

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

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INTERIM APPLICATION NO.2508 OF 2024
IN
CRIMINAL APPEAL NO. 664 OF 2024

Javed Abid Hussain Shaikh

...Applicant

Versus

State of Maharashtra and Anr.

...Respondents

Dr. Abhinav Chandrachud (through VC) a/w Wasim Ansari, Vishal Kolekar, Harsharaj Jagtap, Shubham Kadam, Kiran Jadhav i/b Randhir Kale for the Applicant/Appellant.

Ms. R.D. Humane, APP for Respondent No.1/State.

Mr. Shilpan S. Gaonkar for Respondent No.2 (appointed through Legal Aid Service Committee).

CORAM : M.M. SATHAYE, J.

DATE : 6 DECEMBER, 2024

P.C. :

1. Heard learned counsel for the Applicant/sole Accused, learned APP for Respondent Nos.1/State duly assisted by learned counsel for Respondent No.2/victim. This is an application for suspension of sentence and interim bail, pending the appeal. The appeal is already admitted on 22.07.2024 and the same is pending.

2. By the impugned Judgment dated 21.05.2024 passed in Special Case No. 28 of 2023, the Applicant is convicted for offences punishable u/s. 363, 376(1) of Indian Penal Code, 1860 ('IPC' for short) and u/s.4(2) of the Protection of Children From Sexual Offences Act, 2012 ('POCSO Act' for short). The Applicant is sentenced to suffer rigorous imprisonment of 20 years in addition to

fine.

3. Learned counsel for the Applicant submitted as under. That even as per the case of the victim, the relationship was consensual. the Applicant was 22 years old on the date of incident. That the case of the prosecution is of kidnapping and alleged penetrative assault. The Applicant was arrested on 12.11.2022 and he is under detention since then. That the Applicant has already suffered detention of 2 years. That even as per the case of the prosecution and evidence of the victim, the Applicant and the victim had traveled from Dadar to Pune, back to Dadar, then to Aurangabad and back to Dadar, using public transport. However, no co-passenger have been examined to believe the case of kidnapping or the Applicant forcefully taking the victim or any sign of coercion. That the medical evidence is inconclusive. No injury marks were found. That while narrating history to PW-5 Medical Officer, victim has narrated that she was in relationship with Applicant and ran away with him, due to opposition from family. That it can be seen from the medical evidence that the victim was suffering from depression. That there is contradiction about submission of Aadhaar card of the victim at the lodge at Aurangabad. In these set of facts, it is dangerous to rely upon sole testimony of the victim about penetrative assault. Therefore, this is a fit case for granting interim bail. He relied upon the case of **Jeetu Khatim Vs. State of Chhatisgarh**¹ as well as **Preet Pal Singh Vs. State of Uttar Pradesh and Anr.**²

4. On the other hand, learned APP for Respondent No.1/State

1 2022 SCC OnLine SC 1356

2 (2020) 8 SCC 645

assisted by learned counsel for Respondent No.2-victim submitted as under. That age of the victim below 16 years is well established. That use of force by the Applicant is duly proved by the testimony of the victim. That if the evidence of PW-6 Doctor is closely considered then this is not a case of depression but only of sadness and scaredness. That there is nothing on record to conclude depression. That initially FIR was filed for missing person because the Complainant did not know the whereabouts of the victim. That victim was in 10th standard on the date of the incident and was found in the custody of the Applicant. That the Applicant has not denied these facts. That the evidence of victim about penetrative assault is sufficient.

5. I have considered the rival submissions and perused the record.

6. The offence is of serious nature and the sentence awarded is of 20 years. In **Preet Pal Singh (supra)**, Hon'ble Supreme Court has held as under :

“35. There is a difference between grant of bail under Section 439 CrPC in case of pre-trial arrest and suspension of sentence under Section 389 CrPC and grant of bail, post conviction. In the earlier case, there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in Dataram Singh v. State of U.P. However, in case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail,

notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) CrPC.”

