

(2019) 07 J&K CK 0006

In the Jammu And Kashmir High Court

Case No : Criminal Appeals (CRA) No. 03 Of 2018, IA 01 Of 2018, Conf 01 Of 2017

Abdul Rashid And Anr

APPELLANT

Vs

State Of Jammu & Kashmir And Others

RESPONDENT

Date of Decision : 08-07-2019

Acts Referred:

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 34, 201, 302
Code Of Criminal Procedure, 1973 — Section 389, 426
Jammu And Kashmir High Court Rules, 1999 — Rule 138(4)

Citation : (2019) 07 J&K CK 0006

Hon'ble Judges : Sanjay Kumar Gupta, J;Dhiraj Singh Thakur, J

Bench : Division Bench

Advocate : Navneet Dubey, Deepali Arora

Final Decision : Dismissed

Judgement

IA NO.01/2018

Sanjay Kumar Gupta, J

1. Through the medium of instant application, applicants/appellants seek stay of operation of the judgment of conviction dated 28.12.2016 passed by

learned Principal Sessions Judge, Reasi in File No.13/Sessions and they also seek bail.

2. In the application, applicants have reiterated almost all the grounds as taken in the memo of appeal. It is stated that the applicants are innocent and

have been involved in a false case. The prosecution story is full of doubts and there is no evidence against the applicants for their involvement in the

case. The applicants have been convicted on a false complaint and the story of the prosecution is belied on various grounds. There was no legal

evidence to connect the applicants with the commission of the crime.

3. Learned counsel for the applicants has stated that the impugned judgment is contrary to facts and law. The trial Court has not appreciated the

evidence on record in its right perspective. The evidence led is ridden with material contradictions and discrepancies. The evidence produced by the

prosecution is contradictory, improbable and is not worthy of any credence. The trial Court has passed the impugned judgment of conviction on the

basis of conjectures and surmises, which is not tenable in law.

4. Learned counsel for the applicants has stated that both the applicants have suffered more than seven yearsâ?? incarceration and there is no

likelihood of hearing of the main appeal in near future due to pendency of similar appeals filed prior to the instant appeal being of year 2018.

5. Learned counsel for the applicants, in support of their case, has relied upon decisions in the cases titled Smt. Akhtari Bi Vs. State of M.P. reported

in AIR 2001 SC 1528; Atul Tripathi Vs. State of U.P. and another reported in 2014 (9) SCC 177; and Suddu Kumar Vs. The State of Bihar (Criminal

Appeal (DB) No.583 of 2015, date of decision 09.03.2017.

6. Despite time granted to learned State counsel for filing objections to the instant application, the needful has not been done till date. Even no one

represented the State at the time of hearing of the instant application.

7. We have heard learned counsel for the applicants and considered the instant application on the basis of material available on the file.

8. Precisely, the prosecution case is that on 21.03.2012 at 2 p.m., an information from reliable source was received by the Police Station Mahore to

the effect that a person namely Nazir Ahmed S/o Faku, Caste Gujjar R/o Village Bathoi Danda Bass, Tehsil Mahore is lying dead near the house of

one Haji Khushi Mohd S/o Fikka R/o Bathoi. He is being taken in suspicious circumstances for burial. Vide D.D. Entry No.16 dated 21.03.2012 Vijay

Dhar- Inspector the then SHO along with Mohd. Sharief ASI, Gulzar Ahmed Constable and Abdul Hamid Constable rushed to the spot in a Govt.

Vehicle driven by its driver Mohd. Akhter. After reaching the spot the dead body of the deceased was found near the house of aforesaid person Haji

Khushi Mohd. Both the applicants/accused persons were arrested on 23.03.2012. During investigation, it was found that the deceased was suffering

from Tuberculosis for the last 14-15 years and since last 7/8 years he was unable

to walk and confined to bed. During this period, illicit relations between the accused persons developed and with the passage of time the illicit relation got strengthened. They started visiting each other's houses and finding opportunity used to spent nights together. The deceased had the information about the illicit relation and he forbid accused Abdul Rashid from visiting his house. He also used to forbid Jan Bibi for the same. As a consequence, he also used to quarrel with accused Jan Bibi. It was also found that wife of Accused No.1 had died in the year 1993. He has two daughters and a son. His all the three children are married. Accused No.1 was residing alone in his house. He intended to contract marriage with Accused No.2. It was also found that Accused No.2 had agreed to marry her daughter PW-3 with the son of Accused No.1. The deceased was the hurdle for them. Accused No.1 with common intention with Accused No.2 fell down the deceased and with his both knees hit the deceased on his chest and belly, and also assaulted him with fist and blows. Accused No.2 pressed the neck of the deceased. Thereby they killed him. Clay was applied to the injury marks so that it may remain unnoticed. The offences under Sections 201/34 RPC were added. Both the accused persons were charged for the commission of offences under Sections 302, 201, 34 RPC.

