

Court No. - 65

Case :- CRIMINAL MISC. APPLICATION U/S 389(2) No. - 2 of 2023

Applicant :- Mohammad Abdullah Azam Khan

Opposite Party :- State of U.P.

Counsel for Applicant :- Mohammad Khalid

Counsel for Opposite Party :- G.A.

Hon'ble Rajiv Gupta,J.

Heard Shri Imran Ullah, learned counsel assisted by Shri Mohammad Khalid, learned counsel for the applicant and Shri Manish Goyal, learned Additional Advocate General assisted by Shri Amit Sinha, Shri Jay Narayan, Shri Abhijeet Mukherjee, Shri Rajesh Mishra and Shri A.K. Sand, learned counsels for the State and perused the record.

The present application under Section 389(2) Cr.P.C. has been filed by the applicant with the prayer to set aside the order dated 28.02.2023 passed by learned Additional Sessions Judge, Court No.2 Moradabad in Criminal Appeal No.14 of 2023 (Mohd. Abdullah Azam Khan Vs. State of U.P.) and stay the order of conviction dated 13.02.2023 passed by Ist Additional Chief Judicial Magistrate, Court No.4, Moradabad in Criminal Case No. 366 of 2022, arising out of Case Crime No.01 of 2022, under Sections 353/341 IPC and Section 7 of Criminal Law Amendment Act, Police Station Chhajlet, District Moradabad.

Brief facts giving rise to this application are that on 02.01.2008, an FIR was lodged at the Police Station Chhajlet, District Moradabad alleging therein that an information was transmitted that a Pajero car with red beacon on its top and dark coloured window glasses is coming in a suspicious condition from Moradabad to Kanth Road. On getting the said information, Station Officer along with police force reached at the place on incident. At about 11.30 AM, a black coloured Pajero car with red beacon on its top having Registration No. U.P.-32-BA-6525 reached there and the said vehicle was intercepted by the Station Officer Asaf Ali Khan. On enquiry, driver of the vehicle produced a photocopy of his driving license, however, he did not

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disclose his name and rather stated that his name is mentioned in the driving license itself. He further stated that the person, lying on the rear seat of the car, is his father Mohd. Azam Khan and you do not know his status and dares to intercept him. It is further stated that suddenly, Mohd. Azam Khan alighted from the car and stated that he is an MLA of Samajwadi Party and Ex-Minister and Lifetime Chancellor of Maulana Mohammed Ali Jauhar University, Rampur and how he dared to stop his vehicle. He started making calls from his mobile phone. The police party challaned the vehicle under the Motor Vehicles Act, however, the driver refused to sign the said challan. Mohd. Azam Khan then threatened to set his car on fire, which may result in breach of peace in the entire State. He, thereafter called number of political leaders and workers of Samajwadi Party over his mobile phone and started giving provocative speech against the Government and blocked the public road on Moradabad-Haridwar Highway causing great inconvenience to the general public. The nominated accused persons, namely, Mohd. Azam Khan, Mohd. Abdullah Azam Khan, Rajesh Yadav, D.P. Yadav, Raj Kumar Prajapati, Haji Ikram Quraishi, all residents of Moradabad, Mahboob Ali, resident of Amroha, Manoj Paras and other unknown 1000-1200 workers of Samajwadi Party blocked the entire highway and started raising slogans and thereafter, left the place of incident leaving behind the vehicle.

On the basis of the said allegations, FIR was registered vide Case Crime No.01 of 2008 against the nominated accused persons under Sections 147, 353 and 341 IPC and Section 7 of Criminal Law Amendment Act. After registration of the case, the police thoroughly investigated the matter and after concluding the investigation, submitted the charge-sheet against the applicant including other co-accused persons under Sections 147, 353, 341 IPC and Section 7 of Criminal Law Amendment Act.

