IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION (FOR SUSPENSION OF SENTENCE) NO. 1 of 2019

In R/CRIMINAL APPEAL NO. 1492 of 2019

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SANJIVKUMAR RAJENDRABHAI BHATT
Versus
STATE OF GUJARAT

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Appearance:

MR BB NAIK, SR. ADVOCATE WITH MR EKANT G AHUJA for the PETITIONER(s) No.
MR MITESH R. AMIN, PUBLIC PROSECUTOR WITH MR HIMANSHU K. PATEL, APP for the RESPONDENT(s) No. 1

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CORAM: **HONOURABLE MS.JUSTICE BELA M. TRIVEDI**
and
HONOURABLE MR.JUSTICE A.C. RAO

Date : 25/09/2019

IA ORDER
(PER : HONOURABLE MS.JUSTICE BELA M. TRIVEDI)

1. The application has been filed by the applicant – appellant under Section 389 of Cr. P.C., seeking suspension of sentence imposed by the Sessions Court at Jamnagar (hereinafter referred to as "the trial Court") in Sessions Case No.148 of 2016, whereby the trial Court has convicted the applicant for the offence under Sections 323, 302, 506(1) read with Sections 34 and 114 of IPC and directed the applicant to undergo

life-imprisonment and to pay a fine of Rs.10,000/-, in default thereof, to undergo simple imprisonment for one year for the offence under Section 302 read with Sections 34 and 114 of IPC; and further to undergo rigorous imprisonment for one year and to pay a fine of Rs.5,000/-, in default thereof, to undergo simple imprisonment for three months for the offence under Section 323 read with Sections 34 and 114 of IPC, as also to undergo rigorous imprisonment for two years and to pay a fine of Rs.5,000/-, in default thereof, to undergo simple imprisonment for three months for the offence under Section 506(1) read with Sections 34 and 114 of IPC.

2. As per the case of the prosecution before the trial Court, the applicant – appellant was posted as ASP in Jamnagar (Rural Division) as his first posting and was given additional charge of ASP, Jamnagar City on account of the "Bharat Bandh" call given by the Vishva Hindu Parishad. On 30.10.1990 the applicant was on patrolling duty near Amran Village and due to incidents of communal violence in Jam-Jodhpur, he had reached Jam-Jodhpur Police Station. On account of such incidents, about 133 persons were arrested by the applicant and other police officers. The deceased Prabhudas Madhavji Vaishnani and his brother Rameshchandra Madhavji Vaishnani were also amongst the persons arrested. At that time, the other accused

Deepakkumar Bhagwandas Shah, Shaileshkumar Lambashanker Pandya, Pravinsinh Bavubha Zala, Pravinsinh Jorubha Jadeja, Anopsinh Mohabatsinh Jethava and Keshubha Dolubha Jadeja were also the police officers on duty at Jam-Jodhpur for maintaining law and order. The C. R-I No.96 of 1990 was registered at Jam-Jodhpur Police Station in connection with the said incident. According to the prosecution, the said arrested persons were severely beaten and tortured by the applicant and other officers. They were compelled to crawl and do sit-ups and were tortured mentally and physically. As a result thereof, the said deceased Prabhudas Madhavji Vaishnani and Rameshchandra Madhavji Vaishnani suffered injuries on the vital parts of their bodies. Thereafter, Prabhudas Madhavji Vaishnani died on 18.11.1990 during the course of his treatment. His brother Amrutlal Madhavji Vaishnani, therefore, gave a complaint to the DSP, Jamnagar, which was registered as C.R. No.00/1990 at DVD Police Station for the offence under Sections 302, 323, 506(1) and 114 of IPC, however, since the incident in question had taken place within the jurisdiction of Jam-Jodhpur Police Station, the same was transferred to the said Police Station, where it was registered as C.R-I No.102 of 1990 for the offence under Sections 302, 323, 506(1) and 114 of IPC. The Investigating Officer, Jamnagar after carrying out necessary investigation

