

Surinder Kumar vs Ut Of J&K on 16 December, 2022

Author: Mohan Lal

Bench: Mohan Lal

Sr.No.

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Crl A(S) No. 8/2022
CrlM Nos. 1148 & 1172/2022

Reserved on: 28.11.2022
Pronounced on: 16.12.2022

Surinder Kumar

....Applicant/Appellant(s)

Through :- Mr. Tarun Sharma, Advocate

V/s

UT of J&K

....Respondent(s)

Through :- Mr. Pawan Dev Singh, Dy AG

Coram: HON'BLE MR. JUSTICE MOHAN LAL, JUDGE

ORDER

16.12.2022

1. Instant criminal appeal is directed against judgment of conviction and order of sentence dated 30.08.2018 rendered by the Court of learned 3rd Additional Sessions Judge, Jammu in file No. 78/Sessions titled "State v/s Surinder Kumar" where under appellant/convict has been found guilty of commission of offence u/s 376 RPC and sentenced to undergo rigorous imprisonment for ten (10) years and fine in the sum of Rs.5,000/-, in default of payment of fine, he shall further undergo simple imprisonment for six (6) months and for the commission of offence under Section 363 RPC, the appellant/convict shall undergo rigorous imprisonment for a period of seven (7) years and also fine in the sum of Rs. 3,000/- and in default of payment of fine, he shall further undergo simple imprisonment for (03) months.

2. Feeling aggrieved of the impugned judgment of conviction, appellant/convict has assailed it's correctness, propriety and legality on the grounds, that as a result of miss-appreciation of facts and misapplication of law so far as the finding of the trial court relating to holding appellant guilty of having committing of offences under Sections 376, 366 RPC and convicting him of the same is bad

in the eyes of law, therefore has prayed that the present appeal be allowed and the judgment of learned 3rd Additional Sessions Judge, Jammu be set aside.

3. Alongwith the appeal, appellant/convict has filed application for suspension of conviction and sentence pending the hearing of appeal, with further prayer for ordering his release on bail primarily on the grounds, that there is no likelihood of the appeal being heard in the near future and in view of the law laid down by the Supreme Court wherein it has been held that when a convicted person is sentenced to a fixed period of sentence, on filing of appeal, suspension of sentence should be considered liberally unless there are exceptional circumstances; that the reasoning given by the trial court while rejecting the arguments raised before it by the defence are not based on correct appreciation of evidence and law; that the appellant is in custody since the day of his arrest (i.e.01.07.2014) and he has undergone rigorous imprisonment of more than eight (8) years, therefore, the present application be allowed and sentence of the appellant may kindly be suspended.

4. Respondent has filed objections wherein it has been contended that appellant/convict is the main accused in case FIR No. 32/2014 for commission of offences U/S 376, 363, 109 RPC registered at Police Station Chenani, Arnia; that it has been established by the court below that appellant/convict has kidnapped the prosecutrix/victim who was minor and had taken her to some unknown place and raped upon her, therefore, the appellant/convict do not deserve for any lenient view and death sentence be awarded to him with large amount of fine; that the offences for which the accused/appellant is charged is of heinous nature and these offences definitely constitute a class apart and need to be viewed with a different approach in the matter of bail; that the appellant/convict has committed a grievous crime; that offence in itself is heinous enough to ruin the whole life of the complainant who is now living in a very disturbed life and physiologically depressed and lost her reputation in the eyes of society as well as in her family; that no case of suspension of sentence is made out as the offences for which the appellant/convict are charged of heinous nature, therefore, the application be dismissed.

5. Sh. Tarun Sharma, learned counsel for appellant/convict to support the case of appellant/accused for suspension of his sentence of conviction and his released on bail, has strenuously argued, that the prayer for suspension of sentence of conviction and ordering of the appellant/accused on bail should be considered liberally unless there is any statutory restriction. It is argued, that when the sentence is of life imprisonment, the consideration for suspension of sentence should be of different approach, and when the appellate court finds that due to practical reasons the appeal could not 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, but if for any reason the sentence of limited duration cannot be suspended, every endeavor should be made to dispose of the appeal on merits and prays that in case the conviction imposed upon the appellant is not suspended immediately the appellant would suffer huge loss and injury which cannot be compensated later on, as such, he seeks kind indulgence of this Court in granting him bail till disposal of the appeal.

6. Sh. Pawan Dev Singh, learned Dy AG, Per Contra, while opposing the application has strenuously articulated arguments, that the appellant is the main accused in case FIR No. 32/2014 for commission of offences U/S 376, 363, 109 RPC registered at Police Station Chenani, Arnia and it has been established by the court below that appellant/accused has been convicted after full trial. It is argued that the liberty of the individual is precious and is to be zealously guarded by the Court, however, such a protection cannot be absolute in every situation; that the interest of the society and liberty of the individual has to be balanced; that in the case in hand is a fit one where collective interest of the community outweighs the right of the personal liberty of the appellant and granting of the bail impede not only the administration of justice but also is going to injure the public interest rather than to serve it, therefore, appellant/accused is not entitled to bail and suspension of sentence..

7. Heard & considered. Section 389 of Code of Criminal Procedure deals with the provisions of suspension of sentence pending the appeal. For the sake of convenience Sec. 389 Cr.PC is reproduced hereunder:-

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. (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 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.

