
(2017) 04 MP CK 0096
In the Madhya Pradesh High Court
Case No : 1248 of 2005

The Divisional Railway Manager

APPELLANT

Vs

Goyanka Limes And Chemicals

RESPONDENT

Date of Decision : 26-04-2017

Acts Referred:

Constitution of India, Article 21, Article 19 - Amendment of the Schedule - Protection of certain rights regarding freedom of speech, etc
Code of Criminal Procedure, 1973

Citation : (2017) 04 MP CK 0096

Hon'ble Judges : P.K. Jaiswal, Ved Prakash Sharma, Virender Singh

Bench : Single Bench

Advocate : C.L. Yadav, Nilesh Dave, Sunil Jain, M. Soni, P.K. Saxena, Sunil Verma

Judgement

1. A Division Bench of this Court comprising two of us (Hon"ble Shri Justice P.K. Jaiswal and Hon"ble Shri Justice Virender Singh) while considering the prayer for suspension of custodial sentence under Section 389(1) of the Code of Criminal Procedure, 1973 (for short "the Code") in Cr.A. No.1248/2005 expressing its reservation to subscribe to the legal proposition made by a co-ordinate Bench (Gwalior Bench) of this Court in Raghuvar Singh @ Raghuveer Singh vs. State of M.P., reported in 2015 (2) JLJ 218, has referred the question of law to be answered by a larger Bench. Pursuant to this Hon"ble the Chief Justice has been pleased to constitute this Bench. The question of law referred to this Bench is as follows : "Whether sentence of life imprisonment or imprisonment of any lesser term of a convict can be suspended solely on the ground of his having served sentence of any particular period or one-half of the maximum sentence, inclusive or exclusive of remission, which would otherwise entitle him to release from jail, and whether the judgment of a Division Bench of this Court in Raghuvar Singh @ Raghuveer Singh vs. State of M.P., 2015 (2) JLJ 218, holding so, has been correctly decided ?"

2. A brief conspectus of the facts relevant to unfold the controversy is as under :

3. Appellant Dashrath, vide judgment dated 20.06.2005 rendered in S.T. No.15/15 by learned First Additional Sessions Judge, Mandsaur, was convicted for offences punishable under Section 376 & 302 of IPC, 1860 (for short "the IPC") for subjecting 10 years old girl child to rape and committing her murder. He was ordered to suffer RI for 10 years with fine of Rs.1000/- under Section 376 of IPC and further to suffer life imprisonment and to pay a fine of Rs.500/- under Section 302 of IPC with usual default stipulation.

4. The conviction and sentence was challenged by the appellant by way of criminal appeal No.1248/2005. He also made an application for suspension of sentence and grant of bail which came to be rejected on 16.04.2007 as not pressed. Repeat application for suspension of sentence in terms of Section 389 of "the Code" was rejected on merits, vide order dated 02.11.2015.

5. Third application for suspension under Section 389 of Cr.P.C. was moved primarily on the ground that the appellant is in jail since 20.10.2004 and has thus suffered a jail sentence of more than 11 years 9 months. It was submitted that the final hearing of the appeal is likely to take sufficient long period, therefore, the sentence imposed against the appellant be suspended. The learned counsel for the appellant in support of the plea for suspension pressed into service the decision rendered by a Division Bench of this Court (Gwalior Bench) in Raghuvar Singh @ Raghuveer Singh (supra), wherein it has been held that the factor of prolonged post-conviction incarceration, bleak possibility of the appeal coming up for final hearing in near future and the appellant not having misused the liberty for temporary bail granted earlier and absence of criminal antecedents outweigh the gravity of offence and the manner of commission of the offence. In para-8 of the report, the Bench posed to itself the following question:- "The sole question before this Court is as to whether in the attending circumstances as mentioned above, a life convict who has suffered about 11-12 years of rigorous imprisonment can successfully seek suspension of sentence merely on grounds of having undergone substantial period of sentence and there being no possibility of final hearing of the pending appeal."

