



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

CRIMINAL APPLICATION (APPA) NO. 81 OF 2025 IN
CRIMINAL APPEAL NO. 384 OF 2024

Kiran S/O Mahadeorao Shaharkar 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. R.R. Vyas, counsel for applicant/appellant.

Mr. C.A. Lokhande, APP for respondent/State.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 23/01/2025.

1. By this application, the appellant is seeking suspension of sentence and releasing the appellant on bail.
2. Learned counsel, Mr. R.R.Vyas for the appellant, submitted that the appellant was prosecuted for the offence punishable under Section 376(AB) of the Indian Penal Code and Sections 5 and 6 of the Protection of Children from Sexual Offences Act (hereinafter referred to as the POCSO Act) and sentenced to suffer rigorous imprisonment for a period of 20 years and a fine of Rs. 30,000/- for the offence punishable under Section 5 read with Section 6 of the POCSO Act, and simple imprisonment for 2 years in default of payment of fine.
3. He further invited my attention towards the evidence of the victim and pointed out that as far as the allegation of the penetrative sexual assault is concerned, the said omission is proved through evidence of the investigating officer. He stated that medical evidence is

also not there to show that there was a penetrative sexual assault even touched by the present appellant to the private part of the victim. He submitted that at the most, even accepting the allegation as it is, the offence would be covered under Section 8 of the POSCO Act. In view of that, the punishment imposed is apparently incorrect and illegal, and the appellant has every chance of success in the present appeal. In view of that, the execution of the sentence be suspended.

4. He further submitted that considering the reasoning given by the learned Special Court, it is apparent that the learned Sessions Court has ignored the definition of rape even under Section 375 as well as the definition under Section 3 of the POSCO Act. He submitted that by no stretch of imagination, it can be said that, victim was subjected for the penetrative sexual assault. In view of that, the appellant has every chance of success in the present appeal, and therefore, the execution of the sentence be suspended and the appellant be released on bail.

5. Learned APP strongly opposed the said application and submitted that considering the nine years victim girl was subjected for the sexual assault by the present appellant. The application deserves to be rejected. In view of that, the application be rejected.

6. After hearing both sides and on perusal of the impugned judgment as well as the deposition of the victim,

from which it is apparent that as far as the allegation of the sexual assault is concerned, which is in the nature of the omission. The said omission is proved by the investigating officer, who specifically stated that as far as the part of the penetrative sexual assault is concerned, it is not narrated before him.

7. The learned counsel has pointed out from the medical evidence also that there was no injury found, or he has not marked any signs to show that the victim was subjected for penetrative sexual assault. In view of that, the submissions made by the learned counsel for the appellant has some substance. From which, it is apparent that learned Special Judge has not considered this aspect. As far as the suspension of sentence is concerned, admittedly no straight jacket formula is given under the Code of Criminal Procedure or for considering the application under Section 430 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS). It is apparent that what is to be seen is whether the appellant has every chance of success in the present appeal. Admittedly, re-appreciation of the evidence is not permissible at this stage.

8. This aspect is considered by the Hon'ble Apex court in the case of ***Omprakash Sahni vs Jai Shankar Chaudhary and another in Criminal Appeal Nos. 1331-1332 of 2023 decided on 02/05/2023***, wherein by referring its earlier decision it is observed by the Hon'ble Apex Court that what is really necessary is to consider whether reason exists to

suspect, execution of sentence and grant of bail. It is further observed that in cases involving conviction under Section 302 of IPC, it is only in exceptional cases that the benefit of suspension of sentence can be granted.

9. By referring the various decisions in para-33, it is observed 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 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.”

10. In the light of the above observation of the Hon'ble Apex Court in the case in hand, if the evidence that is pointed out by learned counsel is taken into consideration.

He has pointed out that he has many arguable points, which is supported by the evidence and the cross-examination of the witnesses. In view of that, the appellant has made out a case for suspension of sentence; in view of that, the application deserves to be allowed. Accordingly, I proceed to pass the following order.

- a] The criminal application is **allowed**.
- b] The execution of the sentence passed in Spl. POCSO Case No.165/2020 passed by the Additional Sessions, Wardha is hereby suspended till disposal of the appeal.
- c] The appellant shall be released on bail on executing PR. Bond of Rs. 25,000/- with one solvent surety of the like amount.
- d] The appellant shall attend the Court of Additional Sessions Judge, Wardha on first of every month till disposal of the appeal
- e] The appellant shall furnish his address along with the address proof as well as names of the address of his two relatives along with the address proof.
- f] The suspension of sentence is subject to the depositing of the fine amount within four weeks.

11. The criminal application (APPA) No. 81/2025 is **disposed of**.

CRIMINAL APPEAL NO. 384 /2024

1. The appeal is already admitted. The record and proceedings is already received
2. The appeal be listed for final disposal after preparation of paper-book.

[URMILA JOSHI-PHALKE, J.]