

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

**Crl A(S) No. 16/2021
CrIM No. 2120/2021**

**Reserved on: 24.05.2022
Pronounced on:30.05.2022**

Rajesh Kumar Abrol

....Applicant/Appellant(s)

Through :- Sh. P. N. Raina, Sr. Advocate with
Sh. J. A. Hamal, Advocate

V/s

UT of J&K

....Respondent(s)

Through :- Sh. Amit Gupta, AAG

Coram: HON'BLE MR. JUSTICE MOHAN LAL, JUDGE

ORDER
30.05.2022

CrIM No. 2120/2021

1. Instant Criminal Appeal under Section 378 Cr.P.C is directed against judgment of conviction dated 21.10.2021 and order of sentence dated 23.10.2021 rendered by the Court of learned Presiding Officer Fast Track Court Jammu in file No. 28/FTC titled "State v/s Rajesh Abrol" where under appellant/convict has been found guilty of commission of offences u/s 420, 376(2)(K) RPC and sentenced to undergo rigorous imprisonment for (10) years for the commission of offence u/s 376 (2) K RPC and also fine in the sum of Rs.50,000/ and further sentenced to simple imprisonment for seven years for the commission of offence under section 420 RPC and fine in the sum of Rs. 20,000/- and in default of the payment of fine, appellant/convict has directed to undergo further imprisonment for a period of three months in each offence.
2. Feeling aggrieved of the impugned judgment of conviction, appellant/convict has assailed it's correctness, propriety and legality on the grounds, that as a result of miss-appreciation of facts and misapplication of law so far as the finding of the trial court relating to

holding appellant guilty of having committing of offences under Sections 420, 376(2)(K) RPC and convicting him of the same is bad in the eyes of law, therefore, prayed that the present appeal be allowed and the judgment of learned Presiding Officer Fast Track Court, Jammu be set aside.

3. Alongwith the appeal, appellant/convict has filed an application for suspension of conviction and sentence pending the hearing of appeal, with further prayer for ordering his release on bail primarily on the grounds, that there is no likelihood of the appeal being heard in the near future, and in view of the law laid down by Hon'ble the Supreme Court wherein it has been held that when a convicted person is sentenced to a fixed period of sentence, on filing of appeal, suspension of sentence should be considered liberally unless there are exceptional circumstances; that the impugned judgment of conviction and order of sentence, both are result of complete mis-appreciation of evidence and are totally bereft of any evidentiary support or sanction of law, as such, are liable to be set aside only on this ground alone; that only because the appellant has been a judicial officer, the principle of law relating to trial would not change and in law, it would not be a principle, that appellant, as he was a judicial officer, the judicial mind of the learned trial court was not to appreciate the prosecution case/story on the touch stone of accused/appellant being presumed to be innocent till prosecution could prove by such trust worthy, reliable and legal evidence; that the prosecution had not proved the charges against the appellant, the order of charge dated 09.06.2018, even if the same was churned to find out as if there was anything in the prosecution case or in the order of charge, that could be read into prosecution story or the charge or the order dated 09.06.2018, to indicate that the appellant could be deemed or presumed to have known, that he was being tried for offence u/s 376 (2) (K) RPC, while the investigating officer had made a statement that as per his investigation, alleged offence u/s 376 (5) RPC was proved against the accused; that the appellant would thus plead that he has been convicted of an offence for which he was not tried and which was distinct and separate to the offence for which he was charged; the prejudiced

appellant, as such, has suffered is writ large, as it has been the prosecution evidence itself that accused was a person suffering from blood cancer and was hospitalized and received chemotherapy when the prosecutrix became a caretaker of the appellant; that the very fact, that, a cancer patient receiving chemotherapy for whom death is roaming and revolving in every cell and every part of the body, thus medically would be dependent on the caretaker and not vice versa.

4. Respondent has filed objections wherein it has been stated that appellant is the main accused in case FIR No. 06/2018 for commission of offences u/s 420, 376 RPC registered at Police Station Janipur Jammu; that after the completion of investigation challan was presented against appellant/accused and the learned Presiding Officer Fast Track Court Jammu vide its judgment/order dated 23.10.2021 framed charges against accused, prosecution led evidence to prove guilt of the accused beyond any shadow of doubt by convicting the present appellant for the commission of aforementioned offences; that it has been established by the court below that appellant/accused has ruined the life of the prosecutrix on the pretext of marriage and providing of better education to her minor daughter, therefore, the accused does not deserve for any lenient view and is liable for extreme punishment for the commission of offences u/s 420, 376 (2) (K) RPC alongwith fine; that the offences for which the accused/appellant is charged are of heinous nature and these offences definitely constitute a class apart and need to be viewed with a different approach in the matter of bail; that there is every likelihood of accused misusing the liberty, if granted bail and may jump over the bail having regard to all the circumstances, including the gravity of the nature of the offence, as such, does not deserve bail at this stage, therefore, the appellant is not entitled to bail and suspension of sentence.
5. Sh. P.N Raina, learned Senior Counsel for appellant/convict to support the case of appellant/convict for suspension of his sentence of conviction and his released on bail, has strenuously argued, that the prayer for suspension of sentence of conviction and ordering of the appellant/convict on bail should be considered liberally unless there is

