

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Criminal Appeal (D.B.) No.257 of 2023

1. Chotka Gope @ Chotu Gope @ Chhotka Gope @ Chhotaka Gope, aged about 26 years, S/o Lt. Vimal Gope, R/o Vill.-Tilabani, P.O and P.S-Musabani, District-East Singhbhum, Jharkhand.
2. Dhano Tudu, Aged about 24 years, S/o-Lakhan Tudu, R/o-Vill-Uparbandha, P.O and P.S-Musabani, District-East Singhbhum, Jharkhand

..... ... **Appellants**

Versus

The State of Jharkhand

... ... **Respondent**

**CORAM: HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD
HON'BLE MR. JUSTICE SANJAY PRASAD**

For the Appellant No.2: Mr. Manoj Kumar Dash, Advocate
For the Respondent : Mr. Vishwanath Roy, APP

Order No.07/Dated: 18th September, 2026

I.A. No. 12632 of 2026

1. The instant interlocutory application has been filed on behalf of the appellant no.2, namely, Dhano Tudu, under Section 430(1) and 2 of the Bhartiya Nagarik Suraksha Sanhita, 2023 for suspension of sentence passed by the learned Special Judge (POCSO) East Singhbhum, Jamshedpur, in connection with Spl. POCSO Case No.484 of 2015, arising out of Musabani P.S. Case No.50 of 2015 whereby and whereunder, he has been convicted under Sections 376D/511, 302/34 of the IPC and under Sections 4/18 and 8 of Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and sentenced to undergo rigorous imprisonment for life along with fine of Rs.20,000/- and in default of payment of fine, he has to further undergo imprisonment for six (6) months for the offence under Sections 302/34 of the Indian Penal Code. The appellant no.2 has further sentenced to undergo rigorous imprisonment for ten years along with fine of Rs.10,000/- for the offence under Sections 376D/511 of the Indian Penal Code and in default of

payment of fine, he has to further undergo imprisonment for three (3) months. However, no separate sentence has been passed against the appellant no.2 for the offences under POCSO Act.

2. This is the second attempt by the appellant/applicant for renewal of prayer for suspension of sentence.

3. At the outset, it needs to mention here that earlier the prayer for suspension of sentence of the present appellant/applicant has been rejected by this Court vide order dated 02.11.2023 passed in I.A No.9475 of 2023.

4. It has been contended by the learned counsel for the present applicant/appellant no.2, namely, Dhano Tudu that although the prayer for suspension of sentence of the present applicant/appellant has already been rejected by this Court vide order dated 02.11.2023 passed in I.A No.9475 of 2023, but now the appellant has already undergone sentence of more than 10 years out of maximum award of sentence of life imprisonment.

5. It has been submitted on behalf of the present applicant/appellant no.2 that maximum sentence inflicted upon the applicant herein is life imprisonment under section 302 of the IPC and, as such, on completion of more than 10 years of sentence he may be released on bail after suspending his sentence.

6. While, on the other hand, the learned APP appearing for the respondent-State of Jharkhand has vehemently opposed the prayer for suspension of sentence and submitted that earlier this Court has rejected

the prayer of suspension of sentence of the appellant on merit by a detailed order vide order dated 02.11.2023 passed in I.A No.9475 of 2023.

7. It has been contended by the learned State counsel that earlier this Court has considered all aspect of the matter and passed a detailed order based upon the deposition of the witnesses which has come against the present applicant/ appellant no.2 during the trial. It has been contended that it is not available for the present applicant/appellant no.2 to again raise the issue on merit without assailing the order dated 02.11.2023 rejecting the prayer for suspension of sentence.

8. It has been submitted that so far as the period of custody is concerned, the present applicant/appellant no.2 has only undergone the sentence of 10 ½ years out of maximum sentence of life imprisonment under section 302 of the IPC.

9. The learned State counsel, based upon the aforesaid ground, has submitted that, therefore, there is no reason for releasing the present appellant/applicant on bail by suspending his sentence.

10. We have heard the learned counsel for the parties and on appreciation of the arguments advanced on behalf of the parties, it is evident that the prayer for suspension of the present applicant/appellant no.2, namely, Dhano Tudu has already been dealt with by this Court while considering the interlocutory application being I.A No.9475 of 2023 vide order dated 02.11.2023.

