

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****CRIMINAL MISC.APPLICATION (FOR SUSPENSION OF SENTENCE) NO.  
1 of 2023  
In R/CRIMINAL APPEAL NO. 2198 of 2019**

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PRATAPBHAI @ SHIVABHAI HAMIRBHAI SOLANKI  
Versus  
STATE OF GUJARAT

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**Appearance:**

MR ND NANAVALY & MR YS LAKHANI SR. ADVOCATES with MR. RAHUL  
R DHOLAKIA(6765) for the Applicant  
MR BB NAIK, SR. ADVOCATE with MR EKANT AHUJA for the Opponent  
No.3.  
MR RC KODEKAR, Special PP for the Opponent No.2  
MS CM SHAH, ADDL. PUBLIC PROSECUTOR for the Opponent State

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**CORAM: HONOURABLE MR. JUSTICE S.H.VORA**  
and  
**HONOURABLE MRS. JUSTICE MAUNA M. BHATT**

**Date : 06/02/2023**  
**IA ORDER**

**(PER : HONOURABLE MR. JUSTICE S.H.VORA)**

1. Present application is filed by the applicant – original accused No.4 of Special (CBI) Case No.2 of 2014 under the provisions of section 389 of the Code of Criminal Procedure, 1973 (for short “the Code”) seeking suspension of sentence of judgment and order dated 6.7.2019 and 11.7.2019 passed by the learned Special Judge, CBI, Court No.1, Ahmedabad and release the applicant pending hearing and final disposal of captioned criminal appeal.

2. The applicant convict is convicted for the offences punishable u/s 302 r/w section 120(B) of the IPC and sentenced him to imprisonment for life and to pay a fine of Rs.15 lakh and in default, to undergo SI for a further period of three years. The

applicant is also convicted for the offence punishable u/s 201 r/w section 120(B) of the IPC and sentenced him RI for three years and to pay a fine of Rs.5000/-, in default further SI for three months.

3. Feeling aggrieved by the aforesaid order, captioned criminal appeal came to be filed before this Court on 5.9.2019, which was admitted on 14.11.2019.

4. We have permitted parties to place on record affidavit-in-reply and we have also taken into consideration note containing important paras/pages from the judgment furnished by learned advocate Mr. Ekant Ahuja on 3.2.2023 so as to decide present application bearing in mind limited scope of section 389 of the Code.

5. Heard learned Senior Counsel Mr. ND Nanavaty and Mr. YS Lakhani with learned advocate Mr. Rahul Dholakia for the applicant, Mr. RC Kodekar, learned Special Public Prosecutor appearing for opponent No.2 learned Senior Counsel Mr. BB Naik appearing with learned advocate Mr. Ekant Ahuja for opponent No.3. We have also gone through the decision cited by learned Senior Counsel Mr. BB Naik in case of Preet Pal Singh Vs. State of Uttar Pradesh and another reported in AIR 2020 SC 3995 and in case of Shakuntala Shukla Vs. State of Uttar Pradesh and another reported in 2021(10) SCALE 298 and bearing in mind the principles settled by the Hon'ble Apex Court, now, we will consider the application.

6. It is settled by the Hon'ble Supreme Court in various

pronouncements that discretion under section 389 of Code of Criminal Procedure is to be exercised judiciously and the Appellate Court is obliged to consider whether cogent ground has been disclosed, giving rise to substantial doubts about the validity of the conviction and there is likelihood of unreasonable delay in disposal of the appeal, the Appellate Court is only to examine if there is such patent infirmity in the order of conviction that renders the order of conviction prima facie erroneous. It is also settled by the Hon'ble Supreme Court that where there is evidence that has been considered by the Trial Court, it is not open to the Court considering the application under section 389 to re-assess, re-examine and/or re-analyze the same evidence and take a different view to suspend the execution of the sentence and release the convict on bail. In nutshell, following factors before grant of bail are required to be considered :-

- (i) Nature of accusation, severity of punishment in case of conviction and nature of supporting evidence.
- (ii) Reasonable apprehension of tempering with the evidence and apprehension of threat to the complainant.
- (iii) Prima facie satisfaction of the Court in support of the charge.

7. Before submissions made at bar on its merits is considered, it needs to be noted that as Co-ordinate Bench released the accused no.7 on bail pending appeal, present applicant filed Criminal Misc. Application No.5 of 2022 in the captioned appeal u/s 389 of the Code but it was disposed of as withdrawn vide order dated 14.9.2022 on the premise that the

Hon'ble Apex Court had passed an order on 31.1.2022 in SLP to Appeal (Criminal) No.9546 of 2021, wherein order of release of accused no.7 was challenged, by which this Court was requested to dispose of the appeals expeditiously, preferably by the end of December, 2022 and that the appeals were notified on board before the Co-ordinate Bench and heard for final disposal and simultaneously, a liberty in favour of the applicant to file fresh application was reserved, if the appeal is not heard before 31.12.2022. It is stated at bar that though appeals were heard, but could not be disposed of and hence, present application for suspension of sentence is filed by the present applicant. Accordingly, we have taken up the hearing of the application for suspension of sentence on account of liberty reserved as per aforestated order of the Coordinate Bench and further, no any application was earlier filed.