After necessary legal formalities, the charges were framed against the applicant, to which, he did not plead guilty and claimed to be tried. Thereafter, statements of the witnesses

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were recorded and after a full-fledged trial, the applicant along with his father were convicted for the offence under Section 353 IPC and awarded the sentence of two years of simple imprisonment with a fine of Rs.2,000/- each, further under Section 341 IPC and awarded the sentence of one month simple imprisonment with a fine of Rs.500/- each, further under Section 7 of Criminal Law Amendment Act and awarded the sentence of six months simple imprisonment with a fine of Rs.500/- each, with default stipulations. All the sentences were directed to run concurrently vide judgment and order dated 13.02.2023 passed by ACJM Court No.4, Moradabad.

Being aggrieved and dissatisfied with the said order dated 13.02.2023, the applicant preferred an appeal before the Sessions Judge, Moradabad under Section 374 Cr.P.C. Along with the said appeal, an application was also filed for suspending the sentence and releasing the applicant on bail and further, under Section 389(2) Cr.P.C., another application was also filed for staying the conviction of the applicant till the disposal of the appeal. The appeal was admitted and the prayer for suspension of sentence till the disposal of the appeal has been allowed and the applicant has been directed to be released on bail, however, the application for stay of conviction during the pendency of the appeal has been rejected vide order dated 28.02.2023 passed by learned Additional Sessions Judge, Court No.2, Moradabad.

Being aggrieved and dissatisfied by the aforesaid order dated 28.02.2023, rejecting the prayer for stay of conviction present application under Section 389(2) Cr.P.C. has been filed and a prayer has been made for stay of conviction by setting aside the impugned order dated 28.02.2023.

Learned counsel for the applicant, seeking stay of applicant's conviction, has made two fold submissions before this Court. The first submission being that on the date of incident i.e. on 02.01.2008, the applicant was a minor, however, the trial court illegally proceeded with the entire trial treating him to be an adult, as such, his entire trial stands vitiated and, therefore, till the disposal of the appeal, the conviction recorded against the applicant by the court

below be stayed.

The second submission made by learned counsel for the applicant is that in view of the judgment and order dated 07.11.2022, passed by Hon'ble Apex Court in ***Civil Appeal No. 104 of 2020 (Mohd. Abdullah Azam Khan Vs. Nawab Kazim Ali Khan)***, arising out of Election Petition No. 08 of 2017, wherein, the question of his minority has been dealt with and he has been held to be a 'minor', therefore, his criminal trial in the instant case should have proceeded as a 'minor' before the competent court and not before the court below, which has illegally convicted and sentenced him by the order dated 13.02.2023, as such, the said order is bad in law and is liable to be set aside. In the meantime, his order of conviction be stayed by this Court by setting aside the impugned order dated 28.02.2023 passed by the appellate court.

No other ground has been pressed by learned counsel for the applicant seeking stay of conviction.

Per contra, learned Additional Advocate General has supported the impugned orders and has submitted that impugned order dated 28.02.2023 passed by the appellate court rejecting the prayer for stay of conviction is just, proper and legal and do not call for any interference.

Learned AAG has further submitted that during the course of trial, the applicant never claimed himself to be a minor and accordingly, the trial court tried the applicant along with other co-accused and recorded the entire evidence and after concluding the full-fledged trial, the applicant was found guilty for the offence, charged with, and was accordingly convicted. Even, at the time of recording the sentence, the applicant did not raise any plea that at the time of incident, he was a juvenile and rather stated that he is highly educated person and is presently a Member of Legislative Assembly and earlier also, was a Member of Legislative Assembly and as such, a compassionate view be taken, however subsequently, after recording of conviction and passing of sentence by the trial court, he has taken a

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somersault and for the first time, for seeking stay of his conviction, has come up with a case that he was a minor at the time of incident, however, he has been illegally tried as an adult along with other co-accused, as such, the entire trial stands vitiated and his conviction and sentence is liable to be set aside, which by no stretch of imagination, is conceivable and worth consideration.

