139 OF 2024

IN

CRIMINAL APPEAL NO. 31 OF 2024

Vinayak Shantwan Shinde,
Aged-37 years, Occu: Business,
R/a-Survey No.2, Mother Teresa Nagar
Gadital, Yerwada, Pune
(At present Yerawada Central Jail).

.....Applicant

In the Matter Between :

Vinayak Shantwan Shinde,
Aged-37 years, Occu: Business,
R/a-Survey No.2, Mother Teresa Nagar
Gadital, Yerwada, Pune
(At present Yerawada Central Jail)

.....Appellant

Vs.

1. The State Of Maharashtra,
(Through P. I. Yeerwada
Police Station, District-Pune)
(CR No.-65/2014).

2. XYZ
Age: 26 years,
Through P.I. Yerawada
Police Station, Pune.

.....Respondents

Ms. Pooja Agarwal with Mr. Shubham Sane, i/b. Mr. Vaibhav Kulkarni, for
the Appellants.

Mr. Vinod Chate APP, for Respondent No.1-State.

Ms. Sakshee P. Chavan, Appointed Advocate for Respondent No.2-State.

CORAM : A. S. GADKARI AND
DR NEELA GOKHALE, JJ.

RESERVED ON : 30th AUGUST, 2024.

PRONOUNCED ON : 4th SEPTEMBER, 2024.

ORDER :- (Per Dr. Neela Gokhale, J.)

1) This is an Application for suspension of sentence and releasing
the Applicant on bail during the pendency of his Appeal.

1.1) Applicant is the original accused in Special Child POCSO Case No.133 of 2014. By a Judgment and Order dated 4th December 2023, the Additional Sessions Judge, Pune held the Appellant guilty for the offense punishable under Sections 376 of the Indian Penal Code, 1860 (I.P.C.) and Section 3 punishable under Section 4 of the Protection of Children From Sexual Offences Act, 2012 ('POCSO'). The Applicant is sentenced to suffer imprisonment for life for the offense punishable under Section 376 of the I.P.C. along with fine of Rs.50,000/- and in default of payment of fine to suffer three months of simple imprisonment. He has also been sentenced to suffer imprisonment for life along with fine of Rs.50,000/- for the offense under Section 3 punishable under Section 4 of the POCSO and in default of payment of fine to suffer simple imprisonment for three months. Both the sentences are directed to run concurrently.

2) Heard Ms. Agarwal for Applicant, Mr. Chate, APP for State and Ms. Sakshi Chavan, learned Advocate appointed by the Legal Aid to represent Respondent No.2.

3) The case of the prosecution as discerned from the Judgment and Order of the trial Court is as follows:

3.1) Respondent No.2 ('Victim') being 16 years of age, reported on 11th February 2014 that, she was residing with her mother at Chandan Nagar, Kharadi, Pune and studying in 9th standard in Netaji Subash Chandra Bose Vidyalaya, New Khadki, Airport Road, Yerwada, Pune. Her father died

in April 2013 and she lives with her mother, who is serving as a nurse. Her school timings were from 7 a.m. to 12 p.m. She traveled to school partly by bus and walks rest of the way.

3.2) In December 2013, after school hours, she was accosted by the Applicant while she was drinking water at tea stall. He tried to talk to her and gave her his phone number. The victim was annoyed and threw away the chit. The Applicant introduced himself as 'Vinod Shantanu Shinde'. He followed her every day, as she returned from school, making an effort to catch her attention. On the fatal day on 20th December 2013 at around 12 p.m., the Applicant stopped her as she was on the way, professed his love for her and caught her hand. He insisted that, she accompany him to his house despite her refusal. When she tried to resist, he grabbed her hand and pulled her. The victim was terrified and didn't call for help. He then took her to his house and raped her.

