

(2016) 04 GUJ CK 0093

In the Gujarat High Court

Case No : Criminal Misc. Application (For Suspension of Sentence) No. 9096 of 2016 in Criminal Appeal No. 621 of 2016.

Naranbhai Bhikhabhai Kachhadia

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 18-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 389
Penal Code, 1860 (IPC) — Section 186, 332

Citation : (2016) 2 Crimes 586 : (2016) 3 GCD 1949 : (2017) 2 GLR 1320

Hon'ble Judges : Rajesh H. Shukla, J.

Bench : Single Bench

Advocate : N.D. Nanavati, Sr. Advocate with Devang Vyas, Advocate, for the Appellant; Hansa B. Punani, Addl. Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

Rajesh H. Shukla, J.(Oral) - Rule. Learned APP Ms. Hansa Punani waives service of rule for the respondent State.

2. The present application is filed by the applicant - appellant under section 389 of the Code of Criminal Procedure, 1973 for suspension of sentence as well as for suspension of conviction as per the passed in Special (Atrocity) Case No. 10 of 2014 by the learned 2nd Addl. Sessions Judge and Special Judge (Atrocities), Amreli dated 13.4.2016, on the grounds stated in the application.

3. Heard learned Sr. Counsel Shri N.D. Nanavati appearing with learned advocate Shri Devang Vyas for the appellant and learned APP Ms. Punani.

4. Learned Sr. Counsel Shri Nanavati referred to the papers and the paper-book which is supplied at the time of hearing of this application and emphasised referring to the testimony of the complainant victim, PW-13 at exh. 54 (Dr. Dabhi) and submitted that as stated in his testimony, there was some misunderstanding which led to the altercation. However, learned Sr. Counsel Shri

Nanavati submitted that he has been assaulted by one person who was with the present applicant - appellant and not by the applicant. He further submitted that it is not shown how the provisions of section 332 and 186 of IPC would be attracted as there is no "obstruction in discharge of duty" by the applicant. Learned Sr. Counsel Shri Nanavati referred to the background with the testimony of other witnesses including the testimony of Dr. Shobhnaben Mehta, PW-9 at exh. 43. He submitted that as a Member of Parliament, the appellant went to the hospital accompanied by the patient when the telephone was not answered by the complainant. He also submitted that in fact the appellant had also tried to contact the superior, Dr. Shobhnaben Mehta, and when it was not responded the appellant as a public servant had gone to the hospital where the incident is said to have occurred.

5. Learned Sr. Counsel Shri Nanavati submitted that the court below has failed to consider the totality of the facts and circumstances particularly the settlement arrived at which ought to have been considered. He referred to the observations and the discussion made in para 27 of the judgment and submitted that the court below has failed to consider two necessary aspects. He emphasised that there is no obstruction in discharge of duty which would attract section 332 and/or section 186 of IPC. Similarly, he submitted that the court below could have considered the effect of such order recording the sentence and he could have been awarded lesser punishment after recording conviction. For that purpose, learned Sr. Counsel Shri Nanavati referred to section 186 and 332 of IPC and tried to submit that the assault is made by one person along with the appellant accused and therefore at the most it would attract section 186 qua the present applicant. He emphasised that section 332 of IPC or the ingredients for the offence under section 332 cannot be said to have been fulfilled. Learned Sr. Counsel Shri Nanavati submitted that the ingredients for the offence under sections 34, 114 etc. are also not fulfilled and therefore he submitted that the conviction is required to be stayed as it would have a harsh effect rendering the applicant disqualified from holding the post of Member of Parliament.

6. For that purpose, learned Sr. Counsel Shri Nanavati referred to the Representation of People Act, 1951 (hereinafter referred to as the Act) and pointedly referred to the provisions of section 8(3). He submitted that even if the appellant succeeds in appeal, it would be an irreversible situation and damage which cannot be compensated as disqualification would be incurred and therefore the stay of conviction may be granted.

7. Learned Sr. Counsel Shri Nanavati also referred to and relied upon the judgment of the Hon'ble Apex Court reported in (2007) 1 SCC 673 in the case of Ravikant S. Patel v. Sarvabhuma S. Bagali and referred to the observations made in para 10 which read as under :

"(10) The question whether an order of conviction can be stayed, in the absence of a specific provision for such stay in the Code, came up for consideration before this Court in the case of Rama Narang v. Ramesh Narang and Ors., [1995] 2 SCC

513. In the said case, the order that had been passed, while admitting the appeal, by the High Court purporting to be one under Section 389(1) of the Code was to the following effect :-

"Accused be released on bail on his furnishing a personal bond in the sum of Rs. 10,000 with one surety in the like amount to the satisfaction of the trial Judge. The operation of the impugned order shall remain stayed."

