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

% *Date of Decision: 28th March, 2024*

\+ CRL.A. 643/2022

BHIMA ALIAS MANOJ ..... Appellant
Through: Mr. S.N. Gupta and Mr. Vinod Kumar Bhardwaj, Advocates.

versus

STATE (GOVT. OF NCT OF DELHI) ..... Respondent
Through: Ms. Richa Dhawan, APP for State

\+ CRL.A. 236/2023

RAVI @ ANIL ..... Appellant
Through: Mr. Rajesh Mahajan and Ms. Jyoti Babbar, Advocates.

versus

STATE ..... Respondent
Through: Ms. Richa Dhawan, APP for State

\+ CRL.A. 5/2023

MUNESH ..... Appellant
Through: Mr. P.K. Bhardwaj and Mr. S.C. Singh, Advocates.

versus

STATE GOVT OF NCT OF DELHI ..... Respondent
Through: Ms. Richa Dhawan, APP for State

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

CRL.M.(BAIL) 1532/2022 (suspension of sentence) **in CRL.A. 643/2022, CRL.M.(BAIL) 369/2023** (suspension of sentence) **in CRL.A. 236/2023 & CRL.M.(BAIL) 6/2023** (suspension of sentence) **in CRL.A. 5/2023**

1. These applications have been filed under Section 389 Cr.P.C. on behalf of the Appellants, namely, (i) Bhima @ Manoj S/o Om Prakash, (ii) Ravi @ Anil S/o Ramesh Chand, and (iii) Munesh S/o Gajender Singh, seeking suspension of sentence in FIR No.118/2011 registered under Sections 307/34 IPC at PS: Mayur Vihar, Delhi. Since the appeals arise out of a common judgment and the same FIR, these applications for suspension of sentence were heard together and are being decided by this common order.

2. Briefly stated, the facts are that on 03.05.2011, upon receipt of DD No.77B that someone had been stabbed in a quarrel at 29/242, Trilok Puri, Delhi and was being taken to the hospital, police team reached at the spot where they learnt that injured had been shifted to LBS Hospital. No witness was found at the spot. On reaching the hospital, IO collected the MLC of injured Suraj and Sunil. Statement of Sunil was recorded who stated that he along with his friend Suraj were consuming liquor at around 9.30 pm at a park at Block-29, Trilok Puri, when Appellants Ravi, Bhima and Munesh came to the spot and asked for drinks, which request was refused by the Complainants and the three persons started beating them. Bhima held Sunil and Munesh held Suraj while Ravi hit them with a pointed object. Sunil was hit on the chest and Suraj was hit on the stomach and back. Later the three fled away and on a complaint by someone at 100 number, the police came and the FIR was registered. As per MLC of Sunil, nature of injury was opined to be simple, while as per MLC of Suraj, injury was grievous in nature. FIR was earlier registered under Sections 324/34 IPC but later IO

added 325 IPC. Charge Sheet was filed under Sections 325/307/34 IPC and after taking cognizance of the offences, learned MM, vide order dated 05.01.2015 committed the case to the Court of Sessions.

3. On 11.02.2015, charges were framed by the Court against the three accused under Sections 307/34 IPC. Prosecution evidence was led, in which 11 witnesses were examined, out of which PW-1 was a Doctor who prepared the MLC of Sunil; PW-2 was the Doctor who opined that Suraj was not fit for statement; PW-3 was injured Suraj; PW-4 was injured Sunil; PWs-5, 6, 8, 9 and 10 were police witnesses; PW-7 was the brother of Suraj; and PW-11 was the Doctor who identified the handwriting and signatures of Dr. Priyanka, who had prepared the MLC of Suraj. During trial, accused admitted two documents i.e. FIR and MLCs. Dr. Priyanka was dropped from the list of witnesses.

4. After conclusion of trial and hearing the arguments, learned Sessions Court convicted the Appellants for offences under Sections 307/34 IPC, vide judgment dated 28.09.2022 and vide order on sentence dated 25.11.2022, Appellants were sentenced to rigorous imprisonment for 7 years and fine of Rs.7,000/- each and in default, to undergo simple imprisonment for 3 months for offence punishable under Section 307 IPC.

5. Common contentions raised on behalf of the Appellants are that Appellants have been falsely implicated by the alleged victims Sunil and Suraj and they are innocent. All accused were on bail throughout the period of trial and never misused the liberty granted by the Court. FIR was registered in 2011 and Appellants have been facing agony of prolonged trial since then. Appellants have undergone 1 year 4 months of imprisonment up to January, 2024, excluding the remissions earned. They have clean antecedents and were involved in no other offence in the past. In

fact, Complainants are known criminals of the area and have several FIRs pending against them, which is an undisputed fact.