submitted the final report of A-Summary in the Court of Judicial Magistrate First Class, Jam-Jodhpur. However, the said Court vide the order dated 30.12.1995 rejected the said report and issued process against all the accused for the offence under Sections 302, 323, 506(1), 34 and 114 of IPC, by registering the same Criminal Case No.1 of 1996. The said case being triable by the Court of Sessions, the same was committed by the Judicial Magistrate First Class to the Court of Sessions, Jamnagar vide the order 20.1.2001, where it was registered as Sessions Case No.35 of 2001. The Sessions Court, after appreciating the evidence on record passed the order of conviction and sentence as mentioned herein above vide the judgement and order dated 20.6.2019. Being aggrieved by the same, the applicant – appellant has preferred the Criminal Appeal No.1492 of 2019, which has already been admitted by this Court. The present application has been filed seeking suspension of the sentence imposed by the Sessions Court pending the appeal.

3. Learned Sr. Advocate Mr.B.B. Naik for the applicant vehemently submitted that there were many lapses in the trial conducted by the Sessions Court, which had vitiated the whole trial. According to him, the trial of the case had proceeded against the applicant, though there was no sanction granted by the government as required under Section 197 of Cr.P.C.. In

this regard he has relied upon the decision of the Supreme Court in case of **Sankaran Moitra Vs. Sadhna Das and Anr., reported in AIR 2006 SC 1599** and submitted that sanction under Section 197(1) of Cr.P.C., was necessary for prosecuting the applicant, who was the accused before the Sessions Court. Relying upon the evidence of the witnesses examined on behalf of the prosecution, he vehemently submitted that the depositions of the said witnesses were not trustworthy and that the prosecution had failed to examine the material witnesses, who were listed in the charge-sheet. Accordingly to him, the compound of the Jam-Jodhpur Police Station, where the alleged incidents of beating and torturing the arrested persons by the applicant - accused had taken place comprised of many other offices and residential quarters, however, the prosecution had not examined any of the independent witnesses to substantiate the allegations levelled against the applicant. He has also submitted that the witnesses examined by the prosecution were interested-witnesses, who were either the relatives of the deceased or the persons, who had grudge against the police officers, and therefore, the entire testimony of such witnesses could not be said to be reliable. Mr.Naik further submitted that neither the deceased nor his brother Rameshchandra Madhvji Vaishnani had made any complaint before the doctors or before any other authority with

regard to the alleged beating and torture by the applicant and other accused, and it was only after the death of Prabhudas Madhavji Vaishnani, the applicant and others were involved in such a serious case. Placing heavy reliance on the medical evidence as also the evidence of the doctors, he submitted that the prosecution had failed to prove the nexus between the cause of death of Prabhudas Madhavji Vaishnani and the injuries sustained by him. According to him, Dr.Gajera, who had given first certificate with regard to the cause of death of the deceased Prabhudas Madhavji Vaishnani was also not examined along with many other important witnesses. Relying upon the postmortem report and the testimony of PW-24 Dr.Satish Dinkarbhai Kalel, who had carried out the postmortem of the deceased, he submitted that there were no external or internal marks of injuries found on the dead body of Prabhudas, and therefore, it could not be said that the death of the deceased was a homicidal death. Mr.Naik has also placed reliance upon the decision of the Supreme Court in case of **Sunil Kumar Vs. Vipin Kumar and Ors., reported in (2014) 8 SCC 868** and in case of **Vijay Kumar Vs. Narendra and Ors., reported in (2002) 9 SCC 364** to submit that since the applicant – accused was enlarged on bail pending the trial and had not misused his liberty, and since the entire trial had vitiated on account of many lapses pointed out by him in conducting

the trial, the applicant deserves to be released on bail pending the appeal. According to him, the other cases pending against the applicant could not be taken into consideration for deciding the present application when there is no material to show that the applicant had misused the process of law or liberty granted to him during the course of trial.

