

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

(Through Virtual Mode)

Pronounced on: 02.06.2021

CrLA(D) No. 08/2020
Vishal Sharma

.....Applicant(s)

Through: -

*Mr. Sunil Sethi, Sr. Advocate with
Mr. Vaibhav Gupta, Advocate.*

V/s

Union Territory of Jammu and Kashmir through SHO P/S Domana and Anr.

.....Non-Applicant(s)

Through: -

Mr. Aseem Sawhney, AAG

CrLA(D) No. 09/2020
Ashok Kumar.

.....Applicant(s)

Through: -

Mr. Rohit Sharma, Advocate.

V/s

Union Territory of Jammu and Kashmir through Advocate General Jammu.

..... Non-Applicant (s)

Through: -

Mr. Aseem Sawhney, AAG

CrLA(D) No. 06/2021
Amrish Khajuria

.....Applicant(s)

Through: -

Mr. S. C. Sharma, Advocate

V/s

Union Territory of Jammu and Kashmir through P/S Domana Jammu.

..... Non-Applicant (s)

Through: -

Mr. Aseem Sawhney, AAG.

CORAM:

HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE.

HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE.

JUDGEMENT

1. By this common order three applications bearing CrLM No. 687/2020, CrLM No. 1446/2020 and CrLM No. 404/2021 filed by

the applicants for suspension of sentence and grant of bail pending disposal of their respective above referred appeals shall be disposed of.

2. The applicant in **CrLM No. 687/2020 Vishal Sharma** is convicted and sentenced in terms of judgement dated 07.07.2020 and order dated 09.07.2020 respectively passed by the court of 1st Additional sessions Judge, Jammu in criminal challan titled as “State of J&K Vs. Vishal Sharma and Ors”., having been held guilty for commission of offences punishable under Sections 302, 34, 341 RPC and Section 30 Arms Act sentenced to undergo life imprisonment and fine of Rs. 10,000/= for commission of offence punishable under Section 302 RPC, simple imprisonment of one month and fine of Rs. 500/= for commission of offence punishable under Section 341 RPC and simple imprisonment of six months and fine of Rs. 2,000/= for commission of offence punishable under Section 30 of Arms Act. The sentences imposed have been directed to run concurrently.
3. The applicant in **CrLM No. 1446/2020 Ashok Kumar** stands convicted for offences under Section 302, 341 and 34 RPC having been sentenced to undergo imprisonment for life with fine of Rs. 10,000/= for commission of offence under Section 302 RPC and simple imprisonment of one month with fine for commission of offence under Section 341 RPC. The sentences imposed have been directed to run concurrently.

4. The applicant in **CrLM No. 404/2021 Amrish Khajuria** stands convicted for commission of offences under Section 302, 341 34 RPC and 4/25 Arms Act having been sentenced to undergo life imprisonment with fine of Rs. 10,000/= for commission of offence under Section 302 RPC and simple imprisonment of one month with fine of Rs. 500/= for commission of offence under Section 341 RPC and simple imprisonment of two years with fine of Rs. 2000/= for commission of offence under Section 4/25 Arms Act. The sentences imposed have been directed to run concurrently.
5. Before adverting to the applications in hand, a brief background of the case as emerging from the record would reveal that on 10.01.2008, Sub Inspector Shiv Dev Singh while on patrol duty in Muthi Area received a verbal report from one Manga Ram regarding an attack with sharp edged weapons/ Tokas and indiscriminate firing with his pistol by Vishal Sharma, Vikas Sharma, Rohit Kumar, Labha Ram, Ashok Kumar and three other persons on Ajit Singh Dogra (the then Deputy Advocate General) while the said advocate was coming from the court in Car No. JK02A-6729.
6. Upon receipt of the said verbal report the S.I sent a docket to incharge/SHO Police Station Domana, for registration of FIR, whereupon FIR No. 11/2008 for offences under Section 307, 341, 147, 34 RPC and 3/25, 4/25 Indian Arms Act came to be registered in Police Station Domana and investigation set into motion. The injured advocate on 12.01.2008 had been shifted from JMC Jammu

to Apollo Hospital Delhi, where he succumbed to his injuries on 19.01.2008 whereupon his postmortem had been conducted by Delhi Police in Medical Institute Delhi resulting into adding of offences under Section 302, 149 RPC.

