

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL APPLICATION NO.1601 OF 2023
IN APEAL/287/2023 WITH APEAL/287/2023**

**TANHYA @ VICKY NARAYAN JADHAV
VERSUS
THE STATE OF MAHARASHTRA**

...
Advocate for Applicant : Mr. S. S. Jadhav
APP for Respondent: Mr. Y. G. Gujarathi

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CORAM : S. G. MEHARE, J.

DATE : 20.07.2023

PER COURT :

1. Hear the learned counsel for the applicant and the learned A.PP for the respondent State.

2. The applicant/convict is seeking suspension of the sentence to undergo rigorous imprisonment for 10 years imposed upon him in Sessions Case No. 73/2022 by the learned Additional Sessions Judge, Jalna for the offence punishable under Sections 394 of the Indian Penal Code.

3. The learned counsel for the applicant would submit that the judgment of the conviction completely rests upon the test identification parade. The complainant/first informant, cannot be

believed as he saw the accused before identification in police lock-up. Since co-accused who has been acquitted, was not in the lock up, the complainant did not identify him. His description was not given in the First Information Report. Merely, recovery of stolen property, without referring to its owner i.e. the complainant, the accused cannot be convicted. He would also argue that the applicant is 32 years old. Out of 29 cases, 10 cases have been disposed of. Considering his age, the execution of the sentence may be suspended. He also argued that the evidence collected by the investigating officer and witnesses testified before the Court were not sufficient to conclude that the accused had robbed the first informant. Considering pendency of the cases, the appeal may takes its time. Therefore, his sentence may be suspended.

4. Per contra the learned A.P.P. would argue that the applicant is a hardened criminal. There are 10 convictions to his discredit for the similar offences. Whether his test identification is legal or illegal is a matter of merit. The recovery of stolen ornament was the best evidence against him. Therefore, whether identification of the stolen property by its owner affects the trial is also a matter to be decided at the final hearing. Considering his past, releasing the applicant on bail may cause the inconvenience and unsafe feelings among the common man. The prosecution has cogently proved the

charges against him Therefore, he does not deserve suspension of the sentence.

5. The normal rule of any suspension during appeal is laid down in **Kiran Kumar Versus State of M.P. (2001) 9 SCC 211** laid down by the Hon'ble Supreme Court

“ Where during the pendency of the appeal the High Court rejecting appellant's application for suspension of sentence, the Supreme Court laid down : The normal rule is that when the appeal of a person convicted and sentence is pending, the sentence passed on him should be suspended unless any exceptional reason existing therein requires the denial of the same.”

6. The Supreme Court in the case of **K.C Sareen Versus CBI (2001) 6 SCC 584:2001 SCC (Cri) 1186** observed that

“though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal to challenge his conviction, the Court should not suspend the operation of the order of conviction. The Court has a duty

to look at all the aspects including the ramification of keeping such convictions in abeyance. The suspension order has to be reasoned order. It should be passed considering all relevant aspects carefully and not as a matter of routine ”.

7. The issue as regards identification of the accused and non identification of stolen property by its owner has been raised to convince the Court that it is difficult to held him guilty. As observed in case of Kiran Kumar, normal is rule to exercise the power under section 389 of the Cr.PC in favour of the accused. However, it is not absolute rule that the sentence in every case shall be suspended but where there are exceptional circumstances the suspension may be denied.

8. The argument of the learned counsel for the applicant did not convince this Court that the applicant was not involved in the similar crime. However, police made him an accused in various similar cases. The reason is obvious that the Court has to assess the reasoning given by the learned Judge in the impugned order. *Prima facie the* Court has to examine whether the judgment of conviction is based upon the proper appreciation of the evidence.

9. Here in the case at hand, the recovery of the stolen article and identification of the accused are the circumstances against him. However, its legal consequences were considered on merits. Considering the evidence brought on record, the applicant has been convicted. The exceptional circumstances in this case were that at the age of 32 there are 29 similar cases registered against him and in 10 cases the applicant has been convicted. His conduct itself is exceptional circumstance to deny his request for suspension of sentence.

10. The applicant has a bad past. He was repeatedly involved in the crime. He is convict of ten cases for the similar offences. It seems that the applicant did not bent upon to keep himself away from the similar offences. He seems to be a habitual offender. The suspension of sentence of such person and granting bail would not be in the interest of public at large. The graph of his crime is increasing day by day. Therefore, this Court is of the view that this is not a fit case to exercise the discretion under Sections 389 of the Code of Criminal Procedure. Hence, the application stands dismissed.

11. Since the applicant is in jail, convict the learned counsel for the appellant requested the Court to expedite the appeal.

12. List the matter in due course.

(S. G. MEHARE)
JUDGE

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