

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

INTERIM APPLICATION NO.4119 OF 2023
IN
CRIMINAL APPEAL NO. 1229 OF 2023

Santosh Eaknath Kedar

...Applicant

Versus

The State of Maharashtra and Anr.

...Respondents

Digitally signed
by
HUSENBASHA
RAHAMAN
NADAF
Date: 2025.01.07
19:41:42 +0530

Appearance on 13.12.2024:

Ms. Anjali Patil, for Applicant.

Ms. P.N. Dabholkar, APP for Respondent No.1/State.

Ms. Vidhya N. Shet, for Respondent No.2 (appointed through Legal Aid Services).

Appearance on 07.01.2025:

Mr. Tohid Shaikh i/b. Ms. Anjali Patil, for Applicant.

Mr. Shrikant Yadav, APP for Respondent No.1/State.

Ms. Vidhya N. Shet, for Respondent No.2 (appointed through Legal Aid Services).

CORAM : M.M. SATHAYE, J.

**DATE : 7th JANUARY, 2025
(IN CHAMBER)**

P.C. :

1. Learned counsel for the Applicant/convict and learned APP for Respondent Nos.1/State duly assisted by learned counsel for Respondent No.2/Victim were heard on 13.12.2024 and the matter is placed today for passing order.

2. This is an application for suspension of sentence and interim bail during the pendency of the appeal. By the impugned Judgment

and Order dated 12.09.2023 passed in Special Case No. 66 of 2019 by District Judge-3 & Special Judge (POCSO), Solapur, Applicant/Accused No.1 is convicted for the offences punishable u/s. 376(2)(f)(j) & (l) of the of Indian Penal Code, 1860 ('I.P.C.' for short) and sentenced to suffer rigorous imprisonment of twenty years. The appeal is already admitted on 30.11.2023.

3. The case of the prosecution, in short, is as under. The Victim is a mentally retarded orphan staying at District Hostel for Mentally Retarded Girls, Solapur ('the said Hostel' for short). On the applications of President, Women's Protection and Enablement Institution, Solapur and President, Committee for Protection of Disabled from Harassment ('Sanstha/Samiti' for short), made to the Commissioner of Police Solapur, the Complainant working as Superintendent in the said Hostel, filed the complaint against various Accused persons, all being staff of the said Hostel. Inquiry was made and Victim PW-3 narrated that the Applicant / Accused No.1, who was working as her teacher, has touched the Victim's chest and private part and has also inserted his penis in her mouth in the class room. In supplementary statement recorded by the Complainant, it is stated that on 04.07.2018, the watchman & caretaker of the said Hostel told the Complainant that the Victim had narrated that the Applicant had committed the said act. On inquiry, the Victim narrated the incident to the Complainant. The Complainant narrated it to Headmaster. Thereafter, written complaint was taken and Headmaster issued notice and called for explanation from the staff members and thereafter, complaint was lodged on 25.05.2019. The

prosecution examined PW-1 panch witness, PW-2 Doctor, PW-3 Victim, PW-4 Psychologist about IQ test, PW-5 Psychiatrist about disability certificate, PW-6 Doctor for the purpose of age determination, PW-7 Doctor Radiologist, PW-8 1st Investigating Officer, PW-9 2nd Investigating Officer as well as PW-10 Doctor.

4. Learned counsel for the Applicant submitted that the Applicant is acquitted from the charges under Protection of Children From Sexual Offences Act, 2012 ('POCO' Act). She submitted that the Applicant has already suffered detention of 5 years and 6 months, out of 20 years sentence. She submitted that the minimum sentence is in fact 10 years. However, in the present case the Applicant has been awarded 20 years. She submitted that if the minimum sentence is considered, then the Applicant has already suffered detention of more than 50% thereof. Relying on evidence of PW-3 the Victim, it is submitted that the Victim was never alone and she used to be escorted from place to place by an attendant. It is submitted that medical evidence is not supporting the prosecution. It is submitted that the help of Interpreter is not taken. It is submitted that the mental retardation of the Victim is not proved. She submitted that there is variance between statements given by the Victim before the Magistrate u/s. 164 of Criminal Procedure Code ('Cr.PC.' for short), given in the Court and given before the Doctor. She submitted that the Applicant is teacher and there are no other complaints against him. It is finally submitted that the Applicant is ready to abide by the terms and conditions as may be imposed by the Court.