6. In case of Appellant Munesh, it is stated that he like the other two Appellants belongs to the lowest strata of the society and was the sole bread earner of his family comprising of his wife, aged parents and unmarried sister and his father has been diagnosed with cancer. It is also stated that Munesh was newly married when he was arrested.

7. Learned counsels further contend that in a recent judgment in ***Om Prakash Sahni v. Jai Shankar Chaudhary and Another, (2023) 6 SCC 123***, the Supreme Court reiterated the proposition of law laid down in ***Kashmira Singh v. State of Punjab, (1977) 4 SCC 291***, wherein the Supreme Court had observed that it would be a travesty of justice to keep a person in jail for a long period for an offence, which is ultimately found to have not been committed by him and posed a question, whether a Court can ever compensate him for incarceration, which is found to be unjustified. It is, therefore, essential that if the Court is not in a position to hear the appeal within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail where special leave has been granted to the accused to appeal against his conviction and sentence. Bearing the principles laid down in ***Kashmira Singh (supra),*** the Supreme Court in ***Om Prakash Sahni (supra)*** observed that the endeavour on the part of the Court should be to see as to whether the case presented by the prosecution and accepted by the Trial Court can be said to be a case, in which ultimately the convict stands a fair chance of acquittal. If the answer is in the affirmative, he should not be kept behind bars for a long time till the conclusion of the appeal, which usually takes very long for decision and disposal.

8. It was contended that in criminal jurisprudence, the burden to prove the case against the accused is on the touchstone of proof beyond reasonable doubt and in the present case, prosecution has failed to establish even a *prima facie* case against the Appellants. The entire case is shrouded in doubt and mystery. It has come on record that the Complainants were known criminals of the area with several cases filed and pending against them. PW-4 Sunil, who was facing trial in three cases, falsely implicated the Appellants. PW-7, brother of Suraj admitted that his brother was involved in several FIRs. Place of occurrence is not clear, which is a fundamental flaw in the prosecution case and is fatal. PW-4 stated in his *Asal Tehrir* that the place of occurrence was a park in Block-29, Trilok Puri, however, PW-9 W/Ct. Shakuntala deposed that the place of incident was residence of PW-3. PW-11 SI Dharampal deposed in his cross-examination that the place of occurrence was 29/242, Trilok Puri, Delhi. There are several material contradictions in the testimonies of witnesses. PW-1 Dr. Sushil Kumar, who examined Sunil, found 3 simple injuries as recorded in the MLC (Ex.PW-1/8). During cross-examination, he stated that injuries No.1 and 3 were possible due to fall whereas injury No.2 is possible due to fall on broken pieces of glass. PW-11 Dharampal, IO deposed that he found no blood, pieces of glass, bottles, glasses, plates etc. at the spot, when he visited at 9.30 pm and this belies that the injury was possible due to fall on a glass. Dr. Priyanka was the author of the MLC of Suraj, wherein it was stated that the injury was grievous, but she was not produced for cross-examination. It is settled law that if the Doctor, who opines the injury to be grievous, is not examined or cross-examined, the injury cannot be stated to be proved. ***[Ref.: Bava Salemamad Gulmamad v. The State of Kutch, AIR 1953 Kutch 7***].

9. It was further argued that the FIR records that someone had called the 100 number, however, that 'someone' was never produced in Court and is unknown till date and PW-11 deposed that he never made any inquiry about the owner of the phone, from which the call was made. PW-11 deposed that smell of alcohol was found positive on both the MLCs, but also deposed that he did not find any bottle of liquor at the spot. He further deposed that no weapon was recovered. FIR records that weapon of offence was stated to be '*Nukili Cheez*', but assuming this was the weapon, it cannot cause blunt injuries, which is a finding in the MLC. No independent witnesses or eye-witnesses were produced before the Court, though the quarrel allegedly took place in an open park. No photographs of the scene of crime were admittedly taken, as deposed by the IO. No CCTV footage or even soil samples were collected by the IO. In ***Jage Ram and Others v. State of Haryana, (2015) 11 SCC 366,*** the Supreme Court has held that for purpose of conviction under Section 307 IPC, prosecution has to establish: (a) intent to commit murder, and (b) that the act is committed by the accused. Neither of the two ingredients have been established by the prosecution. PW-3 Suraj was examined on 03.05.2016, however, cross-examination was recorded as 'Nil' on 25.11.2016. Subsequently, on an application filed under Section 311 Cr.P.C., the Court vide order dated 12.04.2017, permitted recall of PW-1 to PW-4. However, PW-3 could not be cross-examined by the accused as he expired during COVID-19. The testimony of the witness remained incomplete in terms of Section 138 of Indian Evidence Act, 1872 and therefore, its probative value was questionable and yet the Sessions Court heavily relied on his deposition during examination-in-chief. PW-4 Sunil supported the case of the prosecution in the examination-in-chief recorded on 15.11.2016 but in

