

Javid Ahmad Shah vs Union Territory Of J&K Through Sho P/S ... on 13 September, 2022

Author: Ali Mohammad Magrey

Bench: Ali Mohammad Magrey

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR
CrIM No. 348/2022 IN
CrLA(D) No. 22/2022
c/w
CrI Ref(L) No. 02/2022

Reserved on:- 07.09.2022
Pronounced on:- 13.09.2022

Javid Ahmad Shah

...Appellant(s)

Through: Mr. M.Y.Bhat, Sr. Advocate with
Mr. Faizan Majid, Advocate.
Vs.

Union Territory of J&K through SHO P/S Pulwama

...Respondent(s)

Through: Mr. M.A.Chashoo, AAG with
Mr. Asif Maqbool, Dy.AG.

CORAM:

HON'BLE MR. JUSTICE ALI MOHAMMAD MAGREY, JUDGE
HON'BLE MR. JUSTICE MD. AKRAM CHOWDHARY, JUDGE

JUDGMENT

(Per Chowdhary, J)

1. The appellant, through the medium of this composite application, seeks suspension of sentence and grant of bail pending appeal filed by him as well as Criminal Reference received from the court of learned Principal Sessions Judge Pulwama, having been aggrieved of his conviction for the commission of offences punishable under Section 302 and 392 RPC vide impugned judgment dated 04.02.2022 in a case No. 25/Session, titled U.T of J&K Vs. Sameer Ahmad Sheikh & Ors. arising out of FIR No. 72/2011 registered at Police Station Pulwama.

2. The appellant herein was awarded life imprisonment under Section 302 RPC and one year rigorous imprisonment under Section 392 RPC vide Page |2 order dated 04.02.2022. Both the sentences of imprisonment were ordered to run concurrently.

3. The appellant has assailed the judgment of his conviction and sentence on many grounds. Alongside appeal, application for suspension of sentence and grant of bail has also been moved by the appellant-convict, asserting therein that the appellant since his arrest on 11.04.2011 has been in continuous custody and has completed 10 years and 10 months in jail, though he is a man of clean antecedents with history of not involved in any criminal matter or case; that he has preferred an appeal against his conviction and sentence and is sure that he will succeed in the appeal; that the entire case rests on circumstantial evidence and there is no eye witness to the alleged incident; that no independent witness has been examined by the prosecution and all the witnesses were either relatives or close friends of the complainant except PW-18 Feroz Ahmad Sheikh, who had been declared as hostile; that there was unexplained delay in lodging FIR; that the trial court has failed to consider whether the approver was a reliable witness and a portion of his statement was conveniently ignored resulting in failure of justice; that there was inconsistencies in the statement of PW-19 regarding 'last seen together' theory; that the trial court has rejected the plea of defense with regard to identification parade, on the wrong premise, that the accused was known to all the witnesses; that there was a long time gap between the date of last seen together and date of death which renders the theory of 'last seen together' irrelevant; that the provisions of Section 342 of J&K Cr.PC pari materia to Section 313 of Cr.P.C were observed in breach by the trial court rendering the conviction liable to be set aside. It was, therefore, prayed that having regard to the points Page |3 raised by the appellant-convict, the sentence of imprisonment is required to be suspended pending disposal of the appeal and the appellant be granted bail.

4. Pursuant to notice, respondent filed objections resisting the plea of suspension of sentence and grant of bail in favour of the appellant, asserting therein that the appellant has been convicted after the full dressed trial under Section 302 RPC and sentenced to imprisonment for life and one year rigorous imprisonment for the commission of offence of robbery under Section 392 RPC; that the application deserves to be dismissed as the presumption of innocence cannot be taken after recording of conviction by the court; that the appellant in connivance with other accused killed a young boy who was undergoing his studies in 2nd year of Graduation. It was further submitted that the murder of an innocent young boy was committed for robbery by Sameer Ahmad Sheikh, Javid Ahmad Shah (appellant herein) and Ab. Rashid Dar (who later on turned as approver). That the complainant had suspected the accused in his missing complaint and on the detailed and scientific investigation, the Investigating Agency concluded that the accused including the appellant herein had committed aforesaid offences. The trial court examined 37 out of 38 listed witnesses and after just trial the appellant had been held guilty for serious offences of murder and robbery. It was, thus, prayed that the application seeking suspension of sentence and grant of bail pending appeal, be rejected in the interest of justice.

