



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 3171 OF 2023
IN
CRIMINAL APPEAL NO. 969 OF 2023

Devendra Rajendra Bhoi (More)
Age 24 years, Occu. Footana Seller,
R/o. Vaijapur, Taluka Chopda,
District Jalgaon.

... Applicant

Versus

1. The State of Maharashtra
2. XYZ

... Respondents

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Mr. Satej S. Jadhav, Advocate for the Applicant.
Mr. S. D. Ghayal, APP for Respondent No.1-State.
Mr. K. L. Tupe h/f Mr. Y. A. Jadhav, 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.], the applicant/appellant is praying for suspension of sentence and grant of bail during pendency of appeal.

2. Learned counsel for the applicant would submit that applicant is held guilty for charge under Sections 323, 341, 354, 363, 376, 376-A and 506 of the Indian Penal Code as well as Sections 5(m), 8 and

12 of the Protection of Children from Sexual Offences Act, 2012. It is pointed out that statements of victim are recorded by taking aid of translator and therefore it is doubtful whether it is a correct version. He pointed out that there are accusations about initially kidnapping two girls and sexually abusing them but there is no proper identification. Only description given is that the person who sexually abused was a gram seller. The person who abused was allegedly seen in the light of a mobile torch. Only piece of evidence which seems to have prevailed over learned trial Judge is the DNA evidence/forensic evidence but, according to him, there are major infractions and lapses while collecting samples and therefore appellant has a good case in appeal. However, according to him, it would take long time for hearing of the appeal and so at this juncture he prays for suspension of sentence and grant of bail.

3. Learned APP and learned counsel representing victim, both are resisting the above relief by pointing out that there is overwhelming evidence. That, both victims have identified accused. There is severe sexual assault on two minor girls belonging to reserved category. Therefore, serious offence has been committed and on proper appreciation, guilt is recorded. On such reasons, relief is resisted.

4. Heard 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 straightjacket 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. Keeping in mind the above legal position, we have *prima facie* considered the material before us. Victims appear to be sisters aged 8 years and 7 years respectively and are taking education in primary school. It seems that on 13.08.2019, one Surmal and his wife brought victims who were in terrified condition and were having injuries on their person. Victims seem to have narrated that while they were going for answering call of nature, they were picked up on a motorcycle and taken to an open plot and ravished.

PW17, who has medically and physically examined the victims, has noticed and confirmed sexual assault. Both victims seem to have also identified accused in the court. Issue of identification and correctness and reliability of forensic evidence cannot be gone into at this stage. Admittedly, accused was not on bail even during trial.

Taking overall circumstances into consideration, including the gravity and seriousness of the offence, we do not find it a fit case to grant relief as prayed. The application is accordingly rejected.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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