8. The brief facts of the case are that an FIR being I – C. R. No. 163 of 2010 dated 20.07.2010 came to be lodged by Police Constable Mr. Indrajitsinh Hathubha against two unknown persons for offence punishable under section 302, 114 of the Indian Penal Code and section 25(1-B)(a) of the Arms Act. The said FIR was registered with Sola High Court Police Station, Ahmedabad for an incident wherein 2 assailants had fired upon the deceased namely Mr. Amit Jethva and killed him due to some unknown reasons. Upon registration of the FIR, the investigation was undertaken by the Sola High Court Police Station and thereafter, the investigation was transferred to CID Crime, who filed chargesheet against six accused persons under section 302, 201, 120(B) of the Indian Penal Code and 25(1)(b) (a), 27 of the Arms Act including the present applicant. The

father of the deceased had approached this Hon'ble Court vide Special Criminal Application No. 1925 of 2010 for transfer of investigation, wherein the investigation was handed over to SIT headed by SP, Surendranagar. Finally, vide order dated 25.09.2012, the investigation was handed over to CBI by this Hon'ble Court which registered FIR on 03.10.2012. At the end of the trial, the learned CBI Judge convicted seven accused persons and imposed aforesaid punishment. During the course of trial, 195 witnesses were examined and 385 documentary evidence were placed on record. On retrial, the Hon'ble Apex Court granted permission to examine 26 prosecution witnesses and thereafter, the defence had also examined two witnesses. At the end of retrial, the learned CBI Court on appreciation of evidence was pleased to convict and sentence all the seven accused vide judgment and order dated 7.6.2019 and 11.6.2019 respectively for the offences u/s 302 r/w section 120(B) of the IPC and sentence, as aforesaid.

9. It is an undisputed fact that the prosecution rests on circumstantial evidence and as far as present applicant – original accused No.4 is concerned, he is arraigned as accused mainly on the charge that during the relevant period, the deceased had been obtaining various information about illegal mining, other illegal activities in the Gir Forest area through RTI and was filing various litigation including PIL against accused No.7 and his family including the present applicant and therefore, accused Nos.1,4 and 7 hatched a criminal conspiracy with an intention to eliminate the deceased and thus, the accused Nos.1, 4 (present applicant) and 7 had met at the farmhouse of the accused No. 7 at village Harmadiya and had

conspired to kill the deceased. In furtherance of such conspiracy, various accused were contacted and roped in for achieving the object of eliminating the deceased and such persons had eventually eliminated the deceased on 20.07.2010.

10. The accused No.7, who is one of the co-conspirator, came to be released on bail pending hearing of Criminal Appeal No.2163 of 2019 filed at his behest as per order dated 30.9.2021 passed in Criminal Misc. Application No.2 of 2021 annexed at Annexure C. Feeling aggrieved by the said order, the respondent No.3 herein preferred SLP (Cri.) before the Hon'ble Apex Court, which, after hearing, confirmed the order of bail in favour of the accused No.7.

11. During the course of hearing, relevant evidence read before us, more particularly, deposition of PW 26 Mr.Rama Haja, PW 48 Mr.Dharmendragiri Goswami, PW 169 advocate Mr. Anandvardhan Yagnik and PW 116 advocate Mr. Vijay Nangesh, wherein they have attributed identical and same role as to hatching of conspiracy so far as accused Nos.1,4 and 7 are concerned. The judgment of conviction mainly rests on the depositions of the aforesaid four witnesses and heavy reliance was placed by the learned Judge on the evidence of PW 26 namely Rama Haja, who claims to be an employee at the farm house of the accused No.7 from the year 2003 to 2011. Learned Counsel appearing for the respondents heavily relied upon the deposition of PW 26 Mr. Rama Haja, who claims to be in employment with the accused No.7 at the relevant time when the criminal conspiracy was hatched by the accused Nos.1,4 and 7. In this regard, we have minutely gone through the entire

