

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR
&
THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

Wednesday, the 15th day of November 2023 / 24th Karthika, 1945

CM.APPL.NO.1/2023 IN CRL.A NO. 602 OF 2023

SC 265/2018 OF SPECIAL COURT FOR SC/ST(POA)ACT CASES/ADDITIONAL SESSIONS COURT,
MANNARKKAD

PETITIONER/APPELLANT/ACCUSED NO. 2&5:

1. MARAKKAR, [REDACTED]

2. RADHAKRISHNAN, [REDACTED]

RESPONDENT/RESPONDENT/STATE:

STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF
KERALA, PIN - 682031
(CRIME NO. 87/2018 OF AGALI POLICE STATION-678581)

Application praying that in the circumstances stated therein the High Court be pleased to suspend the execution of sentence passed by the Special Court for the trial of Sc/ST Cases/ Additional Sessions Court, Mannarkad in SC No. 265/2018 till the disposal of the Criminal appeal in the interest of justice by allowing this petition.

This Application coming on for orders upon perusing the application and upon hearing the arguments of M/s. S.RAJEEV, V.VINAY, M.S.ANEER, SARATH K.P., PRERITH PHILIP JOSEPH, ANILKUMAR C.R., P.BABU KARTHIKEYAN., Advocates for the petitioners and of PUBLIC PROSECUTOR for the respondent, the court passed the following:

P.B. SURESH KUMAR & P.G. AJITHKUMAR, JJ.

**Crl.M.A.No.1/2023 in Crl.Appeal No.598/2023,
Crl.M.A.No.1/2023 in Crl.Appeal No.601/2023,
Crl.M.A.No.1/2023 in Crl.Appeal No.602/2023 &
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Dated this the 15th day of November, 2023

ORDER

P.G.Ajithkumar, J.

The appellants filed respective petitions (Crl.M.A.No. 1 of 2023 in each appeal) under Section 389(1) of the Code of Criminal Procedure, 1973 (Code) seeking suspension of sentence. Details are tabulated below:-

Crl.M.A.No.	Crl.Appeal No.	Accused Nos.
1 of 2023	598 of 2023	A3,A6, A8 to A10
1 of 2023	601 of 2023	A1
1 of 2023	602 of 2023	A2 & A5
1 of 2023	604 of 2023	A7, A12 to A15

2. There were 16 accused. Common charge was framed against them. The offenses charged are under Sections 143, 147, 294(b), 323, 324, 326, 342, 352, 364, 367, 368, 302 read with Section 149 of the IPC and Sections 3(1)(d), 3(1)(r), 3(2)(v) and 3(2)(va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (SC/ST Act). After trial, accused Nos.4 and 11 were acquitted. Accused No.1 was convicted for a set of offences. Accused No.2, 3, 5 to 10 and 12 to

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15 were convicted for another set of offences. Accused No.16 was convicted for offence under Section 352 of the IPC alone. The details of the sentence are tabulated below:

Accused Nos.	Offences for which convicted	Punishment imposed
A1	S.143, 147, 323, 342, 304 Part II r/w 149 of the IPC.	RI for 7 years and fine of Rs.100000/- u/s.304 Part II r/w S.149 IPC with default SI for one year. RI for 6 months and fine of Rs.1000/- u/s.143 r/w S.149 IPC with default SI for one week. RI for 2 years and fine of Rs.2000/- u/s.147 r/w 149 IPC with default SI for two weeks. RI for one year and fine of Rs.1000/- u/s.323 r/w S.149 IPC with default SI for one week. RI for one year and fine of Rs.1000/- u/s.342 r/w S.149 IPC with default SI for one week.
A2, A3, A5 to A10 and A12 to A15	S.143, 147, 323, 324, 326, 367,304 Part II r/w 149 of the IPC and S.3(1)(d), of the SC/ST (POA) Act	RI for 6 months and fine of Rs.1000/- each u/s.143 r/w S.149, IPC with default SI for one week each. RI for two years and fine of Rs.2000/- each u/s.147 r/w S.149 of IPC with default SI for two weeks each RI for one year and fine of Rs.1000/- each u/s.323 r/w S.149 IPC with default SI for one week each. RI for 2 years and fine of Rs.1000/- each u/s.324 r/w S.149, IPC with default SI for one week each. RI for 7 years and fine of Rs.5000/- each u/s.326 r/w S.149 IPC with default SI for five weeks each. RI for one year and fine of Rs.1000/- each u/s.342 r/w S.149 IPC with default SI for one week each. RI for 5 years and fine of Rs.2000/- each u/s.367 r/w S.149 IPC with default SI for two weeks each. RI for 7 years and fine of Rs.1,00,000 each u/s.304 Part II r/w S.149 IPC with default SI for one year each. RI for 3 years and fine of Rs.5000/- each u/s.3(1) (d) of SC/ST (POA) Act r/w S.149 IPC with default SI for five weeks each.
A16		SI for 3 months and fine of Rs.500/- under S.352 of IPC with default SI for four days

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3. Heard the learned counsel appearing for the respective petitioners/appellants, the learned Special Public Prosecutor and the learned counsel appearing for the additional 2nd respondent.