3.3) She was frightened to narrate the incident to her mother. However, she confided in her friend, who in turn shared this with other girls in the class. At the time of the incident, Miss. 'L' a friend of the victim, was attending a workshop at India Sponsorship Institute, Yerwada, Pune. She shared the victim's ordeal with the social workers of the Institute, who promptly contacted the victim's mother and informed her of the situation. The victim's mother, accompanied by the social workers, filed a FIR with the Police.

3.4) The offence was registered and the investigation commenced. The victim was medically examined. The victim's Age/Birth Certificate was procured from her school which ascertained that she was a minor. Her statement was recorded under Section 164 of the Cr. P. C. and the statements of other witnesses were also recorded by the Police. Medical reports of chemical analysis were also collected from the Forensic Laboratory. As all the evidence confirmed commission of alleged offence, a charge sheet came to be filed by the Police.

4) At the very outset, Ms. Agarwal attempted to impress upon us that, this was a case of mistaken identity and the victim had never identified the Applicant. She said that, the victim had stated the name of the Applicant to be one 'Vinod Shantanu Shinde' whereas the Applicant's name was 'Vinayak Shantanu Shinde'. Ms. Agarwal also contended that, the trial Court failed to appreciate that, the FIR was lodged under the guidance of and in consultation with the social workers, who were Prosecution Witnesses No.2 and 5. She also argued that, the spot of the alleged incident was a thickly populated area, adjacent to a fish market and it is highly improbable that a school going girl in uniform was dragged and nobody noticed. Ms. Agarwal argued that, the medical evidence was not appreciated in the proper perspective. Most importantly she contended that, the prosecution failed to establish applicability of POCSO Act and that, the victim was a minor. Ms. Agarwal finally stated that, the Applicant

enjoyed bail throughout the trial and he had not misused the liberty. She thus urged us to suspend the sentence of the Applicant and enlarge him on bail during the pendency of his Appeal.

5) Ms. Chavan contended that, the statements of the Victim in the FIR was reiterated by her in her statement recorded under Section 164 of the Cr. P. C. as well as in her deposition during the trial. PW.3 also proved the seizure of clothes and PW.4 Miss. 'L', the victim's friend deposed regarding the victim narrating the incident about the sexual assault. Ms. Chavan pointed out that, the School Leaving Certificate proved the date of birth of the victim to be 27th December 1997 and hence, the minority of the victim was established. She further drew our attention to the deposition of PW.8 namely, Dr. Sakshi Mundada, who deposed regarding Medical Report of the victim which established penetrative vaginal sexual intercourse. Thus, she prayed that, the Application be dismissed.

6) Mr. Chate strongly supported the case of the prosecution and reinforced the arguments of Ms. Chavan.

7) In reference to the arguments of Ms. Agarwal regarding mistaken identity of the Applicant, we perused the depositions relied by her. There is nothing on record to demonstrate that 'mistaken identity' as a defence was suggested to any of the witnesses in cross-examination by the Applicant. The victim, during her examination-in-chief, testified that the Applicant had introduced himself as 'Vinod Shantanu Shinde' and that she

had no prior acquaintance with him. In her cross-examination, she also specifically deposed that, the accused in the trial was the person, who chased her while she proceeded to walk to school and accosted her on various occasions. There is no suggestion given by the defence to any witnesses during trial that, the Applicant was not the person identified by the victim as the person committing the offence. In fact, a case is tried to be made out that, the victim was in relationship with the Applicant and she lodged the FIR only when she learnt that, he was already married and had a child. This demolishes the defence of the Applicant regarding mistake in identity. In any case there was no way for the victim to know the real name of the Applicant and she only knew him by the name that he himself had told her. The name of the Applicant does not hold much significance in view of the fact that, the victim has identified the Applicant. This clearly negates the argument of the Applicant relating to the conviction being based on mistaken identity and hence, bad in law.