6. Referring to decisions rendered by the apex Court in Kashmira Singh vs. State of Punjab reported in (1977) 4 SCC 291, Babu Singh vs. State of U.P. reported in (1978) 1 SCC 579 and Shailendra Kumar vs. State of Delhi reported in (2000) 4 SCC 178, the Court observed that an appeal being continuation of trial, the conviction, though binding on the parties is not final and remains subject to the appellate order as and when passed. The Court went on observing that while considering an application under Section 389 of "the Code" at the initial stage of the appeal, the merits of the case are seen, though perfunctorily, to ascertain justifiability of release on bail; however, when substantial part of the sentence is suffered with no foreseeable hope of final hearing in the appeal in near future, "the factor of merit involving gravity of offence, nature of commission of offence and quality of evidence on record, takes a backseat" and instead, the factors pertaining to the post-conviction period, i.e. "period of custody, post-conviction

behaviour, instances of misuse of bail, age, possibility of hearing of the appeal in near future and efforts made by the counsel for convict to get the appeal heard," assume prominence and primacy. Accordingly, the Bench felt inclined to suspend the sentence of life imprisonment that was imposed against the appellant.

7. The Division Bench in Criminal Appeal No.1248/2005 has been of the view that Hon"ble the Supreme Court in a catena of decisions has consistently held that mere fact of incarceration for a certain period nor the fact that the trial is not likely to be concluded in the near future either by itself or with the period of incarceration, would not be sufficient to enlarge a person on bail, when the gravity of the offence alleged is severe. Resultantly, expressing its inability to subscribe to the view taken by the co-ordinate Division Bench in Raghuvir Singh @ Raghuvir Singh (supra), the matter was referred to larger Bench.

8. Shri C.L. Yadav, learned Senior Counsel appearing on behalf of the appellant referring to decisions of the apex Court in Kashmira Singh (supra), Hussainara Khatun vs. Home Secretary, State of Bihar, AIR 1979 SC 1360, Smt. Akhtari Bi vs. State, AIR 2001 SC 1528, Moti Lal Saraf vs. State of Jammu & Kashmir, AIR 2007 SC 56 and Bhagwan Rama Shinde Gosai & Ors. vs. State of Gujarat, AIR 1999 SC 1859, has submitted before us that right to speedy trial is a fundamental right being implicit in the broad sweep of Article 21 of the Constitution of India as interpreted by the apex Court in Maneka Gandhi vs. Union of India reported in AIR 1978 SC 597. It is further submitted that as held in Akhtari Bi (supra), the trial Court's verdict does not attain finality during the pendency of the appeal and for that purpose trial is deemed to be continuing despite conviction of an accused. The contention is that speedy trial being a fundamental right, the State is under an obligation that the criminal matters particularly, criminal appeals are disposed of expeditiously. The further submission is that since the Criminal Appeals filed in 1998, 1999 and the year 2000 are still waiting for their turn to be taken for final hearing, therefore, the appellants, who are in jail and have suffered substantial part of the sentence imposed against them, deserve to be released on bail under Section 389 of "the Code".

9. The learned Senior Counsel appearing on behalf of the appellant has also referred to decisions of the apex Court in Kamal vs. State of Haryana, (2004) 13 SCC 526, A.E. Premanand vs. Escorts Finance Ltd. & Ors., (2004) 13 SCC 527 and Salim Javed vs. State of Rajasthan, (2006) 9 SCC 602, where Hon"ble the apex Court has been pleased to grant suspension on account of the imprisonment suffered by appellant in cases where the appellant was sentenced to undergo imprisonment for a term. Noticeably, none of these cases relates to sentence of life imprisonment.

10. Per contra, referring to the decisions of the apex Court in Kishori Lal vs. Rupa and others reported in (2004) 7 SCC 638, Anil Ari vs. State of West Bengal, (2009) 11 SCC 363 and State of Haryana vs. Hasmat, (2004) 6 SCC 175, it is submitted by Shri Sunil Jain, learned Additional Advocate General that in exercise

of powers under Section 389 of "the Code" the appellate Court has to decide about the question of suspension of sentence on the basis of all relevant aspects of the case including seriousness of the crime and that no straight jacket formula can be laid down with regard to suspension of sentence.

