

Rahul Kanojia vs The State & Anr on 12 December, 2022

Author: Dinesh Kumar Sharma

Bench: Dinesh Kumar Sharma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.A. 344/2022
RAHUL KANOJIA

Through: Mr. Shiv Chopra, Ms. Aad
Khanna, Mr. Siddharth Ar
Nikhil Srivastava, Advs.

versus

THE STATE & ANR.

Through: Mr. Raghuwinder Verma, A
State with SI Lovely Pri
Connaught place.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA
ORDER

% 12.12.2022 CRL.M.(BAIL) 903/2022 (suspension of sentence)

1. The present application has been filed on behalf of the appellant under Section 389 read with Section 482 Cr. P.C. seeking suspension of sentence till final disposal of the present appeal in FIR No. 40/2017 registered at PS Connaught Place under Sections 4 of POCSO Act read with Section 377/ 506 IPC.

2. The learned Trial court vide its judgement dated 07.04.2022 convicted the appellant for the offences under 4 of POCSO Act and in the alternative under Section 377 IPC and acquitted the appellant for the offence under section 506 IPC. The learned Trial court vide its order on sentence dated 29.04.2022 sentenced the appellant to a simple imprisonment for ten years and imposed a fine of Rs. 20,000/-, and in the case of default of payment of fine, a simple imprisonment for six months. The learned Trial court further granted the appellant the benefit contained under section 482 Cr. P.C. qua the period undergone in judicial custody. As per Part I of the Schedule of The Delhi Victims Compensation Scheme, 2018, the victim was granted compensation of Rs. 3,00,000/ by the learned Trial court.

3. Learned counsel for the appellant submits that he has been assigned the case by the Delhi High Court Legal Service Committee and submits that the appellant is a vagabond near Hanuman Mandir, Connaught Place, New Delhi and a permanent resident of Village Kodwa, Bilaspur District, Madhya Pradesh. Learned counsel submits that the appellant belongs to poor strata of society. It has been submitted that the sentence of the appellant may be suspended as the appellant has already undergone more than half of the sentence awarded to him. Ld. Counsel submits that of a total period

of ten years, simple imprisonment, the appellant has already undergone a period of 5 years and 9 months in custody as on date. Learned counsel submits that the hearing of the appeal may take some time and prays that while the appeal is pending disposal, the appellant's sentence may be suspended as per section 389 CrPC. Reliance has been placed on the order dated 06.10.2021 in "Sonadhar v. The State of Chhatisgarh", 2021 SCC Online SC 3182, whereby the Supreme Court inter alia observed as under:

a) A similar exercise be undertaken by the High Court Legal Services Committee of different High Courts so that convicts represented by legal aid Advocates do not suffer due to delay in hearing of the appeals. NALSA will circulate this order to the concerned authority and monitor the exercise to be carried on.

b) The Delhi High Court Legal Services Committee would take up the cases of those convicts who have undergone more than half the sentence in case of fixed term sentences and examine the feasibility of filing bail applications before the High Court, while in case of „life sentence cases, such an exercise may be undertaken where eight years of actual custody has been undergone.

c) We are of the view that in fixed term sentence cases, an endeavor be made, at least as a pilot project, in these two High Courts to get in touch with the convicts and find out whether they are willing to accept their infractions and agree to disposal of the appeals on the basis of sentence undergone.

d) A similar exercise can be undertaken even in respect of „life sentence cases where the sentenced persons are entitled to remission of the remaining sentence i.e., whether they would still like to contest the appeals or the remission of sentence would be acceptable to such of the convicts."

4. Learned APP for the State has opposed the suspension of sentence on the ground that the appellant may not be available to suffer the sentence if the appeal is dismissed.

5. Section 389 Cr. P.C. deals with suspension of sentence pending the appeal and release of appellant on bail. The said section is reproduced herein under:

"(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 a 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.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."

6. A perusal of the aforesaid provision reveals that 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 the sentence or order appealed. If the appellant is in confinement, the concerned 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 ought to be a 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. It is only in exceptional cases that the benefit of suspension of sentence can be granted. The reasons indicated must be germane to justify the suspension of sentence or grant of bail. The appellate Court is duty bound to objectively assess the matter and to record reasons for the conclusion that the case warrants suspension of execution of sentence and grant of bail. Thus, what really is necessary to be considered by the High Court is whether reasons existed to suspend the execution of sentence and thereafter grant bail. [Refer Anil Ari vs State of West Bengal dated 09.02.2009, CrI. A 000239/2009 arising out of SLP (CrI) No. 006513/2008; Vasant Tukaram Pawar vs State of Maharashtra, CrI A 558/2005)].

