

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
INTERIM APPLICATION NO.2532 OF 2022
IN
CRIMINAL APPEAL NO.548 OF 2022

Mahendra Hari Dalvi .. Applicant

Versus

The State of Maharashtra & Anr. .. Respondents

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Mr.Raja Thakare with Mr.Akash Kavade, Mr.Siddharth Jagushte i/b Mr.Pradeep Gharat for the Applicant.

Ms.Drishti Shah i/b Ms.Rekha Rajagopal for the E.C.I./Respondent No.2.

Mr.Sanjeev P. Kadam with Mr.Mayur G. Sanap, Ms.Aditi Rajput and Mr.Pratik Deshmukh i/b Mr.Prashant Raut for the Original Complainant.

MR.S.R.Agarkar, A.P.P. for the State.

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CORAM: BHARATI DANGRE, J.

DATED : 27th APRIL, 2023

P.C:-

1. The Applicant, a Member of Legislative Assembly representing District Raigad, being elected in the year 2019, seeks suspension of conviction imposed upon him by the Special Judge in Special (Atrocity) Case No.13 of 2014, where he stand convicted for committing the offences punishable under Sections 324, 143, 147, 148 read with Section 149 of IPC as well as under Sections 504, 506 of IPC and under Section 37(1)(3) alongwith Section 135 of the Maharashtra Police Act.

On being convicted under Section 324 of IPC, he is sentenced to suffer S.I. for two years and pay fine, whereas on being convicted under Section 147 read with Section 149 of IPC, he is sentenced to suffer R.I. for two years and pay fine. Similar sentence is imposed on him, on being convicted under Section 148 read with Section 149 of IPC. All substantive sentences have been directed to run concurrently.

Being aggrieved by the conviction and sentence, he preferred Cri.Appeal No.548 of 2022, alongwith the other co-accused and the Appeal came to be admitted and his sentence was suspended and he is directed to be released on bail, by order dated 11/07/2022.

2. By the present Application filed in the subject Appeal, he seeks suspension of the conviction imposed on him vide the impugned judgment and it is prayed that the said relief should be continued till the Appeal is finally heard.

The aforesaid relief is sought on the ground that his tenure as a Member of the Legislative Assembly is continued till 2024 and despite his sentence being suspended and he being released on bail, there is every possibility that the bye-elections for the said post, in the wake of his disqualification, would be held, though the election is not yet declared by Respondent No.3 till date and in that case, unnecessary public expenditure would be involved for a short period of time.

Apart from this, the relief is also necessitated in view of the fact that on 20/07/2022, election for the post of President of India were held, but the Applicant was not permitted to cast

his vote, since he stand convicted, though the sentence imposed upon him came to be suspended.

The alleged incident, which resulted in registration of subject C.R. involving the present Applicant, has taken place on 15/12/2013 and the judgment convicting him of the charges levelled against him is delivered on 13/05/2022.

3. Heard learned senior counsel Mr.Raja Thakare for the Applicant, learned counsel Ms.Drishti Shah for the E.C.I., learned counsel Mr.Sanjeev Kadam for the Complainant and the learned A.P.P. for the State.

The learned senior counsel Mr.Raja Thakare, representing the Applicant, would submit that he is conscious of the legal position that the conviction can be suspended only in exceptional circumstances, but according to him, the case of the Applicant would squarely fall within the purview of an 'exceptional case', as he was wrongly involved in the said criminal case on account of political vendetta. He would submit that the political vendetta becomes apparent, since it can be seen that in respect of the alleged incident, the charge-sheet was filed against Accused Nos.1 to 8 on 24/06/2014 and even the charge was framed against them on 30/01/2015, but by way of an after thought, on 26/08/2016, the Applicant came to be arraigned as an accused, by filing a supplementary charge-sheet.

The submission of Mr.Thakare is, the Applicant continue to be a Member of the Legislative Assembly and the Election Commission has not yet declared the bye-election and,

therefore, if the conviction is not suspended, and the bye-election is declared, huge loss would be caused to the public exchequer. He would further submit that if the impugned judgment is carefully perused, it would lead to an irresistible conclusion that the learned Judge has failed to appreciate that the prosecution has failed to prove the case against the Applicant beyond reasonable doubt and the evidence of the material witnesses suffer from inconsistencies, contradictions and embellishments.

It is submitted that the hearing of the Appeal, though admitted, would consume considerable time, but in the meantime, if the conviction is not suspended, his political career would be doomed and he will suffer irreparable loss for which, he cannot be compensated, even though he may secure an acquittal from the criminal case.

