

(2022) 04 DEL CK 0022

In the Delhi High Court

Case No : Criminal Writ Petition No. 2995 Of 2019, Criminal Miscellaneous
Application No. 41209-41210 Of 2019

Gavade Kisan Bapu

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 04-04-2022

Acts Referred:

National Security Guard Act, 1986 — Section 45
Protection Of Children From Sexual Offences Act, 2012 — Section 5(1), 6, 8, 10
Indian Penal Code, 1860 — Section 342, 363, 377, 506I

Citation : (2022) 04 DEL CK 0022

Hon'ble Judges : Talwant Singh, J

Bench : Single Bench

Advocate : Ravinder Singh, Astha Sharma, Raveesha Gupta, Sanjeev Kaushik,
Anjana Gosain, Shalini Nair, Ritika Kahnjwal

Final Decision : Disposed Of

Judgement

Talwant Singh, J

Crl.M.A.41210/2022

1. The petitioner has moved this application for suspension of sentence, which was awarded to him vide order dated 08.08.2016 passed by Learned General Security Guard Court, upheld by order dated 19.10.2016 passed by the Director General, National Security Guard (NSG) and further upheld by order dated 14.12.2018 passed by The Secretary, Ministry of Home Affairs, and to release him on bail.

1.1. It has been mentioned in the application that the petitioner had filed a criminal writ petition challenging the above detailed orders. He was convicted under Section 45 of National Security Guard Act, 1986, read with Section 10 of The Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to 'POCSO Act') and he was sentenced to undergo imprisonment for a term of 5

years and was also dismissal from service.

1.2. When this application was moved, it was stated the petitioner had undergone imprisonment for a period of 3 years and 6 months out of total punishment of 5 years, as he was in custody since 17.04.2016. The final disposal of the writ is likely to take some time, hence in the meantime, suspension of sentence was prayed for. Giving history of the matter, it has been submitted that the applicant had joined Indian Army in 2002; he has good character and antecedents and there is no truth in the case made out against him; the petitioner is the sole bread earning member in his family; he has two minor children, who are completely dependent on the petitioner for their survival; and they are in a pitiful and very bad condition, as there is no one to take care of them. Hence, it is prayed that the sentence awarded to him may be suspended.

2. Notice was issued on this application. Reply was filed on behalf of the respondents. It has been mentioned that the petitioner was on deputation to NSG w.e.f. 07.01.2014. After the Court of Inquiry into the complaints against the petitioner, 05 charges for aggravated sexual assault on children at NSG Campus were framed and he was tried by General Security Guard Court (GSGC) under Section 45 of the NSG Act, 1986 read with Section 10 of POCSO Act, 2012. At the end of the trial, the petitioner was found guilty of three charges by GSGC and he was sentenced to 5 years imprisonment along with dismissal of service. As stated in the petition, the said sentence was upheld by authorities for Internal Security Division of MHA.

2.1. The petitioner was stated to be under trial person since 17.04.2016 to 25.10.2016. The period undergone after conviction by the petitioner was from 26.10.2016 to 21.03.2022. During this period, he had also availed parole for a total period of 1 year, 2 months and 15 days on various occasions. This period has been deducted from the sentence served. The under-trial custody period has also been duly adjusted and his probable date of release is in the month of July, 2022. On 03.02.2022, the actual sentence undergone by the petitioner, including custody as under-trial by the petitioner is 4 years, 7 months and 01 day, as per the letter of Superintendent of Prison, District Prison, Gurugram, Haryana, dated 07.02.2022.

2.2. It is also submitted by the respondents that the remission application, moved by the present petitioner, is pending consideration before Haryana Government, which is also opposed by the respondents. The offence committed by the petitioner is of grave nature and against multiple victims of minor age. The petitioner misused his position as an NSG official and has tainted the image of the prestigious security organization, i.e., NSG by committing aggravated sexual assault on 3 minor children; the faith of the common people in the Army personnel would be adversely affected if the sentence of the petitioner is suspended. The petitioner was an adult male and victims of the petitioner were minor girls.