7. After completion of the investigation and filing of the charge sheet before the trial court, the accused Vishal Sharma on 14.10.2008 came to be charged for commission of offence under Section 302, 341, 147, 149 RPC and Section 30 Arms Act, whereas accused Amrish Khajuria came to be charged for commission of offences under Section 302, 341, 147, 149 RPC and 4/25 Arms Act. The accused Ashok Kumar came to be charged for commission of offences under Section 302, 341, 147, 149 RPC along with accused Labha Ram, Raj Kumar (died during trial) Gourav Ram and Mohan Singh. The accused pleaded not guilty to the charges framed against them.
8. The prosecution in order to bring home the guilt of the accused persons produced/examined 24 witnesses out of listed 40 witnesses and after completion of the trial, the trial court on the basis of ocular, circumstantial, medical and scientific evidence held the accused Vishal Sharma, Ashok Sharma and Amrish Khajuria guilty and consequently convicted and sentenced them as above in terms of judgement and order dated 07.07.2020 and 09.07.2020 respectively.
9. **Heard learned counsel for the parties and perused the record.**

10. The learned appearing counsel for the applicants while pressing for suspension of sentence and grant of bail in favour of the applicants during pendency of their respective appeals would argue that the judgement of the trial court besides being perverse and flawed is based on no evidence connecting the accused persons with the commission of the offences they have been convicted and sentenced. Besides, the appearing counsels would seek bail of the applicants on the premise that the accused persons have been under incarceration for the last more than ten years and that since there is no possibility of adjudication/disposal of their respective appeals by this court in near future therefore, the applicants have become entitled to grant of bail during pendency of their respective appeals. The learned counsel in this regard referred to orders passed by the Apex court in case titled as “Javed Ahmad Vs. State of Jammu and Kashmir” (Criminal Appeal No. 632/2018 dated 15.09.2020), “A. L. Ravi Vs. The State of Karnataka” (Criminal Appeal No. 973/2019 dated 28.08.2019) as also order dated 28.12.2018 passed by this court in case titled as “Mohinder Singh and Ors. Vs State of J&K and Anr”. (IA No. 01/2016 in CRA No. 03/2016), order passed in case titled as “Rayees Ahamd Mir and Anr. Vs. State of J&K and Others” (IA No. 02/2018 in CRA No. 9900004/2017), order dated 25.02.2020 passed in case titled as “Irfan Ahmad Bhat Vs State through Police Station Budgam” (BA No. 173/2018) and order dated 17.12.2019 passed in case titled as “Ravinder Singh Vs. State of Jammu and Kashmir” (IA No.

01/2017 in CRA No. 40/2017. The learned appearing counsels also placed heavy reliance on the judgement of the Apex court passed in case titled as **“Akhtari Bi Vs. State of M.P reported in AIR 2001 SC 1528”**.

11. **Per contra**, on the other hand learned counsel for the non-applicants would controvert and resist the applications inasmuch as the contentions raised, grounds urged and arguments advanced by the learned counsel for the applicants/accused persons, in line with the objections filed thereto. The learned counsel for the non-applicants would argue that the judgement/conviction and sentence passed by the trial court against the accused persons is well reasoned based on substantial, material, cogent, credible and legal evidence. The learned counsel would further argue that the applicants/accused persons have been convicted and sentenced by the trial court after a full dressed trial having found the accused/applicant persons involved in the commission of premeditated murder of a practicing advocate. The counsel would further argue that in the facts and circumstances of the case the applicants/accused persons are neither entitled to the suspension of sentence nor concession of bail on any grounds whatsoever much less those urged in the applications including on the ground of duration of their incarceration. The learned counsel in support of his case relied upon judgement of the Supreme Court passed in case titled as **“Masood Ali Khan vs. State of UP and Others reported in AIR 2009 SC 1465”**.

12. Since through the medium of instant applications the applicants are seeking suspension of sentence pending the appeal and release on bail, as such, a reference to the relevant provisions of Section 389 CrPC becomes imperative here under: -

“**S. 389.** (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the court by which he is convicted that he intends to present an appeal, the court shall –

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail,

order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under subsection (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

13. A plain reading of Section 389 CrPC, makes it is clear that the Section confers discretionary jurisdiction on Appellate court to suspend the execution of sentence during the pendency of the appeal on valid reasons recorded in writing. Law being settled that although the High court is not debarred from suspending the sentence and granting bail to a convict but that power has to be exercised sparingly while objectively assessing the matter and that too in the particular circumstances of each case. A reference hereto the judgement of the Apex court passed in case titled as “**Preet Pal Singh Vs. State of UP reported in 2020 (8) SCC 645**, would be relevant and germane herein, wherein at para 25 and 26 it has been provided as under: -

“25. Section 389 provides that pending any appeal by a convicted person, the appellate court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is confinement, that he be released on bail.”