any statutory restriction. It is argued, that when the sentence is of life imprisonment, the consideration for suspension of sentence should be of different approach, and when the appellate court finds that due to practical reasons the appeal could not be disposed of expeditiously, the appellate court must bestow special concern in the matter of suspending the sentence so as to make the appeal right, meaningful and effective, but if for any reason the sentence of limited duration cannot be suspended, every endeavor should be made to dispose of the appeal on merits. It is argued, that by the judgment and order of this court passed in “Vajida Bano and ors v/s State in CrI A (S) No. 05/2019, CrIM No. 853/2019” it is manifest, that even the sentence of ten (10) years rigorous imprisonment was suspended against the accused persons who were found guilty for commission of offences u/ss 364/120- B/201 RPC. To support of his arguments, learned counsel for the appellant/convict has relied upon the judgments reported in, (i) **(1999) 4 Supreme court Cases 421** (Bhagwan Rama Shinde Gosai and others—Appellants versus State of Gujarat—Respondents) & (ii) **judgment/order of J&K High Court rendered in CrI A (S) No. 05/2019 CrIM No. 853/2019** (Vajida Bano and Ors v/s State).

6. Sh. Amit Gupta, learned AAG, Per Contra, has strenuously articulated arguments, that the appellant is the main accused in case FIR No. 06/2018 for commission of offences u/s 420, 376 RPC registered at Police Station Janipur Jammu, and it has been established by the court below that appellant/accused has ruined the life of the prosecutrix on the pretext of marriage and providing of better education to her minor daughter, therefore, the accused does not deserve for any lenient view and is liable for extreme punishment for the commission of offences u/s 420, 376 (2) (K) RPC alongwith fine. It is argued, that the offences for which the accused/appellant is charged are of heinous nature and these offences definitely constitute a class apart and need to be viewed with a different approach in the matter of bail; that there is every likelihood of accused person misusing the liberty if granted bail and may jump over the bail, having regard to all the circumstances including the gravity of the nature of the offence, thus, detention is necessary to ensure the

attendance of accused person in court in order to be dealt with according to law. It is moreso argued, that no case of suspension of sentence is made out, as the case of the appellant is also not covered under the Supreme Court judgments as he has not been in the prison for half of his sentence, therefore, the appellant is not entitled to bail and suspension of sentence.

- 7. Heard & considered.** Section 389 of Code of Criminal Procedure deals with the provisions of suspension of sentence pending the appeal. For the sake of convenience Sec. 389 Cr.PC is reproduced hereunder:-

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) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,-

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of 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.

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

Cursory glance of Section 389 Cr.P.C makes the legal proposition abundantly clear, that pending an appeal preferred by a convicted person notice shall only be issued to the Public Prosecutor/State in case the convict is punished for offences punishable with death or imprisonment for life or imprisonment for a term not less than ten (10) years, which clearly connote that if the convict is punished with imprisonment for a term less than 10 years no notice is required to be given to the Public Prosecutor/State in regard to the application filed by the convict/accused for suspension of his sentence and his release on bail.

In the case of **BHAGWAN RAMA SHINDE GOSAI AND OTHERS** Versus **STATE OF GUJARAT [(1999) 4 Supreme Court Cases 421]**, relied by learned counsel for the appellant, Hon'ble the Supreme Court while discussing the power and scope of section 389 Cr.PC regarding suspension of sentence pending the appeal filed by the convict, and while holding that the prayer for suspension of sentence should be considered liberally unless there is any statutory restriction, and while suspending the sentence and directing appellant/accused/convict to be released on bail found guilty for commission of offences u/ss 392 r/w 397 IPC for rigorous imprisonment of 10 years by the trail court, in paras 3&4 of the judgment held as under:-

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

Ratio of the judgment (Supra) makes it manifest, that Section 389 Cr.PC does not contain any “statutory restriction” in suspension of sentence and granting of bail to the accused/convict and the prayer should be considered liberally and the Appellate Court may impose restrictions considering the gravity of offence.