One of the questions that was examined in that case was whether the power under Section 389(1) of the Code could be invoked to stay the conviction. This Court held that an order of conviction by itself is not capable of execution under the Code of Criminal Procedure, but in certain situations, the order of conviction can become executable in a limited sense, inasmuch as it may result in incurring of some disqualification under other enactments; and that in such cases, it was permissible to invoke the power under Section 389(1) of the Code for staying the conviction also. We extract below the reasoning for such a conclusion, given by this Court :

"That takes us to the question whether the scope of Section 389(1) of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some disqualification of the type mentioned in Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction, although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389(1) of the Code." This Court, however, clarified that the person seeking stay of conviction should specifically draw the attention of the appellate court to the consequences that may arise if the conviction is not stayed; and that unless the attention of the court to the specific consequences that are likely to fall upon conviction, the person convicted cannot obtain an order of stay of conviction. In fact, if such specific consequences are not brought to its notice, the court cannot be expected to grant stay of conviction or assign reasons relevant for staying the conviction itself, instead of merely suspending the execution of the sentence. In that case, it was found on facts that the appellant therein had not specified the disqualification he was likely to incur under Section 267 of the Companies Act, if his conviction was not stayed. Therefore, this Court refused to infer that the High Court had applied its mind to this specific aspect of the matter and had thereafter granted stay of conviction or the operation of the impugned judgment.

Consequently, the order of stay was not construed as a stay of conviction."

He also referred to the observations in para 12.5 and submitted that the court has failed to consider this aspect.

8. Similarly, he has referred to and relied upon the judgment of the Hon"ble Apex Court reported in (1995) 2 SCC 513 in the case of Rama Narang v. Ramesh Narang and submitted that though it was a case with regard to the provisions of the Companies Act, the scope of section 389 has been considered and therefore learned Sr. Counsel Shri Nanavati submitted that the present application may be allowed granting stay of the conviction and sentence.

9. Learned APP Ms. Punani submitted that the prayer regarding stay of conviction is an exception and not a rule. It was submitted that the discretion exercised in such matter would amount to hearing of the appeal and allowing it at this stage. It was submitted that after the appeal is admitted on overall consideration and appreciation of evidence in the appeal the order could be passed finally and no such order granting stay of conviction may be made at this stage as it would amount to hearing the appeal itself. She submitted that exercise of discretion in a rare case has to be justified and there is no justification for exercise of such discretion. She submitted that the cumulative effect of the judgment and order can be considered at the time of finally hearing the appeal and therefore the present application may not be entertained.

10. In rejoinder, Learned Sr. Counsel Shri Nanavati referred to the title of the case and submitted that the original accused A-4 and A-5 are arraigned as accused without any reason and therefore if there is no unlawful assembly, then the applicant accused could not be convicted for the assault made on the victim. Learned Sr. Counsel Shri Nanavati again submitted that the conviction and sentence recorded by the court below is disproportionate to the offence or the guilt of the applicant accused which has not been considered and therefore the present application may be allowed.

11. In view of these rival submissions, it is required to be considered whether the present application deserves consideration.

12. As referred to by both the sides, the background of facts narrated clearly suggests that the appellant who is a sitting Member of Parliament is said to have gone to the hospital where the complainant victim was discharging his duty and as he had not picked up the telephone or responded to it the present applicant accompanied by his persons is said to have assaulted the complainant victim doctor who was discharging his duty in the hospital at the time of the incident.

13. The first aspect which has been much emphasised by learned Sr. Counsel Shri Nanavati referring to the provisions of section 332 and 186 requires a closer scrutiny with reference to the testimony of witnesses including the testimony of the victim PW-13 at exh. 54. A close look at the testimony of the complainant victim Dr. Dabhi at exh. 54 refers to what has transpired and he has categorically

stated that he was busy examining a patient who was brought in emergency due to a vehicular accident and therefore he had asked one another patient to get the indoor case prepared and the applicant accused is said to have intervened.

14. Section 332 of IPC refers to "voluntarily causing hurt to deter public servant from his duty". Thus, it is not in dispute that the complainant victim was hurt when he was on duty in the hospital. Section 186 provide, "obstructing public servant in discharge of public functions" which has a reference to obstructing the person in discharge of duty. Therefore, both have different spheres when section 186 refers to obstructing a public servant in discharge of public function, whereas section 332 of IPC refers to an offence causing hurt to deter a public servant from discharge of his duty which is more severe and therefore the punishment has been provided accordingly. As stated, it is not compoundable which has also been discussed by the court below in the judgment. Therefore, the submissions with regard to compromise or referring to the understanding or settlement would not have much relevance once the offences are not compoundable and rightly the court below has referred to this aspect.

