

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

**CRIMINAL APPLICATION NO.3697 OF 2023
IN
CRIMINAL APPEAL NO.167 OF 2023**

Navnath Baliram Borade,
Age-37 years, Occu:Agri.,
R/o-Sawargaon, Tq-Bhoom,
Dist-Osmanabad.

**...APPLICANT
(Orig. Accused No.2)**

VERSUS

The State of Maharashtra,
Through in-charge Paranda
Police Station, Tq-Paranda,
Dist-Osmanabad.

...RESPONDENT

...
Mr. V.D. Sapkal, Senior Counsel i/b. Mr. Sandip R. Sapkal
Advocate for Applicant.
Mr. A.M. Phule, A.P.P. for Respondent-State.
...

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

DATE OF RESERVING ORDER : 25th OCTOBER 2023

DATE OF PRONOUNCING ORDER : 7th NOVEMBER 2023

ORDER [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Application is the second application for suspension

of sentence filed by original accused No.2, who came to be convicted in Sessions Case No.173 of 2014 on 29th September 2020 by the learned Additional Sessions Judge, Bhoom, District-Osmanabad for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. The earlier application for suspension of sentence i.e. Criminal Application No.184 of 2021 in Criminal Appeal No.672 of 2020 came to be withdrawn on 14th September 2021. Though it is not stated in the said order that the said withdrawal was after the disinclination shown by this Court (Co-ordinate Bench), however, the separate order passed on the Criminal Appeal on the same day, shows that note was taken that the appellants were not on bail but they were in jail right from 2014. Learned Senior Counsel Mr. V.D. Sapkal instructed by learned Advocate Mr. S.R. Sapkal for the applicant, however, admits that the earlier application was withdrawn after the disinclination was shown by this Court.

2. Heard learned Senior Counsel for the applicant as well as learned APP for the respondent.

3. It has been vehemently submitted by the learned Senior Counsel that the earlier bail application was filed by the present

appellant along with co-accused, however, after seeking permission, present applicant has filed separate Appeal. In all ten accused faced the prosecution. The trial Court has held accused Nos. 1, 2 and 3 guilty of committing offence punishable under Section 302 read with Section 34 of the Indian Penal Code and they have been sentenced to suffer rigorous imprisonment for life and to pay fine. Along with accused Nos.1, 3 to 9, present applicant who is accused No.2, came to be acquitted of the offence punishable under Sections 120-B, 143, 147, 148, 201 read with Section 149 of the Indian Penal Code, Section 4 punishable under Section 25 of the Arms Act and Section 37(1) (3) read with Section 135 of the Bombay Police Act. After narrating the story of the prosecution, learned Senior Counsel submits that appellant is in jail since 2014 and in fact when the earlier application was withdrawn, at that time the appeal was expedited and was placed for final hearing on 11th October 2021. However, due to paucity of time, it could not be taken up and since then the applicant is waiting for his matter to be taken up for final hearing. Co-accused Mangesh Borade i.e. accused No.1 filed application for suspension of sentence but it came to be rejected on 27th January 2023. It is not possible for this Court to take up the matter within a short period and therefore, as per

the settled position of law when the applicant is in jail for more than nine years, his bail application should be considered positively. The applicant is the only bread earner of the family and having domestic responsibilities on his shoulders. His mother is also suffering from several ailments. The applicant was released on medical parole for short period on 1st September 2023.

4. Learned Senior Counsel is relying on the decision in ***Kashmira Singh vs. The State of Punjab, 1977 Cri. L.J. 1746***, wherein the Hon'ble Supreme Court observed that if it is not likely that the appeal would be taken in a near future for final hearing then application for suspension of sentence should be considered. It was also observed that:-

"It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for a quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?"

5. Learned Senior Counsel also relies the decision in ***Madan Singh vs. State of Madhya Pradesh, AIR 2018 SC (Supp)***

1126, wherein it has been held that when the accused had already undergone a custody for a period of seven years and the appeal pending before the High Court would take some time for disposal when accused was convicted under Section 302 read with 34 of the Indian Penal Code, then the accused is entitled to be released on bail. Learned Senior Counsel, relying upon these pronouncements, has prayed for suspension of sentence and release of the applicant on bail.