Cursory glance of Section 389 Cr.PC makes the legal proposition abundantly clear, that pending an appeal preferred by a convicted person notice shall only be issued to the Public Prosecutor/State in case the convict is punished for offences punishable with death or imprisonment for life or imprisonment for a term not less than ten (10) years, which clearly connote that if the convict is punished with imprisonment for a term less than 10 years no notice is required to be given to the Public Prosecutor/State in regard to the application filed by the convict/accused for suspension of his sentence and his release on bail.

In the case of BHAGWAN RAMA SHINDE GOSAI AND OTHERS Versus STATE OF GUJARAT [(1999) 4 Supreme Court Cases 421], Hon'ble Supreme Court while discussing the power and scope of section 389 Cr.PC regarding suspension of sentence pending the appeal filed by the convict, and while holding that the prayer for suspension of sentence should be considered liberally unless there is any statutory restriction, and while suspending the sentence and directing appellant/accused/convict to be released on bail found guilty for commission of offences u/ss 392 r/w 397 IPC for rigorous imprisonment of 10 years by the trial court, in paras 3&4 of the judgment held as under:-

3. When a convicted person is sentenced to fixed period of sentence and when he files appeals 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 limited duration cannot be suspended every endeavour should be made to dispose of the appeal on merits more so when motion for expeditious hearing 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.

4. In this case as the High Court was not inclined to hear the appeal expeditiously we are of the view that the sentence passed on appellants can be suspended on some stringent conditions. We, therefore, suspend the sentence and direct the appellants to be released on bail on each of them executing a bond to the satisfaction of Additional Sessions Judge, Nadiad. We direct the appellants to report to Kapadwang Police Station on all Mondays and Thursdays between 4.00p.m. and 6.00 p.m. until disposal of the appeal pending before the High Court.

Ratio of the judgment (Supra) makes it manifest, that Section 389 Cr.PC does not contain any "statutory restriction" in suspension of sentence and granting of bail to the accused/convict and the

prayer should be considered liberally and the Appellate Court may impose restrictions considering the gravity of offence.

Similarly, in the case of Vajida Bano and Ors V/s State Through Advocate General, a Coordinate Bench of this Court while relying upon the judgment of BHAGWAN RAMA SHINDE GOSAI'S (Supra) suspended the sentence of appellant/convicts, convicted and sentenced in FIR 09/2014 for commission of offences u/ss 363/317/ 302/ 120-B & 201 RPC of P/S Kargil.

8. In the case in hand, appellant/applicant has been found guilty by the trial court of learned 3rd Additional Sessions Judge Jammu vide impugned judgments dated 30.08.2018 for commission of offences punishable under Sections 376,363,109 of RPC and sentenced to undergo rigorous imprisonment for ten (10) years for the commission of offence punishable u/s 376 RPC and fine in the sum of Rs.5,000/-, in default of payment of fine, he shall further undergo simple imprisonment for six (6) months and for the commission of offence under Section 363 RPC, the appellant/convict shall undergo rigorous imprisonment for a period of seven (7) years and also fine in the sum of Rs. 3,000/- and in default of payment of fine, he shall further undergo simple imprisonment for (03) months. Vide ratio's of the judgments of Bhagwan Ram Shinde Gosai's and others case (1999) 4 Supreme Court Cases 421 (Supra), and Vajida Bano's and others case rendered in CrI A(S) No. 05/2019 CrIM No. 853/2019, there is no statutory restriction/prohibition in not considering the application for suspension and releasing of appellant/convict on bail. Appellant/convict is the resident of Village Raharian, Tehsil Samba has deep roots in the society and do not possess the golden wings to flee from justice, as nothing substantial has been brought before the notice of this court that appellant/convict has absconded during trial. The seriousness or gravity of offence is to be seen in cases where accused/convict is punished with death penalty, life imprisonment or imprisonment of 10 years and above, wherein, while considering the application for suspension and bail the judicial description lies in the wisdom of the court. Right to life and liberty of an individual is precious under Article 21 of the Constitution of India and is also a very valuable right of accused/convict which also continues during the appeal period as appeal is the continuation of the trial.

9. Keeping in view the fact that the applicant/appellant as per nominal roll submitted by Superintendent District Jail Jammu is in jail for the last more than eight (8) years out of the total sentence of ten (10) years and there is no immediate prospect of the main appeal being heard in near future, a strong case for suspension of sentence and grant of bail has been made out by the appellant/convict.

10. As a sequel to the aforesaid discussion, I, therefore, suspend the sentence inflicted upon the applicant/appellant Surinder Kumar S/o Jagdish Raj R/o Raharian Tehsil Vijaypur District Samba and direct him to be released on bail by executing surety bond in the sum of Rs.50000/- to the satisfaction of Registrar Judicial of this Court with the direction to furnish personal recognizance of like amount before Superintendent District Jail Jammu where the applicant/appellant is presently serving the sentence term in judicial lockup. It is further ordered, that the applicant/appellant shall appear before this court on each and every date of hearing except for the reasons beyond his control and unless exempted.

11. .Application is disposed of.

12. Appeal Crl A(S) No. 8/2022 is taken on board.

13. Admit.

14. Call for the original record from the trial Court.

15. For arguments, list on 27.02.2023.

(Mohan Lal) Judge Jammu:

16.12.2022 Vijay Whether the order is speaking: Yes/No Whether the order is reportable: Yes/No