8) The P.W.2 namely, Mayuri Joshi, a Social Worker working with the India Sponsorship Institute has specifically deposed about Miss. 'L' sharing the ordeal suffered by the victim and thereafter revealing the same to the victim's mother and accompanying her to the Police Station. Notably disposition of Miss. 'L' dispels any doubts about the incident as she corroborates the victim's entire account. Additionally, P.W.5 namely, Kranti Dabir, a fellow Social Worker also corroborates the statement of Mayuri

Joshi, her co-worker confirming that they only provided guidance and support to the victim and her mother in reporting the incident to the Police. PW.6 namely, Bhanudas Khandve, the in-charge Head-Master of the school, where the victim was admitted in 5th standard deposed regarding the School Leaving Certificate issued by the Municipal Corporation School No.72 (Girls'). He corroborated with the original General Register that, the date of birth of victim is 27th December 1997. PW-8 namely, Dr. Sakshi also deposed that, as per her clinical examination, the victim had penetrative vaginal sexual intercourse. Upon consideration of the entire evidence, the trial Court has concluded that, the victim's age as on the date of incident was below 16 years.

9) In the overall conspectus of the matter, two things emerge, *firstly* that the victim was a minor below 16 years of age and *secondly*, she was subjected to a penetrative sexual assault.

Section 29 of the POCSO Act provides for presumption as to certain offences under the Act. It reads as :

"Section 29: Presumption as to certain offences:- (1)
Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

10) There is no material on record to demonstrate anything contrary to the allegations made by the victim, supported by the testimony

of the witnesses examined by the prosecution. In this context, the Supreme Court recently observed in an order in the case of *Bhupatji Sartajji Jabraji Thakor v. The State of Gujarat*, (SLP (Cri.) Diary No.27298 of 2024) dated 5th July 2024 that, a life convict can be granted the benefit of suspension of sentence only if *prima facie* it appears that, the conviction is unsustainable and the convict has a high chance of succeeding in Appeal against the conviction. The Apex Court said that, the benefit of suspension of sentence cannot be granted to the convict, if there is nothing palpable to conclude that, the conviction was unsustainable in law. In the present matter, considering the evidence on record and appreciation of the same by the trial Court, we find nothing palpable to conclude the conviction to be unsustainable in law.

11) The Supreme Court in its recent decision in the matter of *Omprakash Sahni v. Jai Shankar Chaudhary & Anr.*,¹ held as under:

"33. 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

¹ (2023) 6 SCC 123.

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."

12) The offense held to have been committed by the Applicant is serious. From the evidence on record it appears that, the Applicant has taken undue advantage of a young school going girl of a tender age of barely 16 years. He himself at the relevant time was about 26 years of age. It is apparent that, he abused his dominant position to abuse the young victim and ruined a promising future. The victim was made to undergo mental as well as physical trauma of being physically mauled by the Applicant. Since the victim is indubitably under the age of consent, the defence of the Applicant relating to consensual relationship is of no consequence.

13) From the observations of the Supreme Court in various precedents it is clear that, while undertaking the exercise to ascertain

whether the Applicant has fair chance of acquittal, what is to be looked into is something palpable. From the strict perusal of the appreciation of evidence by the trial Court, we have neither found anything which is very apparent or gross on the face of the record, nor have we found any noticeable and perceivable error in the findings of trial Court. For this reason, we are unable to accept the contention of Ms. Agarwal that, it would be meaningless, improper and unjust to keep the Applicant behind bars for a further period than that which has already undergone after conviction till the disposal of his Appeal.

In any case, the Applicant has never suffered any incarceration during the entire period of the trial. The Supreme Court in various decisions has also held that, the mere fact that during the period of trial, the accused was on bail and there was no misuse of liberty, does not *per se* warrant suspension of execution of sentence and grant of bail. What is really necessary is to consider whether reasons exist to suspend execution of the sentence and grant of bail. We are thus not inclined to suspend the sentence of the Applicant and grant him bail during the pendency of the Appeal.

14) The Application is accordingly dismissed.

(DR NEELA GOKHALE, J.)

(A.S. GADKARI, J.)