
(2014) 07 J&K CK 0042
In the Jammu And Kashmir High Court
Case No : Bail Appl. No. 50/2014

Rayees Manzoor Bhat

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 04-07-2014

Acts Referred:

Citation : (2015) 1 JKJ 20

Hon'ble Judges : Ali Mohd. Magrey, J.

Bench : Single Bench

Advocate : S.T. Hussein, Sr. Advocate, for the Appellant; R.A. Khan, AAG and Z.A. Qureshi, for the Respondent

Final Decision : Dismissed

Judgement

Ali Mohd. Magrey, J.â?"This application seeks suspension of sentence of the appellant-convict, petitioner herein, and grant of bail in his favour

pending decision in the Criminal Appeal No. 10/2013 filed by him. Heard learned counsel for the parties and considered the matter.

2. The convict, applicant herein, has been held guilty of culpable homicide not amounting to murder punishable under Section 304 Part-I of RPC

and has been convicted by the learned 1st Additional Sessions Judge, Srinagar, by judgment dated 05.04.2013, and sentenced to undergo

imprisonment for ten years by order dated 08.04.2013. The convict has preferred an appeal against the judgment and order of sentencing on

18.04.2013 which is pending disposal before the Court.

3. It may be noted here that earlier two applications--one seeking suspension of sentence and the other seeking grant of bail--were filed on behalf

of the convict. The two applications alongwith two other Cr.MPs moved on his

behalf were decided by this Court by detailed order dated 03.04.2014 which is quoted hereunder extenso.

1. These are two applications filed on behalf of the convict: one seeking suspension of sentence; and the other seeking grant of bail in his favour.

Before enumerating the grounds taken in these two applications, it becomes imperative to state the facts leading to the filing thereof.

2. The applicant/convict was charged for the commission of offence under section 302 RPC. Alongwith him three other accused were charged for

the commission of offences under Sections 148, 149 read with Section 302 RPC. By judgment dated 05.04.2013, passed by the 1st Additional

Sessions Judge, Srinagar, the applicant-convict was found and held to be guilty of culpable homicide not amounting to murder punishable under

Section 304 Part-I RPC. As regards the other three accused, the learned trial court held that the prosecution has failed to prove as to which five or

more persons, except the applicant-convict, were forming part of the mob/unlawful assembly, and, consequently, acquitted the three accused of

the commission of the offences for which they had been charged. Subsequently, by order dated 08.04.2013, the learned trial court sentenced the

applicant to undergo rigorous imprisonment for ten years with fine of Rs. 25,000.00, in default of payment whereof, the applicant-convict was

ordered to undergo a further three months' rigorous imprisonment. The imprisonment undergone by the applicant-convict during the course of

investigation and trial with effect from 09.12.2011 to 08.04.2013 (both days inclusive) was ordered to be set off against the period of

imprisonment thus awarded to the applicant-convict.

3. The applicant-convict has filed Criminal 1st appeal No. 10/2013 against the aforesaid judgment convicting him and the order of sentencing so

passed against him. Alongwith the appeal, the applicant-convict filed an application, being Cr.MA No. 103/2013, praying for suspension of

sentence during the period of pendency of the appeal. The said application was dismissed by a Coordinate Bench of this Court vide order dated

15.05.2013. The operative part of the order passed by the Court is quoted hereunder:

After hearing the rival contentions of either side and giving my thoughtful consideration to the entire case and refraining myself from commenting

upon the merits of the case at this stage, lest it may prejudice the case of either side at the relevant stage of consideration of main appeal, the

applicant-appellant does not deserve the concession of suspension of sentence, at least, at this stage. The application at hand stands dismissed

accordingly.

However, keeping in views totality of facts and circumstances, especially, the age factor of the applicant-appellant, the main appeal deserves to be

taken up for final consideration in the shortest possible period.

List the main appeal in the first week of July, 2013 for final consideration higher up as case No. 1. Registrar Judicial to ensure that record is

available to the Court before the next date positively. If the rule so provides, paper book shall also be prepared within this period only one set

each whereof to be provided to learned counsel for both the sides.

4. After the aforesaid order of the Court, on 27.07.2013, the applicant-convict filed an application, being IA (Criminal) No. 274, seeking

suspension of sentence on the ground of violation of Court order. In the application it was stated that (pursuant to the aforesaid Court direction)

the appeal was listed on 01.07.2013 but it was a strike day. On the subsequent dates viz., 03.07.2013 and 24.07.2013 the matter could not be

taken; therefore, the applicant-convict be released on bail, otherwise his case may be heard and finally decided on priority basis.