7. The courts while exercising power under section 389 Cr. P.C. for serious offences should consider the relevant factors such as 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 a serious offence. [Refer Vijay Kumar V. Narendra and others (2002) 9 SCC 364 pertaining to section 302 IPC; Ramji Prasad V. Rattan Kumar Jaiswal and another (2002) 9 SCC 366; Kishori Lal v. Rupa and Others 2004 (7)

SCC 638, Vasant Tukaram Pawar v. State of Maharashtra 2005 (5) SCC 281 and Gomti v. Thakurdas and Ors. (2007 (11) SCC 160)].

8. In *Kashmira Singh v. State of Punjab*, (1977) 4 SCC 291, the Supreme Court *inter alia* held as under:

" 2. ...Now, the practice in this Court as also in many of the High Courts has been not to release on bail a person who has been sentenced to life imprisonment for an offence under Section 302 of the Penal Code, 1860. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: "We have admitted your appeal because we think you have a *prima facie* case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?" What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a Judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

9. In *Somesh Chaurasia v. State of M.P. & Anr.*, 2021 SCC OnLine SC 480, the Supreme Court referring to the guidelines and judgement rendered in *Atul Tripathi v. State of U.P.*, 2021 SCC

OnLine SC 480, summed up the guidelines that may be considered while exercising power under Section 389 CrPC. The relevant excerpt is reproduced herein under:

"36. Section 389 (1) 1 of the CrPC allows the court to release a convicted person on bail. The second proviso to Section 389(1) of CrPC provides that where a convicted person has been released on bail, it is open to the public prosecutor to file an application for the cancellation of bail. However, the grant of bail post- conviction is governed by well-defined procedures and parameters. The factors that govern the grant of suspension of sentence under Section 389(1) have been discussed by this Court (speaking through Justice Kurian Joseph) in *Atul Tripathi v. State of U.P.* in the following terms:

"It may be seen that there is a marked difference between the procedure for consideration of bail under Section 439, which is pre conviction stage and Section 389 Code of Criminal Procedure, which is post-conviction stage. In case of Section 439, the Code provides that only notice to the public prosecutor unless impractical be given before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Sessions or where the punishment for the offence is imprisonment for life; whereas in the case of post-conviction bail under Section 389 Code of Criminal Procedure, where the conviction in respect of a serious offence having punishment with death or life imprisonment or imprisonment for a term not less than ten years, it is mandatory that the appellate court gives an opportunity to the public prosecutor for showing cause in writing against such release.

15. Service of a copy of the appeal and application for bail on the public prosecutor by the Appellant will not satisfy the requirement of first proviso to Section 389 Code of Criminal Procedure. The appellate court may even without hearing the public prosecutor, decline to grant bail. However, in case the appellate court is inclined to consider the release of the convict on bail, the public prosecutor shall be granted an opportunity to show cause in writing as to why the Appellant be not released on bail. Such a stringent provision is introduced only to ensure that the court is apprised of all the relevant factors so that the court may consider whether it is an appropriate case for release having regard to the manner in which the crime is committed, gravity of the offence, age, criminal antecedents of the convict, impact on public confidence in the justice delivery system, etc. Despite such an opportunity being granted to the public prosecutor, in case no cause is shown in writing, the appellate court shall record that the State has not filed any objection in writing. This procedure is intended to ensure transparency, to ensure that there is no allegation of collusion and to ensure that the court is properly assisted by the State with true and correct facts with regard to the relevant considerations for grant of bail in respect of serious offences, at the post conviction stage."

10. In *Preet Pal Singh v. State of U.P.*, (2020) 8 SCC 645, the Supreme Court inter alia held as under:

" 35. There is a difference between grant of bail under Section 439 CrPC in case of pre-trial arrest and suspension of sentence under Section 389 CrPC and grant of bail, post-conviction. In the earlier case, there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in *Dataram Singh v. State of U.P.* [*Dataram Singh v. State of U.P.*, (2018) 3 SCC 22 : (2018) 1 SCC (Cri) 675] However, in case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the court considering an application for suspension of sentence and grant of bail, is to consider the *prima facie* merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) CrPC.

38. In considering an application for suspension of sentence, 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. Where there is evidence that has been considered by the trial court, it is not open to a court considering application under Section 389 to reassess and/or re- analyse the same evidence and take a different view, to suspend the execution of the sentence and release the convict on bail."

11. Following the settled law on the subject issue as propounded by a plethora of cases, the following salient parameters may be culled out that may be considered while exercising power under Section 389 Cr. P.C.:

1. For the convicts in custody in cases other than life sentence cases, the broad parameter of 50 per cent of the actual sentence undergone can be the basis for grant of bail. [Refer *Saudan Singh v. State of Uttar Pradesh* 2021 SCC OnLine SC 3259.]

2. In cases of post-conviction bail under Section 389 Cr. P.C., where the conviction in respect of a serious offence having punishment with death or life imprisonment or imprisonment for a term not less than ten years, it is mandatory to follow the following conditions:

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.

On such opportunity being given, the State is required to file its objections, if any, in writing.

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.

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.