4. However, the learned Public Prosecutor Mr.Mitesh Amin appearing for the respondent State, placing reliance on the orders passed by this Court as well as by the Supreme Court in the proceedings of the present case and of other cases submitted that the applicant is in the habit of misusing the process of law and scandalizing the Court. According to him, the applicant had successfully thwarted the proceedings for about two decades and it was only because of the directions issued by this Court and by the Supreme Court, the proceedings before the Sessions Court were commenced and completed. He also submitted that the prosecution by examining all relevant witnesses had proved the nexus between the applicant and the alleged crime committed by him and other accused and considering the chequered history of the accused, the Court should not exercise judicial discretion in favour of the applicant. In response to the submissions made by the learned Sr. Advocate Mr.Naik, Mr.Amin had taken the Court to the evidence of the witnesses, more particularly the evidence of the

complainant Amrutlal Vaishnani and of his brother Rameshchandra Vaishnani, who himself was an injured witness, as also the medical evidence, and submitted that the deceased Prabhudas Vaishnani and his brother Rameshchandra Vaishnani were subjected to torture and harassment by the applicant, who was the ASP at the relevant point of time, which had resulted into the death of Prabhudas Vaishnani. Relying upon the evidence of PW-19 – Dr. Nileshkumar Kalola, PW-20 – Dr. Kantilal Pansuriya, PW-21 – Dr. Shashikant Vallabhdas Sapariya, and PW-23 – Dr.Sanjay Natwarlal Pandya, as also PW-24 – Dr. Satish Dinkarbhai Kalole, Mr.Amin submitted that the prosecution had duly proved that due to the severe beating and torture by the applicant and other police officers, there was acute failure of kidney of the deceased Prabhudas Vaishnani, which had resulted into Rhabdomyolysis as stated by the doctor in the postmortem report. Mr.Amin also relied upon the evidence of Dr. Sapariya to buttress his submission that about 25 persons were severely beaten by the police on the date of incidents and they were treated by the said doctor before whom the said injured persons had specifically stated that they were beaten up by the police. According to him, the applicant had challenged the non-examination of certain witnesses by the prosecution by filing the petition before this Court, and this Court

having directed to examine three witnesses as Court witnesses, they were examined by the Sessions Court and the case diary was also placed before the Court for perusal. According to him, as per the names of the witnesses short-listed by the learned Advocate for the applicant in the said petition, the name of Dr.Gajera was not included, and therefore, it did not lie in the mouth of the learned Advocate for the applicant to say that Dr. Gajera was a material witness. He also drew the attention of the Court that though the defence had summoned certain witnesses, they all were dropped without offering any explanation. In any case, the Court is not required to reappreciate the evidence at this stage while considering the application for suspension of sentence of the applicant – accused, who has been convicted by the Sessions Court for the serious offence under Section 302 of IPC. Mr.Amin also submitted that the State has already preferred an appeal for the enhancement of the sentence so far as the other accused are concerned.

5. At the outset, it may be stated that the law as regards the granting or refusing to grant suspension of sentence pending the appeal under Section 389 of Cr. P.C., is well settled by the Supreme Court in case of **Sidhartha Vashisht alias Manu Sharma Vs. State (NCT of Delhi), reported in 2008 Cri. L. J. 3524 (SC)** in which it has been observed in paragraphs 16, 30 to 34

as under:-

> "16.We are conscious and mindful that the main matter (appeal) is admitted and is pending for final hearing. Observations on merits, one way or the other, therefore, are likely to prejudice one or the other party to the appeal. We are hence not entering into the correctness or otherwise of the evidence on record. It, however, cannot be overlooked that as on today, the applicant has been found guilty and convicted by a competent criminal court. Initial presumption of innocence in favour of the accused, therefore, is no more available to the applicant.
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> 17 to 29 xxx
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> 30. The other consideration, however, is equally important and relevant. When a person is convicted by an appellate Court, he cannot be said to be an `innocent person' until the final decision is recorded by the superior Court in his favour.
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> 31. Mr. Gopal Subramanyam, learned Addl. Solicitor General invited our attention to Akhilesh Kumar Sinha v. State of Bihar, (2000) 6 SCC 461, Vijay Kumar v. Narendra & Ors., (2002) 9 SCC 364 : JT 2004 Supp (1) SC 60, Ramji Prasad v. Rattan Kumar Jaiswal & Anr., (2002) 9 SCC 366 : JT 2002 (7) SC 477, State of Haryana v. Hasmat, (2004) 6 SCC 175 : JT 2004 (6) SC 6, Kishori Lal v. Rupa & Ors., (2004) 7 SCC 638 : JT 2004 (8) SC 317 and State of Maharashtra v. Madhukar Wamanrao Smarth, (2008) 4 SCALE 412 : JT 2008 (4) SC 461.
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> 32. In the above cases, it has been observed that once a person has been convicted, normally, an appellate Court will proceed on the basis that such person