cross-examination conducted on 11.01.2019, his deposition regarding the place and manner of occurrence was contrary to and at variance with the prosecution case. He categorically deposed that none of the accused persons caused injuries to him or Suraj and there was no enmity or quarrel between them. On cross-examination by the learned APP, he stated that he had deposed falsely during his examination-in-chief at the instance of the police officials. PW-7 Manoj, brother of Suraj did not support the case of the prosecution with regard to who caused the actual assault on the injured persons. In view of all this, learned counsels for the Appellants state that there is high probability of success of the Appellants on merits in the appeals and therefore, as per the settled law, it would be unfair to continue them in custody.

10. Learned APP for the State *per contra* argues that the offences committed by the Appellants are grave and serious and they have been convicted based on cogent evidence led by the prosecution before the Sessions Court and it is not open to this Court at this stage to enter into appreciation of the evidence, as that would be a matter to be looked into when the appeals are finally decided. She further states that there is a difference when the Court is considering the prayer for grant of bail at the pre-conviction stage and request for suspension of sentence at the post-conviction stage. Presumption of innocence is lost after an accused is convicted and it is equally settled that the mere fact that during trial, Appellants were granted bail and there was no allegation of misuse of liberty, will be of not much consequence while considering an application for suspension of sentence. In serious offences, the Courts have been repeatedly holding that it is only in exceptional cases that the benefit of suspension of sentence can be granted. ***[Ref. Vijay Kumar v. Narendra and***

Others, (2002) 9 SCC 364]. The sentence awarded to the Appellants is rigorous imprisonment for 7 years and fine and in default, simple imprisonment for 3 months and they have only undergone 1 year and 4 months excluding remissions and therefore, at this stage, no ground is made out for suspending the sentence.

11. I have heard the learned counsels for the Appellants and learned APP for the State.

12. Section 389 Cr.P.C. provides for suspension of sentence pending the appeal and release of the Appellants on bail. In ***Angana and Another v. State of Rajasthan, (2009) 3 SCC 767***, the Supreme Court observed that when an appeal is preferred against conviction in the High Court, Court has ample power and discretion to suspend a sentence, but the discretion has to be exercised judiciously, 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 nature of the offence, manner in which occurrence had taken place and whether in any manner, bail granted earlier has been misused. Relevant paragraph is as follows:

> *"14. 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 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 nature of the offence, manner in which occurrence had taken place, whether in any manner bail granted earlier had been misused. In fact, there is no straitjacket formula which can be applied in exercising the 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 of the Criminal Procedure Code."*

13. In ***Takht Singh and Others v. State of M.P., (2001) 10 SCC 463***, the Supreme Court held that Appellants were in jail for 3 years and 3 months and released them on bail on the ground that there was no possibility of

early hearing of the appeal. It would be significant to refer to the observations of the Supreme Court in ***Kashmira Singh (supra)***, as follows:-

> ***"2.*** *..... Now, the practice in this Court as also in many of the High Courts has been not to release on bail a person who has been sentenced to life imprisonment for an offence under Section 302 of the Penal Code, 1860. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?" What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a Judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."*

14. In ***Bhagwan Rama Shinde Gosai and Others v. State of Gujarat, (1999) 4 SCC 421***, the Supreme Court observed as under:-

> ***"3.*** *When a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be 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 a limited duration cannot be suspended every endeavour should be made to dispose of the appeal on merits more so when a motion for expeditious hearing of 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 of 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."*

15. In ***Preet Pal Singh v. State of Uttar Pradesh and Another, (2020) 8 SCC 645***, the Supreme Court observed that in considering an application for suspension of sentence, Appellate Court is only to examine if there is such patent infirmity in the order of conviction that renders the order of conviction *prima facie* erroneous. This Court in ***Chaman Lal & Ors. v. Central Bureau of Investigation, (2013) 135 DRJ 699***, while considering applications for suspension of sentence on a bird's eye view of the evidence before the Trial Court and after referring to the decisions of the Supreme Court, held as under and suspended the sentence of all the four Appellants:-

