

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL (AGAINST CONVICTION) NO. 505 of 2024

With

**CRIMINAL MISC.APPLICATION (FOR SUSPENSION OF SENTENCE) NO.
1 of 2024**

In R/CRIMINAL APPEAL NO. 505 of 2024

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JOSHI PARESHBHAI THAKORBHAI

Versus

STATE OF GUJARAT

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Appearance:

DR BALRAM D JAIN(3146) for the Appellant(s) No. 1

PUBLIC PROSECUTOR for the Opponent(s)/Respondent(s) No. 1

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CORAM: HONOURABLE MR. JUSTICE ILESH J. VORA
and
HONOURABLE MS. JUSTICE S.V. PINTO

Date : 22/10/2024

ORAL ORDER

(PER : HONOURABLE MS. JUSTICE S.V. PINTO)

ORDER IN CRIMINAL MISC. APPLICATION:

1. By way of the present application under Section 389 of the Code of Criminal Procedure the applicant - accused is seeking suspension of sentence and release on regular bail during the pendency of the present appeal against the judgment and order of conviction dated 23.10.2023 passed in Sessions Case No. 08 of 2022 by the learned Sessions Judge, Mehsana, whereby, the present applicant - accused

was sentenced to life imprisonment and fine of Rs. 5,000/- and in default, six months simple imprisonment for the offence punishable under Section 302 of IPC and three years rigorous imprisonment and fine of Rs. 3,000/- and in default, three months simple imprisonment for the offence punishable under Section 201 of IPC. The learned Trial Court was further pleased to order that both the sentences shall run concurrently.

2. Heard learned advocate Dr. Balram Jain for the applicant as well learned APP Ms. Jirga Jhaveri for the respondent – State.

3. Learned Advocate Dr. Balram Jain for the applicant submits that the applicant is in custody since 03.12.2021 and the applicant is convicted for the offence under section 302 of the IPC and sentenced to undergo imprisonment for life and fine. That the applicant has a good chance of success in the appeal as there is no evidence showing the involvement of the applicant in the offence. That the case of the prosecution is on the basis of the last seen theory and

circumstantial evidence and it is alleged that the applicant was in a relationship with Kaminiben Satendrasingh Jaat - the mother of the deceased Bhumiben. It is alleged that the applicant took the deceased Bhumiben aged about 19 years on 28.11.2021 at around 8.00 pm from Siddhpur in his Baleno Car bearing registration no. GJ-24-AM-0157 and went to Nugar Bypass Circle and purchased petrol from the petrol pump and took her to the bridge on the Khari River and hit her on the head continuously with a hammer and caused her death and thereafter, doused her body with petrol and burned her with the intention of causing disappearance of the evidence. Learned Advocate submits that the prosecution has failed to prove the guilt against the applicant and the learned Trial Court has not appreciated the evidence properly. That there are no independent eye witnesses examined before the learned Trial Court and adverse inference must be drawn against the prosecution. That the applicant is falsely implicated in the offence and learned advocate submits that this is a case based on circumstantial evidence and the circumstances should be

fully established that only the accused has committed the offence. That there are no circumstances to show that the applicant has committed the offence and learned advocate submits that as the applicant is in jail for more than 2½ years and looking to the fact that the applicant has good prima facie case and there are all chances to succeed in the present appeal, the application for suspension of sentence may be allowed. That the applicant has paid the amount of fine and learned advocate has urged this Court to allow the application and suspend the sentence of the applicant.

3.1 Learned advocate Dr. Balram Jain has relied on the following judgements of the Apex Court in support of his case.

1. R. Sreenivasa V. State of Karnataka order passed in Criminal Appeal No. 859/2011.
2. State of Goa V. Sanjay Thakran & Anr. order passed in Appeal (Cri.) 873/2004.
3. Dinesh Kumar V. State of Haryana order passed in Criminal Appeal No. 530/2022.
4. Reena Hazarika V. State of Assam reported in AIR

2018 SC 5361.

5. Kanhaiya Lal V. State of Rajasthan order passed in Criminal Appeal No. 595/2014.

4. Learned APP Ms. Jirga Jhaveri for the State has objected to the present application to grant suspension of sentence and has submitted that the order of sentence is just and proper and no interference is required in the order passed by the learned Sessions Judge and hence, present application may be rejected.

5. The present application has been filed by the applicant for suspension of sentence under Section 389 of Code of Criminal Procedure and it would be fruitful to refer to the observations of the Hon'ble Apex Court in case of **Kishori Lal Vs. Rupa and Ors.** reported in **2004 (7) Supreme 102**, wherein, in paras 4, 5 and 6 it is observed as under:

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. 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.