11. This Court, after going through the order dated 02.11.2023 while rejecting the prayer for suspension of sentence of the appellant no.2, namely, Dhano Tudu, has found that the argument which has been advanced on merit on behalf of the applicant that there is no ingredient of commission of rape, has already been dealt with by this Court as would be evident from para-21 and while dealing the said argument as under para-22 and 23 thereof. It further appears from the aforesaid order that the prayer for suspension of sentence has been rejected on consideration of the testimony of the PW6, sister of the victim and PW7.

12. This Court has also taken into consideration the implication of section 29 of the POCSO Act which contained the mandatory presumption *qua* certain offences to be drawn against the accused in a prosecution for the offences under sections 3, 5, 7 and 9 of the POCSO Act, unless the contrary is proved.

13. This Court, based upon the consideration of the testimony of the witnesses as also the applicability of principle of reverse onus in view of the provision of section 29 of the POCSO Act as also by taking the aid of section 106 of the Evidence Act has rejected the prayer for suspension of sentence of the present applicant/ appellant no.2, for ready reference the said order is being referred hereunder as:

“1. The instant interlocutory application has been filed on behalf of the appellants, under Section 389(1) of the Cr.P.C. for suspension of sentence dated 25.02.2020 passed by the learned Special Judge (POCSO) East Singhbhum, Jamshedpur, in connection with Spl. Pocso Case No.484 of 2015, arising out of Musabani P.S. Case No.50 of 2015 whereby and whereunder, the appellants have been convicted under Sections 376D/511, 302/34 of the IPC and under Sections 4/18 and 8 of Protection of Children from Sexual Offences Act,2012 (Pocso Act) and sentenced to undergo rigorous imprisonment for life along with fine of

Rs.20,000/- and in default of payment of fine, they have to further undergo imprisonment for six (6) months for the offence under Sections 302/34 of the Indian Penal Code. The appellants have further sentenced to undergo rigorous imprisonment for ten years along with fine of Rs.10,000/- for the offence under Sections 376D/511 of the Indian Penal Code and in default of payment of fine, they have to further undergo imprisonment for three (3) months. However, no separate sentence has been passed against the appellants for the offences under Pocso Act.

2. The prosecution story as per F.I.R. in brief is that in the evening of 19.11.2015 the Karma Puja was being celebrated in the house of one Niranjan Choudhary. The two daughters of informant had gone to see the Karma Puja. At about 8:00 pm. Chhotka Gope and Dhanu Tuddu took away the elder daughter of informant/victim "X" after inducing her. The younger daughter of informant came to the house and she told that Chhotka Gope and Dhanu Tuddu (appellants herein) took away her sister. The informant and his family members searched for the victim daughter but they did not find. They went to the house of Chhotka Gope and Dhanu Tuddu, but they were also not present in their respective houses. During this period, a hullah was raised in the village that the dead body of a girl has been thrown in bushes situated at northern side of village Tilabani. On that information, informant and his family members went there and saw the dead body of his daughter where they found that a thin rope was wrapped around her neck. Some blood was oozing from her both ears. There was mark of rope on her neck and the panty was present near the dead body. On 20.11.2015 at about 6:00 p.m. some villagers saw Chhotka Gope and Dhanu Tuddu in village and after seeing the villagers they started fleeing. They were apprehended by the villagers after chasing them for some distance. It is stated that previously on 18.11.2015 aforesaid accused persons had attempted to commit rape upon his daughter after giving money and Pakora to her. When the informant got knowledge about this, a Panchayati was held in the village and they were reprimanded in that meeting. It is alleged that accused persons have committed rape with informant's daughter and killed his daughter after pressing her neck by thin rope.

3. Accordingly, F.I.R has been lodged against accused persons (appellant herein) for the offences U/s 376D/ 302/ 201/34 of the IPC and under 4/8 of the POCSO Act.

4. Learned Counsel appearing for the appellant has submitted that it is a case where the prosecution has miserably failed to prove the charge beyond all reasonable doubts. Such argument has been made on the following grounds:

(k) The post-mortem report (Ext-7) of deceased victim does not disclose about the sexual assault with the victim and no injury was found on the private part of deceased victim.

(ii) As per the S.F.S.L report no trace of semen was found in the vaginal swab of the deceased victim.

(iii) There are material contradictions and omissions in the statements of the prosecution witnesses which is evident from the deposition of P.W.7 the mother of deceased victim wherein she has testified that she has not disclosed to her husband that her daughter (sister of the deceased victim) had stated to her that the appellants took away the victim after pressing her mouth.