[Emphasis supplied]

7. In the judgment of Jeetu Khatim (supra), the Hon’ble Supreme court was considering the case of kidnapping of a 9 year old victim where the Accused was convicted for rigorous imprisonment of 3 years u/s. 8 of the POCSO Act and u/s. 363, 354 of the IPC. The context of consideration is totally different as compared to present case.

8. As per the law laid down by Hon’ble Supreme Court in paragraph 33 of **Omprakash Sahni vs. Jai Shankar Chaudhary & Anr.**³, the Court will have to see whether the convict has fair chance of acquittal on the basis of something palpable or so apparent or gross on the face of the record, on the basis of which, the Court can arrive at *prima facie* satisfaction that the conviction may not be sustainable. In the light of this settled position of law, this Court will have to check if this threshold is crossed in the present case.

9. The age of the victim is proved by birth certificate Exh.14 which shows her date of birth as 09.08.2008. The first incident has taken place on 08.11.2022. Therefore, at the relevant time, the age of victim was 14 years and 3 months, which is below 16 years. The Trial Court has found that presumption under Section 29 and 30 of the POCSO Act has not been rebutted. Considering that the victim is found to be below 16 years of age, the argument of Applicant that it

3. (2023) 6 SCC 123

was a case of consensual relationship, is of no consequence, as the aspect of consent is immaterial. Evidence of PW-5 - Medical Officer on duty at the relevant time, indicates that the victim's hymen was found torn and multiple healed hymenal tears were present. As rightly pointed out by learned counsel for the victim, evidence of PW-6 (another Doctor), indicates that the symptoms recorded were of sadness, scared-ness and sleep disturbance and not of depression, as contended by the learned counsel for the Applicant.

10. Also, medical evidence in the form of deposition of PW-6 shows that intelligence of the victim was found to be below average and therefore, IQ test was advised; however, the victim did not come for the said test or follow up. This aspect *prima facie* is against the Applicant as it runs contrary to the case of consensual relationship.

11. So far as the argument of inconsistency in the evidence of victim's Aadhar card is concerned, it is material to note that evidence of PW8 - person working at reception of Mevad Lodge at Aurangabad would show that as per entry in the register, one customer by name S.K. Javed had come to the lodge at 07.11.2022 at 9 a.m. and one lady was with him whose age was stated to be 18 and who did not give her Aadhar card when demanded, on the pretext that it is in the luggage. *Prima facie* the name of the Applicant is Javed Abid Hussain Shaikh and does not resemble S.K.Javed as indicated in the register. This being the position at least at this stage, the argument about inconsistency of victim's Aadhar card cannot be said to be applicable at all, as the said entry can be of a completely different person.

12. It is recorded in the impugned judgment that there is no evidence whatsoever to indicate any reason for false implication. The Applicant was admittedly a married man having a child at the relevant time of incident. It is held in the impugned judgment that it is not a defence of the Applicant that the victim had multiple partners. It has come on record that the Applicant and victim stayed in one hotel at Dadar on 04.11.2022, thereafter for 2 days they stayed in a lodge at Pune. Thereafter, the victim was taken to a lodge at Aurangabad where the Applicant and victim stayed for 2 days. The victim has specifically deposed that at Aurangabad, the Applicant raped her. It has come on record that the victim has withstood the cross-examination and has been consistent throughout about Applicant committing penetrative sexual assault at least twice. As recorded in paragraph 25 of the impugned Judgment, the Applicant under Section 313 of the Cr.P.C., has admitted that he and victim traveled from Dadar to Pune, Pune to Dadar and from Dadar to Aurangabad where they stayed together. In such circumstances, it is difficult to disbelieve the consistent case of the victim that there was penetrative sexual assault upon her by the Applicant.

13. Therefore, in the aforesaid facts and circumstances of this case, in my considered view, the threshold as set by the Hon'ble Supreme Court is not crossed.

14. Hence, I am not inclined to grant bail. The application is rejected.

(M.M. SATHAYE, J.)