

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

CRIMINAL APPLICATION (APPA) NO.345 OF 2023

IN
CRIMINAL APPEAL NO.200 OF 2023

Roshan Sadanand Patil

Vs.

State of Maharashtra through Police Station Officer, Police Station, Bori, District
Nagpur and another

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

Court's or Judge's orders

Mr. S. S. Sohoni, Advocate for applicant/appellant.
Mr. S. M. Ghodeswar, APP for respondent No.1/State.
Ms. Mohini A. Sharma, appointed Advocate for respondent No.2.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 17/07/2023

1. The present application is preferred under Section 389 of the Code of Criminal Procedure for suspension of sentence and to release the appellant on bail.

2. The appellant was prosecuted for the offence punishable under Sections 376(1)(2) of the Indian Penal Code and Section 5 (1) punishable under Section 6 of the Protection of Children From Sexual Offences Act, 2012. After appreciation of the evidence, the appellant is convicted of the offence punishable under Section 376(2) (j)(n) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years and fine of

Rs.1,00,000/- in default of payment of fine rigorous imprisonment for one year.

3. By this appeal, the appellant has challenged the Judgment and order of sentence on the ground that the age of the victim was not proved before the trial Court. Further ground raised is that appellant is convicted under Section 376(2)(j)(n) of the Indian Penal Code, under which he was not charged and at the time of incident, there was no amendment in Section 376 by adding sub-clauses (j) and (n). The Protection of Children From Sexual Offences Act was also not given effect at the relevant time when the alleged incident has taken place. Thus, the learned trial Court has not considered the evidence and wrongly convicted the present appellant. The appellant is already undergone four years of sentence. The appellant has every chance of success in the present appeal and hence, the execution of the sentence be suspended and he be released on bail.

4. The said application is strongly opposed by the State on the ground that the learned trial Court has rightly considered the evidence and rightly convicted the appellant. No grounds are made out to show that the appellant has any chance of acquittal in the present appeal. Hence, the application deserves to be rejected.

5. Heard learned Counsel Mr. Sohoni for the appellant. He reiterated the contention and submitted that without charge the appellant is convicted under Section 376(2)(j)(n) of the Indian Penal Code. Moreover, the alleged incident has taken place prior to the amendment in Section 376 and prior to the Protection of Children From Sexual Offences Act was given effect. Thus, the entire conviction is to be vitiated on this ground. Considering the same, the appellant has every chance of success in the present appeal and hence, the execution of sentence be suspended.

6. The learned APP and learned Counsel for respondent No.2 reiterated the contentions and opposed the application.

7. Having heard both the sides and perused the record and proceeding as well as the impugned Judgment. The appellant is convicted under Section 376(2)(j)(n) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years. On perusal of the charge, it is apparent that the appellant was not charged under Section 376(2)(n) and (2)(j) of the Indian Penal Code. As far as the legal point is concerned, whether there was an amendment in Section 376(2)(n) of the Indian Penal Code or not as a matter which can be considered at the time of final disposal of the appeal. At this stage, it is to be seen whether the appellant has any

chance of success in the present appeal. Admittedly, no principles are laid down while considering the application under Section 389 of the Code of Criminal Procedure. The Hon'ble Apex Court in **Omprakash Sahni Vs. Jai Shankar Chaudhary in Criminal Appeal Nos. 1331-1332 of 2023 decided on 02.05.2023** recently considered this issue and held that from perusal of Section 389 of the Cr.P.C., it is evident that save and except the matter falling under the category of sub-section 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.P.C.

8. After referring the catena of decisions the Hon'ble Apex Court held that the 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 CrPC 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.

9. In the light of the above said principles, the learned counsel for the appellant has pointed out that there is no charge under Section 376(2)(j)(n) framed against the appellant, but he is convicted under the said provisions. There was no amendment in Section 376 when the alleged incident has taken place. The age of the victim is not proved. So, the learned Counsel for the appellant has made out the arguable points. The appellants has already undergone four years sentence. Considering the same, the appellant has every chance of success in the present appeal and the appeal takes its

own time for final decision. The execution of the sentence deserves to be suspended. In view of that, I proceed to pass following order.

- (i) Application is allowed.
- (ii) The execution of the sentence is hereby suspended till disposal of the appeal.
- (iii) The appellant be released on bail on executing of PR. Bond in the sum of Rs.25,000/- with one solvent surety in the like amount.
- (iv) The appellant shall put his presence before the Special Court under the Protection of Children From Sexual Offences Act, Nagpur on 3rd of Every month and the learned trial Court shall record his presence.
- (v) The appellant shall furnish his cell phone number and address with the address proof.

The application is disposed of

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The appeal be placed for final hearing after the preparation of the paper book.

(URMILA JOSHI-PHALKE, J.)

Sarkate