(iv) Appellants are innocent persons and they have no criminal antecedent and they have been falsely implicated in the instant case solely due to village politics.

6. While, on the other hand, the learned APP appearing for the State has vehemently opposed the prayer for suspension of sentence on the following grounds:

(i) The P.W.-6 (Sister of Victim) is eye-witness of the occurrence, when both accused persons took away the victim and when this witness came to home, she had narrated the entire occurrence to her parents.

(ii) There was no reason as to why, P.W.6, a minor child will tell a lie and that too to implicate the present accused/appellants only and no one else. In the statement U/s-313 of Cr.P.C., both accused persons/appellants have not given any explanation regarding the aforesaid fact which are especially within their knowledge and, as such, the requirement of section 106 of the Evidence Act has not been followed by the accused.

(iii) Further, there was motive also to commit the said crime because a day before the occurrence, they had given Rs.-10/- to deceased and called her inside the house and for this act a panchayati was held and both accused persons were admonished by villagers.

The aforesaid fact has been substantiated by P.W.4 the father of victim and P.W.7 the mother of the victim and the both accused persons have also accepted this fact while recording of their statement U/s-313 of Cr.P.C.

(iv) Further, section 29 and 30 of the POCSO Act raise statutory presumption against the accused/appellants regarding their culpable mental state or regarding commission of offence by them unless contrary is proved.

(v) Further the chain of circumstances in this case is complete and the motive of this incident was clear as per evidence of prosecution witnesses.

7. Learned A.P.P, based upon the aforesaid argument, has submitted that it is not a case where sentence is required to be suspended.

8. This Court has heard learned counsel for the parties, perused the finding recorded by learned trial Court in the impugned order as also the testimonies of the witnesses including the documents available in Lower Court Records.

9. This Court, before appreciating the argument advanced on behalf of parties in order to examine as to whether in the given facts of the case it is a fit case where sentence is to be suspended, deems it fit and proper to refer the settled position of law regarding consideration to be made at the time of suspension of sentence, as has been settled by Hon'ble Apex Court in **Preet Pal Singh vs. State of U.P.** reported in (2020) 8 SCC 645 has held at paragraphs 32 and 35 as under:

“32. In *Mauji Ram v. State of U.P.* [(2019) 8 SCC 17] , this Court referred to *Ajay Kumar Sharma v. State of U.P.* [(2005) 7 SCC], *Lokesh Singh v. State of U.P.* [(2008) 16 SCC 753] and *Dataram Singh v. State of U.P.* [(2018) 3 SCC 22] and stated categorically that this Court had time and again emphasised the need for assigning reasons while granting bail.

35. There is a difference between grant of bail under Section 439 CrPC in case of pre-trial arrest and suspension of sentence under Section 389 CrPC and grant of bail, post-conviction. In the earlier case, there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in *Dataram Singh v. State of U.P.* [*Dataram Singh v. State of U.P.*, (2018) 3 SCC 22 : (2018) 1 SCC (Cri) 675] **However, in case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling**

reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) CrPC.”

10. It is evident from the aforesaid judgment, that while considering the suspension of sentence under section 389 of Cr.P.C., which is the post-conviction stage, the presumption of innocence in favour the accused cannot be available and at this stage, the Court’s only duty is to see that the prima-facie case is made out or not.

11. Recently, the Hon’ble Apex Court in the case of **Omprakash Sahni v. Jai Shankar Chaudhary & Anr., (2023) 6 SCC 123** has been pleased to hold that in cases involving conviction under Section 302 IPC, it is only in exceptional cases that the benefit of suspension of sentence can be granted and while considering the bail, the Court should take care of the relevant factors like the nature of accusation made against the accused and the manner in which the crime is alleged to have been committed. The Hon’ble Apex Court further held that the appellate court should not reappreciate the evidence at the stage of Section 389 Cr.P.C. and try to pick up a few lacunae or loopholes here or there in the case of the prosecution. Such would not be a correct approach. For ready reference the relevant paragraphs are being quoted herein under:

“31. In *Vijay Kumar v. Narendra* [*Vijay Kumar v. Narendra*, (2002) 9 SCC 364 : 2003 SCC (Cri) 1195] and *Ramji Prasad v. Rattan Kumar Jaiswal* [*Ramji Prasad v. Rattan Kumar Jaiswal*, (2002) 9 SCC 366 : 2003 SCC (Cri) 1197] , it was held by this Court that in cases involving conviction under Section 302IPC, it is only in exceptional cases that the benefit of suspension of sentence can be granted. In *Vijay Kumar* [*Vijay Kumar v. Narendra*, (2002) 9 SCC 364 : 2003 SCC (Cri) 1195] , it was held that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302IPC, **the court should consider the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, and the desirability of releasing the accused on bail after they**

have been convicted for committing the serious offence of murder.