deposition of said witness, more particularly, para 14, 16, 18, 19, 25, 33, 42, 45, 46, 48, 56 to 58 and 61. On reading the deposition as it is, it is very much doubtful that said PW 26 was in employment of accused No.7 and on top of it, he was present there before three months of the incident as stated by him. What is surprising and interesting is that though said witness was in close contact with the deceased and family of the deceased and if at all, he had overheard any such conspiracy hatched by the accused Nos.1,4 and 7, then he has an ample opportunity to disclose this fact, but it seems that he remained silent all throughout for three years till he made his statement first time in the year 2013. We have also noted that said witness disowned his relationship with the father of the victim, namely Bhikhabhai but when he was confronted with the various photographs of both uploaded by him on his facebook account, he accepted relationship. He accepted the fact that he runs news agency and location of his office and Congress Karyalay office is situated in one office (para 61 of the deposition). On combined reading of the entire deposition of the said witness, it transpires that he has got up the theory of his employment with the accused No.7 for the reasons best known to him. To base the conviction on the deposition of said prosecution witness without re-appreciating his evidence, it makes the conviction vulnerable since it creates doubt on the very foundation of chain of circumstances against the applicant, more particularly, theory of hatching conspiracy. The Coordinate Bench released the accused No.7 on bail. Feeling aggrieved by the same, the respondent No.3 victim herein approached the Hon'ble Apex Court but the order of the Coordinate Bench qua accused No.7 was maintained as per order annexed at Annexure D. Needless

to say that law of parity would be applied in granting bail to accused, where co-accused has been granted bail on similar set of circumstances. Law of parity is desirable rule where case of the accused is identical with co-accused, who is already enlarged on bail. However, simply because, co-accused has been granted bail, it cannot be a sole criteria for granting bail to co-accused if they are standing on different footings. Parity cannot be a sole ground for granting bail and if on scrutiny and examination of records in a given case, it transpires that the case of the present applicant is identically similar to the accused, who has already been granted bail, then it would be desirable that the applicant should also be enlarged on bail. We did not notice any material even remotely to say that the case of the present applicant and accused No.7 granted bail is distinguishable on facts. Before applying the law of parity, we have minutely considered the affidavit-in-reply filed by the respondent No.3 and also affidavit-in-reply filed by the respondent CBI. There is no whisper on this aspect and therefore, we have no hesitation to observe that the role played by the accused No.7 and the present applicant is same and identical. For such purpose, we have examined the findings of the learned Judge in para Nos.176 to 190 (PW No.-26) and paras Nos.245 to 258 (PW No.-48). Similarly, we have appreciated the deposition of advocate Mr. Yagnik vis-a-vis the fact that the victim's location on 19.7.2010 at Amreli with regard to which findings recorded in para 362 to 365. Without reassessing the evidence adduced with regard to hatching of criminal conspiracy and motive based on appreciating of evidence, we can see that the case of the accused No.7 and the present applicant stands on same footings for all purposes.

12. The learned Senior Counsel Mr. Naik appearing for the respondent No.3 much relied upon call records so as to demonstrate that co-accused were in touch with each other, more particularly, accused Nos.1,4 and 7. But, there is no evidence in form of telephonic interaction or conversation amongst the accused, but reliance is placed only on CDR details of the number used by the applicant to the extent only having conversed with the accused No.7 and his friend accused No.1. There is no any evidence to prove that the mobile number attributed to the applicant firstly belonged to him or being used by him and also PW 33 examined by the prosecution to prove the mobile number of the applicant has not supported the prosecution case including seizure of panchnama of the mobile of the applicant is not proved.

13. It is one of the contentions of learned Senior Counsel Mr. BB Naik that present applicant is involved in tempering with the evidence and prosecution witness Mr. Dharmendragiri (Pw No.48) was threatened outside and inside CBI Court premises and during the deposition, son of the said witness was kidnapped in order to give undue pressure upon said witness so as not to depose against them. On account of such event occurred during trial, said witness was provided police protection and further, joint inquiry was conducted by the CBI as well as Gujarat Police and offence was registered against the applicant and other accused u/s 120(B) r/w section 195A, 364A and 506 of the IPC. To appreciate this submission, we have considered the deposition of said witness examined as PW 48, who was examined at first instance and also reexamined pursuant to the direction issued by the Hon'ble Apex Court. One

fact is clear that he did not support the prosecution case on both occasions and despite permission to cross-examine was granted by the learned CBI Court, the prosecution did not put a single question with regard to episode of kidnapping of his son. Without taking this issue any further, since the offence is already registered, law will take its own recourse. Even otherwise, this witness PW No.48 is cited for very limited purpose to say that prior to the incident some accused persons were visiting his hotel and talking on mobile phone. Except this, no any facts disclosed before the Court, even before Investigating Officer. In other words, he is not prime witness as to hatching of conspiracy under section 120(B) of IPC. Lastly, learned Senior Counsel for the respondent victim relied on certain details with regard to other FIRs against the applicant. We do not consider that to be relevant factor, because the point of under consideration is whether the conviction recorded by the learned CBI Court in this case is sustainable or not. In totality, we find that on facts and evidence as surfaced on record as it is, the conviction recorded by the learned CBI Court is based on presumptions and assumptions and the same lacks cogent and reliable evidence required to establish the case u/s 120(B) of the IPC.

