

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

CRIMINAL APPLICATION (APPA) NO.53 OF 2017

IN

CRIMINAL APPEAL NO.29 OF 2017

Najju @ Nazir Khan s/o Pir Khan Pathan

..VS..

State of Maharashtra, through Police Station Officer, Police Station Mangrul
(Dastagir), District Amravati

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

Court's or Judge's Order

Shri T.U. Tathod, Counsel for the applicant.

Shri R.S. Nayak, Addl.P.P. for the non-applicant/State.

CORAM : V.M. DESHPANDE, J.

DATED : JUNE 29, 2017.

This is an application for suspension of
substantive jail sentence and for grant of bail.

Heard learned counsel Shri T.U. Tathod for the
applicant and learned Additional Public Prosecutor Shri R.S.
Nayak for the non-applicant/State.

The applicant is convicted by learned Additional
Sessions Judge-3, Amravati in Special (POCSO) Case No.150 of
2015 by which the applicant is convicted for the offence
punishable under Section 376(2)(n) of the Indian Penal Code and
is directed to suffer rigorous imprisonment for 10 years and to
pay a fine of Rs.25,000/- and in default of fine amount to suffer

rigorous imprisonment for 6 months. He is also convicted for the offence punishable under Section 4 of the Prevention of Children from Sexual Offences Act, 2012 and on that count is directed to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.10,000/- and in default of fine amount to suffer rigorous imprisonment for 3 months. He is also convicted for the offence punishable under Section 6 of the Prevention of Children from Sexual Offences Act, 2012 and on that count is directed to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.25,000/- and in default of fine amount to suffer rigorous imprisonment for 6 months.

The record shows that only two witnesses were examined by the prosecution during the course of Trial. They are PW1 prosecutrix and PW2 investigating officer. The applicant also entered into the witness box.

The crucial question in order to decide the present application for bail is, the age of the prosecutrix since the applicant is convicted under the relevant provisions of the Prevention of Children from Sexual Offences Act, 2012. Since the provisions of this Act are stringent one, stricter proof is required for proving the age of the prosecutrix and surely that burden rests firmly on the shoulder of the prosecution alone.

In the present case, by filing document, which is at Exhibit 85, the prosecution is contending that her age, at the

date of the occurrence, was below 18 years so as to attract the provisions of the Prevention of Children from Sexual Offences Act, 2012 .

Interestingly, Exhibit 85, which is given by the Registrar of Gram Panchayat, was not filed along with the charge-sheet nor the same was filed when the investigating officer was in the witness box.

The evidence of the investigating officer was complete on 4.3.2016 whereas on 16.3.2016 a list Exhibit 84 was filed along with the document, as referred above, to prove the date of birth of the prosecutrix. It appears that no application was moved by the prosecution for placing the said document on record.

The prosecution, in my view, at least, *prima facie*, has not proved that the said document is coming on record from the proper custody. Hence, *prima facie* , I am of the view that the prosecution has not proved the age of the prosecutrix strictly.

The evidence of the prosecutrix shows that there were thick relations between her and the present applicant and, therefore, theory of consent, as sought to be propagated by the present applicant, cannot be completely ruled out. Once the age of the prosecutrix is not strictly proved, in my view, at least, *prima facie*, the applicant is out of clutches of the Prevention of

Children from Sexual Offences Act, 2012 .

The applicant was on bail during the course of the Trial.

Since it appears *prima facie* that there was consent on the part of the prosecutrix and the age is not strictly proved, therefore, the applicant is entitled to be released on bail by suspending substantive jail sentence.

Hence, I pass the following order:

The criminal application is allowed.

The substantive jail sentence, imposed upon the applicant by learned Additional Sessions Judge, stands suspended during the pendency of the present appeal.

The applicant be released on bail on he executing a P.R. Bond in the sum of Rs.15,000/- (rupees fifteen thousand only) with two solvent sureties of like amount.

The Court below to ensure that the entire fine amount is deposited by the applicant before he executes P.R. Bond and he is released on bail.

The applicant to personally remain present at the time of final hearing of the criminal appeal.

The criminal application is disposed of.

JUDGE

!! BRW !!

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