“26. As the discretion under Section 389 (1) is to be exercised judicially, the appellate court is obliged to consider whether any cogent ground has been disclosed, giving rise to substantial doubts about the validity of the conviction and whether there is likelihood of unreasonable delay in disposal of the appeal, as held by

this court in Kashmira Singh Vs. State of Punjab and Babu Singh Vs. State of U.P”.

14. While advertng to the applications in hand, it gets revealed upon perusal of the record that the accused/applicants have been held guilty and convicted/sentenced for commission of a heinous offence against the then serving Law Officer (Deputy Advocate General of the State) after a full dressed trial for about twelve years by the trial court and upon evaluation of ocular, circumstantial, medical and scientific evidence. The aforesaid position cannot be overlooked by this court at this stage while considering the instant applications for suspension of sentence and grant of bail.
15. A conjoint reading of the applications in hand would reveal that in none of the said applications the applicants have spelt out any cogent ground giving rise to substantial doubt about the validity of the conviction, so much so there is no credible contention raised therein the said applications that there is likelihood of unreasonable delay in disposal of their appeals.
16. While considering the prayer for grant of bail being made by the applicants in the instant applications, again a reference to the judgement of the Apex court passed in case titled as “**Preet Pal Singh’s case supra**” would be relevant and germane herein wherein at para 35, following is noticed: -

“35. There is a difference between grant of bail under [Section 439](#) CrPC in case of pre-trial arrest and suspension of sentence under [Section 389](#) CrPC and grant of bail, post conviction. In earlier case there may

be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in Dataram Singh v. State of U.P. However, in case of post conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the Court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) of the Cr.P.C.”

17. This court though would refrain from undertaking any exhaustive exploration of the merits of the case while considering the instant applications in such a depth which would amount to determining the legality or otherwise of the judgement/conviction and sentence passed against the applicants yet risking repetition it needs reiteration that perusal of the record demonstrates that applicants/accused persons have been convicted and sentenced by the trial court after holding a full dressed trial having found them guilty of the commission of a heinous crime of murder of a practicing advocate, in furtherance of their motive, intention etc etc., upon threadbare consideration, analysis and evaluation of

direct, circumstantial, scientific and medical evidence by the trial court.

In regard to above a reference here under to para 10 of the judgement of the Apex court passed in “**Masood Ali Khan case supra**” would also be relevant and germane herein:

“10. In Vijay Kumar V. Narendra and others (2002 (9) SCC 364) and Ramji Prasad V. Rattan Kumar Jaiswal and another (2002 (9) SCC 366), it was held by this court that in cases involving conviction under Section 302 IPC, it is only in exceptional cases that the benefit of suspension of sentence can be granted. The impugned order of the High court does not meet the requirement. In Vijay Kumar’s case (supra) it was held that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 IPC, the court should consider the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder. These aspects have not been considered by the High court, while passing the impugned order.”

18. The orders of the Apex court as also orders of this court supra relied upon by learned counsel for the applicants qua the ground of duration of incarceration do not lend any support to the cases of the applicants, in that, firstly, the said orders may not constitute per-se a precedent in law for the instant applications as the said orders *prima-facie* seemingly have been passed having regard to the facts

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and circumstances of the said cases which indisputably are distinct and different from the instant cases and secondly, in view of the law laid down by the Apex court in “**Akhtari Bi’s**” case *supra* wherein it has been held that if an appeal was not disposed of within a period of five years for no fault of the appellant, such convicts may be released on bail. Admittedly the respective appeals of the applicants herein have been filed in the year 2020-2021 itself and the period of five years has not yet elapsed as such, the applicants cannot be held entitled to the concession of bail at this stage. Even otherwise also assuming the said period of five years was over, yet bail could not be granted to the applicants as a matter of course by this court during the pendency of their appeals in view of ratio laid down by the Apex court in “**Preet Pal Singh’s** and “**Masood Ali Khan’s**” cases *supra*.

19. Viewed thus, what has been observed, considered and analyzed hereinabove, the applicants in the peculiar facts and circumstances of the case are not held entitled to suspension of sentence and consequent grant of concession of bail during pendency of their respective appeals as such, applications in hand merit dismissal and are accordingly **dismissed**.

(Javed Iqbal Wani)
Judge

(Tashi Rabstan)
Judge

SRINAGAR

02.06.2021

Ishaq