5. On 11.12.2013, the applicant-convict filed another application (Bail Application No. 90/2013) under Section 498 Cr.P.C. seeking grant of bail.

The said bail application was filed on the sole ground that the criminal appeal was listed for hearing on six dates and that, in the circumstances, the

judgment of the Supreme Court in Bhagwan Rama Shinde Gosai and Others Vs. State of Gujarat, , was attracted and the applicant-convict was

entitled to grant of bail on the principle of parity. Notice in the aforesaid application was issued on 12.12.2013.

6. Meanwhile, it appears that the applicant-convict filed writ petition, OWP No. 1620/2013, seeking a direction to the respondents therein to

consider his case for grant of probation under the provisions of the Prison Rules on the grounds mentioned in the writ petition, which included the

grounds of death of his grandfather, ailment of his sister etc. The writ petition was disposed of by order dated 12.11.2013 with direction to the

respondents to consider the case of the applicant-convict for probation under the Prisoners' Act and the Rules as also in terms of the judgment of

the Supreme Court reported in 2008 SC (Cri. Rulings) 585. Ultimately, the Director General of Prisons granted a parole for 21 days in favour of

the applicant-convict.

7. Thereafter, on 05.02.2014, the applicant-convict filed yet another application, being Bail Application No. 16/2014. Alongwith this application,

the applicant-convict also filed Interim Bail Application No. 15/2014. The grounds urged in this bail application are that the Director General of

Prisons has take into account the subsequent event because when the petitioner came out of the Jail, the whole family was devastated

economically. They had become destitute and in the meanwhile the sister of the applicant-convict, Mst. Shazia due to developed breast cancer had

to undergo surgery and that the applicant-convict has to arrange finances for further treatment of his sister and to provide economic help to his

ailing parents. It is the further ground taken in the application that under the Jammu & Kashmir Good Conduct Prisoners (Temporary Release)

Rules, 1978, parole can be extended and even a fresh parole can be granted if the circumstances so warrant and that it is the releasing authority

which has to issue to the Superintendent of Police, Central Jail a sealed warrant indicating the period of release. It is further stated that the period

of release under Section 21 of the General Clauses Act in vogue in the State of Jammu and Kashmir can be modified, if special circumstances of a

serious nature arise after the parole has been fixed.

8. The aforesaid two applications came up for consideration before a Coordinate Bench of this Court on 07.02.2014 and the Court passed the

following order:

Mr. Hussain informs that main appeal is listed before a Bench of this Court on 12th February, 2014 and seeks liberty to make a mention to the

concerned Bench for taking up of the case out of turn. Such a mention may be made. Mr. Hussain also produced communication addressed by the

District Magistrate, Srinagar, to the Director General of Prisons, purportedly making a recommendation for releasing the applicant on parole and

prays that direction may be issued to the Director General of Prisons to accord consideration to extension of the parole. However, Mr. Khan

points out and Mr. Hussain admits that a similar direction stands issued today itself by a Coordinate Bench of this Court in a writ petition having been filed on behalf of the applicant. No fresh direction is required.

9. It may be mentioned here that all the aforesaid applications, being IA (Cr.) No. 274/2013, IA (Cr.) No. 90/2013, IA No. 15/2014 and BA

No. 16/2014 jointly came up for consideration before this Court on 14.02.2014. It hardly needs a reiteration that IA No. 15/2014 was filed for

grant of interim bail pending disposal of the main bail application No. 16/2014. Since the respondent-State had failed to file objections despite

repeated opportunities granted in that behalf, by order dated 14.02.2014 this Court allowed IA No. 15/2014 and ordered interim bail of the

applicant-convict for two weeks only, which interim direction, was, in fact, expended from time to time and continues to be operative till date

pending disposal of the main application(s). The main applications were ordered to be listed with the appeal.

10. I have heard the learned counsel for the parties, perused the applications and considered the matter.

11. As mentioned above, IA(Cr.) No. 274/2013 has been filed by the applicant-convict on the sole ground that the main appeal was not heard

despite it having been listed thrice. The applicant-convict alleges violation of the Court order dated 15.05.2013 passed in Cr.M.P. No. 103/2013.

