

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

CRIMINAL APPLICATION (APPA) NO. 144 OF 2023
IN
CRIMINAL APPEAL NO. 77 OF 2023

Nitesh Shankar Zade

..VS..

State of Maharashtra through PSO, PS Padoli, Dist. Chandrapur

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

Court's or Judge's orders

Mr. A.D. Hazare, Advocate for appellant/applicant.

Mr. I.J. Damle, Additional Public Prosecutor for respondent/State.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : JUNE 19, 2023

Present application under Section 389 of the Code of Criminal Procedure filed by the appellant is for suspension of sentence and for release him on bail.

2. As per contention of the appellant, he was prosecuted for the offence punishable under Sections 376(2)(j), 376(2)(l), 376 (2)(n), 504, 417, 342 of the Indian Penal Code and under Section 3(1)(w)(i), 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The victim has lodged a report at Padoli Police Station on 03.12.2016. As per the allegations of the victim that while she was residing along with her family members and when she had gone to meet the sister of the accused, the accused subjected her for sexual assault on 03.09.2016 at about 02.00 pm.

On the basis of the said report, police have registered the crime. During trial, her evidence was recorded and appreciation of the evidence, the trial Court held that the prosecution has proved that on 03.09.2016 the accused committed forcible sexual intercourse with the victim and on another occasion in his house. The victim was pregnant and she delivered a male child. The DNA test of the child shows that the accused is the biological father of the child. Thus, the evidence of the victim inspiring the confidence and held the present appellant guilty of the offence punishable under Sections 376(2)(j), 376(2)(l) and 376(2)(n) of the Indian Penal Code and sentenced to suffer rigorous imprisonment of ten years and pay fine of Rs.5,000/-. The fine amount is not paid. Being aggrieved and dissatisfied with the judgment and order of sentence, the present appeal is preferred by the appellant on the ground that learned trial Court had not considered the evidence properly. The appellant has every chance of success in the present appeal however, the appeal will take its own time for its final decision, in the meanwhile if the sentence is executed, then the appeal will become infructuous.

3. Said application is strongly opposed by the State on the ground that there is ample evidence against the present appellant. The trial Court has considered not only the oral evidence but the DNA report also and on the basis of which the appellant is convicted. If appellant is released on bail and if the appeal is decided against

him, it will be difficult to secure his presence for execution of the sentence hence, the application deserves to be rejected.

4. Heard learned counsel for the appellant and perused the evidence on record. On the basis of the oral evidence of the victim as well as the medical evidence and scientific evidence, the appellant is convicted. Admittedly, the appellant was on bail during the trial and he has not misused the liberty. Considering the grounds raised by the appellant that there is a delay in lodging the First Information Report as well as the ground that material omissions and contradictions are not considered by the trial Court, it is submitted that the appellant has every chance of success in the present appeal.

5. Admittedly, no principles or guidelines are there while considering the application under Section 389 of the Code of Criminal Procedure. Perused the evidence, it appears that the opportunity is to be granted to the appellant to challenge the findings of the trial Court. The appeal will definitely take its own time for its final decision. Considering the same, the application deserves to be allowed. Accordingly, I proceed to pass the following order :

- (i) The Criminal Application No.144/2023 is allowed.
- (ii) The execution of the sentence is suspended till final disposal of the appeal.

- (iii) The appellant – Nitesh Shankar Zade is released on bail on executing P.R. bond of Rs.25,000/- with one solvent surety in the like amount.
 - (iv) The appellant shall remain present on 5th of every month and the trial Court shall record his presence before it.
 - (v) The appellant shall furnish his cellphone number and address with the address proof.
 - (vi) The appellant shall deposit the fine amount before the trial Court within a period of two weeks, if not deposited.
6. The application is disposed of.

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The appeal be placed before the Court after preparation of the paper book.

(URMILA JOSHI-PHALKE, J.)

Kirtak