

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

+ **Crl.M.B.No.1334/2010 in Crl.A. No.1122/2010**

% **Date of Decision: 27.10.2010**

Moinuddin Appellant
Through Mr.J.P.Pandey, Advocate

Versus

The State 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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The appellant/applicant has filed the above noted application under Section 389 (2) of Criminal Procedure Code for suspension of his sentence pending his appeal against the order of conviction dated 5th June, 2010 and sentencing him for imprisonment of life and a fine of Rs.5,000/- and in default to undergo further rigorous imprisonment for 1 years and sentence of 3 years rigorous imprisonment under Section 201 of Indian Penal Code with a fine of Rs.1000/- and to undergo further rigorous imprisonment of 6 months in default of payment of fine by order dated 23rd June, 2010, in Sessions Case No.5 of 2007 arising

out of FIR No.640 of 2006, under Section 302 of Indian Penal Code, P.S.Nizamuddin, Delhi.

The appellant/applicant has contended that he was arrested on 21st September, 2006 from his native Village Narainpur, Kushinagar (U.P.) and he has been in jail since then. According to the nominal roll of the appellant/applicant, he has been incarcerated as on 23rd October, 2010 for 4 years and 27 days and he has earned remission for a period of 2 months 10 days and his conduct in the jail is satisfactory.

The appellant/applicant has further contended that he has been convicted by the trial court without any material on record against him and his case is based on circumstantial evidence and the prosecution has failed to prove any circumstance against the appellant/applicant inculcating him, and therefore, he is entitled to be released on bail pursuant to suspension of his sentence during pendency of the present appeal. It is also contended by the learned counsel for the applicant that testimony of Rubina about deceased being last seen with the accused has been held to be suspicious by the Trial Court itself. Learned counsel for the appellant/applicant has very emphatically contended that the last seen evidence in case of the appellant/applicant has been disbelieved and recovery of key of the room of the deceased from his body does not implicate him. Referring to the register of the

guest house, it is contended that the entries made therein negates the case of the prosecution and documentary evidence shall prevail over the oral evidence in this regard.

The appellant/applicant has also sought suspension of his sentence on the ground that he having a large family whose members are dependent upon him and they are in starving conditions.

The prosecution has prima facie established that the deceased Ashraf Ali with his wife Rubina had come to the Haji Guest House in Nizamuddin area on 11th September, 2006. Though the plea of the appellant/applicant is that the guest house was vacated on 12th September, 2006 as the entry in the guest house register indicates so, however, PW-3, Sh. Anwar, Haji Guest House Manager has categorically deposed that the date of 12th September, 2006 is a mistake as on 15th September, 2006 the appellant/applicant had met the Manager and the deceased was with him and the appellant/applicant had assured the Manager not to remove the deceased and his wife from the room and he had made the payment of the room because of which the Manager had agreed not to remove them. The room was also opened by the duplicate key and the deceased's wife was found inside the room has also been established. In the circumstances, it cannot be held prima facie that the

room in Hazi Guest House was vacated by the deceased and his wife Rubina on 12th September, 2006.

The appellant/applicant had been staying in another guest house in the same area of Nizamuddin, named Gehlot Guest House from 13th September, 2006 and on 16th September, 2006 he had gone out of the guest house in the early morning hours approximately around the time of murder of the deceased Ashraf. When the appellant/applicant came back to the guest house, he was seen not in proper state of mind and his hands were trembling and there were bloodstains on his clothes.

From the record prima facie it is apparent that the prosecution has also established the motive of the appellant/applicant to kill the deceased, which has been inferred from his love letter, Ex.PW-8/B, written by the appellant/applicant to the wife of the deceased, Rubina incorporating “Sath Jiyengen Sath Marengen” which was written by the accused with blood. This letter prima facie has not been contested by the appellant and cannot be ignored.

The weapon of offences, knife was also purchased by the appellant/applicant from a nearby locality, has also been established. The vender who had sold the knife to the accused was examined and his testimony appears to be reliable. In these circumstances, prima

facie, it cannot be held that the prosecution has not been able to make out a case against the appellant/applicant and there is no material on record against him even if the deposition of last seen by the widow of the deceased is considered with suspicion as has been held by the Trial Court. Considering these facts and circumstances, this Court does not find prima facie sufficient reasons to suspend the sentence of the appellant/applicant and to release him on bail on the ground that there is not enough material evidence against the applicant.

The learned counsel for the applicant has also contended that the applicant is in custody for considerable time and his appeal is not likely to be taken up for hearing in near future and he is entitled for suspension of his sentence and for his release on bail.

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 applicant was not on bail during the trial before the Trial Court. Had the appellant been on bail during the trial that would also be not a ground to suspend his sentence and to release him on bail. 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 an accused 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 there are no cogent grounds to suspend the sentence of the applicant and to release him on bail during the pendency of the present appeal. The applicant is not entitled for

suspension of his sentence in the facts and circumstances. The application of the appellant/applicant for suspension of his sentence and to release him on bail is therefore, dismissed.

ANIL KUMAR, J.

S.L.BHAYANA, J.

OCTOBER 27 , 2010

‘VK’