4. The learned counsel appearing for the petitioners almost identically submitted that the findings entered into by the court below are unsupported by reliable evidence and the evidence that came on record was not considered in its proper perspective. It is their contention that considering the charge proved against the petitioners, quality of evidence of the eye-witnesses, particularly, that of PWs.8, 15 and 19 contained many inconsistencies and contradictions, there is every chance for allowing the appeals. Electronic evidence, especially CCTV footage was placed on much reliance by the court below, but the same was not duly proved.

5. The learned counsel appearing for the 1st accused submitted that the court below entered a definite finding that he was not a party to the assembly that went to the forest to apprehend and bring the deceased to Mukkali, where he was manhandled. On the basis of the finding that while the crowd

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was persecuting and assaulting the deceased, the 1st accused joined the group and stamped him on the chest resulting in his head hitting against wall and causing injury No.2, which according to the forensic expert would have contributed to the death, he was held responsible for the culpable homicide. It is not proved that the 1st accused had any hostility towards the deceased or reason to be a party to the assembly of the assailants. Significantly, the court below did not find the 1st accused guilty of the offence under the SC/ST Act. Pointing out those aspects, the learned counsel urged that the term of the sentence imposed on him being seven years, he is entitled to get the sentence suspended.

6. The learned Public Prosecutor filed an objection opposing the suspension of the sentence in respect of the petitioners. It is contended that the nature of the offence is very peculiar and in the exceptional circumstances of the case, none of the petitioners is entitled to get the benefit of Section 389(1) of the Code. It is a case where a hapless Scheduled Tribe member, who was leading a lonely savage life in the forest was apprehended and paraded to the town

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naked, with his hands tied behind and a sack on his shoulders. The provocation was petty theft he said to have committed by 'stealing' food and other articles from the shops of some of the accused persons. He was incessantly manhandled causing fatal injuries. He was not in his normal mental stage. Disregarding such a state of affairs the deceased was subjected to such *abhominal* and inhuman treatment, which has the obvious result of derogation of human dignity of a downtrodden. Pointing out such circumstances the learned Public Prosecutor vehemently opposes the suspension of sentence. It is also stated that the State has already filed an appeal challenging the impugned judgment to the extent of acquitting the accused for the offence of murder and the offences under the SC/ST Act.

7. The additional 2nd respondent, the mother of the deceased, filed a separate objection. She also pointed out the gruesome nature of the harassment and violence perpetrated on the deceased. It is further contended that a few petitioners and their men threatened the 2nd respondent and other witnesses during the trial of the case, which resulted in the

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registration of a crime against such persons. In such circumstances, the release of the petitioners by suspending the sentence, in her view, would pose a serious threat to her very existence. It is further stated that the findings of the court below are wrong insofar as the accused were found not guilty of the offence of murder and also the offences under Sections 3(2)(v) and 3(2)(va) of the SC/ST Act and hence she proposes to file an appeal challenging the judgment in that regard. For such reasons, she seeks to dismiss the petitions.

8. The offences for which charge was framed against the accused are punishable under Sections 143, 147, 294(b), 323, 324, 326, 342, 352, 364, 367, 368, 302 read with Section 149 of the IPC and Sections 3(1)(d), 3(1)(r), 3(2)(v) and 3(2)(va) of the SC/ST Act. The precise allegations were that the deceased, aged 30 years, who was of a loitering nature and living a savage life within the forest, owing to his mental illness took food and other articles from the shop of some of the accused, at Mukkali. On 22.02.2018, accused Nos.3, 5 to 10, 12 and 13 went to the reserve forest area at Aandiyallachaal and took the deceased into their custody,

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removed his clothes, tied his hands behind and paraded to Mukkali town. While so, the other accused joined them. At Mukkali, he was assaulted and inflicted injuries by slapping, stamping and hitting, apart from beating him using weapons. The injuries so inflicted, including head injuries together turned out to be fatal. The prosecution has a definite allegation that the accused knew that the deceased was a member of a Scheduled Tribe.

9. After trial, the court below found the respective accused guilty as mentioned in the tabular column above. Various terms of the sentence, as stated, were imposed; the maximum term being seven years of rigorous imprisonment.