11. Learned Senior Counsel Shri P.K. Saxena has also addressed the Court. It is submitted by him that this Court cannot rewrite the provisions of Section 389 of "the Code" by formulating that an appellant who has served 12 years or more imprisonment, being substantive part of the sentence imposed against him, is entitled for suspension of sentence and release on bail. The contention is that prescribing any time limit in this regard will amount to judicial legislation which is not permissible under the scheme of the things. It is further submitted that though an appeal is required to be disposed of within a reasonable time, however, there is difference between a person facing a trial who carries with him a presumption of innocence and a person who has been found guilty and has preferred appeal against conviction in which case the presumptions of innocence is no more available. The contention is that prescription of any time limit may rather prove counterproductive in the sense that those accused who on merits of the case deserve suspension of their sentence within a year or so of filing of appeal, in such a situation will have to wait for 12 years and thus, the remedy may prove worst than the malady itself. Lastly, it is submitted that the jurisdiction under Section 389 (1) of "the Code" cannot be bracketed within any arithmetical formula as it cannot be said that every person who has challenged the conviction is ultimately going to be acquitted.

12. We have bestowed our anxious consideration to the submissions raised at the Bar and have gone through the record.

13. Section 389 of "the Code", which falls under Chapter XXIX, reads as follows: "S.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).....

(4)....."

14. Inordinate delay in disposal of criminal appeals at the level of High Court has been a perennial problem faced by the judicial system and time to time the apex Court has attempted to address the same. Expressing its deep concern over delay in disposal of Criminal Appeals, the apex Court in the case of Akhtari Bi (supra), observed as under (para-5) : "To have speedy justice is a fundamental right which flows from Article 21 of the Constitution. Prolonged delay in disposal of the trials and thereafter appeals in criminal cases, for no fault of the accused, confers a right upon him to apply for bail. This Court, has time and again, reminded the executive of their obligation to appoint requisite number of judges to cope with the ever increasing pressure on the existing judicial apparatus. Appeal being a statutory right, the trial court's verdict does not attain finality during pendency of the appeal and for that purpose his trial is deemed to be continuing despite conviction. It is unfortunate that even from the existing strength of the High Courts huge vacancies are not being filled up with the result that the accused in criminal cases are languishing in the jails for no fault of theirs. In the absence of prompt action under the constitution to fill up the vacancies, it is incumbent upon the High Courts to find ways and means by taking steps to ensure the disposal of criminal appeals, particularly such appeals where the accused are in jails, that the matters are disposed of within the specified period not exceeding 5 years in any case."

15. In Moti Lal Saraf (supra), the apex Court observed that speedy trial is one of the facets of the fundamental right to life and liberty enshrined in Article 21 of the Constitution of India and the law must ensure "reasonable, just and fair" procedure which has a creative connotation after the decision in Maneka Gandhi's case (supra).

16. In Kashmira Singh (supra), another case relied upon by the learned counsel for the appellant, the apex Court in para-2 of the report had expressed its concern in the following words : "Now, the practice in this Court as also in many of the High Court has been not to release on bail a person who has been sentenced to life imprisonment for an offence under Section 302 of the Indian Penal Code. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no

application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent" What confidence would such administration of justice inspire in the mind of the public It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal Would it not be an affront to his sense of justice Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it It is therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence." Hon"ble the apex Court in view of the aforesaid further held that: "that so long as the Supreme Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail where special leave has been granted to the accused to appeal against his conviction and sentence. The other consideration, however, is equally important and relevant. When a person is convicted by an appellate court, he cannot be said to be an innocent person until the final decision is recorded by the superior court in his favor."

(Emphasis supplied)

17. Another case on which strong reliance has been placed by the learned Counsel for the appellants is that of Babu Singh vs. State of U.P., (1978) 1 SCC 579, wherein the apex Court observed, that, the significance and sweep of Article 21 of the Constitution make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good as spelt out in Article 19.

18. In Surinder Singh alias Shingara Singh vs. State of Punjab, AIR 2005 SC 3669, Hon"ble the apex Court had an occasion to consider the sweep and objective of the observations made by it in the cases of Kashmira Singh (supra), Akhtari Bi (supra) and Babu Singh (supra) and observed that none of the decisions lay down any invariable rule for grant of bail on completion of a specified period of detention in custody as in a discretionary matter, like grant or

refusal of bail, it would be impossible to lay down any invariable rule or evolve a strait jacket formula. Relevant observations run as under: "9. Similar observations are found in some of the other decisions of this Court which have been brought to our notice. But, however, it is significant to note that all these decisions only lay down broad guidelines which the Courts must bear in mind while dealing with an application for grant of bail to an appellant before the Court. None of the decisions lay down any invariable rule for grant of bail on completion of a specified period of detention in custody. Indeed is a discretionary matter, like grant or refusal of bail, it would be impossible to lay down any invariable rule or evolve a strait jacket formula. The Court must exercise its discretion having regard to all the relevant facts and circumstances. What the relevant facts and circumstances are, which the Court must keep in mind, has been laid down over the years by the Courts in this country in large number of decisions which are well known. It is, therefore, futile to attempt to lay down any invariable rule or formula in such matters."

