

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

+ **Crl. MB No. 993/2010 in Crl.A. No.837/2010**

% **Date of Decision: 21.10.2010**

Babu Appellant
Through Mr.Shaad Anwar, Advocate

Versus

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

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR.JUSTICE S.L.BHAYANA

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

ANIL KUMAR, J.

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Crl. MB No. 993/2010

This is an application by the appellant/applicant seeking suspension of his sentence and to release him on bail. The appellant/applicant has been convicted by order dated 17th December, 2009 in Sessions Case No.26 of 2009 under Section 302 of Indian Penal Code and under Section of 27 of the Arms Act, and sentenced to undergo life imprisonment for offence under Section 302 of Indian Penal Code and a fine of Rs.1,000/- and rigorous imprisonment for 7 years for offence under Section 27 of the Arms Act, and a fine of Rs.500/- by order dated 17th December, 2009.

The appellant/applicant has sought suspension of his sentence on the ground that he has been convicted without any reliable evidence and the prosecution has failed to prove its case beyond reasonable doubts. It is also contended that the prosecution could not prove the motive of murder and consequently, his conviction is not sustainable. The suspension of sentence is also sought on the ground that his appeal is not likely to be taken up for hearing in near future.

The allegations against the appellant/applicant are that he married deceased Kohinoor after falling in love with her, though she already had a son from her previous husband. One Ubed came to the house of the accused for shelter who was kept by him in his house, however, Ubed developed illicit relation with his wife Kohinoor. Consequently, Kohinoor left him and started living with Ubed in another house after taking away the household goods of accused. It is also alleged that Kohinoor, his wife, had married Ubed four days before the incident and on 29th April, 2004, he went to the house where his wife Kohinoor was living with Ubed and had threatened her. Next day he went to the house of Kohinoor i.e. on 30th April, 2004 with a loaded Katta which was already with him. On reaching the house of his wife Kohinoor, he demanded his goods back and a scuffle took place where he took out his Katta and fired on his wife Kohinoor and fled from the spot.

Learned counsel for the appellant/applicant has very emphatically contended that the testimony of the son of the deceased Sh.Roop Chand, who was about 11 years old, could not be relied on as he was in the school at the time of incident. It is also contended that though Sh.Roop Chand, son of the deceased, had deposed that one shot was fired, however, post mortem reveals that the deceased had received three injuries. It is also contended that the name of Sh.Roop Chand was not in the MLC and in the circumstances, on the basis of deposition of the son of the deceased, the applicant could not be convicted and sentenced. The learned counsel for the appellant/applicant has also contended that Ubed, who was present at the time of the incident, has not supported the prosecution version and in the circumstances, the prosecution has failed to prove beyond reasonable doubt the allegations against the appellant/applicant and he has a good prima facie case and his conviction is likely to be set aside.

Perusal of the testimony of the Sh.Roop Chand, the son of the deceased, *prima facie* reflects that it is reliable. The said witness has categorically deposed that the appellant/applicant came to the house and demanded money from the deceased and a scuffle took place between his deceased mother and applicant whereafter the appellant/applicant took out a Katta from his pocket and shot at his mother. He also identified the appellant/applicant in the Court. He also

deposed that he and Raju had taken his deceased mother to the hospital in a three wheeler scooter. If the minor son of the deceased had taken her with the help of Raju to the hospital and the MLC does not record the name of the minor son, the testimony of the minor son cannot be disregarded or can be held to be unreliable. It is not necessary for the Doctors to record in MLC the names of all the persons who come with an injured person to the hospital especially of a minor, unless only a minor person takes an injured to the Hospital.

From perusal of the record, it also transpires that three injuries sustained by the deceased were pellet injuries, and therefore, it cannot be held, *prim facie*, that from one shot allegedly fired by the applicant, the deceased could not have received three pellet injuries. The witness Ubed had turned hostile and his testimony is not to be relied on. Therefore, in the facts and circumstances, the appellant/applicant cannot contend that *prima facie* there is no sufficient evidence on record to inculcate him.

Learned Additional Public Prosecutor has pointed out the other evidence including the evidence of child witness, Sh.Roop Chand, in detail and in the circumstances, the plea of the appellant/applicant that there is no reliable evidence for conviction of the

appellant/applicant cannot be accepted, nor it can be accepted that prosecution has failed to prove its case beyond doubts.

The plea of the learned counsel for the applicant that the appeal is not likely to be taken up in near future cannot be accepted as the appeals of 2010 where the accused are under custody are listed in regular matters and therefore, the plea that the appeal is not likely to be taken up in near future and the applicant has already undergone considerable period of incarceration would not be a ground to suspend his sentence and to release him on bail. In *Kishori Lal v. Rupa*, (2004) 7 SCC 638, the Supreme Court has indicated the factors that require to be considered by the courts while granting benefit under Section 389 in cases involving serious offences like murder, etc.. It will be relevant to refer to the observations made at pages 639-40, (paras 4-6)

“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 respondent-accused 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.”

The aforesaid view is reiterated by the Supreme Court in *Vasant Tukaram Pawar v. State of Maharashtra* (2005) 5 SCC 281 SCC p.283, para 7 and *Gomti v. Thakurdas* (2007) 11 SCC 160. In (2008) 2 SCC 571, *Sidhartha Vasisht alias Manu Sharma Vs State(NCT of Delhi)* where it was held that when a person is convicted by a Court, he cannot be said to be an innocent person until the final decision is recorded by the Superior Court or appellate Court in his favor. The Supreme Court rather held that the mere fact that during the period of trial, the accused was on bail and there was no misuse of liberty, does not per se warrant suspension of sentence and to release him on bail. What is really necessary is to consider whether reasons exist to suspend execution of sentence and grant of bail. It was further held in para 32 of the said judgment that the expression within 'measurable distance of time' the appeal is likely to be heard is to be considered keeping in view

the seriousness of offence, the manner in which the crime was said to have been committed and the gravity of offence and not to suspend the sentence merely on the ground that the accused has undergone a number of years of sentence.

In the circumstances and considering the evidence on record, this Court is of the opinion that the appellant/applicant has failed to make out a prima facie case for suspension of his sentence and to release him on bail.

Consequently, the application of the appellant/applicant to suspend his conviction and sentence by order dated 15th December, 2009 and 17th December, 2009 during the pendency of the appeal and to release the applicant on bail is dismissed.

ANIL KUMAR, J.

S.L.BHAYANA, J.

OCTOBER 21, 2010

‘VK’