[Refer Atul Tripathi v. State of U.P. & Ors., (2014) 9 SCC 177, Somesh Chaurasia v. State of M.P. & Anr., 2021 SCC OnLine SC 480]

3. There must be strong and compelling reason for suspension of sentence which must be recorded in detail. [Refer Preet Pal Singh v. State of U.P., (2020) 8 SCC 645].

4. The Appellate Court, at the stage of suspension of sentence and release on bail till disposal of appeal, has to examine if there is any patent infirmity in the order of conviction that renders the conviction prima facie erroneous. The evidence is not to be re-

assessed or re-analyzed to suspend the execution of the sentence. The detailed observations on merits of the case are not called for, at this stage lest it prejudices the case of the petitioner, but the matter has been seen in the light settled principles of law. [Refer Anil v. State, Crl. A. 729/2019, Crl. M. (Bail) 8236/2020]

5. In heinous/ serious offences, following factors ought to be considered:

- seriousness of offence
- the gravity of offence
- the manner in which the crime was said to have been committed
- age of the convict
- criminal antecedents of the convict

- impact on public confidence in the justice delivery system
- etc.

[Refer Somesh Chaurasia v. State of M.P. & Anr. (supra); Sidhartha Vashisht @ Manu Sharma vs State (NCT Of Delhi) State of Haryana v. Hasmat, (2004) 6 SCC 175]

6. Moral conduct of the accused person is also to be considered (Refer State of T.N. v. A. Jaganathan, (1996) 5 SCC 329.

7. Reasons for suspension of sentence must be recorded in detail in writing (Refer Kishori Lal v. Rupa & Ors., (2004) 7 SCC 638, Vijay Kumar v. Narendra & Ors., (2002) 9 SCC 364, Rama Narang v. Ramesh Narang & Ors., (1995) 2 SCC 513, Kanaka Rekha Naik v. Manoj Kumar Pradhan (2011) 4 SCC 596).

8. The fact that accused was granted bail during trial and followed all the conditions placed is not of much significance in suspension of sentence as the accused has been found guilty on conviction. (Refer Anil v. State, Crl. A. 729/2019, Crl. M. (Bail) 8236/2020, Somesh Chaurasia v. State of M.P. & Anr., 2021 SCC OnLine SC 480)

9. Suspension of sentence should only be awarded in exceptional cases and should not be treated as normal practice. [Refer Vijay Kumar v. Narendra & Ors., (2002) 9 SCC 364, Ramaji Prasad v. Rattan Kumar Jaiswal & Anr., (2002) 9 SCC 366, Somesh Chaurasia v. State of M.P. & Anr., 2021 SCC OnLine SC 480)].

10. Accused may be granted bail during the pendency of appeal for suspension of sentence keeping in mind the pendency of cases and the sentence already undergone by the accused persons.

[Refer Mossa Koya KP v. State (NCT of Delhi), 2021 SCC OnLine SC 3110].

11. The mere fact that during the period of parole the accused has not misused the liberties does not per se warrant suspension of execution of sentence and grant of bail. What really was necessary to be considered by the High Court was whether reasons existed to suspend the execution of sentence and thereafter grant bail. [Refer State of Haryana v. Hasmat, (2004) 6 SCC 175].

12. The Court has also to consider the fact that whether the appeal can be disposed of in measurable time. If there is a likelihood of appeal taking a long time, it is a good ground to suspend the sentence, unless there are weighty reasons to reject the plea for suspension of sentence in view of the seriousness of offence, conduct of the accused and other attendant circumstances.

12. I have considered the submissions of both the parties and perused the record. A perusal of the nominal roll indicates that the appellant has already undergone custody of around 5 years and 9 months. The unexpired/ remaining period of sentence is around 4 years, and the conduct of the appellant has also been satisfactory. The hearing of the appeal may take some time. The appellant/ accused is in custody since 2017 and is a young boy of around 25 years of age.

13. Thus, taking into account the totality of facts and circumstances in the case at hand and bearing in mind the aforesaid parameters culled out from a catena of judgements, the sentence of the appellant is suspended till the disposal of the appeal subject to the appellant furnishing a personal bond in the sum of Rs.10,000/- with one surety of the like amount to the satisfaction of the learned Trial Court/CMM/Duty MM, subject to the following conditions:-

(i) The appellant shall remain in touch telephonically with SI Lovely Priyanka /Duty officer, P.S. Connaught Place, Delhi on mobile number i.e. 7903248957 on the first Monday of every month.

(ii) In the event of change of his residential address/ contact details, the appellant shall promptly inform the same to the I.O./SHO, P.S. P.S. Connaught Place Delhi.

(iii) The appellant shall remain present in the Court as and when appeal is taken up for hearing.

14. The present application is disposed of accordingly.

15. List this appeal in due course in the category of 'Regulars' as per the year of its seniority.

DINESH KUMAR SHARMA, J DECEMBER 12, 2022/Pallavi