(Emphasis supplied)

19. In *Kishori Lal Vs. Rupa and Others*, (2004) 7 SCC 638, the apex Court delineated the factors to be taken into consideration while exercising jurisdiction under Section 389 of "the Code" in cases involving serious offences like murder etc. The relevant observations run as under: "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.

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 bail. The High

Court does not seem to have kept the correct principle in view."

(Emphasis supplied)

20. Reiterating the aforesaid in *Anil Ari vs. State of West Bengal*, (2009) 11 SCC 363, the apex Court observed thus: "11. In *Vijay Kumar V. Narendra and others*, (2002) 9 SCC 364 and *Ramji Prasad V. Rattan Kumar Jaiswal and another* (2002) 9 SCC 366, it was held by this Court 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. In *Vijay Kumar's* case (supra) it was held that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 IPC, the Court should consider the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the 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.

12. The above position was highlighted in *Kishori Lal v. Rupa and Others* [2004(7) SCC 638], *Vasant Tukaram Pawar v. State of Maharashtra* [2005 (5) SCC 281] and *Gomti v. Thakurdas and Ors.* (2007 (11) SCC 160)."

21. Recently in *Atul Tripathi vs. State of U.P. and another*, (2014) 9 SCC 177, the apex Court summing up the legal parameters regarding exercise of discretionary power under section 389(1) of "the Code" stressed that the Court is required to judiciously consider all the relevant factors including gravity of offence and the nature of the crime. The relevant observations in this regard run as under: "15. To sum up the legal position,

a. The appellate court, if inclined to consider the release of a convict sentenced to punishment for death or imprisonment for life or for a period of ten years or more, shall first give an opportunity to the public prosecutor to show cause in writing against such release.

b. On such opportunity being given, the State is required to file its objections, if any, in writing. c. In case the public prosecutor does not file the objections in writing, the appellate court shall, in its order, specify that no objection had been filed despite the opportunity granted by the court.

d. The Court shall judiciously consider all the relevant factors whether specified in the objections or not, like gravity of offence, nature of the crime, age, criminal antecedents of the convict, impact on public confidence in court, etc. before passing an order for release."

(Emphasis supplied)

22. In *State of Haryana v. Hasmat*, (2004) 6 SCC 175, the apex Court again held as under: "Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the applicant 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."

(emphasis supplied)

23. The aforesaid view has consistently been held by the apex Court in most of the decisions on the point including in the case of Vasant Tukaram Pawar Vs. State of Maharashtra, (2005) 5 SCC 281 and Gomti Vs. Thakurdas and Others, (2007) 11 SCC 160 and Sidharth Vashisht @ Manu Sharma Vs. The State (N.C.T. of Delhi), (2008) 5 SCC 230.

24. In Sidharth Vashisht @ Manu Sharma Vs. The State (N.C.T. of Delhi), (2008) 5 SCC 230, the apex Court taking due note of the observations made in the cases of Kashmira Singh (supra) and Babu Singh (supra), the cases relied on by the learned Counsel for the appellant, so also referring to few other decisions on the point had held as under: "In the above cases, it has been observed that once a person has been convicted, normally, an appellate court will proceed on the basis that such person is guilty. It is no doubt true that even thereafter, it is open to the appellate court to suspend the sentence in a given case by recording reasons. But it is well settled, as observed in Vijay Kumar that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 IPC, the Court should consider all the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, the desirability of releasing the accused on bail after he has been convicted for committing serious offence of murder, etc. It has also been observed in some of the cases that 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."

(Emphasis supplied)

25. Clearly, as held by Hon'ble the apex Court in State of Punjab vs. Deepak Mattu, (2007) 11 SCC 319 & 2008 Cr.L.J. 322, possible delay in disposal of the appeal and the fact that there are arguable points may not by itself be sufficient to grant suspension of a sentence.

26. To have a clearer perspective of the issue it may be worthwhile to refer to few of the pronouncements of the apex Court, wherein applicability of Section 389 of "The Code" came for consideration.

