



IN THE JUDICATURE OF HIGH COURT AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 3766 OF 2023
IN
CRIMINAL APPEAL NO. 941 OF 2023

Karim Amir Khan
Age: 39 years, Occu: Labour,
R/o. Baidpura, Jalna, Dist. Jalna.

... Applicant

Versus

1. The State of Maharashtra
Through Police Station Officer,
Sadar Bazar Police Station, Jalna,
Tq. & Dist. Jalna

2. XYZ

... Respondents

...
Mr. Azizoddin Syed, Advocate for Applicant.
Mr. S. M. Ganachari, APP for respondent – State.
Advocate for Respondent No.2 : Ms. Ashwini R. Mate.

...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 05th JANUARY 2024

PRONOUNCED ON : 10th JANUARY 2024

ORDER :-

By invoking section 389 of the Code of Criminal Procedure, applicant is praying for suspension of sentence passed vide judgment and order dated 04.10.2023 by the Special Judge/Extra Joint District Judge and Additional Sessions Judge (POCSO), Jalna in Special Case No.165 of 2019 and also to grant bail during pendency of appeal.

2. It is pointed out by learned counsel for applicant that, present applicant was arrested and tried for commission of offence under sections 498-A, 323, 504, 506 read with section 34 and under sections 354 and 354-B of Indian Penal Code (IPC) and under sections 8 read with section 7 and section 12 read with section 11 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), registered with Nirmal Nagar Police Station. That, upon trial he was held guilty for offence punishable under sections 354-B of IPC and under sections 8 read with section 7 and section 12 read with section 11 of POCSO Act. It is pointed out that, there are allegation that he has victimized his own daughter. It is apparently false implication due to strained domestic relations between husband and wife. He further pointed out that, accused nos.2 to 6 were acquitted of all charges, but applicant alone is held guilty for aforesaid offences. He further pointed out that, alleged occurrence is of 2017, but it is reported on 18.05.2019. That, only on second marriage he has been involved and indicted. Further according to him, victim has been tutored and therefore, there is strong case in appeal. However, as much more time would be required, he prays for suspension of sentence and grant of bail .

In support of relief, he seeks reliance on a decision by Hon'ble Apex court in the case of *Kiran Kumar v. State of M.P.*, *MANU/*

SC/3530/2000, therein it has been held that when a person has been convicted and sentenced to a short term imprisonment the normal rule is to suspend the sentence during pendency of appeal.

3. Learned APP as well as learned counsel for victim, both have vehemently opposed the application on the ground that, serious offence has been committed on own daughter. Learned counsel for respondent no.2 would point out that, if the applicant set at liberty, he is likely to misuse the same.

4. This Court is dealing with provisions under Section 389 of the Cr.P.C., which pertain to suspension of sentence and grant of bail during pendency of appeal. There are certain settled principles, which are to be borne in mind while exercising above powers. Law on this point is enumerated as under :

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 the Cr.P.C. has been distinctly and lucidly discussed.

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; *State of Haryana v. 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.”

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.

After going through the record placed before the trial court, it is emerging that, applicant was arrested for commission of offence under sections 498-A, 323, 504, 506 read with section 34 and under

sections 354 and 354-B of Indian Penal Code (IPC) and under sections 8 read with section 7 and 12 read with 11 of POCSO Act on the complaint filed by his own wife (PW1). It seems that, in the month of September 2017, it is alleged that, he disrobed his daughter in the night. Apparently, law is set into motion on 18.05.2019. It is pointed out that, domestic relations between applicant and complainant were strained. Learned trial court seems to have acquitted accused Nos.2 to 6 and appellant alone is held guilty for offence under sections 354-B of IPC and under sections 8 read with section 7 and section 12 read with section 11 of POCSO Act by the judgment and order dated 04.10.2023 i.e. barely three months back. He seems to have been sentenced to suffer imprisonment for five years.

Considering the nature of allegations and relations between applicant, complainant and victim, this court does not deem it a fit case to extend the relief as prayed.

5. The criminal application stands rejected.

(ABHAY S. WAGHWASE, J.)

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