

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

CRIMINAL APPLICATION NO.667 OF 2023

IN

CRIMINAL APPEAL NO.428 OF 2023

(Jaykumar @ Jayant Nandkumar Tayade Vs. State of Maharashtra)

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri S.V. Deshmukh, Advocate for the appellant.
Shri M.J. Khan, APP for State.

CORAM:- URMILA JOSHI-PHALKE, J.
DATED :- JUNE 27, 2023.

Heard.

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

3. The accused was prosecuted of the offence punishable under Sections 376(2)(a)(i)(n) and 406 of the Indian Penal Code. To support the prosecution case, prosecution has examined in all four witnesses and also relied upon some documentary evidence. On the basis of the evidence adduced before the Court, learned trial Court held that the consent given by the victim is under misconception of fact, and therefore, it is not a valid consent and held the present appellant guilty for the offence punishable under Sections 376(2)(a)(i)(n) of the Indian Penal Code and sentenced him to suffer rigorous imprisonment of 7 years and to pay fine of Rs.3000/- in default to undergo simple imprisonment for one month.

The appellant is also convicted for the offence punishable under Section 406 of the Indian Penal Code and sentenced to suffer rigorous imprisonment of one year and to pay fine of Rs.3000/-.

4. Being aggrieved and dissatisfied with the judgment and the order of sentence, present appeal is preferred by the appellant on the various grounds including the ground that the act which has been taken place between the victim and accused was consensual act. The learned trial Court ought to have considered this fact. Further ground raised is that initially the complaint was lodged by the father of the victim however, there was no allegation of sexual assault by the present appellant on the victim. Moreover, the evidence adduced by the prosecution is suffering from infirmities however, learned trial Court ignored the same and convicted the present appellant erroneously.

5. It is further submitted that the appeal will take its own time for its final decision. In the meanwhile, if sentence is executed then appeal will become infructuous. Learned Counsel for the appellant submitted that the grounds raised by the appellant shows that the appellant has every chance of success in the present appeal.

6. Said application is strongly opposed by the State on the ground that the learned trial Court has rightly considered that the consent which is obtained by the accused was under the misconception of fact and

therefore, it is not a valid consent. Learned Additional Public Prosecutor further submitted that the appeal can be disposed of by expediting the same and if the appellant is released on bail there is likelihood of abscondence of the accused and he would not be available to undergo the sentence if appeal is decided against him.

7. Having heard both the sides and on perusal of the record, it appears that the appeal is preferred by the appellant on various grounds including the ground that there was a consent of the victim. Learned trial Court has considered the legal aspect of the consent and also considered whether it was a valid consent or not. Learned Counsel further pointed out that there was previous complaint also lodged by the father of the victim girl wherein the allegation regarding the sexual assault was not made and there is a reference of the earlier complaint in the judgment. Considering the ground raised by the appellant that the learned trial Court has ignored the material evidence which shows that the act of sexual relationship was the consensual act. Learned trial Court had not considered the fact that earlier complaint was filed. Admittedly this facts are to be considered at the time of deciding the appeal on merits. At this stage, whether the appellant has made out the case for suspension of sentence and whether he is having chance to succeed in the appeal is to be looked into.

8. This aspect recently considered by the Hon'ble Apex Court in the case of *Omprakash Sahni Vs.*

Jai Shankar Chaudhary in Criminal Appeal No.1331-1332/2023 along with the connected appeals wherein the Hon'ble Apex Court held that from perusal of Section 389 of Cr.P.C. it is evident that under no 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. The Hon'ble Apex Court further 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.PC. 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. In the light of the above principles laid down by the Hon'ble Apex Court if the appeal raised by the appellant are taken into consideration. Admittedly, the appellant has made out the case to suspend the sentence and to give an opportunity to the appellant to make out the case for his acquittal.

9. In view of that, the application deserves to be allowed. Hence, I proceed to pass the following order :

- (i) The application is allowed.
- (ii) The execution of the sentence is hereby suspended till decision of the appeal.
- (iii) The appellant be released on bail on executing P.R. Bond in the sum of Rs.15,000/- (Rs. Fifteen thousand) with one surety in the like amount.
- (iv) The appellant shall pay fine amount within one month before the trial Court.
- (v) The appellant shall put his presence before the trial Court on 5th of every month and the trial Court shall record his presence.

CRIMINAL APPEAL NO.428 OF 2023

Heard.

2. **ADMIT.**
3. Call for R. & P.
4. Place the matter before the Court after preparation of the paper book.

(URMILA JOSHI-PHALKE, J.)

**Divya*