33. 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 abovesaid 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 takes 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 CrPC and try to pick up a few lacunae or loopholes here or there in the case of the prosecution. Such would not be a correct approach.**”

12. We are now proceeding to examine the material available on record and the rival submissions advanced on behalf of parties.

13. From perusal of the record, it is evident that in the instant case the death of deceased victim was homicidal in nature. The dead body of victim was found in bushes and a thin rope was wrapped around the neck of the deceased and the panty was present near the dead body.

14. It is evident from the testimony of P.W.-6 the younger sister of the minor victim that she went to see Karma puja with her sister (victim deceased) and when they were returning from there, both the accused persons took away her sister. P.W.-6 came to her house and disclosed this fact to the mother of the victim (P.W.-7). The father of P.W.-6 was not present at that time and when he returned

home in the morning, then he got knowledge about the occurrence. On search, the dead body of deceased victim was found in bushes.

15. The testimony of P.W.6 has been substantiated by P.W.-7 mother of deceased wherein she has stated that her daughters went to see Karma Puja at 8:00 pm. and at that time her husband was not present at home. Her daughter (P.W.-6) came back and told about the occurrence but P.W.-7 had not stated aforesaid fact to her husband because he was at the house of Niranaajan and when he returned back home in the morning, came to know about this.

16. It is pertinent to mention here that in the statement recorded under Section 313 of Cr.P.C., both accused persons (appellants herein) did not give any cogent explanation regarding the aforesaid fact which was especially within their knowledge.

17. It is the settled connotation of law that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. In plethora of judgments the hon'ble Apex Court has dealt with the interpretation of Section 106 of the Evidence Act and held that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.

18. From perusal of record and testimonies of witnesses it appears that the appellants have not sufficiently explained or rebutted the facts with cogent evidence that why they had taken the deceased victim by pressing her mouth.

19. Further it is also on record that just one day before this occurrence, both accused persons had given Rs.10/- to victim and had asked her to come inside the house for which a meeting was held in village and both accused persons were reprimanded by villagers. The aforesaid fact has been substantiated by the testimonies of PW-4, PW-5 and PW-7. Thus, from the aforesaid fact it is evident that the motive was also present with the accused persons.

20. The foremost argument which has been advanced on behalf of appellant is that as per the post-mortem report (Ext-7), the victim

was not subjected to the sexual assault and as per the S.F.S.L report no trace of semen was found in the vaginal swab of the deceased victim, therefore, appellants cannot be held liable for the offence under section 376D/511 of the Indian Penal Code.

21. In the context of the argument as advanced by the learned counsel for the appellants, it is pertinent to mention that admittedly as per the postmortem report (Ext.-7), it appears that there is no injury in or around vagina or any private part of the body of deceased victim. The report (Ext.-8) of the vaginal swab which was taken at the time of postmortem and was sent to S.F.S.L., Ranchi for examination, shows that semen was not detected in the exhibits marked-A (Cotton buds).

22. Thus, as per above discussion, it appears that the P.M. report does not disclose that there is sexual assault with the victim, no injury was found on the private part of the deceased victim and the S.F.S.L. report also does not show that there is presence of semen in vaginal swab of deceased.

23. But, as per the testimony of P.W.6, the accused persons had taken away the deceased victim by pressing her mouth. The dead body of victim was found in the morning in the bushes and as per inquest report, a thin rope was wrapped in her neck. Her panty was found beside the dead body of deceased victim, which shows that her panty was removed. It means prima facie inference may be drawn that accused person who have not sufficiently explained the circumstances of taking away the victim with sexual intent and they made attempt of rape after removing the panty of deceased victim "X" which was lying near the dead body of victim.

24. Further it is pertinent to mention here that the deceased victim was last seen in the company of both accused persons and time gap between last seen in the company of accused and recovery of dead body of the deceased was a very short span of time and both accused persons have not given any explanation regarding the facts which were especially within their knowledge.