2.3. The respondents have relied upon judgment of the Madras High Court in Crl. M. P. 5099/2020 in Crl. A. No. 332/2020 titled Elango @ Elangovan vs. State by which on 13.10.2020, the Hon'ble Court had dismissed the application for suspension of sentence moved by the convict, considering the age of the victim and the accused. Here, the petitioner was awarded minimum sentence of 5 years as per the prescribed punishment under POCSO, he had also availed of parole for a total period of 1 year, 2 months and 15 days on various occasions and he is due to be released in the month of July, 2022 and suspending the sentence of the accused would be prejudicial to the victims, who have suffered sexual assault at the hands of the petitioner. On these grounds, it has been prayed that the application for regular suspension of sentence may be dismissed.

3. I have heard arguments. Both the learned counsel appearing for the applicant and respondents, have reiterated the grounds mentioned in the application and reply. Counsel for applicant has especially mentioned the fact that the applicant has already undergone sentence of approximately 4 years and 8 months and his 5 years term is likely to be ending in July, 2022 and keeping in view the workload of the High Court, his appeal is not likely to be finally heard, so the application for suspension of sentence may be favourably considered. He has also made certain submissions on the merits on the case and regarding he being the sole bread earner in the family, which is fully dependent upon him.

3.1. Learned counsel for the applicant has further relied upon the following judgments:-

(i) Haji Mul vs. State (NCT of Delhi), 2015 SCC OnLine Del 6958

(ii) Deepu vs. State, 2021 SCC OnLine Del 155

(iii) Mossa Koya KP vs. State (NCT of Delhi), 2021 SCC OnLine SC 3110

3.2. In Haji Mul vs. State (NCT of Delhi) (Supra), it was observed as under:

"5. Regarding sentence order, the maximum sentence awarded to the appellant was under Section 8 of the POCSO Act, whereby, he was directed to undergo rigorous imprisonment for 3 years with fine of Rs. 1000/-. Sentences under the other offences were to run concurrently. Nominal Roll dated 31.12.2014 reveals that the appellant was aged about 21 years on the date of occurrence; he has already remained in custody for 1 year 10 months and 11 days besides earning remission for 5 months. He is not a previous convict and is not involved in any other criminal activity. He was granted suspension of sentence till the disposal of the appeal on his furnishing a personal bond in the sum of Rs. 15,000/- with one surety in the like amount by an order dated 31.07.2014. He could not furnish the required surety bond. The surety amount was reduced to Rs.5,000/- by an order dated 16.12.2014. Again, the appellant could not get the benefit of the order as he was unable to furnish the surety bond of Rs.5,000/- and has remained in custody since then. Considering these mitigating circumstances, the sentence order is modified and the period already undergone by the appellant in this case

is taken as substantive sentence”.

3.3. In *Deepu vs. State (Supra)*, it was held by Delhi High Court:

“6. It is not in dispute that applicant has already undergone around 4 years and 11 months and earned remission of 9 months 23 days as per nominal roll dated 13.01.2021, thus, he has completed more than half of the sentence. It is also not in dispute that conduct of the appellant in jail is satisfactory”.

3.4. In *Mossa Koya KP vs. State (Supra)*, Hon’ble Supreme Court has observed as under:

“12. We appreciate the submission of the Additional Solicitor General that offences under the NDPS Act are of a serious nature and the case is at the post conviction stage. Yet the Court cannot be unmindful of the fact that the appellant has undergone 8 years out of the total sentence of 10 years. The appeal is unlikely to be heard early. In all probability, the entire sentence would have been undergone by the time the appeal is heard. The decisions on the basis of which the High Court of Delhi has declined to grant suspension of sentence, are, at the highest, a broad guideline and cannot be placed on the same pedestal as a statutory interdict. With the pendency of the work in the High Court, it may not be feasible to expedite the disposal of the appeal within a short period.”

3.5. On the other hand, learned counsel Ms. Anjana Gosain, appearing for respondents, has relied upon the judgment of the Madras High Court in the matter *Elango @ Elangovan vs. State*, where the application for suspension of sentence of a victim was dismissed. The relevant paragraph of the said judgment is under:

“8 In this case, the date of birth of the victim girl is 01.05.2001 as could be seen from the evidence of Valarmathi (P.W.10), Headmistress of the school where the victim girl was studying. The incident had taken place on 26.08.2015, on which date, the victim girl was only 14 years old. The petitioner was 27 years old on the said date. The evidence of the victim girl shows that there was penetrative sexual assault on her by the petitioner”.