5. Heard and considered.

6. Learned counsel for the appellant-convict, while reiterating the grounds pleaded, vehemently, that the conviction, recorded by the trial court, Page |4 cannot be maintained for the reason that the impugned judgment has been passed on unwarranted presumptions without appreciating the evidence in its right perspective. He has further argued that in a case, based on circumstantial evidence, evidence has to be appreciated with great circumspection, since such evidence has weak

evidentiary value. He further submits that the appellant-convict has all chances to be acquitted by this Court at the time of final hearing of Appeal, and that the appellant-convict having been in custody for more than a decade shall be suffering the punishment even if his conviction is set aside by this Court while hearing the appeal finally. Learned counsel, while relying upon the latest judgment of Hon'ble Apex Court passed in a case titled *Satender Kumar Antil Vs. Central Bureau of Investigation & Anr.*, reported as AIR 2022 SC 3386, argued that in view of unexplained, avoidable and prolonged delay in concluding the trial, Appeal or Revision would be the factor for consideration of bail. He further argued that the appellant has been in continuous incarceration for the last more than a decade. Learned counsel for the appellant submitted that since the appeal is a continuation of trial under legal fiction, therefore, inordinate delay in disposal of the case entitles the appellant to suspension of sentence and grant of bail. He, therefore, prayed that the sentence be suspended, and as a consequence the appellant-convict be admitted to bail till disposal of appeal.

7. Mr. Chashoo, learned AAG, on the other-hand, resisted the plea of suspension of sentence and the bail, raised by the appellant-convict, asserting that the appellant-applicant has been convicted for heinous offences including that of murder, and that the trial court, after passing lucid judgment, has recorded conviction of the appellant-convict, and in Page |5 such a situation when the conviction has already been recorded by the trial court, the appellant-convict cannot ask for concession of suspension of sentence and grant of bail for 'no pressing' reason. Mere detention of the convict, in a case where he has been awarded life imprisonment, for more than a decade, will not entitle him to such a relief. Learned AAG finally prayed that the application moved in this behalf may be rejected.

8. Shorn of minute details the factual background of the case is that the dead body of a person was found lying under the heap of cow dung at Muran Pulwama on 02.04.2011, who was later on identified as Khursheed Ahmd Wani S/O Sonaullah Wani R/O Babhar Pulwama; that on the same day, a complaint was also lodged by one Ghulam Ahmad Wani, stating therein that his grandson namely Khursheed Ahmad Wani had left his home on 25.03.2011 along-with an amount of Rs.25000/- for paying his school fee, but did not return thereafter. A case was registered vide FIR No. 72/2011 at Police Station Pulwama under Section 302 RPC. During investigation one of the suspects namely Feroz Ahmad Sheikh stated that during the intervening night of 30/31 March 2011, he came out of his house to meet his friend and in the process reached near a tin shed of one Abdul Rashid Dar and heard lot of noise and screaming coming from inside the shed; that, when he peeped through one of the holes of the shed he found three persons namely Sameer Ahmad Sheikh, Javid Ahmad Shah and Abdul Rashid Dar were fighting with a person and were demanding money from him; that, after a huge scream, all of a sudden, calm prevailed in the shed and after some time Sameer Ahmad Sheikh came out of the shed with a dead body on his shoulder along-with Javid Ahmad Shah (appellant Page |6 herein) holding the legs of dead body, whereas the third person namely Abdul Rashid Dar was seen carrying shoes of the dead body. All the accused were arrested on 11.04.2011. One of the accused namely Abdul Rashid Dar moved an application before the Chief Judicial Magistrate Pulwama on 08.06.2011 to declare him as approver, which was accepted and his statement was recorded under Section 337 of Cr.PC. On conclusion of the investigation, charge-sheet was laid against all the accused and vide order dated 19.10.2011 they were charge-sheeted for the commission of offences punishable under Sections 302, 392, 201 read with Section 34 RPC by the Sessions Court Pulwama. The accused, on their examination, denied the charge

claiming trial.

9. The trial court, after full dressed trial and examining 37 out of 38 listed witnesses and the approver, recorded conviction of Sameer Ahmad Sheikh and Javid Ahmad Shah (appellant herein) for the commission of offence punishable under Section 302 read with Section 34 RPC and Section 392 RPC and sentenced him for life imprisonment for the commission of murder and one year rigorous imprisonment for the commission of robbery.