25. Further Under Section 29 of POCSO Act, a mandatory presumption qua certain offences is to be drawn against the accused in a prosecution for offences under Sections 3, 5, 7 and Section 9 of this Act, unless the contrary is proved. Similarly, Section 30 of POCSO Act mandates that the special Court shall

draw a presumption of the existence of culpable mental state of the accused where culpable mental state is required on the part of accused it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

26. Therefore, from the above facts, oral and documentary evidences available on the record, prima-facie indicate the involvement of accused/appellants in commission of said offence.

27. Considering the same, we are of the view that it is not a case where the sentence is to be suspended.

28. Accordingly, interlocutory application being I.A. No.9475 of 2023 stands dismissed.

29. It is made clear that any observation made herein will not prejudice the case of the appellants issue since the appeal on merit is lying pending for its consideration.

30. Let a copy of this order be forwarded to the appellant through Jail Superintendent.”

14. So far as the issue of ground of sentence having been undergone by the present applicant of 10 ½ years is concerned, the law is well settled that merely on account of the fact that the convict has undergone the sentence of more than 10 years against the maximum sentence of life imprisonment alone cannot be a ground for suspension of sentence as has been held by the Hon’ble Apex Court in the case of ***State of Haryana v. Hasmat, (2004) 6 SCC 175.***

15. The Hon'ble Apex Court in the case of ***State of Haryana v. Hasmat, (Supra)*** has observed that the appellate court is duty-bound to objectively assess the matter and to record reasons for the conclusion that the case warrants suspension of execution of sentence and grant of bail, and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine, for ready reference, the

relevant paragraphs of the aforesaid judgment is being quoted herein:-

"6. Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. There is a distinction between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement for the appellate court to record reasons in writing for ordering suspension of execution of the sentence or order appealed. If he is in confinement, the said court can direct that he be released on bail or on his own bond. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine.

7. The appellate court is duty-bound to objectively assess the matter and to record reasons for the conclusion that the case warrants suspension of execution of sentence and grant of bail.

16. It is settled connotation of law that even if the convict has completed substantive sentence, that cannot be a sole ground for suspension of sentence if the nature of offence having been proved in course of trial is serious.

17. The Hon'ble Apex Court in the case of ***Shivani Tyagi v. State of U.P. & Anr. 2024 INSC 343*** has derived the principle that the factors like nature of the offence held to have committed, the manner of their commission, the gravity of the offence, and also the desirability of releasing the convict on bail are to be considered objectively and such consideration should reflect in the consequential order passed in relation of suspension of sentence.

18. Further, it is settled connotation of law that the appellate court should not reappreciate the evidence at the stage of consideration of suspension of sentence and try to pick up a few lacunae or loopholes here or there in the case of the prosecution. Such would not be a correct approach and at this stage Court is only to see the prima facie case for its

satisfaction.

19. It is evident from the proposition as laid down by the Hon'ble Apex Court in the judgments referred hereinabove, that the period undergone cannot be a basis of suspension of sentence, rather the merit is also to be assessed.

20. The ground of no sign of rape has been raised by the learned counsel appearing for the appellant which has already been dealt with by this Court while rejecting the prayer for suspension of sentence vide order 02.11.2023 passed in I.A No.9475 of 2023.

21. Otherwise, it does not mean that once the prayer for suspension of sentence has been rejected the prayer cannot be renewed. Certainly, the same can be renewed but the ground should be a fresh one if the order passed by this Court rejecting the prayer for suspension of sentence has been renewed without challenging the same before higher Forum.

22. This Court, therefore, is of the view that if this Court will again go into the issue which was earlier dealt with by this Court that will amount to reviewing the earlier order which will not be proper.

23. The issue of custody that the present applicant/appellant no.2 has undergone 10 ½ years of sentence against the maximum sentence of imprisonment of life has also been taken into consideration. The same can also not be a ground for suspension of sentence, since, the appellant has been convicted for life.

24. In view of the discussions made hereinabove, this Court is of the view that there is no fresh ground made in the present application for

suspension of sentence of the present applicant/appellant no.2, namely, Dhano Tudu and, as such, it is dismissed.

25. Accordingly, I.A. No. 12632 of 2026 stands dismissed.

26. It is made clear that any observation made hereinabove will not prejudice the case on merit, since, the criminal appeal is lying pending before this Court for its consideration.

27. Let a copy of this order be forwarded to the appellant no.2 through Jail Superintendent.

(Sujit Narayan Prasad, J.)

(Sanjay Prasad, J.)

Dated:18.09.2026
Sudhir