



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPLICATION NO.84 OF 2024

IN

CRIMINAL APPEAL NO.42 OF 2024

(Yogesh Sanjay Narad Vs. State of Maharashtra)

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

Court's or Judge's Order

Mr. M.V. Amale, Advocate for the appellant.
Mrs. M.H. Deshmukh, APP for the State.

CORAM:- URMILA JOSHI-PHALKE, J.

DATED :- FEBRUARY 6, 2024.

By this application, the appellant is seeking suspension of sentence and releasing him on bail.

2. The appellant was prosecuted for the offence punishable under Sections 366-A, 506 of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012.

3. Learned trial Court after appreciating the evidence, convicted the appellant and sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.2,000/- for the offence punishable under Section 366-A of the Indian Penal Code and in default rigorous imprisonment of two months. The present appellant is also convicted of the offence punishable under Section 506 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three months and to pay fine of Rs.500/- in default, to suffer further rigorous

imprisonment for 7 days. The appellant is also convicted of the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.5000/- in default, to suffer further rigorous imprisonment for six months.

4. Being aggrieved with the same, present appeal is preferred by the appellant along with the application for suspension of sentence and releasing the appellant on bail.

5. Learned Counsel for the appellant submitted that the entire judgment and order of conviction is based upon the evidence of the victim who has not narrated the alleged incident before the police as far as present appellant is concerned. There is no single whisper in the FIR that present appellant has subjected the victim for sexual assault. First time, in Court she come with the story that she was subjected for sexual assault by the present appellant also. PW-2 who is the member of Women Cell of Bela police station has also not supported the prosecution story and PW-1 is the Panch regarding the spot of incident. He invited my attention towards the evidence of the victim and submitted that, in evidence first time the victim has alleged that present appellant has subjected her for sexual assault. In fact, in the FIR and her supplementary statement she has not uttered the single word that the present appellant has subjected her for sexual assault.

During her cross-examination, the facts are brought on record which shows that though she was having an opportunity to make her grievances, she has not made any complaint against the present appellant. Her cross-examination even shows that she is not aware about the name of the sister who is residing at Hinganghat at whose house allegedly the incident of sexual assault has taken place. He submitted that during her evidence, she has exonerated the co-accused Anil and only made allegations against the present appellant which is completely contrary to the FIR registered by her. He submitted that entire version of the prosecutrix regarding the role of the present appellant is in the manner of omission which amounts to contradiction. Considering the evidence of the victim, the appellant has every chance of success in the present appeal. The learned trial Court has not considered this fact and erroneously convicted the appellant. However, the appeal will take its own time for its final decision. In the meanwhile, if sentence is executed then allowing the appellant to remain behind bar will cause prejudice to him and there will be irreparable loss to the present appellant.

6. Learned Additional Public Prosecutor strongly opposed the application on the ground that the learned trial Court has rightly appreciated the evidence which shows that it is the present appellant who subjected her for sexual assault which is also supported by the other medical evidence as well as the evidence of the Investigating Officer. Thus, the appeal filed by the

appellant is groundless. In view of that, the application deserves to be rejected.

7. After hearing the learned Counsel for the appellant and after perusal of the evidence on record, there is no dispute as to the fact submitted by the learned Counsel for the appellant that in the FIR there is no single allegation made by the present victim alleging that the present appellant is one of the person who subjected her for sexual assault. The entire FIR is against the co-accused Anil and the allegation of sexual assault are against the co-accused Anil. Even there is no name mentioned of the present appellant in the FIR. In her subsequent statement also she has not narrated any role to the present appellant. Thus, her entire evidence narrating the role of the present appellant is in the nature of the omission and she has modulated her evidence only to implicate the present appellant in the alleged offence. The scope of Section 389 of the Code of Criminal Procedure is to the extent of postponement or temporarily preventing the appellant from sending behind bar and the execution of the sentence. The Honourable Apex Court in recent decision of *Omprakash Sahni Vs. Jai Shankar Chaudhary in Criminal Appeal No.1331-1332/2023 decided on 02/05/2023* along with the connected appeals dealt with the aspect of suspension of sentence and observed that when we speak of suspension of sentence after conviction, the idea is to defer or postpone the execution of the sentence. The purpose of postponement of sentence

cannot be achieved by detaining the convict in jail; hence, as a natural consequence of postponement of execution, the convict may be enlarged on bail till further orders. It is further observed that the principle underlying the theory of criminal jurisprudence in our country is that an accused is presumed to be innocent till he is held guilty by a court of the competent jurisdiction. Once the accused is held guilty, the presumption of innocence gets erased. In the same manner, if the accused is acquitted, then the presumption of innocence gets further fortified. From perusal of Section 389 of the CrPC, it is evident that save and except the matter falling under the category of subsection 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, i.e. Sections 437, 438, 439 and 389(1) of the Cr.PC. After referring the various earlier decisions, the Honorable Apex Court further held that 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 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 Cr.P.C. 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.

8. In the light of the above observation while considering the application for suspension of sentence, the appellant has to show that on appreciation of evidence there is something between palpable and which can affect the decision of the trial Court. "Palpable" as per the Oxford dictionary is that which is easily noticed by the mind or senses. The Cambridge dictionary described the "Palpable" as so obvious that it can easily be seen or known or (of a feeling) so strong that it seems as if it can be touched or physically felt. "Palpable" means an error

that is obvious.

9. If this settled law is applied to the facts of the present case admittedly, there were no allegations against the present appellant when the FIR was lodged. First time the victim made allegation against the present appellant and exonerated the other co-accused against whom she has lodged the FIR. Thus, there is an obvious reasons which are shown by the present appellant to entertain this application. Admittedly, if in future the appeal is allowed and the appellant undergoes the sentence then irreparable loss would cause to him and it would cause prejudice to him. Admittedly, there are no chances of disposal of the appeal in near future.

10. In the light of the above circumstances, the application for suspension of sentence deserves to be allowed. Accordingly, I proceed to pass following order :

- (i) The application is allowed.
- (ii) The execution of the sentence is hereby suspended till final disposal of the appeal.
- (iii) The applicant be released on bail on executing P.R. Bond in the sum of Rs.25,000/- (Rs. Twenty five thousand) with one surety in the like amount.
- (iv) The applicant shall attend the trial Court on first day of every month and the trial Court shall record his presence.

(v) The applicant shall furnish his Cell-phone number and address along with address proof before the trial Court.

11. The application stands disposed of.

CRIMINAL APPEAL NO.42 OF 2024

Heard.

2. **ADMIT.**

3. Call for R. & P.

4. Issue notice to respondent.

5. Learned APP waives notice for the State.

6. Place the appeal before the Court after preparation of the paper book and after receipt of R. & P.

(URMILA JOSHI-PHALKE, J.)