6. Per contra, the learned APP submitted that the earlier application has been voluntarily withdrawn by the appellant / applicant when this Court had shown disinclination to grant similar relief in the past. On the merits, there is evidence against the present applicant and that was noted in the order passed by this Court when similar application was filed by co-accused Mangesh Borade and therefore, no discretion deserves to be exercised in favour of the applicant.

7. At the outset, it is to be noted that in ***Kashmira Singh vs. The State of Punjab*** (supra), the said appellant was convicted by the Sessions Court for an offence under Section 323 of the Indian Penal Code and was sentenced to suffer six

month rigorous imprisonment. There was charge against the appellant therein for an offence under Section 302 of the Indian Penal Code but he was acquitted of that offence by the Sessions Court. The State had preferred an appeal against the order of acquittal to the High Court and then the said appeal was allowed. Hon'ble High Court had set aside the order of acquittal and convicted the appellant of the offence under Section 302 of the Indian Penal Code and sentenced him to suffer imprisonment for life. In view of this position or situation, those observations have been made while releasing the appellant, by the Hon'ble Supreme Court, by suspending his sentence. Here definitely facts are different. The applicant / appellant along with the co-accused was charged for offence punishable under Section 302 read with Section 34 of the Indian Penal Code and came to be convicted for the said offence, which has to be considered as a serious offence and therefore, we are of the opinion that the said ratio cannot be made applicable to the facts of this case. Further, as regards ***Madan Singh vs. State of Madhya Pradesh*** (supra) is concerned, the Hon'ble Supreme Court took note of the sentence imposed against the appellant therein for offence under Section 302 read with Section 34 of the Indian Penal Code and his

custody for a period of over seven years and within its discretion the said application came to be allowed.

8. We would like to consider certain observations from ***Somesh Chaurasia vs. State of Madhya Pradesh and another, AIR 2021 SC 3563***. In Para Nos. 30 to 32 the Hon'ble Apex Court has observed thus:-

" 30. Section 389(1) of the CrPC allows the court to release a convicted person on bail. The second proviso to Section 389(1) of CrPC provides that where a convicted person has been released on bail, it is open to the public prosecutor to file an application for the cancellation of bail. However, the grant of bail post-conviction is governed by well-defined procedures and parameters. The factors that govern the grant of suspension of sentence under Section 389(1) have been discussed by this Court (speaking through Justice Kurian Joseph) in ***Atul Tripathi vs. State of U.P., (2014) 9 SCC 177*** in the following terms:

"It may be seen that there is a marked difference between the procedure for consideration of bail under Section 439, which is pre conviction stage and Section 389 Code of Criminal Procedure, which is post-conviction stage. In case of Section 439, the Code provides that only notice to the public prosecutor unless impractical be given before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Sessions or where the punishment for the offence is imprisonment for life; whereas in the case of post-conviction bail under Section 389 Code of Criminal Procedure, where the conviction in respect of a serious offence having punishment with death or life imprisonment or imprisonment for a term not less than ten years, it is mandatory that the appellate court gives an opportunity to the public prosecutor for showing cause in writing against such release.

15. Service of a copy of the appeal and application for bail on the public prosecutor by the Appellant will not satisfy the requirement of first proviso to Section 389 Code of Criminal Procedure. The

appellate court may even without hearing the public prosecutor, decline to grant bail. However, in case the appellate court is inclined to consider the release of the convict on bail, the public prosecutor shall be granted an opportunity to show cause in writing as to why the Appellant be not released on bail. Such a stringent provision is introduced only to ensure that the court is apprised of all the relevant factors so that the court may consider whether it is an appropriate case for release having regard to the manner in which the crime is committed, gravity of the offence, age, criminal antecedents of the convict, impact on public confidence in the justice delivery system, etc. Despite such an opportunity being granted to the public prosecutor, in case no cause is shown in writing, the appellate court shall record that the State has not filed any objection in writing. This procedure is intended to ensure transparency, to ensure that there is no allegation of collusion and to ensure that the court is properly assisted by the State with true and correct facts with regard to the relevant considerations for grant of bail in respect of serious offences, at the post conviction stage.”