27. In Akhilesh Kumar Sinha vs. State of Bihar, (2000) 6 SCC 461, the appellant who was convicted u/s. 302/34 of IPC, in appeal applied for suspension of sentence or for taking up his appeal for out of turn hearing. The High Court of

Patna declined the prayer for out of turn hearing so also the prayer for suspension of sentence. In an appeal against this order, the apex Court refusing to interfere in the matter observed as under: "2. A convicted person being kept in jail pending appeal for such a long period is not a desirable course, but it is only one side of the picture. As the petitioner is found guilty by a trial court of the offence under Section 302, the appellate court can normally presume that he is prima facie guilty of the offence as for suspending the sentence despite the pendency of the appeal. Of course it is open to the appellate court, even at that stage to consider whether it is a fit case for suspending sentence despite such presumption."

28. In *Vijay Kumar vs. Narendra*, (2002) 9 SCC 364 the apex Court reversing an order of suspension passed in a case where the appellant was convicted u/s. 302/34 of the IPC, held as under : "10. The principle is well settled that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 IPC, the court should consider the relevant factors like the nature of the accusation made against the accused, the manner in which the crime is alleged to have been committed, the 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."

29. In *Ramji Prasad vs. Rattan Kumar Jaiswal*, (2002) 9 SCC 366, the apex Court held that the normal practice in cases where a person has been found guilty by the trial Court u/s. 302 of the IPC is not to suspend the sentence and it is only in exceptional cases that the benefit of suspension of sentence can be granted.

30. In *State of Haryana vs. Hasmat*, (2004) 6 SCC 175, the apex Court reiterated that there is a distinction between the bail and the suspension of sentence. The apex Court observed that one of the essential ingredients of Section 389 is the requirement of the appellate Court to record reasons in writing for ordering suspension of execution of sentence or order appealed. It was further observed that the requirement of recording reasons in writing clearly indicates that there has to be a 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 apex Court in para 9 of the report quoted with approval the view expressed earlier in *Vijay Kumar vs. Narendra*, (2002) 9 SCC 364 and *Ramji Prasad v. Rattan Kumar Jaiswal*, (2002) 9 SCC 366 to the effect that in cases involving conviction u/s. 302 of IPC, it is only in exceptional cases that the benefit of suspension of sentence can be granted. Para-9 of the report runs as under : "9. In *Vijay Kumar v. Narendra* and *Ramji Prasad v. Rattan Kumar Jaiswal* it was held by this Court 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. The impugned order of the High Court does not meet the requirement. In *Vijay Kumar* case it was held that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 IPC, the Court should consider the relevant facts like the nature of

accusation made against the accused, the manner in which the crime is alleged to have been committed, the 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. These aspects have not been considered by the High Court, while passing the impugned order."

31. In *Kishori Lal vs. Rupa*, (2004) 7 SCC 638, again a matter involving suspension of sentence in a case relating to murder, the apex Court did not approve the view taken by the High Court that custodial sentence can be suspended only on account of absence of allegation regarding misuse of liberty of bail during trial. The relevant observations, which find place in Para 6, run as under : "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 bail. The High Court does not seem to have kept the correct principle in view."

It was reiterated that in cases involving conviction u/s. 302 of IPC, it is only in exceptional cases that the benefit of suspension can be granted.

32. In *State of Maharashtra vs. Madhukar Wamanrao Smarth*, (2008) 5 SCC 721, the apex Court referred to the parameters delineated in *Kishori Lal vs. Rupa*, (2004) 7 SCC 638 to be observed by the High Court while dealing with an application for suspension of sentence and grant of bail and reiterated the view taken in *Vasant Tukaram Pawar vs. State of Maharashtra*, (2005) 5 SCC 281. The relevant part of the report runs as under :- "10. The parameters to be observed by the High Court while dealing with an application for suspension of sentence and grant of bail have been highlighted by this Court in many cases. In *Kishori Lal v. Rupa* it was observed as follows :

"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."

33. Recently, in *Hussain and another vs. Union of India*, (Criminal Appeal No.509/2017, order dated 09/03/2017), the issue with regard to suspension of

sentence of an appellant, who was in custody since 11.01.2009 was agitated before the apex Court contending that regard being had to the long period of custody, he deserves to be released on bail. The apex Court, instead of granting suspension, directed disposal of appeal within a period of six months. Apart this, exhaustive directions with regard to speedy trial of cases including criminal appeal pending in the High Court were also issued.

