

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl. MB No.1082/2010 in Crl. A. No.909/2010**

Date of Decision: 20.09.2010

Riaz Ali (In Jail) Appellant/Applicant
Through Mr.Sumeet Verma, (DHCLSC)

Versus

State of NCT of Delhi Respondent
Through Mr.Lovkesh Sawhney, APP.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE SURESH KAIT

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | <i>To be referred to the reporter or not?</i> | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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The appellant/applicant has filed the above noted application for suspension of his sentence and enlarging him on bail in the above noted criminal appeal filed by him against the judgment of conviction dated 08.02.2008 and sentencing him to life imprisonment by order dated 12.02.2008 under Section 302 of Indian Penal Code and a fine of Rs.10,000/- and in default to further undergo simple imprisonment of three months and Rigorous imprisonment for 10 years under Section 364 of Indian Penal Code and to pay a fine of Rs.10,000/- and in default to undergo further simple imprisonment of three months in Session Case 32 of 2006, tiled as 'State v. Riaz Ali' in F.I.R.No.690/2005, under Section 364/302 of Indian Penal Code, PS Timar Pur.

The plea of the appellant/applicant is that he is a man with clean antecedents and poor financial conditions and is resident of District Bareilly (U.P.), his family comprising of his wife and one small child. It is alleged by him that he was a carpenter and he is the sole bread earner of his family.

The appellant/applicant has further sought suspension of sentence on the ground that he is in judicial custody for around five years, exclusive of the period of remission, and his appeal may not be decided in near future.

Perusal of the nominal roll dated 13th July, 2010 reveals that the appellant/applicant had undergone a sentence of 4 years 6 months and 16 days and he is entitled to a remission of 7 months and 5 days as on 12th July, 2010. Since the appeals of the convicts, whose sentences are not suspended, are to be heard on priority in comparison to those convicts whose sentences have been suspended, the appellant/applicant cannot contend that his appeal is not likely to be heard in near future. Though the appeals of the year 2001 of the convicts whose sentences have been suspended are being heard, however, those convicts whose sentences have not been suspended, their appeals of 2009 are to be considered.

Learned counsel for the appellant/applicant has contended that in the case of appellant/applicant, his motive to abduct the child namely, Abdul Qadir s/o Mohd. Hamid Qadir has not been established. The allegation according to the learned counsel against the appellant/applicant is that with one stab with a blade he had cut the throat of the deceased leading to his death, but weapon of offence, the blade had not been recovered pursuant to the disclosure statement made by him and so could not be considered.

Learned counsel for the appellant/applicant Mr.Sumeet Verma, has emphasized that the dead body was recovered at a distance of about 20 kms. from the place of residence of child as it was found near Ashram Mohalla, Shrinivasपुरi whereas the abducted child used to reside at Renbasera Cycle Market, Chandni Chowk.

The counsel for the appellant/applicant has also contended that disclosure statement was not made before any independent witness and recovery of body was also not discovered in presence of any independent witness, but only in presence of the father of the deceased.

The learned counsel for the appellant/applicant has also challenged the conviction and sentence of the appellant/applicant on the ground that though the blood stained blade was recovered, however, the blood group could not be detected. According to him, if the

applicant is the culprit then at the time of his arrest wearing same shirt which is alleged to have been worn by him on the date of incident with blood stains on his shirt, two days after the incident is highly unlikely. He has also asserted that the father of the deceased had not identified the blood stained shirt.

The learned counsel for the appellant/applicant has also asserted that there is considerable time gap between the last seen time of appellant and the deceased and the time of the death. According to him, in such circumstances, the deceased could have been with someone else and on the basis of last seen evidence, the applicant could not be convicted. Learned counsel for the appellant/applicant has also relied on (2007) 3 SCC, 'State of Goa v. Sanjay Thakre and Others' in support of his pleas and contentions.

Learned Additional Public Prosecutor has opposed the suspension of sentence and enlarging the accused on bail contending, inter-alia, that motive is not material in the present case as the dead body was recovered pursuant to the disclosure statement of the appellant/applicant on the same date. Since in the disclosure statement, the accused/applicant had not revealed about the weapon of the offence that is the blade, the trial court while convicting the accused/applicant has not relied on the same.

Learned Additional Public Prosecutor has drawn the attention of this court to the photographs of the dead body revealing that the body of the deceased child who was allegedly abducted by the appellant/applicant and killed was found lying in the thick bushes between two railway lines, which was not easily visible and from where it could not be traced easily by general public. According to the disclosure statement of the accused, he had killed the child at 8:30 p.m. whereas according to the post mortem report, the child was killed at 9:00 p.m. which is proximate to the time given by the witness who had seen the applicant and the deceased together. In the circumstances, the appellant could be convicted on the basis of last seen evidence.

Though the body was recovered on 22nd December, 2005, two days after the child had gone missing, he was last seen on 25th December, 2005 at 5:00 p.m., however, body was recovered pursuant to the disclosure statement made by the applicant on the same day. On the basis of the post mortem report also it can be inferred that the child was killed sometime at about 9:00 p.m. on 25th December, 2005. The dead body was identified by the father of the deceased child, and in the circumstances, even in absence of any independent witness, the recovery cannot be doubted. The alleged weapon of offence, the blade has not been considered and relied on, however, the recovery of weapon of offence cannot be equated with the recovery of dead body in the

present facts and circumstances. Consequently, the plea of the learned counsel for the appellant/applicant that the recovery of dead body was weak evidence and could not be relied on, cannot be accepted prima facie in the facts and circumstances. Since the body was recovered pursuant to the disclosure statement of the applicant, the motive behind killing of the child after abducting him will not be so material as to absolve the applicant of his dastardly act. This Court has also perused the photographs of the place where the dead body was recovered and considering the other facts established on the record, prima facie the applicant has not been able to make out a case that there are glaring lacunas in the case of the prosecution and the inferences of the guilt against the accused/applicant cannot be inferred with certainty or that the decision of the trial Court is perverse or not sustainable. The ratio of the case relied on by the learned counsel for the applicant Sanjay Thakre (supra) is also distinguishable and on the basis of the same, the applicant is not entitled for the relief claimed.

In the circumstances, prima facie the last seen evidence cannot be ignored especially in absence of any explanation from the accused as to where he has dropped the child after taking him from near his house. In the circumstances, the chain of events prima facie points to the guilt of the accused and in the circumstances, this Court deems it not appropriate to suspend the sentence of the appellant and to release him on bail.

This has also already been observed that the appellant/applicant has undergone 4 years 6 months and 16 days as on 12th July, 2010, and it cannot be held that the appeal of the appellant is not likely to be heard in near future in the facts and circumstances.

In the totality of the facts and circumstances, this Court is not inclined to suspend the sentence of the appellant and to release him on bail. The application of the applicant is therefore, dismissed.

ANIL KUMAR, J.

SURESH KAIT, J.

SEPTEMBER 20th, 2010

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