4. Per contra, the learned counsel Mr.Kadam would vehemently oppose the Application by submitting that the charges levelled against the Applicant have been held to be conclusively proved and once he is convicted and the sentence is imposed upon him, there is no propriety in suspending the conviction, which is a discretionary relief vested in the Court, to be exercised with great caution and limiting it to very exceptional cases. Mr.Kadam would submit that merely because the convicted person has filed an Appeal, challenging his conviction, the Court should not suspend the operation of the conviction and it has duty to look into all aspects, including the ramifications of keeping such suspension in abeyance.

5. In order to appreciate the rival contentions, I have to first appreciate the argument of Mr.Thakare, about the likelihood of the impugned judgment, being reversed on the ground that the findings rendered therein is perverse, as the Court has failed to appreciate the evidence.

The prosecution case could be briefly summarized, as narrated by the learned Judge in the impugned judgment to the following effect :-

“2] Wheels of the investigation rotated on the basis of statement of injured witness Babu Dighi recorded at Civil Hospital Alibag in surgical ward on 15.12.2013 by Police Naik of Alibag police station is as under :-

a. Complainant Babu Dighi is resident of Simon colony and working as Medical Representative. He also holds post of Vice-President of RPI Party at Alibag Taluka.

b. On 15.12.2013 at about 01.30 p.m. complainant alongwith President Sunil Sapre and other colleagues, after completion of the work of election campaign, while returning back towards Thal-Alibag, from Simon Colony reached near Ganpati Mandir. All accused and near about 90 persons were present near under Banyan Tree near Ganpati Temple. When complainant and his colleagues reached Banyan Tree accused Mahendra Dalvi, Anil Patil, Ankush Patil, Manohar Patil, Pappu Patil, Rakesh Patil, Rupesh Patil, Avinash Patil and Ajay Mhatre were standing there. Mahendra Dalvi caught hold the collar of Sunil Sapre, Taluka President and humiliated him by abusing him in the name of caste. He also abused as “you sale mahar will fight against us. “तुम्ही साले महार आमच्या विरुद्ध काय लढणार”) and raised pistol upon the neck of complainant and fired bullet in the air. Accused Mahendra also slapped under the ear of complainant and told his other associates to break their legs and limbs (“हातपाय तोडा”) and left the spot. The persons accompanied him namely Avinash Mhatre, Anil Patil and Ankush Patil who were armed with hockey sticks started assaulting complainant on his head, back, hand and leg. They also started assaulting Taluka President of RPI, Alibag Sunil Sapre by means of hockey stick. By putting down and by throwing stones they caused damage to Bajaj Pulsar Motorcycle No.MH06/AM-5010. While accused were assaulting the complainant he faint giddiness and he fell down and regained consciousness after some time.....”

6. In order to prove it's case, the prosecution has examined 16 witnesses, including the injured, being examined as PW 5 and three eye witnesses, who came to be examined as PW 9, PW 10 and PW 13.

Though the charge-sheet was filed under Section 3(i)(x) (iv) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, **"the P.O.A. Act"**), as the prosecution had alleged that the members of the unlawful assembly intentionally insulted the Complainant-Babu Dighi and witness Sunil Sapre (PW 9) with an intent to humiliate them as members of scheduled caste/tribe within public view, the impugned judgment has categorically recorded that the version could not attract the offence and, since, no offence was made out by Accused Nos.1, 2 and 4 to 8, they came to be acquitted of the charge under the Prevention of Atrocities Act.

7. The role attributed to the Applicant, who came to charged as Accused No.9, has surfaced through the injured and the eye witnesses. The prosecution alleged that all the accused persons formed unlawful assembly and Accused No.9 slapped and humiliated the Complainant-Babu (PW 5) and as per the eye witness Sunil (PW 9) it is on his instigation and provocation, the co-accused assaulted the injured by wooden stick, hockey stick and iron rod, which resulted into grievous injuries.

The learned Judge, in order to establish the charge under Sections 324, 143, 147, 148 read with Section 149, scrutinized the evidence and relied upon the version of PW 13 -Sunil More, who had stated that on 15/12/2013, he alongwith PW 9 and PW

5, were on door-to-door canvassing for Gram Panchayat election and at around 1.30 p.m., they came near Banyan tree of Simon Colony and at that point of time, the Applicant in his four wheeler arrived on the spot alongwith his 2-3 associates and he took out the pistol attached to his waist and pointed it out at the witness and abused him , slapped him and left the spot by his vehicle.

After the said incident, other co-accused mounted the assault in which, Sunil Sapre and Babu Dighi fell on the ground.