Hence, the application for suspension of sentence was not allowed by Madras High Court.

3.6. The counsel for the applicant rightly pointed out that in the said case before Madras High Court, the conviction was under Section 5 (1) read with Section 6 of POCSO Act, being a case of penetrative sexual assault on the victim by the petitioner. However, charges in the present case are not so grave. In the said case, 10 years rigorous imprisonment was awarded under Section 5 (1) read with Section 6 of POCSO Act, apart from other punishments. Whereas, in the present case, the punishment of 5 years was awarded, out of which the present petitioner/applicant has already completed 4 years and 8 months of incarceration. I agree with this submission of the learned counsel for applicant.

3.7. Keeping in view the judgment of the Hon'ble Supreme Court in the matter of *Mossa Koya KP vs. State (NCT of Delhi)* (Supra), where the petitioner had undergone 8 years imprisonment out of 10 years awarded sentence in a heinous crime under NDPS Act, and the appeal was unlikely to be heard early, the Court was pleased to grant the prayer of the application for suspending the sentence, I am inclined to consider the present application favourably.

3.8. Moreover, in *Haji Mul vs. State (NCT of Delhi)*, a coordinate bench of this court, considered the fact that the appellant was sentenced under Section 8 of POCSO Act to undergo rigorous imprisonment for 3 years with fine of Rs.1,000/- and he had remained in custody for 1 year and 10 months and 11 days besides earning remission for 5 months and he was not a previous convict, so, he was granted suspension of sentence till disposal of the appeal. Similarly, in the matter of *Deepu vs. State*, the sentence awarded was rigorous imprisonment for 10 years with fine of Rs.10,000/- for offence punishable under Section 377 IPC and in default of payment of fine, further SI for a period of 6 months and he has been sentenced to undergo RI for a period of 10 years with fine of Rs. 10,000/- for offence punishable under Section 6 of POCSO Act and in default of payment of fine, further SI for a period of six months. He was further sentenced to undergo RI for a period of 5 years with fine of Rs.1,000/- for offence under Section 363 IPC and in default of payment of fine, further SI for a period of 1 month. He was also sentenced to undergo RI for a period of one year for offence punishable under Section 342 IPC. He was also sentenced to undergo RI for a period of 1 year for offence punishable under Section 506 (Part I) IPC. Out of this period, the applicant had undergone around 4 years and 11 months and earned remission of 9 months 23 days and he had completed more than half of the sentence awarded, so, keeping in view the conduct of the appellant in jail being satisfactory, the coordinate bench of this Court was pleased to suspend his sentence. Both these judgments are fully applicable to facts of this case.

3.9. In the present case, the appellant/applicant is not a previous convict and there is nothing on record to show that his behaviour in jail is not satisfactory; he had been also granted paroles 8 times between the period 19.03.2019 to 31.08.2021 and not even a single complaint is on record to show that during these periods of paroles, he has committed any other offence. It is also not in dispute that out of the total sentence of 5 years, he has remained in jail for 4 years and 8 months. The appellant stands dismissed from service, so there is no question of him visiting the NSG Campus or causing trauma to the victims, who may or may not residing in the same campus now. It is also not in dispute that looking at the workload and pendency of the old appeals in this court, the present appeal is not likely to be heard before July, 2022, when five years of sentence of the appellant/applicant shall be completed.

4. In view of the above facts, circumstances and the prevailing legal regime, I am inclined to allow suspension of the sentence of the present applicant/appellant on execution of personal bond in the sum of Rs. 25,000/- with one

surety of the like amount to the satisfaction of the Jail Superintendent, Central Jail, Gurugram, Haryana. The appellant shall attend the Court as and when the appeal is listed, he shall not contact or visit any of the victims and he shall not commit any other offence during the period of suspension of sentence. The application is accordingly disposed of.