15. The submission made by Learned Sr. Counsel Shri Nanavati that the ingredients for both the offences under section 332 and 186 are not attracted is misconceived. The emphasis by learned Sr. Counsel Shri Nanavati that the assault was made by one person taller and not by the applicant and therefore he could not have been attributed for the assault when admittedly he has not assaulted the victim has to be considered. This aspect, at the first blush, may sound appealing but it has to be considered with the manner in which the incident is said to have occurred and it has to be also considered with reference to the aspect of unlawful assembly. The elected Member of Parliament though as a representative of the people may be justified for recommendation for the treatment, but the manner in which he is said to have intervened would not justify. Assuming that the victim had not responded to the phone, it would not justify the assault and manhandling of the victim who is a doctor discharging his duty in the Government hospital. Again, there is nothing on record to suggest that the victim had deliberately avoided receiving the phone. Though it could be said that if he has not responded to the phone of the superior, Dr. Shobhnaben Mehta, appropriate measures could be taken, but it would not justify the assault and manhandling amounting to an offence.

16. For the purpose of offence under section 332 and 186 of IPC, it is required to be noted that as a doctor when the victim is examining a patient in discharge of his duty, he is not expected to leave the patient on arrival of the accused with another patient for his recommendation. Again, there the victim is said to have seen the papers and asked to get the case paper prepared when he was examining another case of the vehicular accident. Further, if the doctor is examining a patient or attending a patient, he may not have received the phone which on the contrary suggests about his sincere attention to the patient that he does not take the phone while examining the patient.

17. In fact, the Representation of People Act which has also been referred to by Learned Sr. Counsel Shri Nanavati providing for disqualification on conviction for certain offences is required to be considered. Learned Sr. Counsel Shri Nanavati had referred to sub-section (3) of section 8 of the Act and has tried to submit that it will have a harsh effect even if he succeeds ultimately in the appeal and that is why the conviction may be stayed. At the cost of repetition, learned Sr. Counsel Shri Nanavati has emphasised about the irreversible situation resulting in damage which could not be restored as a ground for exercise of discretion for suspension of the conviction also require a close scrutiny.

18. At the first blush, the submission may sound appealing but it has to be considered with the background of facts and the provisions of section 389. The Hon''ble Apex Court in catena of judicial pronouncements has clearly made the observations laying down broad guidelines that there is no lack of jurisdiction for exercise of such discretion under section 389 for suspension of the conviction. However, it has been observed that it cannot be exercised casually and it has to be exercised only in a rare case. The Hon''ble Apex Court in a judgment reported in (2012) 12 SCC 384 in the case of State of Maharashtra through CBI, Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar has referred to this aspect and it has been observed,

"Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that, the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examined whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done."

19. The Hon''ble Apex Court in the aforesaid judgment in the case of State of Maharashtra through CBI, Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar (supra) has also considered the earlier judgment in the case of Ravikant S. Patil v. Sarvabhouma S. Bagali [(2007) 1 SCC 673] relied upon by learned Sr. Counsel Shri Nanavati. It has been observed referring to this judgment and quoting from the same judgment,

"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 conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative??.All these decisions, while recognising the power to stay conviction, have cautioned and

clarified that such power should be exercised only in exceptional circumstances where failure to stay the conviction, would lead to injustice and irreversible consequences."

Therefore, the moot question is whether the facts of the case justify exercise of discretion on the ground that it would cause prejudice or lead to irreversible consequences as sought to be canvassed.

20. Again, the aspect of irreversible damage or consequence as pressed into service by learned Sr. Counsel Shri Nanavati has been considered and it has been clearly observed that the submission that one would lose his employment is not a ground. Thus, the courts have made the observation that the ramifications for keeping such convictions in abeyance are required to be considered. It is also observed that while granting such stay of conviction, the court must examine all the pros and cons and only if it feels satisfied that a case has been made out, the discretion may be exercised for which also the reasons are to be recorded in writing.

