

Suspension of Sentence pending appeal

Article 21 of constitution provides that no person shall be deprived of his personal liberty except by applying the procedure established by law. The personal liberty of individual can be curtailed by procedure established by law. The Criminal Procedure Code is one of such procedural law.

Section-389. Suspension of sentence pending the appeal; release of appellant on bail

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond. [Provided that the appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail]

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

In the case of **Rama Narang V/s Ramesh Narang (1995(2) SCC 513)** Three Judges Bench of Hon'ble Apex Court is elaborately considered the scope and ambit of the power of Appellate Court envisaged in section 389 of Cr.P.C as under: -

“Appellate Court has powers to suspend the execution of sentence. The section 389(1) deals with power of the Appellate Court is the execution of a sentence or execution of an order and obviously the order referred in sub section (1) must be an order which is capable of execution. It has no power to suspend the order of conviction. An order of conviction by itself is not capable of execution under the code. It is the order of sentence or an order awarding compensation or imposed fine or released on probation which are capable of execution and which, if not suspended, would be required to be executed by the authorities.”

The most relevant factor for the exercise of power of suspending the sentence is the degree of probability of the appeal being finally allowed. Such degree of probability has to be determined on the basis of prima facie satisfaction. The other factors relevant for the enquiry would include ancillary matters such as the nature and gravity of the offence and the age and health of the accused. In the case of **Ashok Malhari Sonawane Vs. State of Maharashtra, Criminal Application No.1245 of 2014 (19-3-2015)** it has been observed that even additional evidence can be considered for suspension of conviction pending appeal. In that case applicant was working as Assistant allegedly demanded bribe for issuing allotment letter to the complainant in MHADA scheme. Applicant contended that complainant was actually declared as 'ineligible' but the superior officers had done manipulation by changing entries in G-form and making him 'eligible' and he was trapped falsely. Applicant obtained certain relevant documents under the RTI Act after his conviction and produced in court. In the copy of G-form the complainant was shown as 'patra' (eligible) by erasing the words 'apatra' (ineligible). It was held, observations made in the departmental enquiry, prima facie, support the defence. Said material in the form of authentic documents, if given in evidence, is capable of changing the complexion of the whole case. Investigating Agency strangely does not feel it necessary to investigate into those aspects. Case is quite extra-ordinary and if the order of conviction is not suspended, the applicant is likely to suffer grave and serious prejudice resulting in injustice. Conviction of applicant suspended pending the hearing and final disposal of the Appeal. In the case of

Mulchand Changumal Jethwani & Ors. Vs. State of Maharashtra, Criminal Application No.2 of 2015 (Smt. Sadhana S. Jadhav, J.), it has been observed good behavior of appellants who were on bail during pendency of trial considered sufficient for granting bail. “where the applicants were on bail during the pendency of trial and have not committed breach of any conditions imposed upon them. Appeal not likely to be heard in the near future. Substantive sentence imposed upon the applicant nos. 1 and 2 is suspended and they be enlarged on bail.

Application for suspension of sentence of imprisonment being rejected once can be presented again giving more details and further developments and different considerations. In the case of **Babu Singh and Others Vs. The State of Uttar Pradesh AIR 1978 SC 527**, It has been observed by their Lordships;

“But an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations. While, we surely must set store by this circumstance, we cannot accede to the faint plea that we are barred from second consideration at a later stage. An interim direction is not a conclusive adjudication and updated reconsideration is not overturing and earlier negation. In this view, we entertain the application and evaluate the merits pro and con”.

Prior to amendment to CrPC notice to public prosecutor before suspension of sentence was not necessary. First proviso to section 389 now makes it mandatory to give opportunity to public prosecutor for showing cause in writing against release of person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term not less than 10 years.

In the case of **Bay Leathers Exports Pvt. Ltd. Vs. Saileela Mad, 1998 Cri LJ 3719**, the question was for consideration in this revision petition was whether the appellate court under Section 389 (1) of the Criminal Procedure Code, 1973, could suspend the sentence of fine, while admitting the appeal and if so, under what circumstances. It has been observed, “the expression “sentence”, of course, means, not only substantive sentence of imprisonment but also included sentence of fine. Though the language of Section 389 of the Criminal Procedure Code is silent in terms of the same, the appellate court has to consider the two situations, while ordering suspension of sentence of fine. The one is to find out the reasons for suspending the sentence of fine and the next is to impose suitable conditions, as may be justified on the facts of each case, in order to ensure that the order of sentence of fine which may ultimately be imposed on the appellant as a result of the appeal, can be executed without any difficulty”.