9. Trial court after conclusion of trial, convicted both the applicants/appellants and sentenced them to imprisonment for life.

10. This appeal was fixed for argument, but counsel for applicants/appellants instead of arguing the main matter has stressed for grant of bail on the grounds mentioned in the petition, with additional ground that accused are in custody for more than five years, so they be enlarged on bail.

11. Section 426 Cr.P.C. reads as under:-

426. Suspension of sentence pending 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.

[(1-a) The Appellate Court may cause any person who has been released on bail under sub-Section (1) to be arrested and may commit him to custody].

(2) The power conferred by this Section on an Appellate Court may be exercised

also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

(2-a) When any person other than a person *[convicted of a non-bailable offence] is sentenced to imprisonment by a Court, and an appeal lies from that sentence, the Court may, if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail for a period sufficient in the opinion of the Court to enable him 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.]

*[(2-b) Where the High Court is satisfied that a convicted person has been granted special leave to appeal to the Supreme Court against any sentence which the High Court has imposed or maintained, the High Court .may, if it so thinks fit, order that pending the appeal, the sentence or order appealed against be suspended, and also, if such person is in confinement, that he be released on bail.]

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

12. Section 426 of State Code is pari materia to Section 389 Cr.P.C of Central Code.

13. Hon'ble the Apex Court in the case of State of Haryana vs. Hasmat 2004 SCC (Cri.) 1757 while considering the provisions of Section 389 Cr.P.C.

held as under :-

Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. 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 execution of the sentence or order appealed. If he is in confinement, the said 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 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.

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. In the instant case, the only factor which seems to have weighed with the High Court for directing suspension of sentence and grant of bail is the absence of allegation of misuse of liberty during the period the accused-respondent was granted parole.

14. In *Kishori Lal Vs. Rupa and Others*, (2004) 7 SCC 63,8 Apex Court has indicated the factors that require to be considered by the courts while granting benefit under Section 389 in cases involving serious offences like murder etc., it is useful to refer to the observations made therein. They are :-

4. Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. 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 execution of the sentence or order appealed against. If he is in confinement, the said 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 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.

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. In the instant case, the only factor which seems to have weighed with the High Court for directing suspension of sentence and grant of bail is the absence of allegation of misuse of liberty during the earlier period when the accused-respondents were on bail.

15. In present case, the counsel for appellants has touched merits of the case and has argued that there are contradictions in the statements of witnesses, so prosecution has not established its case beyond reasonable doubts. After giving our thoughtful consideration to this aspect of the matter, we are of the view that detail appreciation of evidence on record cannot be conducted at this stage; because it will amount to prejudging the main case itself and writing of two judgments on same set of evidence, one at bail stage and second at final stage.

16. Another foremost argument that appellants are in custody since more than five years, so they are entitled for bail in view of law cited in *Akhtari Bi* and *Atul Tripathi*'s cases (*supra*), is also not tenable. Because in *Akhtari Bi*, it has been held that if appeal cannot be decided within five years, then court may consider the bail application of appellant; but in present case the instant appeal is pertaining to 2018. In another case relied by counsel for petitioners (*Atul Tripathi*), it has been held that appellate court can consider the bail application of life convicts or 10 years' imprisonment or more, then public prosecutor shall be given opportunity to show cause in writing against such release. In third case *Suddu Kumar* (*supra*), the court has held that ordinarily bail should be allowed where appellant has undergone 5 years at least 3 years post conviction for male and 4 years at least 2 years post conviction for female.

17. The rationale of this practice can have no application where the Court is in a position to dispose of the appeal for five or six years. In present case, this appeal is at threshold and it can be heard expeditiously; as held it was already fixed for final hearing but instead of arguing the main matter, counsel argued bail application only. There are no special circumstances made out for suspension of sentence and for grant of bail at this stage. There are many appellants convicted in such like offence and are languishing in jails for more than five years of post conviction stage.

18. Therefore, this petition is dismissed at this stage.

This order is pronounced by me, in terms of Rule 138(4) of the Jammu and Kashmir High Court Rules, 1999.

Dhiraj Singh Thakur, J