14. Upon conjoint consideration of evidence, submissions and findings recorded by the learned CBI Court, this Court finds prima facie that the conviction recorded by the learned CBI Court is erroneous, because there is breach of all principles settled by the Hon'ble Apex Court with regard to the circumstantial evidence and requirement for conviction. When circumstances against the applicant are taken cumulatively, we

do not find any chain of evidence having been established leading to the conclusion that in all possibility, the crime was committed by the applicant. On the contrary, the deposition of prosecution witness as aforesaid leads to many other hypothesis than that of guilt of the accused. Even, false implication of the applicant cannot be ruled out keeping aside political consideration out of consideration at this stage.

15. Additionally, we have taken note of the fact that the applicant was on bail pending trial and on various occasions, he was enlarged on temporary bail/parole/furlough leave and there is no any grievance ventilated by any of the parties as to misuse of the liberty. As per the jail remarks submitted on 22.1.2023, the applicant has suffered sentence of 07 years 11 months and 14 days. Considering the fact that 923 appeals older than the present one are pending, it is not likely that the present appeal will be heard in near future, we deem it fit to consider the application for suspension of sentence principally, on the ground of parity.

16. Accordingly, following order is passed.

The judgment and order of sentence dated 6.7.2019 and 11.7.2019 passed by learned Special CBI Judge, Court No.1, Ahmedabad Rural in Special CBI Sessions Case No.2 of 2014 (FIR - I - C. R. No. 163 of 2010 registered with Sola High Court Police Station) is hereby suspended and the applicant accused is released on bail, pending hearing of the appeal on furnishing bail bond of Rs.50,000/- and surety of like amount to the satisfaction of the learned Sessions Court concerned and on further following conditions :

- (a) The applicant shall not leave limits of Gujarat State till final disposal of the appeal.
- (b) The applicant shall surrender passport, if any, within 3 days from today before the concerned Sessions Court and if he does not hold passport, he shall file affidavit before the Sessions Court concerned to that effect.
- (c) The applicant shall not involve himself in any criminal activity while on bail or attempt to contact any prosecution witnesses.
- (d) The applicant shall attend hearing of the appeal regularly as and when it is fixed and further mark his presence on 1<sup>st</sup> day of every Month before the concerned Police Station between 11.00 am to 2.00 pm till appeal is finally disposed of.
- (e) The applicant shall furnish his address of residence to the concerned police station and shall not change the same without prior permission of this Court till final disposal of appeal.

17. It is made clear that if any of the aforesaid conditions is breached by the applicant accused, the State is at liberty to file application for cancellation of bail before this Court. The applicant is ordered to be released on bail forthwith if not required in any other offence.

18. Accordingly, present application is allowed. Direct service is permitted.

(S.H.VORA, J)

(MAUNA M. BHATT, J)

SHEKHAR P. BARVE / Satish

**Further order**

Before pronouncement and signing of the oral order today, learned Senior Counsel Mr.B B Naik appearing for the org. complainant places on record the FIR being CR No.11186008230156 of 2023 registered before the Una Police Station with regard to the one incident occurred on 01/02/2023; wherein PW 48–Dharmendragiri came to be attacked by some named person/s with a view to pressurize him and to settle the issue with regard to one land dispute and incidentally proceedings with regard to kidnapping of son of said witness is pending before the High Court and for other allegations. The said FIR is ordered to be taken on record.

As against this, learned Senior Counsel Mr.Nanavaty for the applicant submits that the entire episode depicted in the said FIR is nothing; but the stunt at the time when the matter for suspension of sentence was already heard and kept for pronouncement of order today; the said incident is got-up and

for the applicant there was no reason to do any such thing when the matter was already heard and posted for orders today.

Based on the submissions made at bar as above, we are not inclined to jump to any conclusion with regard to the said incident at this stage as it may cause prejudice to either side and therefore we refrain ourselves from taking this aspect any further since the legal machinery is already moved and law will take its own course. However, considering the overall facts and circumstances of the case, one more additional condition to an effect that the applicant shall not enter into the local limits of Taluka Una for a period of one year where PW 48 resides is imposed, in addition to the conditions already imposed.

At this stage, learned Senior Counsel for the respondent makes a request to stay the order of suspending sentence so as to approach before the Hon'ble Apex Court. We do not find any reasons to accept the request for the reasons recorded in the order itself and therefore, such request is not entertained.

**(S.H.VORA, J)**

**(MAUNA M. BHATT,J)**

SHEKHAR P. BARVE / Satish