Thus, while using discretion for suspension of sentence of fine reason must be given for suspending the sentence of fine and suitable conditions must be imposed.

The Court of Sessions after hearing the appeal cannot give time to the accused to surrender because it indirectly tantamount to suspending the sentence or releasing the convicted accused on bail. The moment the Sessions Court dismisses the appeal, it follows that the accused whose appeal has been dismissed has to surrender to serve out the sentence imposed upon him. It is only the High Court which can pass appropriate orders in this regard.

When the appellate Court suspends the execution of sentence, and grants bail to an accused, the effect of the order is that the sentence based on conviction is for the time being postponed, or kept in abeyance during the pendency of the appeal. By suspension of execution of sentence under S. 389 Cr. P. C. It has the only effect of avoiding sufferance of sentence pending appeal.

Sentence - The term sentence is used in criminal law. It is the appropriate word to denote the action of the court declaring the consequences to the convict of the fact thus ascertained.

There are a variety of sentences that may be imposed on an accused, if he's found guilty in a criminal trial. He may be sentenced to:

- Pay a fine
- Probation
- Imprisonment
- Death

"Suspension" means to take or withdraw the sentence for the time being. It is an act of keeping sentence in abeyance at the pleasure of the person who is authorized to suspend the sentence, and if no conditions are imposed, the person authorized to suspend has the right to have the offender re-arrested and direct that he should undergo the rest of the sentence without assigning any reason. **Law Commission, 41st Report p. 248 para 29.1**

Suspension of Sentence by Probation

The court may stay a sentence of probation if the accused appeals the conviction. Probation is a period of evaluation in which the accused must follow certain conditions, such as not leaving the state etc. If he fails to follow these conditions, he may be sentenced to imprisonment by the court. Just like staying a sentence to pay a fine, the court has the discretion to set any appropriate terms it wants in staying a sentence of probation.

Staying a Sentence of Imprisonment and Death:

If the court suspends a sentence of imprisonment, the accused is released while his appeal is pending, the accused is released if the court grants him **bail**, and he meets the terms fixed by the court. Bail allows the accused to be temporarily released from prison in exchange for cash or a bond from a surety. In order to be granted bail, the accused must show by clear and convincing evidence that he won't flee or endanger other people if he's released pending his appeal. The accused must also show that the appeal isn't for the purpose of delay.

If the accused is not granted bail or fails to meet the terms fixed by the court for bail, the sentence of imprisonment won't be stayed. However, the court can recommend that the accused be confined near the place of the trial or appeal to help him in preparing his appeal.

The accused is entitled to credit towards his sentence of imprisonment for any time served in jail while his appeal is pending. If the accused's appeal is denied, he'll have already served part of his sentence of imprisonment.

Staying a Sentence of Death

The death penalty is the most serious criminal punishment that can be given to an accused. If an accused's sentence of imprisonment isn't stayed by the court, he can be released from custody if the conviction is later found to be defective. However, the death of the accused is final. Nothing can be done if a death sentence isn't stayed and the conviction is later overturned. Therefore, any sentence of death is stayed if the accused appeals the conviction or sentence.

S.389 postulates a right of appeal to convicted person and the power of the appellate court arises when appeal is filed. Where the appellate court suspends execution of sentence or grants interim bail pending the appeal, the order of conviction still remains in existence. In **Pampapathy v. State of Mysore (AIR 1967 SC 286)** it is held by Hon. Supreme Court that the Appellate Court can alone exercise the powers conferred by sub section (1) of this section. But in the absence of an appeal the powers cannot be exercised, because the sub section says "pending any appeal by a convicted person" the execution of sentence may be suspended. In a proper case the High Court has inherent power under section 482 of the Code to cancel the order of suspension of sentence and grant of bail to the appellant made under this section and to order the appellant be rearrested and committed to jail custody.

In **Masood Ali Khan V/s. State of U.P. (2009 Cri. L.J.1322 (1324) (SC)** Hon. Supreme Court held that, Section 389 of the Cr. P. 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. 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 against. 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.