10. The learned counsel for the petitioners invariably relied on **Bhagwan Rama Shinde Gosai and others v. State of Gujarat [(1999) 4 SCC 421]** in order to contend that the sentence being for a fixed period, the petitioners are entitled to suspension of sentence. The observations of the Apex Court are extracted below:

“When a convicted person is sentenced to fixed period of sentence and when he files appeal under any statutory right, suspension of sentence can be

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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 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.”

11. The learned Special Public Prosecutor and also the learned counsel appearing for the additional 2nd respondent pointed out that the view taken by the Apex Court was not to suspend the sentence in all cases where a fixed period of sentence is awarded instead, the direction was to take a liberal view unless there are exceptional circumstances. The learned Special Prosecutor highlighted the circumstances,

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such as, a hapless youth belonging to Scheduled Tribe and suffering from mental ailment was paraded along the street naked and despite the proven facts amount to offences under Sections 3(2)(v) and 3(2)(va) of the SC/ST Act, the court below entered wrong findings and acquitted the accused of such offences. It is submitted that the finding of the court below being that death of Sri.Madhu was the cumulative effect of the injuries inflicted by the assailants, the convicts should have been found guilty of the offence of murder. Challenging those findings an appeal has already been filed by the State. Further, it is urged that the accused being influential businessmen of the locality, the potential threat they would pose to the 2nd respondent in the event of their release is immense and hence it is highly essential to dismiss the petitions.

12. In **Angana and another v. State of Rajasthan [(2009) 3 SCC 767]**, the Apex Court held that when an appeal is preferred against conviction in the High Court, the Court has ample power and discretion to suspend the sentence, but that discretion has to be exercised judiciously

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depending on the facts and circumstances of each case. While considering the suspension of sentence, each case is to be considered on the basis of the nature of the offence, manner in which occurrence had taken place, and whether in any manner bail granted earlier had been misused. In fact, there is no straight jacket formula that can be applied in exercising discretion. The facts and circumstances of each case will govern the exercise of judicial discretion while considering the application filed by the convict under Section 389(1) of the Code.

13. In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and another [(2004) 7 SCC 528]** the Apex Court held that although it is established that a court considering a bail application cannot undertake a detailed examination of evidence and an elaborate discussion on the merits of the case, the court is required to indicate the *prima facie* reasons justifying the grant of bail.

14. The view taken by the Apex Court in **Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi) [(2008) 5 SCC 230]** is that when considering an application for

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suspension of sentence the court shall be conscious and mindful of the fact that the appeal is admitted and is pending for final hearing. Observations on merits, one way or the other, therefore, are likely to prejudice one or the other party to the appeal. Hence the court can not enter into the correctness or otherwise of the evidence on record. Also, the reality that the applicant has been found guilty and convicted by a competent Criminal Court with the result the Initial presumption of innocence in favour of the accused is no more available to the appellant cannot be overlooked.

15. In view of the said principles of law, this Court is not expected to enter in the area of appreciation of evidence and consider the merits or not of the findings in order to decide the entitlement or not of the petitioner for an order of suspension of sentence. However, as held in **Vinay Kumar v. Narendra and others [(2002) 9 SCC 364]**, the court should consider the relevant aspects like the nature of the accusation against the accused, the manner in which the crime was said to have been committed, the gravity of the offence, the desirability of releasing the accused on bail after they have

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been convicted for the offence, etc. are to be taken into account while deciding the question of suspension of sentence. Section 389(1) of the Code envisages that it is the discretion of the Appellate Court to suspend the sentence pending consideration of the appeal. While ordering suspension, it is necessary to record the reasons thereof also. As mentioned hereinbefore, in a case where a fixed period of sentence is imposed, a liberal view is required to be taken, but that benefit may have to be denied if there are exceptional circumstances.

16. The court below considered the question whether the proven facts will amount to an offence under Section 3(2) (v) or 3(2)(va) of the SC/ST Act under point No.26. The court below observed that the accused did not have knowledge that the deceased was a member of a Scheduled Tribe and therefore, no such offence would be attracted. If an offence punishable with imprisonment for a term of ten years or more is committed against a member of the Scheduled Caste or Scheduled Tribe, that would amount to an offence under Section 3(2)(v) of the SC/ST Act. In a similar situation, if an

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offence specified in the schedule to the SC/ST Act is committed, that will amount to an offence under Section 3(2) (va).