is guilty. It is no doubt true that even thereafter, it is open to the appellate Court to suspend the sentence in a given case by recording reasons. But it is well settled, as observed in Vijay Kumar that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302, IPC, the Court should consider all the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, the desirability of releasing the accused on bail after he has been convicted for committing serious offence of murder, etc. It has also been observed in some of the cases that normal practice in such cases is not to suspend the sentence and it is only in exceptional cases that the benefit of suspension of sentence can be granted.

33. In Hasmat, this Court stated;

> "6. Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the applicant 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". (emphasis supplied)

> 34. The mere fact that during the period of trial, the accused was on bail and there was no misuse of liberty, does not per se warrant suspension of execution of sentence and grant of bail. What really necessary is to consider whether reasons exist to suspend execution of the sentence and grant of bail. "

6. In view of the above settled position, it is clear that the normal practice in the cases of conviction under Section 302 or for serious offences, is not to suspend the sentence pending the appeal and it is only in exceptional cases that the benefit of suspension of sentence can be granted. So let us see whether any exceptional case is made out by the applicant for the suspension of his sentence.

7. As stated herein above the learned Advocates for the parties have made their submissions at length on the merits of the Appeal, which is pending for final hearing. However, the Court is of the opinion that any observation made by this Court at this juncture may cause prejudice to the parties one way or the other at the time of hearing of the Appeal, and therefore, it would not be desirable to reappreciate the evidence and record the findings even tentatively. Suffice is to say that the applicant has been found guilty and convicted by the competent Criminal Court for the offence under Section 302 of IPC, and therefore, the initial presumption of innocence in favour of the applicant –

accused is no more available to him.

8. Now, if the other factors are considered, the learned Public Prosecutor Mr.Amin has placed heavy reliance on the observations made by this Court and by the Supreme Court against the applicant in other proceedings. Having regard to the said orders, it appears that the applicant has scant respect for the Courts and is in the habit of misusing the process of law and scandalizing the Court. Some of the observations made by the Supreme Court in the proceedings filed by the applicant substantiates the submissions made by Mr.Amin, more particularly in the case of **Sanjiv Rajendra Bhatt Vs. Union of India, reported in (2016) 1 SCC 1**, in which the Court had observed in paragraph 65 *inter alia* that the petitioner i.e. present applicant had made a deliberate attempt to mislead the Court and he was guilty of *suppressio veri and suggestio falsi*. Even this Court, while rejecting his bail application being Criminal Misc. Application N.23368 of 2018 preferred under Section 439 of Cr.P.C., in respect of the FIR registered with the Palanpur City Police Station for the offence under NDPS Act and IPC had also considered the antecedents of the applicant, had observed that the applicant had scant regards for the truth and rejected the same vide the order dated 7.3.2019. The Court, therefore, is of the opinion that not only that learned SR. Advocate Mr.Naik has failed to make

out any exceptional case for the applicant for suspension of his sentence, but it is also not desirable to suspend the same.

9. Whether the trial had vitiated or not on account of non-examination of some of the witnesses by the prosecution or on account of other lapses would be the issues to be considered at the time of final hearing of the Appeal. At this juncture, the Court, after having considered the evidence on record as well as the findings recorded by the Sessions Court, is *prima facie* satisfied about the conviction of the applicant under Section 302 of IPC, and in absence of any exceptional case made out by the applicant, the present application does not deserve any further consideration. The application for suspension of sentence, therefore, is dismissed.

(BELA M. TRIVEDI, J)

(A. C. RAO, J)

V.V.P. PODUVAL