5. Learned APP for Respondent No.1/State vehemently opposed the application contending *inter-alia* that this is a case where a teacher in a hostel for mentally retarded girls has raped one of the students, who is mentally retarded. It is submitted that the Victim's evidence is unshaken and is duly corroborated by the evidence of Psychologist as well as Psychiatrist and it is proved that the Victim suffered from 45% mental disability and her IQ is only 43. It is submitted that there is no cross-examination on the evidence of Victim herself about the incident of penetrative assault by the Applicant. It is submitted that the Applicant was in the position of authority and trust being a teacher, who has indulged in a heinous act and therefore no indulgence be shown. She submitted that no substantial sentence has been served so far.

6. Learned counsel for Respondent No. 2 Victim appointed through Legal Aid Services, also opposed the application. It is submitted that the incident has come to light because of independent letters issued by Sanstha/Samiti. It is submitted that since the teacher and staff of the said Hostel were involved in the crime, there were no chances of it being reported and therefore, on the letters of independent Sanstha/Samiti the incident has to come light. It is submitted that if the evidence is carefully perused, then the incident has taken place multiple times and Victim's evidence alone is sufficient in the present case to prove the guilt.

7. I have carefully considered the submissions. Perusal of the Victim's statement u/s. 164 of Cr.P.C. shows that the Victim has clearly stated that the Applicant was troubling her to the extent of

touching her chest and private part and has also inserted his private part in her mouth. She has also stated that during one of such incidents, because of insertion of the Applicant's private part in her mouth, she had suffered vomiting. She has stated that the Applicant has done such act 2/3 times. Perusal of the deposition of the Victim PW-3 shows that she has clearly stated that the Applicant used to take her in class room and used to indulge in the said acts. She has specifically stated that at such times, other students remained at the ground and such acts were committed 2/3 times. She has also clearly stated that she had reported the incidents to staff members including teachers.

8. The argument of the Applicant that the Victim used to be accompanied by the attendant all the time and therefore alleged act is not possible, does not seem to be worth considering at this stage. In this respect, Victim has stated that one 'madam' accompanied the children while 'going to school and while going to hostel'. She has already stated that 'madam' used to wait at the ground floor during school time. This *prima facie* indicates that during school time when the incident happened in the class room, there was nobody to accompany the Victim. The Victim has clearly narrated that nobody asked her to take Applicant's name. *Prima facie*, the oral evidence of the Victim PW-3 is consistent and there is no fatal cross-examination about actual act described by the Victim herself.

9. The argument about alleged inconsistency in the statements of the Victim before the Magistrate, in the Court and before the doctor,

are matter of consideration at the time of final hearing and they are not sufficient at this stage to discard the incident completely.

10. The prosecution has examined doctors to prove that the Victim is biologically about 18 to 19 years old but the disability certificate shows that the Victim is intellectually disabled to the extent of 45% and her IQ is found to be 43. The argument about necessary degree / course for proving mental disability / IQ are matter of consideration at the time of final hearing. At this stage, the evidence of the Victim about actual act and admitted position of authority / trust that the Applicant held, cannot be discarded or overlooked. The offence is of serious nature.

11. The argument that more than half of the sentence is undergone cannot be considered on the possibility on reduction in the sentence.

12. The very nature of offence by the Applicant being teacher and the Victim being student who is orphan staying in a hostel for mentally retarded girls, is heinous in nature. The acts included insertion of private part in the mouth of the Victim. The effect of such offence on the society at large is serious.

13. In **Preet Pal Singh Vs. State of U.P.**¹, while considering the case of a convict sentenced to life imprisonment, 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

¹ (2020) 8 SCC 645

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.

38. In considering an application for suspension of sentence, the appellate court is only to examine if there is such patent infirmity in the order of conviction that renders the order of conviction prima facie erroneous. Where there is evidence that has been considered by the trial court, it is not open to a court considering application under Section 389 to reassess and/or re-analyse the same evidence and take a different view, to suspend the execution of the sentence and release the convict on bail."

[Emphasis Supplied]

14. Indeed, there is no presumption of innocence here and this is not a stage of re-appreciation or re-analysis of the evidence.

15. In a recent case of **Omprakash Sahni Vs. Jai Shankar Choudhary**², while considering the case of a convict in a serious offence, the Hon'ble Supreme Court has held as under :

"33. Bearing in mind the aforesaid principles of law, the

² (2023) 6 SCC 123

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 re-appreciate 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.”

[Emphasis supplied]

16. In my considered view, the threshold as set out by the Hon’ble Supreme Court above, is not crossed in the facts and circumstances of the present case. Therefore, I am not inclined to grant bail. The application is accordingly rejected.

17. The Applicant is at liberty to move fresh application after completing half of the awarded sentence, if the appeal is not taken up for hearing by that time.

(M.M. SATHAYE, J.)