In that order, as quoted hereinabove, the Court has in clear and unambiguous terms expressed the view that ""the applicant-appellant does not

deserve the concession of suspension of sentence, at least, at this stage"". However, the Court had further observed that keeping in view the

totality of facts and circumstances, especially the age factor of the applicant-appellant, the main appeal deserves to be taken up for final

consideration in the shortest possible period. The Court order nowhere made it a condition that if the appeal is not immediately heard finally, the

appellant-convict would be entitled to grant of bail or that fact ipso facto would entitle him to the relief of suspension of sentence. Therefore, the

question of violation of any Court order did not arise.

12. It needs a mention here that the present application was filed just within 72 days of the passing of the aforesaid Court order. Merely because a

case is not finally heard within 72 days when it was listed thrice during the very

same period is no ground to seek suspension of the sentence. Even otherwise, the minutes of the file reveal that in terms of the aforesaid order, the appeal was listed on 03.07.2013, but the same was not reached.

Thereafter, the appeal has come up for final hearing on many occasions, namely, 24.07.2013, 29.07.2013, 05.08.2013, 16.08.2013, 02.09.2013, 12.09.2013, 09.10.2013, 13.11.2013, 27.11.2013, 09.12.2013 and so on. Whereas on four occasions, namely, 03.07.2013, 03.10.2013, 27.11.2013 and 09.12.2013 the appeal was not reached, on two dates, namely, 29.07.2013 and 13.11.2013, it had been listed in supplementary cause list. The minutes further reveal that on 24.07.2013, 05.08.2013, 16.08.2013, 02.09.2013 and 09.10.2013, when the appeal was listed, the same has been adjourned at request of the learned counsel for the appellant. In any case, from perusal of these orders recorded by different Coordinate Benches, it does not come forth that the learned counsel for the applicant-convict had shown any keenness or urgency to argue the case. In fact, on some occasions, the appellant has gone unrepresented. Therefore, the grounds taken in the application and sought to be advanced at the Bar are untenable and, in any case, not a plausible ground to entitle the applicant-convict to the relief prayed for. The application on the grounds taken therein is liable to be rejected.

13. Coming to IA (Cr.) No. 90/2013, the prayer made in this application is that as the appeal is not reaching for the last six hearings, bail may be granted on the principal enunciated by the Supreme Court in Bhagwan Rama Shinde Gosai and Others Vs. State of Gujarat, . I have perused the aforesaid judgment. I deem it appropriate to quote the whole judgment hereunder. It reads thus:

1. Leave granted.
2. This is a case where appellants have been convicted by the trial court of the offence under Section 392 read with Section 397 and each of them was sentenced to rigorous imprisonment for 10 years. They filed an appeal before the High Court of Gujarat and moved for suspension of sentence, but that was not allowed. At a later stage they again moved for suspension of sentence and that too was dismissed by the impugned order. Unfortunately, when they made a motion for having their appeal expedited that also was declined by the High Court on the premise that the

High Court is having older appeals on the board.

3. When a convicted person is sentenced to fixed period of sentence and when he files appeal 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 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 4.00 P.M. and 6.00 P.M. until disposal of the appeal pending before the High Court.

5. This appeal is disposed of in the above terms.

The facts of the aforesaid case are distinguishable inasmuch as in that case the appellants had made a motion for having their appeal expedited, but

the motion was declined. In the instant case, the appeal had been listed numerous times, but has not been heard and the circumstances, as specified

above, are not attributable to the Court. In fact, the scenario in the present case, as depicted by the narration of the facts hereinabove, is quite

different, inasmuch the applicant-convict seems to be more interested in seeking bail and parole rather than to seek disposal of the appeal on

merits. The judgment cited and relied upon thus is not attracted. Therefore, the

ground sought to be impressed upon is not available to the applicant-convict.

14. The grounds taken in the application, numbered as BA No. 16/2014, and captioned as Bail Application, in essence and effect are meant to direct the Director General, Prisons, to extend the parole granted in favour of the applicant-convict. As a matter of fact, when this application had come up before a Coordinate Bench of this Court on 07.02.2014, the learned counsel for the applicant-convict had made a specific prayer that direction may be issued to the Director General of Prisons to accord consideration to extension of the parole. When it was brought to the notice of the Court by the learned AAG that a similar direction stood already issued on the same day in a writ petition filed by the applicant-convict, which fact was admitted by the learned counsel for the applicant-convict before the Court, the Court ordered that no fresh direction was required. Going by the language of the order passed by the Court on 07.02.2014, as quoted hereinabove, this application, practically stands disposed of by the said order, though that is not expressly mentioned in the order. Be that as it may, since that direction stood passed in the writ petition (second in series) filed by the applicant-convict, the ground taken in the application would not entitle the applicant-convict the relief of suspension of sentence and/or grant of bail.