34. From the aforesaid, it is abundantly clear that the apex Court has consistently taken the view that, while dealing with question of suspension under Section 389 of "The Code", the Court is required to judiciously take into consideration "all the relevant factors", like ? gravity of offence, nature of crime, manner in which it was committed, age, criminal antecedents of the convict and impact of public confidence in Court. It further clearly emerges that sole factor that the appellant was on bail during trial and that there is no allegation of misuse of liberty or that the appellant's appeal is likely to take long time in its final disposal by itself cannot be sufficient to grant suspension.

35. In Siddarth Vashist" case (supra), in an admitted criminal appeal pending before the apex Court, the appellant prayed for early hearing of the appeal or grant of suspension. Reliance in this regard was also placed on the decisions rendered by the apex Court in Kashmira Singh's case (supra), Babu Singh's case (supra) and Akhtari Bi's case (supra). Declining the prayer for suspension the apex Court held that the Court while considering the prayer for bail in a case involving serious offence like murder, should consider "all the relevant factors" like nature of accusation made against the accused, manner in which the crime alleged to have been committed, the gravity of offence, desirability of releasing the accused on bail after he has been convicted for committing serious offence of murder etc. It was reiterated that normal practice in such cases has been not to suspend the sentence and it is only in exceptional cases, that the benefit of suspension can be granted.

36. No doubt, speedy trial is a fundamental right implicit in Article 21 of the Constitution of India, however, the Court considering the question of bail is required to struck a balance between right of the individual and societal interest and the bare fact that the appellant has suffered substantial part of sentence cannot be the sole criteria for grant of suspension. Needless to say that there may be cases, including under Section 302 of IPC where sentence is suspended on merits within a year or two. Again, contrarily there may be cases, where in view of the gravity of the offence and the manner in which it was committed, a Court of law, may find it difficult to grant suspension. It was for, preciously, this reason that the apex Court in Surinder Singh @ Shingara Singh's case (supra), referring to observations made in the Kashmira Singh's case (supra), has held that such observations and similar observations found in some of the other decisions of the Court only lay down broad guidelines and that none of the decisions lay down any invariable rule for grant of bail on completion of a specified period of detention in custody and indeed, in a discretionary matter, like

grant or refusal of bail, it would be impossible to lay down any invariable rule or evolve a strait jacket formula and that the Court must exercise its discretion having regard to all the relevant facts and circumstances. It was in these premises that a Full Bench of Rajasthan High Court, Mohd. Mohsin Khan @ Bhooria versus State of Rajasthan, 2013 Cr.L.J. 4156 dealing with an identical issue concluded in para-29 that merely because a convict has served five years or one half of the sentence including remission would not "ipse dixit" make him or her entitled to be released on bail as a matter of right.

37. In the aforesaid premises we are of the considered view that proposition of law laid down by the Division Bench of this Court in Raghuwar Singh's case (supra) to the effect that where substantial part of the sentence is suffered with no foreseeable hope of final hearing of the appeal in near future, the factor of the merits involving gravity of offence, nature of commission of offence and quality of evidence on record take a backseat, cannot be held to be a good law.

38. As a fallout of the aforesaid discussion and analysis, we are of the considered view that sentence for life imprisonment or imprisonment for any lesser term of a convict cannot be suspended "solely" on the ground of his having served sentence of any particular period or one half of the maximum sentence, inclusive or exclusive of remission, therefore, the view taken in this regard by the Division Bench of this Court in Raghuwar Singh's case (supra) does not reflect correct position of law.

39. Accordingly, we answer the reference as under: (i) The sentence of life imprisonment or imprisonment of any lesser term of the convict cannot be suspended under Section 389(1) of "the Code" solely on the ground of his having served sentence of any particular period or one half of the maximum sentence, inclusive or exclusive of remission. To that extent the legal proposition laid down in Raghuwar Singh's case (supra) is contrary to settled legal position.

(ii) Under Section 389 of "the Code" an appellate Court, for reasons to be recorded in writing order suspension of execution of sentence and in this regard, there has to be judicious and careful consideration of all the relevant aspects and the order directing suspension cannot be passed as a matter of routine.

(iii) While considering suspension, the Court, amongst other factors, is required to consider the nature of accusation made against the accused, gravity of the offence, the manner in which the crime is alleged to have been committed and the desirability of the accused being released on bail after conviction.

Reference is answered, accordingly.