

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

CRIMINAL APPLICATION (APPA) NO.583 OF 2023

IN
CRIMINAL APPEAL NO.374 OF 2023

Mohd Nazim @ Nadim Mohd Hussain

Vs.

State of Maharashtra, Through Police Station Officer, Old City Police Station, Akola
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. M. N. Ali, Advocate for applicant/appellant.

Mr. I. J. Damle, APP for respondent No.1/State.

Ms. F. N. Haideri, appointed Advocate for respondent No.2.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : 12/07/2023

1. The present applicant is seeking suspension of sentence and releasing him on bail.

2. The applicant was charged for the offences punishable under Sections 363, 366, 376(2)(n) of the Indian Penal Code, Sections 3 and 4 of the Protection of Children From Sexual Offences Act and Section 3(1)(w) (i)(ii) and 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act.

3. After appreciation of the evidence, the learned trial Court held the present applicant guilty for the offence punishable under Section 376(2)(n) of the Indian Penal Code and Section 3 punishable under

Section 4 of the Protection of Children From Sexual Offences Act. Accordingly, the applicant is convicted and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.5000/-, in default to suffer simple imprisonment for fifteen days.

4. The judgment and order of sentence is challenged by the applicant by preferring this appeal on various grounds. The grounds raised by the applicant is that, the learned trial Court has not considered the evidence on record, wherein the victim girl has admitted that she stayed along with the present applicant as his wife. Her evidence further shows that she at her own accord left the parent's house and joined his company. The age of the victim girl is also not proved by the prosecution, but the learned trial Court without considering these discrepancies convicted the applicant. It is further contended that the applicant has every chance of success in the present appeal, however, if the sentence is executed, then the purpose of preferring the appeal will be frustrated and therefore, he prays for suspension of sentence and releasing him on bail.

5. The said application is strongly opposed by the State on the ground that the learned trial Court has rightly considered that the victim was minor at the relevant time. She was threatened by the present applicant and she was constrained to join the company

of the present applicant. The present applicant subjected her for sexual assault. The learned trial Court has further considered that the victim was minor and therefore, her consent is not relevant and rightly convicted him. No grounds are made out to suspend the sentence and therefore, the application deserves to be rejected.

6. The learned Counsel for the respondent No.2 also reiterated the contentions and submitted that if the applicant is released on bail, again there is apprehension that he will threaten the victim and similar incident may happened.

7. Having heard both sides. On perusal of the evidence on record. The learned Counsel for the applicant has pointed out the admissions given by the victim. From the cross-examination of the victim, it reveals that victim has joined the company of the applicant. She stayed along with him approximately one and half years. The evidence on record also shows that different work date came on record. As per the submissions of the learned Counsel for the applicant that the said evidence is not appreciated by the learned trial Court. Admittedly, at this stage, the evidence and the loopholes of the prosecution evidence is not to be discussed. At this stage it is only to see whether the applicant is to be released on bail by suspending the

sentence. Admittedly, no principles laid down while considering the application under Section 389 of the Code of Criminal Procedure to suspend the sentence. This aspect is recently considered by the Hon'ble Apex Court in the case of **Omprakash Sahni Vs. Jai Shankar Chaudhary in Criminal Appeal Nos. 1331-1332 of 2023 decided on 02.05.2023** wherein the Hon'ble Apex Court has 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.

8. After referring a catena of decisions of the Hon'ble Apex Court, the Hon'ble Apex Court has 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 reappreciate 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.

9. In the light of the above principles laid down by the Hon'ble Apex Court, if the fact and the evidence of the present case is taken into consideration, admittedly, the evidence of the victim shows that she stayed along with the present applicant as his wife for one and half years. From the evidence it further reflects that regarding the age of the victim there is a conflicting evidence. Considering the nature of the evidence, admittedly, there are arguable points for the defence.

Thus, applicant has made out the case to show that he has arguable points in the present appeal. Admittedly, at this stage, the evidence is not to be appreciated however, considering that applicant has made out a case for suspension of sentence. Hence, the application deserves to be allowed. Accordingly, I proceed to pass the following order.

ORDER

- (i) The Criminal Application is allowed.
- (ii) The execution of the sentence is hereby suspended till disposal of the appeal.
- (iii) The applicant Mohd Nazim @ Nadim Mohd Hussain is released on bail on executing PR. bond in the sum of Rs.25,000/- with one solvent surety in the like amount.
- (iv) The applicant shall put his presence before the trial Court on 5th of every month and trial Court shall record his presence.
- (v) The applicant shall furnish his cellphone number and address with address proof.
- (vi) The applicant shall not in any manner contact with the victim and shall not induce, threat or promise any witnesses who are connected with the alleged crime.
- (vii) The fees of the learned appointed Counsel for the respondent No.2 be quantified as per rules.

CRIMINAL APPEAL NO.374 OF 2023

1. **Admit.**
2. The learned APP waives notice for respondent/State.
3. Call for record and proceedings.
4. The appeal be placed before the Court after preparation of the private paper book.

(URMILA JOSHI-PHALKE, J.)

Sarkate