Similarly, in the case of **Vajida Bano and Ors V/s State Through Advocate General**, also relied by learned counsel for the appellant, this Court while relying upon the judgment of BHAGWAN RAMA SHINDE GOSAI’S (Supra) suspended the sentence of appellant/convicts, convicted and sentenced in FIR 09/2014 for commission of offences u/ss 363/317/ 302/ 120-B & 201 RPC of Police Station Kargil.

- 8.** In the case in hand, appellant/convict has been found guilty by the trial court of learned Presiding Officer Fast Track Court Jammu for commission of offence u/s 420, 376 (2) (K) RPC and sentenced to undergo rigorous imprisonment for (10) years and also fine in the sum of Rs.50,000/- under section 376 (2) RPC and simple imprisonment for (7) years for commission of offence under section 420 RPC and fine of Rs. 20,000/-, and in default of payment of fine appellant/convict has been directed to undergo further imprisonment for a period of three months in each of the offences. Vide ratio of the judgment of Bhagwan Ram Shinde Gosai’s and others case (1999) 4 Supreme Court Cases 421 (Supra), relied by learned counsel for appellant/convict, there is no statutory restriction/prohibition in not considering the application for suspension and releasing of appellant/convict on bail. Appellant is

resident of Lower Roop Nagar Jammu, was a judicial officer, and has deep roots in the society, therefore, there is no apprehension that appellant/convict will abscond/give a slip to the law if his sentence is suspended and he is released on bail. Nothing substantial has been brought before the notice of this court by the prosecution that appellant/convict has absconded during the trial and will abscond during the bail period. The seriousness or gravity of offence is to be seen in cases where accused/convict is punished with death penalty, life imprisonment or imprisonment of more than 10 years, wherein, while considering the application for suspension and bail the judicial discretion lies in the wisdom of the court. Right to life and liberty of an individual is precious under Article 21 of the Constitution of India and is also a very valuable right of accused/convict which also continues during the appeal period, as appeal is the continuation of the trial. Record of the trial court demonstrates that appellant/convict has been registered/admitted vide MRD/OPD/RT No. 173-2014 dated 30.01.2014 as a case of **'Hodgkins Disease' (blood cancer)** in Government Medical College Jammu vide No. JMC/LCDC/Es-4/14/86 dated 19.02.2014 which disease is life threatening and cancer of part of immune system called 'lymphatic system'. Record further depicts that from the date of arrest of appellant/convict on 23.01.2018 for the last more than four (4) years and four (4) months, appellant/convict is lying in detention and is presently lodged in Central Jail Kot Bhalwal Jammu. It is apt to mention here, that "under trial prisoner's right to life does not diminish even a wee bit when in jail as an accused/convict for an offence and such person's health concerns have to be taken care by the state and if not done so, by the judiciary. The right to dignity of an accused does not dry out with the Judges' ink, rather, it subsists beyond the prison gates and operates until his last breath". "The most precious fundamental 'right to life' unconditionally embraces even an undertrial". Owing to the apparent precarious health condition of accused/petitioner as he is suffering from Hodgkins Disease (blood cancer), it is necessary that he should get himself adequately and effectively medically treated. Every person who is accused of an offence requires a humane treatment by the

prison authorities. Humane treatment to all including accused/convict is requirement of law. Furthermore a prisoner/convict who is suffering from an ailment has to be given due treatment and care while in prison. Respondent UT has not pointed out any incident of reported misdemeanor or misbehaviour, let alone commission of some offence by appellant/convict while he is serving jail terms

- 9.** In view of the aforesaid and considering the totality of the facts and circumstances and for the reasons noted herein above, on merits or even on health grounds, this court is persuaded to suspend the sentence of appellant/convict. The present application for suspension of sentence thus, succeeds. It is accordingly ordered, that the substantive sentence passed by the trial court vide judgment dated 21/10/2021 in Sessions case file no. 28/FTC titled “State vs Rajesh Abrol” against appellant/convict namely Rajesh Kumar Abrol, S/o Late Sh. Isher Dass Abrol, R/o House No. 136, Sector 2, Lower Roop Nagar Jammu shall remain suspended till final disposal of the aforesaid appeal, provided appellant/convict executes a personal bond in the sum of Rs. One Lac (Rs.1,00,000) before Superintendent Central Jail Kot Bhalwal Jammu where appellant/convict is presently serving the jail term, with two sureties of one lac each to the satisfaction of Registrar Judicial of this court. It is further ordered, that the appellant/convict shall appear before this Court on each and every date of hearing except for the reasons beyond his control and unless exempted by this Court.

- 10.** Application is disposed of.
11. Appeal CrI A(S) No. 16/2021 is taken on board.
12. Admit.
13. For arguments, list on 27.07.2022.

(Mohan Lal)
Judge

Jammu:
30.05.2022
Vijay

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No