



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

CRIMINAL APPLICATION [APPA] NO.68 OF 2023

IN

CRIMINAL APPEAL NO.41 OF 2023

[Ashok s/o Madhavrao Kulmethe .vs. State of Maharashtra and one]

 Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders

Court's or Judge's orders

 Mr. S.K. Patil, Advocate (Appointed) for the Applicant-Appellant,
 Ms. Kavita Bhondge, APP for respondent no.1-State,
 Ms. Falguni Badani, Advocate for respondent no.2-Victim.

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CORAM : M.W. CHANDWANI, J.

DATE : 16/02/2024.

Since Advocate Mr. S.K. Patil engaged by the appellant is present today, hence Advocate Mr. Saurabh Singha appointed by the High Court Legal Services Sub-Committee, Nagpur is discharged.

2. By this application, the applicant seeks suspension of substantive sentence in Special (POCSO) Case No.50/2019. The learned Special Judge, Chandrapur, by impugned order dated 14.12.2022, recorded the judgment and order of conviction. The operative order is as follows :

1. The accused Ashok s/o Madhavrao Kulmethe is hereby convicted for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 read with Sections 376(1)(A), 376(2)(f)(j)(n) of the Indian Penal Code and he shall undergo Rigorous Imprisonment for 10 (Ten) years and shall pay a fine of Rs.5000/- (Five Thousand) in default, R.I.

for Three months, vide Section 235 (2) of the Code of Criminal Procedure.

2. The accused is hereby convicted for the offence punishable under Sections 354, 354-A of the Indian Penal Code and he shall undergo Rigorous Imprisonment for 3 (Three) years and shall pay a fine of Rs.2500/- (Two Thousand Five Hundred) in default, R.I. for Two months, vide Section 235 (2) of the Code of Criminal Procedure.

3. The accused is hereby convicted for the offence punishable under Section 506 of the Indian Penal Code and he shall undergo Rigorous Imprisonment for 2 (Two) years and shall pay a fine of Rs.2000/- (Two Thousand) in default, R.I. for Two months, vide Section 235 (2) of the Code of Criminal Procedure.

4. All the aforesaid sentences shall run concurrently.

5. The accused Ashok s/o Madhavrao Kulmethe is hereby acquitted of the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 vide Section 235 (1) of the Code of Criminal Procedure.

6. The fine amount be given to both the victims equally residents of Nagbhir, Tah. Nagbhir, Dist. Chandrapur.

7. Set-off be given to the accused as per Section 428 of Criminal Procedure Code from the date of his arrest i.e. 29.07.2019.

8. *The seized property, if any, being worthless be destroyed after appeal period is over.*

9. *Copy of judgment be given free of cost to the accused.*

3. It is contended by the learned counsel for the appellant that the appellant has been falsely implicated in this case. According to him, the appellant, who is father of the victim, has some dispute with his wife and, therefore, his wife in connivance with the victim-girl, has implicated the appellant in false case. According to him, there is no medical evidence in support of the prosecution. He submits that Doctor has opined that the evidence of sexual intercourse cannot be ruled out. He submits that the appellant has good case on merit and, therefore, seeks suspension of substantive sentence passed by the learned Special Court. He further submits that the accused is behind bar since 29.07.2019, near about 4½ years. Therefore, the appellant be released on bail pending the appeal.

4. To buttress his submission, he relied on the judgment of the Supreme Court in the case of **State of Jharkhand .vs. Shailendra Kumar Rai, 2022 SCC Online SC 1494**, wherein the Supreme Court has observed that “two-finger test” must not be conducted for establishing rape/sexual violence and the size of the vaginal introitus has no bearing on a case of sexual violence.

5. Per contra, learned APP for the State assisted by the learned counsel for victim-girl, vehemently objected the application for bail on the ground that the appellant, who is the

father of minor girl, has committed penetrative sexual assault on his own daughter. Just because the wife has admitted that he was talking to one girl Vandana, therefore, there was dispute between the appellant and his wife, the mother of the victim. The evidence of minor girl cannot be brushed aside. According to her, there is no merit in the appeal. The State is ready for final hearing. According to her, no case is made out for suspension of substantive sentence.

6. To buttress her submission, she relied on the judgment of the Supreme Court in the case of **Omprakash Sahni .vs. Jai Shankar Chaudhary and another, (2023) 6 SCC 123**. Para 33 reads 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 abovesaid 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 takes 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 a few lacunae or loopholes here or there in the case of the prosecution. Such would not be a correct approach.“

7. The perusal of the impugned judgment as well as version of the prosecution witnesses goes to show that there is evidence on record that the appellant committed sexual assault on the victim-girl, her own elder daughters about 4½ years prior to year 2019. There is also version of the victim-girl that she had also seen the appellant while committing sexual intercourse with her younger sister. Evidence shows that the appellant committed penetrative sexual assault on her own daughters. Thus, there is material on record which *prima facie* justify the conviction recorded by the learned Special Court.

8. In the decision of **State of Jharkhand** (supra) relied by the counsel for appellant, it was in respect of “two-finger test”. The present is not a case of “two-finger test” therefore, it will not help to the appellant.

9. So far as the submissions of the learned counsel for the appellant regarding incarceration of the appellant since 4½ years is concerned, learned counsel for the appellant was asked to argue on merit, but he pressed the application for suspension of substance sentence.

10. Considering the material and evidence against the appellant, no case is made out for suspending the substantive

sentence pending the appeal. Hence, **the application is rejected.**

11. The observations made herein-above are *prima facie* in nature and are made in the context of deciding the issue of suspension of sentence.

12. Fees of the learned counsel appointed on behalf of the appellant be quantified as per the rules.

CRIMINAL APPEAL NO.41 OF 2023

Early hearing of the appeal is granted. List the appeal for final hearing.

2. The paper book would be prepared expeditiously.

(M.W. Chandwani, J.)