21. Therefore, a public servant losing his job which is necessary for his survival has also not to be considered as a ground for exercise of such discretion for stay of the conviction. Disqualification earned as a Member of Parliament could not be a justification for exercise of such discretion. The Hon''ble Apex Court has considered various relevant aspects including the observations made in the judgment in the case of K.C. Sareen v. CBI [(2001) 6 SC 584] as well as in another case reported in (2003) 12 SCC 434 in the case of Union of India v. Atar Singh. The consistent broad guidelines which have been laid down by the Hon''ble Apex Court clearly provide that an order of conviction should not be suspended merely on the ground that non-suspension of such conviction may entail the consequences like removal of a Government servant from service or, as it is stated in the facts of the case, disqualification as a Member of Parliament. It has also been observed that such power should be exercised only in exceptional circumstances where failure to stay the conviction would lead to injustice and irreversible consequences.

22. Much emphasis by learned Sr. Counsel Shri Nanavati on this aspect of irreversible situation being created causing damage to the applicant is also required to be considered with reference to the public interest. If such a representative of people or a public servant is allowed to behave in such fashion, it would also not be in the public interest and the court cannot absolve pending the appeal such a conduct at this stage exercising discretion under section 389 of CrPC. As observed, though the discretion is vested with the court, it has to be exercised rarely and with circumspection only in some circumstances which justify exercise of such power . The background of facts as stated do not justify exercise of such discretion as it cannot be said to be an exceptional case. The submissions which have been made referring to the irreversible situation being created causing damage to the career or prejudice to the applicant could be said to be a consequence of the act amounting to the offence which every accused is

bound to suffer at the conclusion of the trial.

23. It is required to be noted that Justice J.S. Verma Committee Report on amendment to the criminal law has proposed and recommended that section 8 of the Representation of People Act, 1951 should be amended providing for disqualification of the Member of Parliament or the legislative assembly. It appears that necessary amendment has been made and as observed by the Hon"ble Apex Court in the judgment reported in (2014) 9 SCC 1 in the case of Manoj Narula v. Union of India, criminalisation of politics create a dent in the marrows of nation. In this judgment referring to Article 84, the Hon"ble Apex Court has quoted President of the Constituent Assembly Dr. Rajendra Prasad, which is quoted in para 111,

"There are only two regrets which I must share with the honourable Members. I would have liked to have some qualifications laid down for Members of the Legislatures. It is anomalous that we should insist upon high qualifications for those who administer or help in administering the law but none for those who make it except that they are elected. A law-giver requires intellectual equipment but even more than that capacity to take a balanced view of things, to act independently and above all to be true to those fundamental things of life - in one word - to have character (Hear, hear). It is not possible to devise any yardstick for measuring the moral qualities of a man and so long as that is not possible, our Constitution will remain defective....."

The Hon"ble Apex Court has observed and quoted in the next para 112, "Hopefully, Parliament may take action on the views expressed by Dr. Rajendra Prasad, the first President of our Republic."

24. Therefore, when it is talked about good governance, it must reflect upon the democracy and rule of law which in turn has been provided in the Representation of People Act, 1951 providing for disqualification. In other words, while exercising power under section 389, the courts have to have regard to the underlying philosophy of the Constitution and democracy which is sought to be achieved through the Representation of People Act, 1951 which in turn has made the provision for disqualification.

25. A useful reference can also be made to the observations made by the Hon"ble Apex Court in a judgment reported in AIR 2005 SC 688 in the case of K. Prabhakaran v. P. Jayarajan with Ramesh Singh Dalal v. Nafe Singh and ors., where the discussion has been made referring to section 8 of the Representation of the People Act that those who break the law should not make the law and the purpose which is sought to be achieved by enacting disqualification on conviction.

26. It is in these circumstances the present application seeking suspension of conviction cannot be entertained.

27. However, the suspension of sentence imposed pursuant to the judgment rendered in Special Atrocity Case No. 10 of 2014 by the learned Addl. Sessions

Judge (Special Judge, (Atrocity), Amreli dated 13.4.2015 recording conviction for the offence under section 332, 186 and 143 and imposing sentence as stated in detail deserves consideration. As the hearing of the appeal may take time and since it is a short sentence and also considering the provisions of section 389, implementation and operation of the substantive sentence requires to be suspended and accordingly stands suspended.

28. The applicant - appellant, original accused No. 1, Naranbhai Bhikhabhai Kachhadia, is ordered to be released on bail on his executing a personal bond of Rs. 10,000/- (Rs. Ten thousand only) with simple surety of the like amount to the satisfaction of the trial court and subject to the condition that he shall not take undue advantage of his liberty or abuse or misuse the liberty and shall maintain law and order.

29. The present application accordingly stands allowed partly to the extent of suspension of sentence only and not the conviction. Rule is made absolute to the aforesaid extent.