



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 2800 OF 2023
IN
CRIMINAL APPEAL NO. 683 OF 2023

Ankush Popat Wadane
Age 38 years, Occu- nil,
R/o: Malumbra,
Taluka Tuljapur,
District Osmanabad.

... Appellant

Versus

1. The State of Maharashtra
Through Police Station Murum Taluka Omerga,
Taluka Omerga,
District Osmanabar.

2. XYZ

... Respondents

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Mr. R. J. Nirmal, Advocate for the Applicant.
Mr. Uma S. Bhosale, APP for Respondent No.1-State.
Mr. R. S. Shinde and Mr. V. P. Latange, Advocate for Respondent
No.2.

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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATED : 18.12.2023

ORDER [ABHAY S. WAGHWASE, J.] :

1. By invoking Section 389 of the Code of Criminal Procedure [Cr.P.C.], prayers are raised for suspension of sentence and grant of bail during pendency of appeal bearing Criminal Appeal No. 683 of 2023.

2. Learned counsel for the applicant submits that there is false implication. There are allegations that victim was taken away when she had been to answer call of nature and was sexually abused. Initially, information was regarding said act committed by unknown person. Therefore, learned counsel submits that there is doubt whether there is proper identification. He tried to submit that merely because accused was also in the same vicinity and had been for answering call of nature, he is mistaken to be the culprit and arrested after being caught by people. That, case has not been proved beyond reasonable doubt and entire case is based on circumstantial evidence and scientific evidence. That, applicant has strong case in appeal, but as it would take long time, relief of suspension and grant of bail are pressed into service.

3. Above relief is resisted by learned APP for State as well as learned counsel representing victim on the ground that offence is serious and victim is a child and there is severe sexual assault which is confirmed through medical experts. It is also brought to the notice that instant crime is not the only crime committed by applicant and previously also similar offences have been committed by him and as such he is habitual offender. For such reasons, prayers are sought to be rejected.

4. Heard learned counsel for respective sides.

5. We are now called upon to exercise powers under Section 389 of Cr.P.C. for suspending the sentence inflicted by trial Judge along with prayer for grant of bail during pendency of appeal. Above section permits suspension of sentence after conviction and even permits setting convict at liberty. However, it is fairly settled that such powers are to be exercised only in exceptional cases and in rare circumstances when it is palpably shown that there are fair chances of success in appeal and when appellate court is satisfied about existence of apparent and gross error on the face of record. Obviously, at this stage, there cannot be meticulous re-appreciation of the evidence but only on *prima facie* consideration and satisfaction, if the court feels that conviction may not be sustained while rejudging the case, only in such exceptional cases, sentence has to be suspended and bail can be granted to the prisoner till decision of the appeal by the appellate court. As to what are the exceptional cases and rare cases has not been defined or categorized but going by the precedents, certain factors like gravity of offence, nature of crime, circumstances in which offence has taken place are a few considerations which are expected to be borne in mind while exercising powers under Section 389 of

Cr.P.C. There are catena of judgments on above point and a few could be named as *Rama Narang v. Ramesh Narang and others* (1995) 2 SCC 513 ; *Rajesh Rajan Yadav alias Pappu Yadav v. CBI* (2007) 1 SCC 70 and *Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)* (2008) 5 SCC 230 wherein scope, object and purport of Section 389 of Cr.P.C. has been distinctly and lucidly discussed.

6. Very recently, the Hon'ble Apex Court in the case of *Omprakash Sahni v. Jai Shankar Chaudhary and another* (2023) LiveLaw SC 389 has elaborately dealt with the precedent on above provision and after dealing with above referred cases and other cases namely, *Ash Mohammad v. Shiv Raj Singh alias Lalla Babu and another* (2012) 9 SCC 446; *Bhagwan Rama Shinde Gosai and Others v. State of Gujarat* (1999) 4 SCC 421; *Hasmat* [(2004) 6 SCC 175]; *Vijay Kumar v. Narendra and Others* [(2002) 9 SCC 364]; *Atul Tripathi v. State of Uttar Pradesh and Others* (2014) 9 SCC 177; *Kishori Lal v. Rupa and Others* (2004) 7 SCC 638; *Ramji Prasad v. Rattan Kumar Jaiswal and Another* (2002) 9 SCC 366; *Vasant Tukaram Pawar v. State of Maharashtra* (2005) 5 SCC 281 and *Gomti v. Thakurdas and Others* (2007) 11 SCC 160, culled out following propositions in para 33 of the judgment which is as under:

“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 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 CrPC and try to pick up few lacunas or loopholes here and there in the case of the prosecution. Such would not be a correct approach.”

7. Therefore, the legal proposition that is settled is that though it is a discretionary power, it is expected to be exercised judiciously and in only such cases in which circumstances and reasons exist to grant such relief. Ultimately, it all depends on the facts and circumstances

of each case and there is no straight jacket formula or absolute rule for grant or refusal. However, in the case of ***Vijay Kumar*** (supra) as well as ***Atul Tripathi*** (supra), it has been held that court should consider factors like nature of accusation, manner in which the crime is alleged to have been committed, gravity of offence, age, criminal antecedents of the convict, desirability of releasing the accused on bail by suspending the sentence etc.

8. After hearing both sides and on going through the papers cursorily, there seems to be charge for offences punishable under Sections 363, 376-AB, 376-E, 377 of the Indian Penal Code [IPC], Sections 3(a)(b), 4(2), 5(i), 5(m), 5(t), 6, 14 of the Protection of Children from Sexual Offences Act, 2012 and Section 66E of the Information Technology Act, 2000. It seems that victim in this case was studying in 1st standard. When she had been to answer call of nature on 30.08.2022, she was allegedly taken beside the field and sexually assaulted. Doctor, who medically examined as well as the treating doctor both have confirmed sexual assault. When mother realized that her daughter was missing, search seems to have been undertaken. Witnesses, namely, Nanda, Hanmant and Yakub also accompanied in the search and they have also been examined by prosecution. It is claimed that applicant was seen running by carrying

his own clothes and was resultantly chased and caught hold of. PW2 Nanda, PW3 Hanmant, PW4-mother of victim as well as PW5 victim herself have narrated about the occurrence. Medical experts, who examined and treated victim are also examined as PW11, PW17 and PW18. Even DNA examination seems to have been got done.

Considering the gravity of the offence, the age of the victim, the circumstances in which serious offence has been committed, we do not consider a case being made out to extent the relief sought before us. Hence, the application is rejected.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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