5.1 The Hon'ble Apex Court in case of **Omprakash Sahni Vs. Jai Shankar Chaudhary & Anr.** arising out of **Criminal Appeal Nos. 1331-1332 of 2023**, has observed in para 33 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 or there in the case of the prosecution. Such would not be a correct approach.

6. In light of the above settled principles of law in cases of Kishorilal (supra) and Omprakash (supra) and considering the factors to be considered while granting benefit under Section 389 of Code of Criminal Procedure, we have carefully perused the impugned judgement and order of conviction and the evidence recorded before the learned trial court and find that the case against the applicant is that the applicant was in a relationship with Kaminiben Satendrasingh Jaat (Chaudhary) the mother of deceased Bhumiben and on 28.11.2021, the applicant took the deceased Bhumiben from Siddhpur frp, the company of her mother Kaminiben Satendrasingh Jaat at around 8:00 pm in his Baleno Car bearing registration no. GJ-24-AM-0157. PW-14 - Kaminiben Satendrabhai Chaudhary has in her deposition on oath stated that on the fateful day, the applicant took the deceased and after half an hour, she made a call to the applicant and at that time the deceased had spoken to her on the phone and told her that they were returning after sometime. That after an hour, the applicant called her and told her that he had dropped Bhumi at Lucky

Dairy and inquired whether she had returned but Bhoomi had not returned home. Kaminiben called the applicant once again and told him that Bhumi had not returned and at around 10:30 pm, the applicant came with his worker Hiteshbhai and told her that Bhumi had eloped with some boy and she would be found within two days. The dead body of deceased Bhumi was found on 30.11.2021 which was identified by the witness and in the postmortem note, various injuries were found on the head and body of the deceased and the cause of death was shock and haemorrhage as a result of the head injuries caused by hard and blunt object and the burns present over the body were postmortem in nature. PW-16 -Hiteshsinh Vajesinh Jadav has stated that on 28.11.2021, Kaminiben - the mother of the deceased had phoned him and told him that the applicant had taken her daughter Bhumi and they had not returned and she wanted to talk to the applicant. That he called the applicant and informed him about the telephone call and thereafter, the applicant came to his place and took him to Siddhpur to the house of Kaminiben and the

applicant had told him that Bhumi had eloped with some boy and they had gone to the police station but the police had told them to wait for 24 hours and they would file a complaint if Bhumi was not found. That on the next day, the applicant had informed the police station and told the police that Bhumi was found and on the next day Kaminiben had shifted her luggage to Chanasma and at that time, the applicant had told Kaminiben that Bhumi had eloped with some boy and he would search her and bring her back. PW-19 - Pradhumansinh Harpalsinh Zala has identified the applicant as the person who had taken petrol of Rs 400/- in a white plastic jar on 28.11.2021 at around 8:30 pm and the CCTV footage of the CCTV which was installed on Narayan Petrol Pump is also on record. Moreover, the hammer that was used in the offence and the white plastic jar has also been recovered at the instance of the applicant. We prima facie find that it cannot be said that there are no circumstances to show the involvement of the applicant in the offence and a number of circumstances prima facie shows that there is material regarding the

involvement of the applicant in the offence. Learned advocate for the applicant has placed reliance on the decision of the Apex Court in cases of R. Sreenivasa (supra), Sanjay Thakran (supra), Dinesh Kumar (supra), Reena Hazarika (supra) and Kanhaiya Lal (supra) and we find that these decisions may not be helpful to the applicant at this juncture. First for the reason that at present, we are deciding the application for suspension of sentence and not the final appeal. The endeavour on our part, at this stage is to see the case as presented by the prosecution as a case where there is prima facie evidence against the applicant or whether, he ultimately stands a fair chance of acquittal. Considering the gravity of the offence and the evidence of the prosecution on record before the learned trial court, we find that from the evidence of the prosecution and accepted by the learned trial court, it cannot be said to be a case in which the applicant ultimately stands a fair chance of acquittal. The learned advocate for the applicant has not been able to point out any thing on record which is apparent or gross on the basis of which we can arrive at a

prima facie satisfaction that ultimately the conviction would not be sustainable and we find that the application of the applicant does not deserve consideration, and consequently, the application hereby stands rejected.

7. Needless to say that the observations made in this order touching the merits of the case are only for the purpose of deciding the present application and are not an expression of the final opinion in the pending Criminal Appeal.

(ILESH J. VORA,J)

(S. V. PINTO,J)

VASIM S. SAIYED

Original copy of this order has been signed by the Hon'ble Judges.

Digitally signed by: VASIM SHABBIR SAIYED, PRIVATE SECRETARY, at High Court of Gujarat on 22/10/2024 18:02:36