17. The court below found that the motive has been proved. The motive is that the deceased often reaches the shops of the accused and steals food and other consumables. The accused knew that the deceased was living mostly in the forest. The accused fetched his custody from the reserve forest which is not far away. It was proved that the 2nd accused passed on information to the other accused about availability of Sri.Madhu in the forest and it was thereafter they went to the forest and apprehended him. When the accused were fully aware that Sri.Madhu was a person living in forest, they, who are the local tradesmen cannot be heard to contend that they did not know that Sri.Madhu belonged to a Scheduled Tribe. Moreover, in the light of the aforesaid proved facts, the court below ought to have considered the applicability of Section 8(c) of the SC/ST Act, which reads,-

8. "In a prosecution for an offence under this chapter, if it is proved that-

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(c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved."

The court below did not consider that aspect of the matter. In such circumstances, we are of the view that there is substance in the contention of the Special Prosecutor that there are good grounds for an appeal against the findings of the court below resulting in the acquittal of the accused for the said offences. Now, an appeal is pending also.

18. Accused Nos.1, 2, 3, 5 to 10 and 12 to 15, who are the petitioners, were convicted for the offence under Section 304, Part II of the IPC, besides other offences. Except the 1st accused, others were convicted for the offence under Sections 326 and 367 of the IPC also. The offences under Sections 304, Part II, 326 and 327 are punishable for 10 years. When a person commits an offence under the IPC punishable with imprisonment for a period of 10 years or more, and it was committed against a member of a Scheduled Caste or Scheduled Tribe, he shall be punishable with imprisonment for life and with fine under Section 3(2)(v) of the SC/ST Act. It is

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the submission of the Special Prosecutor that the finding should have been that the accused knew the caste of the deceased. That submission is appears *prima facie* sound. In that case, the mandatory punishment ought to be the life imprisonment as prescribed in Section 3(2)(v) of the SC/ST Act. Therefore, pendency of the appeal filed by the State is a relevant consideration in deciding the petitions for suspension of sentence.

19. Adding to the above, the conviction of the petitioners for the offence under Section 3(1)(d) of the SC/ST Act for the reason of parading the deceased naked with his hands tied from behind along the public road for a considerable span of time certainly makes the case exceptional. The nature of such an act left a blot on the social conscience and the cultural fabric of the society, which is considered to be a civilized one. The petitioners procured custody of the deceased from the forest and in unison paraded him publicly and together they incessantly attacked him. That resulted in his death. It is seen that during the pendency of the trial of the case the 2nd respondent was

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allegedly threatened at the instance of some of the petitioners. Considering those facts and circumstances the concern of the 2nd respondent about her safety and security in the event of releasing the petitioners on bail has reason.

20. In the case of the 1st accused, there is a difference. The very allegation against him is that he joined the other assailants after the deceased was already captured him in custody and kept under confinement. Based on a solitary act that he stamped the deceased and as a consequence his head hit against a wall resulting in head injury, and that turned out to be a major cause of the death, he was found guilty. When there is no allegation that he was a party to the assembly that perpetrated harassment and ridiculing of the deceased, a different criteria is liable to be taken in his case.

21. Accordingly, we take the view that the 1st accused, who is the petitioner in Crl.M.A.No.1 of 2023 in Crl.Appeal No.601 of 2023 is entitled to get an order of suspension of sentence, whereas the other petitioners are not. Hence, Crl.M.A.No.1 of 2023 in Crl.Appeal No.601 of 2023 is allowed.

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The sentence imposed on the 1st accused is suspended and he is granted bail on his executing a bond for Rs.1,00,000/- (Rupees one lakh only), with two solvent sureties each for the like sum, to the satisfaction of the trial court and on the condition of deposit of the entire fine amount within a period of one month, and also subject to the following further conditions:

- i) He shall not enter the limits of Palakkad Revenue District till the disposal of Crl.Appeal No.601 of 2023;
- ii) He shall not go abroad without the permission of the trial court and shall surrender his passport, and in case he does not have a passport, he shall file an affidavit to that effect; and
- iii) During the bail period, he shall not get involved in any offence.

In case of breach of any of the bail conditions, the prosecution shall be at liberty to apply for cancellation of the bail before this court.

22. Crl.M.A.No.1/2023 in Crl.Appeal No.598/2023, Crl.M.A.No.1/2023 in Crl.Appeal No.602/2023 and Crl.M.A.No.1/2023 in Crl.Appeal No.604/2023 are dismissed.

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23. When we decline the request of suspension of sentence, which is one for a fixed period, we are not oblivious of our obligation to hear and dispose of the appeals expeditiously. It is true that the practice is to hear the appeals in the chronological order. But, for the reasons stated above, these appeals require out of turn consideration. Therefore, list the appeals for hearing on 15.01.2024.



Sd/-
P.B. SURESH KUMAR, JUDGE

Sd/-
P.G. AJITHKUMAR, JUDGE

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