8. PW 10-Amol Kinge, another eye witness, however, deposed that at around 1.30 p.m., the canvassing party proceeded from Simon Colony towards Thal on their motorcycles and several people were found standing near Ganpati Mandir at Tudal. At that time, one Innova car arrived on the spot and Mahendra Dalvi i.e. the present Applicant alighted and hurled the abuses in the name of the caste and on being threatened, this witness alongwith one Kedar proceeded to Alibaug and he has not witnessed the incident of assault.

The injured i.e. PW 5 has given a distinct version, when he state that on the relevant date, he went to Simon Colony alongwith Raghunath and PW 1 as campaign was over by 12.30 noon and approximately between 1.00 p.m. to 1.30 p.m., when they had stopped near the Banyan tree, the Applicant alongwith other co-accused arrived and hurled abuses. He testified that the Applicant put his pistol near his ear and fired in the air and slapped him. He told his colleagues to break their limbs and legs and left the spot.

PW 9, another eye witness, a member of scheduled corroborate PW 5 on the aspect that he fired in the air and told his colleagues to break their limbs and legs and left the spot.

9. On a careful scrutiny of the testimony of the aforesaid witnesses, the inconsistencies in their version is apparent.

As per PW 5, the injured witness, the first part of the incident involving the present Applicant occurred between 1.00 to 1.30 p.m. when he alongwith his colleagues had stopped in Simon Colony. Admittedly, none of the witness has deposed that the Applicant has participated in the actual assault.

As per the testimony of PW 9 Sunil Sapre, the incident occurred near Ganpati Mandir between 12.00 to 12.15 p.m. In any case neither of the version is possible since there is discrepancy in the timing as well as the spot where the incident took place.

PW 5 was specifically confronted with the footage wherein, the Applicant was seen in his office at 1.40 p.m. and he admitted that he is seen in the footage at the given time.

PW 9, in the cross-examination was confronted with his statement given to the police and reiterated that the incident occurred at 12.30 p.m., but police has wrongly typed it as 1.30 p.m.

Needless to state that the aforesaid inconsistency in the version of the prosecution may prove fatal to it, though the learned Judge has failed to appreciate the same

10. The submission of Mr.Thakare to the effect that his indictment in the subject CR at a belated stage i.e. almost after a period of two and half years, after the date of incident, also deserve appreciation in the right perspective. In the impugned Judgment, the learned Judge has specifically taken note of the supplementary statements given after interval of 15 days and has specifically recorded that the statement of PW 9 Sunil Sapre was recorded on the date of incident, but thereafter 3 consecutive statements in from of supplementary statements are recorded, where there is variation in the timing of the incident, the learned Judge has recorded as under :

“33. It is astonishing that after the intervals of 15 days second, third and fourth statement in the form of supplementary statement came to be recorded. No reason is explained by investigating officer for arising of such occasion for recording of supplementary statements three times.

This important aspect also deserve a consideration and depending upon the appreciation of the evidence, the outcome of the trial will have to be decided in the Appeal, filed and pending, at the appellate stage.

11. The submission of Mr.Thakare, that he was implicated on account of political vendetta, would have to be appreciated in the light of the aforesaid loopholes which are pointed out to me, as none of them has been noticed by the learned Judge in the impugned Judgment.

On appreciating the contentions raised in the Appeal, the Appeal is admitted and the sentence of the Appellants including the Applicant is already suspended pending adjudication of the Appeal.

It has, therefore, become necessary to determine whether the conviction deserve to be suspended on merits as well as in the wake of parameters which have been well settled as regards the suspension of conviction.

12. The legal position that exist as on today, as enunciated through the decisions of various Courts including the highest Court of the country is that, the Appellate Court can suspend or grant stay of the conviction, but the person seeking stay should specifically draw the attention of the Appellate Court to the consequences, that may arise if the conviction is not stayed. Unless the attention of the Court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain a stay of conviction. Further, grant of stay of conviction can be resorted in rare cases depending upon the facts of the case.

It is, therefore, to be seen whether an exceptional case is made out by the present Applicant.

13. The Applicant is elected as a member of legislative assembly, from Raigad Constituency in the election held in the year 2019 and necessarily his term continued till 2024.

sub The learned Counsel Ms.Rekha Rajgopal, appearing for Respondent No.2 has made a statement that though the seat has fallen vacant, bye election for the said post is not yet declared.