'Convict' means declared to be guilty of criminal offence by the verdict of court of law. That declaration is made after the court finds him guilty of the charges which have been proved against him. Thus, in effect, if one prays for stay of conviction, he is asking for stay of operation of the effects of the declaration of being guilty.

Section 389 (1) requires that powers under this section cannot be exercised without recording reasons. This section though gives discretionary powers to the appellate court but it has to be exercised judiciously. In **Kishorlal Versus Rupa and others**, [2004 (7) SCC 638], Hon'ble Apex Court observed that 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.

6. In **Bhagwan Rama Shinde Versus State of Gujarat** [(1999) 4 SCC 421], the Hon'ble Apex Court pleased to lay down guidelines for the purpose of exercising powers by appellate Courts, under section 389 (1) of Cr.P.C. in following words:

"3. When a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate Court liberally unless there are exceptional circumstances. Of course, if, there is any statutory restriction against suspension of sentence it is a different matter. Similarly, when the sentence is life imprisonment the consideration for suspension of sentence could be of a different approach. But, if for any reason the sentence of a limited duration cannot be suspended every endeavour should be made to dispose of the endeavor appeal on merits more so when a motion for expeditious hearing of the appeal is made in such cases. Otherwise the very valuable right of appeal would be an exercise in futility by efflux of time. When the appellate Court finds that due to practical reasons such appeals cannot be disposed of expeditiously the appellate Court must bestow special concern in the matter of suspending the sentence. So as to make the appeal right, meaningful and effective. Of course, appellate Courts can impose similar conditions when bail is granted."

The first and foremost requirement to be fulfilled by the Appellate Court is that it has to record the reasons in writing before execution of the sentence or order appealed against is suspended. Order de hors the reasons may be subjected to critical judicial scrutiny and may be quashed. The significance of the importance of writing the reasons in writing was well explained by the Supreme Court of India in the case of **Kanaka Rekha Naik Versus Manoj Kumar Pradhan** reported in **AIR 2011 SC 799**. The Apex Court ultimately remitted the matter for afresh consideration by observing as under:-

"But, suspension of sentence, pending any appeal by a convicted person and consequential release on bail is not a matter of course. The appellate Court is required to record reasons in writing for suspending the sentence and release of a convict on bail pending the appeal. The impugned order does not record any reason whatsoever except vague observation that nature of allegations have been taken into consideration. The order clearly reflects that the High Court was mainly impressed by the fact that the respondent is a sitting M.L.A. In the circumstances, we find it difficult to sustain the order. It is for the High Court to arrive at a proper conclusion for which purpose, reasons are required to be recorded."

Once the reasons are recorded to support the order, the next imperative requirement is that opportunity of being heard has to be given to the Public Prosecutor when the convict is to be released on bail where the offence is punishable with death and imprisonment for life or imprisonment for a term of 10 years. Otherwise the order of bail would stand vitiated the mandate of the proviso to Section 389 (1) being not complied with. On this point, there is specific decision of the Supreme Court in the case of **Atul Tripathi Versus State OF U.P.** reported in **AIR 2014 SC 3062**. The Apex Court by magnifying this requirement also laid down the parameters for suspension of sentence and observed: -

- "(a) The appellate court, if inclined to consider the release of a convict sentenced to punishment for death or imprisonment for life or for a period of ten years or more, shall first give an opportunity to the public prosecutor to show cause in writing against such release.*
- (b) On such opportunity being given, the State is required to file its objections, if any, in writing. (c) In case the public prosecutor does not file the objections in writing, the appellate court shall, in its order, specify that no objection had been*

filed despite the opportunity granted by the court.

(d) The court shall judiciously consider all the relevant factors whether specified in the objections or not, like gravity of offence, nature of the crime, age, criminal antecedents of the convict, impact on public confidence in court, etc. before passing an order for release.”

Coming to the further parameters for suspending the sentence in the case of **Kishori Lal Versus Rupa**, reported in **AIR 2005 SC 1481** the Supreme Court laid down that the appellate Court is under an obligation to objectively assess the cases so as to warrant suspension of sentence. Simply because no misuse of liberty was made during the trial is no per se a good ground for suspending the sentence. There is vast difference between pretrial bail and bail after conviction. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order should not be passed as a matter of routine. This principle was reiterated in the case of **Vasant Tukaram Pawar Versus State of Maharashtra** reported in **(2005) 5 SCC 281** & **Gomti Versus Thakurdas** reported in **(2007)11 SCC 160**.