15. Learned counsels for the parties, during the course of arguments, have addressed the Court on the merits of the case. However, given the grounds taken in these applications, as mentioned above, seeking suspension of the sentence and grant of bail in favour of the applicant-convict, I deem it unnecessary to deal with those arguments.

16. In view of the above, the three applications, namely, IA (Cr.) No. 274/2013, IA (Cr.) No. 90/2013 and BA No. 16/2014 deserve to be dismissed and are, accordingly, hereby dismissed. The applicant-convict shall surrender before the Superintendent Central, Jail, Srinagar, by 04:00 PM on 05.04.2014 and, consequently, the bail bond and surety bond furnished by him pursuant to the order of this Court dated 14.02.2014 shall stand cancelled from the time and date as aforementioned.

17. However, this order would not preclude the applicant-convict from making a fresh motion for suspension of sentence and/or grant of bail in

future, or, in any manner, debar the State and/or its concerned functionaries from considering the case of the applicant-convict for grant of parole

or furlough, if such a case is pending consideration before them, since the two subjects--suspension of sentence/grant of bail and release on

parole/furlough--are governed by two different sets of rules and laws.

4. The present application has been moved on the grounds that the convict-appellant has not misused the bail granted in his favour and that the

appeal filed by the appellant has not been heard. Relying on the judgment of the Supreme Court in Bhagwan Rama Shinde Gosai v. State of

Gujarat (supra), the learned counsel submitted that the appellant-convict is entitled to bail.

5. It may be observed here that the judgment of the apex court in Bhagwan Rama Shinde Gosai v. State of Gujarat has been passed in the peculiar

facts of that case. In that case the appeal filed by the convicts was not being listed for hearing and even the motion for listing the appeal for hearing

had been rejected by the Court. That is not the case herein, inasmuch as, ever since the date of passing of the order dated 03.04.2014, the appeal

filed by the convict-appellant has been listed for hearing on three occasions viz. on 11.04.2014, 29.04.2014 and 07.05.2014. On 11.04.2014 it

was adjourned, on 29.04.2014 it was not reached and on the last hearing date, the appellant had gone unrepresented. That being the factual

position, the judgment cited and relied upon by the learned counsel is not applicable to the facts of the present case.

6. Learned counsel for the appellant-convict also cited and relied upon the judgment of the Supreme Court in Angana and Another Vs. State of

Rajasthan, to canvas that suspension of sentence can be considered by the appellate court liberally especially so if the convict has not misused or

abused the bail. In the aforesaid judgment, at paragraph 18, the Supreme Court has referred to its decision in Kishori Lal Vs. Rupa and Others,

wherein the Supreme Court has indicated the factors that require to be considered by the courts while granting benefit under Section 389 Cr.P.C.

in cases involving serious offences like murder etc. The observations made therein are quoted hereunder:

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 appellant 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.

5. 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.

6. The mere fact that during the trial, they were granted bail and there was no allegation of misuse of liberty, is really not of much significance. The

effect of bail granted during trial loses significance when on completion of trial, the accused persons have been found guilty. The mere fact that

during the period when the accused persons were on bail during trial there was no misuse of 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 is whether reasons existed to suspend the

execution of sentence and thereafter grant of bail. The High Court does not seem to have kept the correct principle in view.

(Underlining supplied)

The respondent-State in their objections have stated that the appellant-convict is involved in a heinous offence of murder of a young boy

committed during broad day light while the convict-appellant was seeking to enforcing Hartal, therefore, he is not entitled to the concession of bail.

It is also submitted that the case is ripe for hearing and that the respondents are ready to argue the case. They have never sought adjournment of

the case.

Considering the matter in the totality of facts and circumstances attendant to it, I do not see any reason to order suspension of sentence or to order

release of the appellant-convict on interim bail pending decision in the appeal. This application is, therefore, dismissed as being without any merit.