

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

CRIMINAL APPLICATION (APPA) NO.340 OF 2023 IN
CRIMINAL APPEAL NO.196 OF 2023

Swapnil s/o Bhimrao Bhagat Vs. State of Maharashtra and another

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

Court's or Judge's orders.

Shri Vivek Awchat, Advocate for appellant.
Shri M.J. Khan, APP for respondent no.1/State.
Ms Falguni Badani, Advocate appointed for respondent no.2.

CORAM : URMILA JOSHI-PHALKE, J.
DATE : AUGUST 03, 2023.

The present application is for suspension of sentence and for releasing the appellant on bail. The appellant was prosecuted for the offence punishable under Sections 363, 376(2)(n) of the Indian Penal Code (for short "IPC") and under Sections 6 and 17 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO")

2. After appreciating the evidence the learned trial held that the victim was minor at the time of alleged incident and held the present appellant guilty and convicted him of the offence punishable under Section 376(2)(n) of the IPC and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.5,000/-, in default of payment of fine he shall suffer further simple imprisonment for six months. He is further convicted for the offence punishable under Section 363 of the IPC and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.2,000/-,

in default of payment of fine he shall undergo further simple imprisonment for two months.

3. The appellant has challenged the said judgment and order of sentence on the ground that there was love affair between the victim and the present appellant. Out of the love affair, the victim herself left her house willingly and joined the company of the present appellant. She stayed alongwith him for one year on her own. Out of love affair, there was a physical relationship however learned trial Court has not considered the same and wrongly convicted the appellant. The appellant has every chance of success in the present appeal however it will take its own time. In the meantime, if the sentence is executed purpose of preferring the appeal would frustrate.

4. The said application is strongly opposed by the State on the ground that the victim was below eighteen years of age and her consent is not relevant. The learned trial Court has rightly considered the evidence and convicted the appellant.

5. Learned appointed counsel for respondent no.2 reiterated the same contention and submitted that the observation of the learned trial Court is on the basis of evidence adduced by the prosecution. Therefore, the appellant has not made out a case for suspension of sentence.

6. Heard learned counsel for the appellant, learned APP for the State, and learned appointed counsel for respondent no.2. Perused the impugned judgment as well as evidence on record. Initially, the crime was registered under Section 363 of the IPC as the victim left the house. During the investigation, the victim was traced and her statement was recorded. She was also referred for medical examination. The history narrated by the victim shows that she was residing alongwith the present appellant in a love-in-relationship and had multiple times physical relationships with him willingly. She has not narrated the history of forcible sexual assault before the medical officer. The medical officer found the hymen torn during the medical examination. On perusal of the impugned judgment, the learned trial Court held that the victim was a child within the meaning of Section 2(d) of the POCSO Act and also held that oral evidence and medical evidence show that the victim was subjected to sexual assault and convicted the appellant. After going through the impugned judgment and the evidence on record, it reveals that the victim left the house on her own and joined the company of the appellant. She stayed alongwith him for one year. No grievances are made by her that she was subjected to sexual assault. The victim was seventeen years of age at the time of the alleged incident. Apparently, the learned counsel for the appellant has pointed out that out of a love affair, she went alongwith the present appellant. Thus, the appellant has made out a case that the appellant has every chance of success in the

present appeal on the basis of the evidence available on record.

7. As observed by the Hon'ble Apex Court in the case of ***Omprakash Sahani Vs. Jai Shankar Chaudhary & Anr*** in Criminal Appeal Nos.1331-1332 of 2023, that there is no fixed guidelines or criteria is fixed regarding entertaining the application under Section 389 of the CrPC. After considering the catena of decision, the Hon'ble Apex Court held that 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

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.

8. In view of the above observations of the Hon'ble Apex Court, what is to be seen is whether the appellant has a fair chance of acquittal. From the submission made by the learned counsel for the appellant, it is apparent that the appellant has a chance to succeed in the appeal but the appeal will take its own time for a final decision. In the meantime, if the sentence is executed then the purpose of filing of appeal would frustrate. In view of that, the application deserves to be allowed. Accordingly, I proceed to pass the following order:

ORDER

- i. The application is allowed.
- ii. The execution of sentence awarded by the learned Extra Joint Additional Sessions Judge and Special Judge, Wardha in Special (Child Act) Case No.50/2018 dated 10.01.2023 is hereby suspended pending appeal.
- iii. The appellant be released on bail on furnishing PR bond in the sum of ₹25,000/- with one surety of like amount.
- iv. The appellant shall furnish his cellphone number and his address with address proof.

v. The appellant shall attend the trial Court first Monday of every month and the trial Court shall record his presence till disposal of the appeal.

9. Professional fees of learned counsel appointed for respondent no.2 be quantified and paid as per Rules.

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

JUDGE

Wagh

Signature Not Verified

Digitally Signed By SURESH RAOSAHEB
WAGH
Personal Assistant to Hon'ble
Judge, High Court of Bombay, Nagpur
Bench, Nagpur.
Signing Date:04.08.2023