8. The Apex Court in supra **Kishori Lal** also observed referring to the decision in **Vijaykumar V/s. Narendra and Ramji Prasad V/s. Ratankumar Jiswa** that in cases involving conviction U/sec.302 of the Indian Penal Code only in exceptional cases benefit of suspension of sentence can be granted. The relevant factors to be considered by the Court were enumerated by the Supreme Court as under: -

“The court should consider 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, and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder.”

Since these aspects were not considered by the High Court, it was remitted back to the trial for afresh consideration.

9. The legal parameters for suspending of sentence have also been laid down by the Apex Court in the case of **Angana & Anr. Versus State of Rajasthan** reported **(2009) 3 SCC 767**. The Apex Court also referred to the decision in **Takhat Singh vs. State of M.P., (2001) 10 SCC 463** in which, one important factor that there is no possibility of early hearing of the appeal in the High Court was also considered. The Court also referred to the decision in **Kashmira Singh vs. State of Punjab**, reported in **(1997) 4 SCC 291** in which, it was laid down “Can the Court ever compensate him for his incarceration which is found to be unjustified?”

10. In **Sidharth Vashisht @ Manu Sharma Vs. The State (N.C.T. of Delhi)**, **(2008) 5 SCC 230**, the Apex Court after considering all the earlier decisions on the issue of consideration of an application under Section 389 of the Code of Criminal Procedure, has concluded, that in serious offences like murder, sentence would generally be not suspended by court.

Implicitly laying down one additional parameter the Apex Court in the case of **State of Maharashtra Versus Pappu Alia Suresh Budharmal Kalani**, reported in **(2014) 11 SCC 706**, held that prima facie hostility of the wife, father of the deceased and P.W.No.9 driver can be taken in to account when none of the witnesses have made reference to the role played by the accused in hatching the conspiracy to kill the deceased, especially when there

is no explanation in the cross-examination. Ultimately, substantive sentence was suspended and the accused was ordered to be released on bail on some conditions.

16. These principles may be summed up thus: - Before suspending the sentence, the Court has to pass a well-reasoned order by exercising the discretion judiciously. It shall there before afford an opportunity being heard to the public prosecutor. It has to consider all the relevant factors like nature and seriousness of the offence, antecedents of the accused, time likely hear the appeal, any specific embargo laid down in the special statute, the period of sentence undergone, the manner in which the crime was allegedly committed and desirability to release the accused on bail if the offence relates to murder.

Power to suspend a sentence versus power to suspend the conviction

Pending the disposal of an appeal or a revision, appellate and revisional courts have powers to (i) suspend the execution of a sentence and release the appellant on bail or (ii) suspend the conviction itself and release the appellant on bail. In the case of appellate courts, these powers reside in Section 389(1) of the *Code of Criminal Procedure, 1973* ("CrPC"). The important distinction between these powers is that a suspension of the execution the sentence pending an appeal does not erase the conviction or suspend any disqualification that arose from the conviction. A suspension of the conviction on the other hand, has the legal effect of staying any disqualifications under any law because of the conviction. For example, a person is disqualified from being a member of Parliament or the Legislative Assembly or Legislative Council of a state under Section 8(3) of the *Representation of People Act, 1951* if he or she has been convicted and sentenced for any offence for not less than two years. If an appellate court has stayed the conviction under Section 389(1), it has the effect of staying such a disqualification. Not so, if the order merely suspends the execution of the sentence.

Power to suspend conviction – exercise with caution

The Supreme Court has held that the power to suspend the conviction must be exercised only in exceptional cases where a failure to stay the conviction would lead to injustice and irreversible consequences. In *Navjot Singh Sidhu v. State of Punjab*, (Cri Appeal 59/ 2007 SC) the Court held that the person seeking a stay of the conviction should specifically draw the attention of the appellate court to the consequences that may arise if the conviction is not stayed. A person convicted cannot obtain an order of stay of conviction without that. In *State of Tamil Nadu v. A. Jaganathan* (1996 SCALE(5)382) and in *K.C. Sareen* (Cri Appeal 770/2001) the Court has even held that a conviction on a corruption charge against a public servant should not be suspended even if the sentence of imprisonment is suspended.