Learned AAG repelling the aforesaid stand of the applicant has further submitted that under the Juvenile Justice (Care and Protection of Children) Act, a complete mechanism/procedure for declaring an accused to be a 'minor' has been prescribed for claiming juvenility before any court, which is contained in Section 7A of the Act.

Section 7A of the Juvenile Justice Act provides:

"[7A. Procedure to be followed when claim of juvenility is raised before any court.—

(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect.]"

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Procedure to be followed in determination of Age.— (1) *In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.*

(2) *The Court or the Board or, as the case may be, the Committee shall decide the juvenility or otherwise of the juvenile or the child or, as the case may be, the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.*

(3) *In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining —*

(a)(i) *the matriculation or equivalent certificates, if available; and in the absence whereof;*

(ii) *the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;*

(iii) *the birth certificate given by a corporation or a municipal authority or a panchayat;*

(b) *and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year and while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.*

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(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusion proof specified in sub-rule (3), the Court or the Board or, as the case may be, the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

It is further germane to point out here that the Hon'ble Apex Court in the case of **Abuzar Hossain Vs. State of West Bengal reported in (2012) 10 SCC 489**, has laid down the broad principles for determining the claim of juvenility raised by an individual.

39.1. A claim of juvenility may be raised at any stage even after final disposal of the case. It may be raised for the first time before this Court as well after final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in appeal court.

39.2. For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.

39.3. As to what materials would prima facie satisfy the court

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and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rule 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard and fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh and Pawan, these documents were not found prima facie credible while in Jitendra Singh, the documents viz., school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the delinquent.

39.4. An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of age of the delinquent.

39.5. The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in 2000 Act are not defeated by hyper-technical approach and the persons who are entitled to get benefits of 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical

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examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.

39.6 Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at threshold whenever raised.

Thus, it is evident that Juvenile Justice (Care and Protection of Children) Act and Rules clearly lays down a specific procedure to be followed for determination of claim of juvenility, however, the applicant never raised the claim of juvenility and as such, he was never held to be a juvenile as defined under Section 2K of the Juvenile Justice Act. In the absence of which, the applicant cannot be presumed to be a 'minor'.

Learned AAG has further submitted that for raising the claim of juvenility, an application claiming juvenility has to be filed as held by Hon'ble Apex Court in the case of ***Vimal Chaddha Vs. Vikas Chaudhary and Another reported in (2008) AIR SCW 4259***, wherein it has been held that "Determination of age of a "juvenile in delinquency" must be determined as and when an application is filed". Admittedly, in the instant case, no such application has been filed for declaring the applicant to be a "juvenile", however, by presuming himself to be a minor, a stand is being taken that since the trial has illegally proceeded against him treating him as an adult, therefore, the same stands vitiated and the Court must stay his conviction by setting aside the order passed by the appellate court, the said stand by the applicant is wholly untenable and liable to be discarded.

Learned AAG has further submitted that since the applicant has not been held to be a juvenile as envisaged in the Act, therefore, he cannot be held to be a "minor" and extended the benefit of vitiating the trial and stay of his conviction.

Learned AAG has also submitted that in fact, the controversy involved in Civil Appeal No. 104 of 2020 (Mohd. Abdullah

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Azam Khan Vs. Nawab Kazim Ali Khan) is based on an election petition filed under Section 100 of the Representation of People Act and has no relevance at all with the present controversy and is based on its own facts. Merely because the applicant has been held to be a minor in the election petition, the said benefit cannot be extended to him in instant criminal trial without he being held to be a minor as provided under the Juvenile Justice (Care and Protection of Children) Act and therefore, the judgment in the civil appeal would not, in any way, render any benefit to the applicant for staying his conviction and is also liable to be repelled.

Learned AAG has further submitted that as per the settled principle of law laid down by Hon'ble Apex Court in several of its decisions, the conviction is to be stayed only under exceptional circumstances and only in rarest of rare cases, however, by no stretch of imagination, the case of the applicant falls in the category of rarest of rare case and exceptional circumstances.