10. The trial court vide impugned judgment, on consideration of the circumstantial evidence, direct evidence and the medical evidence, came to the conclusion that all the accused had common intention of grabbing money from the deceased by means whatsoever. The accused No.2 (appellant herein) had been found consistently with the deceased immediately before his death and the deceased was killed in the tin shed of accused No.3, who later on had turned as approver. The offences were thus, committed not only with the common intention but all the accused had also participated in the commission of offence in Page |7 furtherance of the common intention, as such, they were held liable for the commission of offences punishable under Section 302 read with 34 RPC, vide impugned judgment.

11. Since the accused Abdul Rashid Dar had been granted pardon by the court, the other accused Sameer Ahmad Sheikh was sentenced to life imprisonment under Section 302 RPC whileas Javid Ahmad Shah (appellant herein) was sentenced to life imprisonment under Section 302 RPC besides one year rigorous imprisonment under Section 392 RPC, and a reference was made to this Court for confirmation of the sentence so imposed by the trial court.

12. While considering the application for suspension of sentence and grant of bail, the appellate court is not required to consider the evidence on record meticulously lest it should affect the merits of the case while considering the main appeal. The appellate court has to consider the case just to find out whether there is prima facie case to hold that there has been some miscarriage of justice which may be apparent on the face of the record and in such situation the suspension of sentence can be ordered and as a consequence the appellant can be released on bail.

13. Hon'ble Apex Court in a case titled Ramji Prasad Vs. Rattan Kumar Jaiswal & Ors., reported as (2002) 9 SCC 366, held that where an accused was found guilty by the trial court under Section 302 IPC, the normal practice in such cases is not to suspend the sentence and it is only in exceptional cases that the benefit of suspension of sentence can be granted. In another case titled Kishori Lal Vs. Rupa & Ors., reported as 2004 (7) SCC 638, it has been held that in cases involving conviction under Section 302 IPC, it is only in exceptional cases that the benefit of suspension of sentence can be granted, after taking into Page |8 consideration relevant factors like nature of accusation, manner in which the crime is alleged to have been committed, 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.

14. Section 426 of the J&K Cr.PC which is pari materia to Section 389 Cr.PC of 1973 deals with suspension of execution of sentence pending appeal and release of appellant on bail. There is

distinction between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement for the appellant court to record reasons in writing for ordering suspension of execution of the sentence or order appealed. 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.

15. So far as contention of learned counsel for the appellant that there is inordinate delay in disposal of the case finally and that this Court was taking longer time to decide the appeal is concerned, Hon'ble Apex Court in a case titled Satender Kumar Antil Vs. Central Bureau of Investigation & Anr., reported as AIR 2022 SC 3386, cited and relied upon by the learned counsel for the appellant, held that in a case where a person has been found guilty of offence punishable under Section 302 IPC and sentenced for life imprisonment, the Code of Criminal Procedure affords right of appeal to such a convict, however, a difficulty arises when the appeal preferred by such convict cannot be disposed of within a reasonable time. It has been further held that in rationale, the practice of not suspending the sentence and granting bail have no application, where court is not in a position to dispose of the Page |9 appeal for 5/6 years and it would indeed be a travesty of justice to keep a person in jail for a period of 5/6 years for an offence which is ultimately found not to have been committed by him. The observation of the Apex Court, thus, suggests that it has only to be after 5/6 years in case the appeal is not disposed of, that suspension of sentence and grant of bail be considered, in a heinous case like murder.

16. In this backdrop and for limited purpose as discussed hereinabove, we are of the opinion that the appeal which was filed on 04.02.2022 cannot be said to be pending for the last 4/5 years as required by the Hon'ble Apex Court. We are also of the opinion that the Criminal Appeals of under-trials (life convicts) or the persons who are in custody for longer duration, will not take much of the time to be heard finally. There is no difficulty in hearing this appeal after ministerial formalities of preparing and furnishing of paper-book to the concerned parties are completed. Since there is a positive finding of the trial court that the case has been proved by the prosecution based on formidable, circumstantial as well as oral evidence supported by medical and forensic evidence, therefore, appellant on his conviction cannot raise a plea of being innocent as the presumption of innocence in the appeal is not available to the appellant as is available to an accused before the trial court.

17. For the foregoing reasons and discussions made hereinabove, we are of the considered opinion that the appellant has failed to make out a prima facie case for suspension of sentence and grant of bail in his favour.

18. CrIM No. 348/2022 is, accordingly, rejected.

19. List the main Appeal along-with Criminal Reference on 13.10.2022.

(MD. AKRAM CHOWDHARY)
JUDGE

(ALI MOHAMMAD MAGREY)
JUDGE

Srinagar
13.09.2022

Muzammil. Q

Whether the order is reportable: Yes / No