> *"6. A perusal of the aforesaid judgment would clearly show that the Supreme Court has expressed its anguish by conserving that while admitting the appeal, we tell the appellant that we have admitted your appeal inasmuch as we find prima facie merit in the same but unfortunately, we have no time to hear your appeal for quite a few years and, therefore, till the time we hear your appeal you must remain in jail, even though you may ultimately prove to be innocent. It also expressed anguish that if that be the situation, what confidence would such administration of justice inspire in the minds of the public. In the instant case also, no doubt, if one sees the allegations against the appellants, as*

have been observed above, they are very serious in nature inasmuch as the protectors of lives of the citizens have become the law breakers and they have allegedly taken the life of an innocent citizen. The report of Sh. R.C. Chopra shows that the deceased was allegedly subjected to physical violence and torture whereupon the blood was oozing from his private part and he died. There is also another fact that there is a seal of judicial approval on the case of the prosecution by the trial court but at the same time, this is also a fact that their appeal stands admitted and they have been visited only with a maximum sentence of five years out of which they have already undergone two years of sentence by now. The court is not able to hear the appeal of the appellants despite its best efforts on account of heavy pendency of fresh admission matters and the new listing as a result of which the regular list moves at a snail pace.

I am quite sure that as the things are placed, as on date because of the various factors which includes heavy filing of criminal matters, paucity of judicial time, paucity of judges, the appeal of the appellants is not likely to be listed for another couple of years in the regular list for final hearing and when it may come up for hearing by that time, the appellants would have undergone substantial portion of sentence. If that be the situation and ultimately at that point of time, the court comes to the conclusion regarding their innocence by giving them the benefit of doubt, the incarceration which they would have suffered would be irreversible and no amount of money or compensation or action on the part of the State would be able to reverse that. Keeping in view this factor, it prompts the Court to consider the option of suspension of sentence and grant of bail to the appellants. Other conditions which also prompts the Court to adopt this kind of approach is that the appellants were on bail during the course of trial and after their conviction, they have undergone the sentence of nearly two years and thus tasted incarceration and know the consequences that if they are found guilty, they will have to undergo the remaining sentence. It is not the case of the Respondents that the appellants are going to flee away from the processes of law or they will not subject themselves to the processes or the directions of the court. Their conduct during the incarceration has also been shown to be satisfactory in the nominal roll. Therefore, keeping in view all these totality of circumstances, I feel that it will be fair, just and reasonable to suspend the remaining sentence of all the four appellants and enlarge them on bail during the pendency of their appeal."

16. Having heard learned counsels for the Appellants on some of the alleged material contradictions in the testimonies of the prosecution witnesses with respect to the place of occurrence, non-recovery of weapon and samples from the spot of the alleged incident, injury to one of the victims being simple and of the other being grievous but not proved

through oral testimony of the concerned doctor and also considering that the appeals are not likely to be heard soon coupled with the fact that the Appellants were young boys at the time of the alleged incident, have clean antecedents and have suffered a prolonged trial since 2011 and incarceration for nearly 1 year and 6 months today and applying the observations of the Supreme Court in ***Kashmira Singh (supra)*** that it would be travesty of justice to keep the Appellant in jail for a long time, if the Courts are unable to hear the appeal and who would compensate if the Appellant is ultimately found to be innocent, this Court is inclined to suspend the sentence awarded to the Appellants.

17. It is accordingly directed that the sentence of the Appellants shall remain suspended during the pendency of the present appeals and they be released on bail, on their furnishing personal bonds in the sum of Rs.50,000/- each with two sureties each of the like amount, to the satisfaction of the Trial Court and further subject to the following conditions:-

(i) Appellants will not leave the country without prior permission of this Court;

(ii) They shall not indulge in any criminal activity or communicate with or come in contact with the injured victim or any other person associated with the present case;

(iii) They shall provide their permanent residential addresses to the concerned IO and shall intimate the IO as well as this Court by filing an affidavit regarding any change in the residential addresses;

(iv) They shall provide their respective mobile numbers to the IO concerned which shall be kept in working condition at all

times and any change in the mobile number will only be after prior intimation to the IO;

(v) They shall appear before this Court, as and when, the appeals are taken up for hearing.

18. Nothing stated in this order will tantamount to an expression on merits of the case.

19. Applications stand disposed of.

20. Copy of the order be sent to the concerned Jail Superintendent for information and necessary compliance.

JYOTI SINGH, J

MARCH 28, 2024/KA/shivam