But for the conviction under the impugned Judgment dated 13.05.2022 the Applicant would have enjoyed privilege confronted upon him on being elected as a member of

legislative assembly, which would have also included a right to cast his vote for election of the President of India. This is one instance which the Applicant has cited in the application, showing the consequences which had fallen upon him, since he has incurred a disqualification and since his conviction is not suspended. Since the Applicant continued to be a member of the legislative assembly, he has not been replaced by a newly elected candidate. He is not deprived of his status as a member of legislative assembly, but on account of the disqualification he is unable to discharge his functions or enjoy the privileges of an elected member of the legislative assembly. If at all the elections to be declared for the seat, to which he was elected, it will be for a brief period i.e. upto 2024 and it will have to be considered, whether it would be in the public interest to incur expenses for conduct of the bye elections for the seat, for a short span of time apart from depriving the Applicant from holding the said post.

14. It is to note that, disqualification falls on the Applicant in the wake of Section 8 of the Representation of People Act, 1951, as it would also be applicable to the legislative Assembly, upon being sentenced and he also stand disqualified for further period of six years since his release.

Sub-section 3 of Section 8 of Act of 1951 read thus :

“(3) A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.”

15. The learned counsel Mr.Thakare has placed reliance upon the decision of the Apex in the case of **Lok Prahari Through its General Secretary vs. Election Commission of India & Ors.**¹, where the scope of the power of the Appellate Court under Section 389 has been reiterated once again and it has been held that the authority vested in the Appellate Court to stay the conviction would ensure that the conviction was untenable or frivolous grounds does not operate to cause serious prejudice.

By referring to its earlier decision in the case of **Rama Narang vs. Ramesh Narang**², as well as the decision in the case of **Navjot Singh Sidhu vs. State of Punjab**³ and further decision in the case of **Ravikant S. Patil vs. Sarvabhouma S. Bagali**⁴, the position of law is reiterated in the following words :

“14. The above position was reiterated by a Bench of three Judges of this Court in Ravikant S. Patil v. Sarvabhouma S. Bagalis, after adverting to the earlier decisions on the issue viz. Rama Narang v. Ramesh Narang, State of T.N. v. A. Jaganathan, K.C. Sareen v. CB110, B.R. Kapur v. State of T.N.² and State of Maharashtra v. Gajanan¹. This Court concluded as follows: (Ravikant S. Patil cases, SCC p. 679, para 15)

"15. It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. As order of stay, of course, does not render the conviction non-existent, but only non-operative. Be that as it may. Insofar as the present case is concerned, an application was filed specifically seeking stay of the order of conviction specifying the consequences if conviction was not stayed, that is, the appellant would incur disqualification to contest the election. The High Court after considering the special reason, granted the order¹² staying the conviction. As the conviction itself is stayed in contrast to a stay of execution of the

1 (2018) 18 SCC 114

2 1995 (2) SCC 513

3 (2007) 2 SCC 574

4 (2007) 1 SCC 673

sentence, it is not possible to accept the contention of the respondent that the disqualification arising out of conviction continues to operate even after stay of conviction.”

It has thus been categorically held that the effect of order of Appellate Court staying the conviction pending the appeal, is the disqualification which operates as a consequence of conviction cannot remain in effect.

It has thus been unequivocally held that once conviction has been stayed during the pendency of an Appeal, disqualification operated as a consequence of conviction cannot remain in effect.

16. In the wake of the position of law emerging as above, it can be seen that the applicant is a member of legislative assembly since 2019 and be continued to be so till the date of his conviction on 13.05.2022.

The prosecution, admittedly, was launched against him when he was not a member of the legislative assembly of the State and the incident occurred prior to he being elected and occupying the post. If the sentence of conviction is not suspended, he would incur disqualification under Section 8(3) of the Representation of People Act and apart from fact that the Appellant shall stand disqualified from contesting the further election, if the election of the constituency from which he is elected, are declared. If the Bye elections are to be held, then definitely, it would cause the Government to bare the brunt of conduct of such election, with the loss of public exchequer and the candidate that would be elected would not enjoy the entire term, but for a short term.

Hence, the consequences of not suspending the conviction of the applicant would be extremely drastic and definitely it would be most appropriate to stay the conviction/suspension, since exceptional case is made out in favour of the Applicant, to exercise the power under Section 389. Ramification of not suspending his conviction would be enormous and as the outcome of the same, the loss caused to him would not be capable of compensating in terms of money .

17. Surely, grant of stay of conviction is not, by way of right, or it is not a rule, but it has to be resorted in the rarest of rare cases and since the Applicant has made out one such case, on appreciating the evidence placed before the Special Judge and the consequences of not suspending the conviction.

The Applicant is entitled for suspension of conviction imposed upon him, vide Judgment dated 13/05/2022 passed by the learned Special Judge in Special Case No.13/2014.

Interim Application stand allowed in the aforesaid terms.

(SMT. BHARATI DANGRE, J.)