31. This Court in ***Ramji Prasad vs. Rattan Kumar Jaiswal and Anr., (2002) 9 SCC 366*** has observed that in cases involving conviction under Section 302 of the IPC, the sentence should be suspended only in exceptional cases.

32. In ***Masood Ali Khan vs. State of U.P. and Ors., (2009) 3 SCC 366***, this Court has held that the mere fact that the accused, who were on bail during the period of trial, did not misuse their liberty is not a sufficient reason for the grant of suspension of sentence post-conviction. This Court by placing reliance on ***Vijay Kumar vs. Narendra, (2002) 9 SCC 364*** reiterated that all the relevant factors including “nature of accusation made against the accused, the manner in which the crime was alleged to have been committed, the gravity of the offence, desirability of releasing the accused on bail after they have committed the serious offence of murder” must be looked into.

9. We would also like to take note of the decision in ***Omprakash Sahni vs. Jai Shankar Chaudhary and another, AIR 2023 SC 2202***, wherein various previous decisions have

been considered. Out of that it is necessary to consider the ratio in ***Kishori Lal vs. Rupa and others, 2004(7) SCC 638***, which reads thus:

"4. 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 against. 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.

5. 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. In the instant case, the only factor which seems to have weighed with the High Court for directing suspension of sentence and grant of bail is the absence of allegation of misuse of liberty during the earlier period when the accused-respondents were on bail.

6. The mere fact that during the trial, they were granted bail and there was no allegation of misuse of liberty, is really not of much significance. The effect of bail granted during trial loses significance when on completion of trial, the accused persons have been found guilty. The mere fact that during the period when the accused persons were on bail during trial there was no misuse of liberties, does not per se warrant suspension of execution of sentence and grant of bail. What really was necessary to be considered by the High Court is whether reasons existed to suspend the execution of sentence and thereafter grant bail. The High Court does not seem to have kept the correct principle in view."

10. Further in Para No.31 in ***Omprakash Sahni*** (supra), note

has been taken of the decision in ***Vijay Kumar vs. Narendra and others, (2002) 9 SCC 364*** and ***Ramji Prasad vs. Rattan Kumar Jaiswal and another, (2002) 9 SCC 366***, wherein it was held by the Hon'ble Supreme Court that in cases involving conviction under Section 302 of the Indian Penal Code, it is only in exceptional cases that the benefit of suspension of sentence can be granted. In ***Vijay Kumar*** (supra) it was held that while considering the prayer for the prayer of bail in a case involving a serious offence like murder punishable under Section 302 of the Indian Penal Code, the Court should consider the relevant factors like the nature of accusations 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. The said ratio was reiterated in ***Vasant Tukaram Pawar vs. State of Maharashtra, (2005) 5 SCC 281*** and ***Gomti vs. Thakurdas and others, (2007) 11 SCC 160***.

11. Further, observations in Para No.33 of ***Omprakash*** (supra) are thus:-

"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 or there in the case of the prosecution. Such would not be a correct approach."

12. Therefore, when in this case the earlier application was withdrawn after the disinclination was shown by the Co-ordinate Bench, we cannot consider the second application. No doubt the appeal was expedited and even fixed for final hearing but it could not reach or taken up due to paucity of time. In the order passed on 27th January 2023 in Criminal Application No. 3832 of 2022, filed by the co-accused – Mangesh Borade for the similar relief, this Court had made categorical observation that this Court is dealing with the matters which are old enough than the present one i.e. jail appeals of 2015. Now, as the matters are taken up year-wise, so that the old matters are given preference, the figure has been reduced and now we are taking up the jail

appeals of the year 2017-2018 also and therefore, the hearing of the present appeal may come up in near future.

13. On the merits also, it was observed in the order dated 27th January 2023 passed in Criminal Application No. 3832 of 2022, filed by the co-accused – Mangesh Borade, that the testimony of the autopsy doctor and postmortem report, inquest panchnama would show that the death is homicidal in nature. The prosecution has examined three eye witnesses and they had categorically stated about the involvement of the present appellant. The weapon that was used was sword and the eye witnesses have stated about the motive behind the crime. Therefore, when there was ample evidence which can be only taken note of at the prima facie stage, we do not find this to be a fit case where the sentence should be suspended and the Application deserves to be rejected.

14. The Application stands rejected.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE