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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Crl. M.B. No. 1112/2010 in Crl. A. No. 941/2010

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Date of Decision: 28.10.2010

Suresh @ Bona

.... Appellant

Through Mr.Bhupesh Narula, Advocate

Versus

State

.... Respondent

Through Mr.Jaideep Malik, APP

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR.JUSTICE S.L.BHAYANA

1. Whether reporters of Local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

ANIL KUMAR, J.

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This is an application by the appellant/applicant under Section 389 of Criminal Procedure Code seeking suspension of his sentence and to release him on bail during the pendency of the appeal.

The appellant has been convicted with imprisonment for life and a fine of Rs. 15,000/- for the offence punishable under Section 302/34 of IPC and in default of payment of fine to undergo further rigorous imprisonment for six months by order of conviction dated 30th January, 2010 and sentenced by the order dated 6th February, 2010 in a case arising out of FIR 337/2007 PS Nabi Karim under Section 302/34 of IPC.

The applicant has contended in para-7 of the application that he was never involved in any other criminal or related cases. According to the applicant his family comprises of his wife and four minor children and applicant is the only bread earner in the family and he was earning Rs.2500/- per month as a labourer in a shop. He is alleged to have come from a poor segment of society and he is unable to furnish a local surety of minimum amount if bail is granted to him. It is also contended that he was never on bail and he has never jumped bail and has never been declared a proclaimed offender.

The applicant has contended that he has already undergone incarceration for the last three years and he has good chance of acquittal as the order convicting him is based on surmises and conjectures and the prosecution has failed to prove its case beyond reasonable doubt.

For seeking suspension of sentence, the applicant has asserted that the testimony of PW-4 Laxman Indoriya lacks credibility and consistency as when he saw the applicant attacking the deceased, instead of trying to rescue the victim or calling police, he proceeded to Railway Station and did not make any effort to call the police which is highly improbable and the conduct of such a witness is doubtful and could not be relied on for his conviction. The testimony of PW-4 is also challenged on the ground that though he has stated that he is not related to the accused, PW-4 is related as Laxman Indoria PW-4 and Mr. Vikas @ Sunil, another co-accused are cousins as their grandmother was Smt. Hardai as testified by DW-1 and the relations between the two branches of the family were not cordial and PW-4 has been extorting money and blackmailing the people. The applicant has also referred to the inconsistencies and glaring discrepancies in the statement of PW-4 which according to the applicant has not been taken into consideration.

The Nominal Roll dated 28th August, 2010 of the applicant reveals that as on that date he has undergone a sentence of 2 years 11 months and six days and has earned remission for two months and nine days.

The status report filed by the respondent states that the applicant Suresh @ Bona had not availed any relief in the nature of interim bail/parole till date and his character during the last one year had been satisfactory. The Court was not satisfied with the status report dated 30th August, 2008 and therefore, directed the respondents to file the detailed report about previous cases or conviction of the appellant or any other material relevant to decide whether the sentence of the applicant is to be suspended or not or whether he is to be released on bail. Another status report dated 26th October, 2010 of Station House Officer, PS Nabi Karim has been filed indicating about 15 cases against the applicant. Some of the cases are pending trial against the applicant whereas he has been acquitted in some of the cases and he has also been convicted in some cases. He has been convicted in FIR 352/07 dated 26th November 2002 under Section 384/324 of IPC & 25 of Arms Act, as well as FIR 92/2006 dated 5th April, 2006 under Section 21 of NDPS Act, PS Nabi Karim and as also in FIR 337/2007 dated 18th September, 2007 under Section 302/34 of IPC, PS Nabi Karim. According to the learned counsel for the prosecution, the applicant is a hard core ruthless criminal, and the details of cases against him are as under:-

S.No.	FIR No.	Date	U/s	P.S	Present Status
1.	401/89	25.11.89	25A A.Act	Nabi Karim	P.T
2.	340/90	25.09.90	21 NDPS Act	Nabi Karim	Acquitted
3.	289/93	06.09.93	25 A Act	Nabi Karim	Acquitted
4.	418/93	12.12.93	21 NDPS Act	Nabi Karim	P.T.

5.	218/96	06.06.96	25A Act	Sadar Bazar	P.T.
6.	212/96	06.06.96	379 IPC	Sadar Bazar	P.T
7.	408/96	14.10.96	21 NDPS Act	Nabi Karim	Acquitted
8.	22/90	20.01.99	27 NDPS Act	Nabi Karim	Acquitted
9.	462/99	20.08.99	307/34 IPC	NDLS	P.T.
10.	19/01	17.01.01	25 A Act	Sadar Bazar	P.T.
11.	143/01	30.05.01	308/324 IPC	Nabi Karim	P.T.
12.	352/07	26.11.02	384/324 IPC & 25 A Act	Nabi Karim	Convicted
13.	163/04	04.05.04	21 NDPS Act	Nabi Karim	Acquitted
14.	92/06	05.04.06	21 NDPS Act	Nabi Karim	Convicted
15.	337/07	18.09.07	302/34 IPC	Nabi Karim	Convicted

The learned additional public prosecutor has also brought to our notice that Laxman Indoria PW-4 was the eye witness of the incident. Pursuant to the disclosure statement, blood stained nicker and one Iranian note of 25000 dinar were recovered. A knife was also discovered which was used by the applicant to stab the deceased and the purse of the deceased was recovered on being pointed out by the applicant on 19th September, 2007.

The status report filed by the respondent also reveals that during the trial, the eye witness Laxman Indoria had made the complaints about threats from applicant consequent to which security under the Witness Protection Program was provided to him. Though later on security provided to PW-4, eye witness Mr. Laxman Indoria was withdrawn on account of the fact that the applicant and other co-accused were convicted. However, the eye witness Laxman Indoria again

complained about the indirect threats given to him and he was again provided with security on the directions of the Court.

According to the learned additional public prosecutor, the applicant is a desperate criminal and he can go up to any extent to commit a crime. It is also apprehended that there is a likelihood of applicant harming Laxman Indoria in case he is released on bail and in the circumstances, suspension of sentence of the applicant and his release on bail is strongly opposed by the learned additional public prosecutor.

This Court has heard the learned counsel for the parties and have also perused the record. The learned counsel for the applicant is unable to give any satisfactory explanation as to why the details of the cases in which the applicant has been convicted under NDPS Act and under Section 302/34 of the IPC were not given in his application for suspension of sentence. The application is supported by the affidavit of the applicant and in the circumstances, it is apparent that the applicant has tried to conceal the material facts from this Court.

The applicant has also not given the details of various cases as detailed hereinabove where the proceedings are still pending against him under NDPS Act, Arms Act and under various provisions of IPC.

The learned counsel for the applicant has also sought suspension of sentence of the applicant on the ground that his appeal is not likely to be taken up in near future. This plea is not correct and cannot be accepted as the appeals of 2010 where the accused are under custody are listed in regular matters. The plea that the appeal is not likely to be taken up in the near future cannot be a ground for suspending the sentence of the applicant. 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. For suspending sentence 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 totality of facts and circumstances, this Court is not satisfied with the pleas of the applicant to suspend his sentence and to release him on bail.

The application is without any merit and it is, therefore, dismissed.

ANIL KUMAR, J.

S.L.BHAYANA, J.

OCTOBER 28, 2010

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