

ORDER SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Crl. Appeal No.137/2018.

Aamir Shamas

Versus

The State, etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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C.M No.01/2018.

03.	11.10.2018	Raja Rizwan Abbasi & Mr. Sohail Akhtar, Advocates for the petitioner. Mr. Zahid Asif Chaudhry, Advocate for respondent No.2.
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Through instant C.M U/S 426, Cr.P.C, the petitioner has prayed for suspension of the sentence awarded to him by Sessions Judge/Prevention of Electronic Crime Court, Islamabad in case FIR No.11, dated 15.02.2016, U/S 36, 37 Electronic Transaction Ordinance 2002, police station Cyber Crime Circle FIA, Islamabad. The petitioner has been convicted U/S 36 ETO 2002 and sentenced to undergo 03 years R.I and to pay fine of Rs.2,00,000/- and in default whereof, he shall further undergo 06 months S.I. The petitioner has also been convicted U/S 37 ETO 2002 and sentenced to undergo 03 years R.I and to pay fine of Rs.2,00,000/- and in default whereof, he shall further undergo 06 months S.I.

2. Brief facts leading to the registration of the FIR are that complainant/respondent No.2 filed a complaint alleging therein that the petitioner hacked her facebook account and further created fake facebook profile account i.e. www.facebook.com/maham.nafees.50 and started blackmailing

her with the intention to satisfy his lust upon which she and her family reacted, where-after the petitioner deactivated her facebook account and created two other fake ID's in her name and started harassing her by way of fabricating her pictures in loose manner. Complainant/respondent No.2 further alleged that the petitioner downloaded and displayed her personal obscene/fabricated pictures and sent to her, her father, relatives as well as friends and blackmailed and defamed her in the eyes of her family, relatives and friends.

3. Learned counsel for the petitioner has contended that initial burden of proof has not been discharged by the prosecution and both the offences are not made out from bare reading of the impugned judgment and learned Trial Court has not appreciated the evidence in its true perspective. The forensic report referred in the case has not linked the petitioner with the main crime and he is entitled for the benefit; that punishment awarded to the appellant is short sentence and the petitioner has already served sentence of 06 months, therefore, sentence of the petitioner may be suspended as the appeal could not be decided in near future.

4. Conversely, learned counsel for respondent No.2 has contended that it is not mandatory in every case to suspend the sentence, even in cases where the sentence is short; that the petitioner is charged with the offence of moral turpitude, who has ruined life of the complainant/respondent No.2 by creating her fake facebook ID and blackmailed her by uploading her obscene pictures; that the mobile phone and laptop have been recovered from the petitioner and as such the duly established technical evidence recorded by FIA Forensic Experts has proved the case against the petitioner.

5. I have heard the arguments and gone through the record.

6. There is no cavil to the proposition that section 426 Cr.P.C is meant to deal with suspension of the sentence, release of the appellant on bail pending the appeal, however, the pre-requisite to exercise such powers is that when the delay is apparent in the decision of the appeal, although there is no denial that the punishment/sentence awarded to the petitioner is 03 years for each offence U/S 36 & 37 ETO 2002. However, the delay in deciding the appeal is paramount consideration for suspension of sentence, whereas instant appeal has been filed on 12.09.2018 only a month ago, therefore, the exception to exercise the jurisdiction U/S 426, Cr.P.C provided in subsection I-A is ***“whose appeal has not been decided within period of 06 months of conviction”*** whereas the petitioner has claimed suspension of the sentence prior to expiry of 06 months after his conviction, which seems pre-mature at this stage.

7. Learned counsel for the petitioner as well as learned counsel for respondent No.2 has relied upon 2005 P Cr L J 657 [Karachi] (Nazeer Ahmed and 2 others vs. The State), 2008 MLD 312 (Ilyas alias Billu vs. The State), 1991 SCMR 1909 (Pervaiz Akhtar vs. The State), 2016 SCMR 1325 (Soba Khan vs. The State and another), 2007 SCMR 246 (Makhdoom Javed Hashmi vs. The State), 2013 SCMR 1403 (Manzoor Ahmed vs. Fazal Ahmed and 3 others), 2013 Law Notes 88 [Rawalpindi] (Shahzaib Hassan, etc. vs. The State, etc), 2010 YLR 1178 [Karachi] (Allah Warrayo alias Jabbal vs. The State) & 1999 MLD 2382 [Karachi] (Waseemul Haque vs. The State).

8. While considering the above referred authoritative judgments of the superior Courts, following principles have been laid down for suspension of the sentence:-

- (a) *Where sentence is short coupled with delay in decision of appeal.*
- (b) *There is likelihood that the appeal cannot be decided within near future.*
- (c) *The petitioner/appellant has served the major portion of his sentence.*
- (d) *The sentence shall not be suspended, where role of the petitioner/appellant cannot be extracted without deeper appreciation of evidence.*
- (e) *Powers of the Appellate Court in granting bail at post conviction stage shall be guided by the criteria/process provided in section 497, Cr.P.C.*
- (f) *Sentence should be suspended in appropriate cases through tentative assessment of the evidence on record, if case of the convicted persons is found fit for grant of bail.*
- (g) *Sentence can be suspended if on reconsideration of evidence the Court of appeal is of the view that conviction/sentence is not liable to be maintained by slightly touching merits of the case without recording conclusive findings.*

9. Keeping in view above referred principles, I am also fortified with the limitation described in subsection 1-A of section 426, Cr.P.C, which is reproduced for ready reference:-

- (1-A) *An Appellate Court shall, except where is of opinion that the delay in the decision of appeal has been occasioned by an act or omission of the appellant or any other person*

acting on this behalf, order a convicted person to be released on bail who has been sentenced.

- (a) to imprisonment for a period not exceeding three years and whose appeal has not been decided within a period of six months of his conviction.*
- b) to imprisonment for a period exceeding three years but not exceeding seven years and whose appeal has not been decided within a period of one year of his conviction; or*
- (c) to imprisonment for life or imprisonment exceeding seven years and whose appeal has not been decided within a period of two years of his conviction.*

Provided that the provisions of the foregoing paragraphs shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Appellate Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

10. The above referred provisions indicate that the legislature has defined sentence into three grades and the above referred categories have to be applied while deciding application U/S 426, Cr.P.C in the light of principles referred in paragraph 8 of this judgment while maintaining those conditions referred above.

11. In view of legal and factual aspects of this case, I am of the considered view the petitioner is prima facie charged with offences U/S 36 & 37 ETO 2002 as he allegedly hacked facebook account of complainant/respondent No.2 and created two other fake IDs of the complainant/respondent and started harassing her by way of fabricating her pictures in loose manner and sent the same to her, her father, relatives and friends. Even otherwise, it requires appreciation to segregate the legal and factual aspect after appreciating the evidence during hearing of main appeal as to whether the prosecution has substantiated the charges against the petitioner under the law or not?

12. Besides the said consideration, in this case only one month has elapsed after conviction of the petitioner, which does not cross the required time frame of 06 months in cases where 03 years sentence has been awarded.

13. For the foregoing discussion, I am not inclined to accept instant C.M/petition U/S 426, Cr.P.C for suspension of the sentence, therefore, the same is hereby dismissed.

Main Case.

Office is directed to fix the appeal on 30.10.2018 for arguments.

(MOHSIN AKHTAR KAYANI)
JUDGE

APPROVED FOR REPORTING.

JUDGE

R.Anjam