Learned AAG has further submitted that the applicant is a man of criminal antecedent and presently, as many as 46 criminal cases are registered against him and in the instant case, he has been convicted. It is further submitted that the people representatives should be a man of clear antecedent and now, there is a need to have purity in the politics. There is nothing on record to show that conviction of the applicant, in any way, would result in injustice. Disqualification is not limited to M.P./M.L.A. and there cannot be a different rule for M.P./M.L.A. In the backdrop of the said circumstances also, the order passed by the appellate court refusing to stay the conviction of the applicant is just, proper and legal and do not call for any interference and the applicant is not entitled for grant of any stay of conviction.

Learned AAG has further pointed out that while rejecting the said application for stay of conviction, even the trial court has made a specific observation that the applicant has not claimed any relief claiming himself to be a juvenile nor has submitted any document regarding his age as held by

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Hon'ble Apex Court in the case of ***Abuzar Hossain Vs. State of West Bengal reported in (2012) 10 SCC 489*** and as such, the impugned order passed by the court below is just, proper and legal and do not call for any interference.

Having considered the rival submissions made by learned counsel for the parties and on perusal of the record, it is evident that the applicant is pleading for stay of his conviction on the ground that at the time of incident, he was a minor, however, he has been illegally tried as an adult along with other co-accused, as such, the entire trial stands vitiated and during pendency of the appeal, the conviction recorded against the applicant is liable to be stayed. The said contention of learned counsel for the applicant is wholly unsustainable and liable to be repelled. Until and unless the applicant has been held to be a minor, he cannot be extended the benefit of a minor as now claimed by him. During the course of trial, the applicant has never claimed himself to be a minor by moving an application for the same as held by Hon'ble Apex Court in the case of ***Vimal Chaddha Vs. Vikas Chaudhary and Another reported in (2008) AIR SCW 4259***, and as such, since the applicant has not been held to be a minor, therefore, the trial against him rightly proceeded as an adult along with the other co-accused and he has rightly been convicted and sentenced. By no stretch of imagination, the trial on this ground can be said to be vitiated and his conviction be stayed till the disposal of the appeal.

Furthermore, the plea raised by the applicant that since he has been held to be a minor in the election petition, as such, in the instant criminal trial also, he should have been presumed to be a "minor" and accordingly tried by the competent court and not by the instant trial court, which has illegally convicted and sentenced him, as such, the trial stands vitiated and his conviction is liable to be stayed. The said plea is also wholly unsustainable and has no legs to stand. Admittedly, proceedings of the election petition filed under Section 100 of the Representation of People Act and the civil appeal arising therefrom are based on entirely

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different issue dealing with disqualification and has no bearing on the instant criminal trial as clarified by Hon'ble Apex Court in Review Petition No. 160 of 2020 in Civil Appeal No. 104 of 2020 (Mohd. Abdullah Azam Khan Vs. Nawab Kazim Ali Khan), wherein it has been observed that criminal case against the applicant, if any, pending in reference to the same self subject may be decided on its own merits, thus the applicant cannot get any benefit out of the said proceedings, which may vitiate the trial.

In fact, the applicant is trying to seek stay of his conviction on absolutely non-existent grounds. It is well-settled principle of law that stay of conviction is not a rule but an exception to be resorted to in rare cases. Disqualification is not limited only to M.Ps/M.L.As. Moreover, as many as 46 criminal cases are pending against the applicant. It is now need of the hour to have purity in politics. Representatives of people should be man of clear antecedent.

In the backdrop of the said circumstances, refusal to stay the conviction would not, in any way, result in injustice to the applicant.

In view of the foregoing discussions, in my considered opinion, there is no reasonable ground to stay the conviction of the applicant in the facts and circumstances of the case. The impugned order passed by the appellate court is just, proper and legal and do not call for any interference.

The present application under Section 389(2) Cr.P.C. is devoid of merits and is accordingly **dismissed**.

Order Date :- 13.4.2023

Nadim