

THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appeal Jurisdiction)

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

I.A. No. 1 of 2021
IN
Crl. Appeal No. 13 of 2021

Pema Tshering Bhutia,
S/o Pempa Bhutia,
Permanent Resident of Phensong,
P.S. Mangan,
North Sikkim.

(At present Rongyek Jail, Gangtok, East Sikkim)

..... Appellant

Versus

State of Sikkim

.....Respondent

**Application under Section 389(1) of the Code of Criminal
Procedure Code, 1973.**

Appearance:

Ms. Zola Megi, Advocate for the Appellant.

Mr. S.K. Chettri, Additional Public Prosecutor and Ms.
Pema Bhutia, Assistant Public Prosecutor for the
State respondent.

Date of hearing : 12.11.2021

O R D E R (ORAL)

Bhaskar Raj Pradhan, J.

1. This is an application under section 389(1) of the Code of Criminal Procedure, 1973 (Cr.P.C.) for suspension of sentence and grant of bail pending disposal of the appeal.

2. Ms. Zola Megi, learned counsel for the appellant submits that the order on sentence was passed on 31.08.2021 by which the appellant has been sentenced to one year each under section 354 and 506 of the Indian Penal Code, 1860 (IPC). Both the sentences have been directed to run concurrently. It is submitted that the appellant was arrested on 06.04.2021 as per the arrest memo and thus he has already undergone sentence of more than seven months as on date. As statutory appeal has been preferred against the impugned judgment dated 28.08.2021 and order on sentence which has now been admitted for hearing, the appellant may be granted bail.

3. Mr. S.K. Chettri, learned Additional Public Prosecutor submits that as the appellant has been convicted by the learned Trial Court, his sentence ought not to be suspended.

4. Section 389 of the Cr.P.C. 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 in confinement, that he be released on bail, or on his own bond. As the appellant has been sentenced to only a year the proviso to section 389(1) Cr.P.C. is not applicable.

5. In *Preet Pal Singh vs. State of Uttar Pradesh*¹ the Supreme Court held that there is a difference between grant of bail under section 439 Cr.P.C. and grant of bail, post-conviction. In the earlier case, there may be presumption of innocence which is a fundamental postulate of criminal jurisprudence, and 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. 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) Cr.P.C. It was further held that in considering an application for suspension of sentence, the Appellate Court is only to examine if there is such patent infirmity in the

¹ (2020) 8 SCC 645

order of conviction that renders the order of conviction *prima facie* erroneous.

6. In *Kiran Kumar vs. State of M.P.*² the Supreme Court noted its opinion in *Bhagwan Rama Shinde Gosai vs. State of Gujarat*³ in which it was held 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. If the short-term sentence is allowed to run during the pending of the appeal, the appeal itself will become for all practical purposes, infructuous, so far as the appellant is concerned. A note of caution was given by the Supreme Court that it did not mean that the Appellate Court should suspend the sentence, if its consequence would be a danger to the society or any other similar difficulties.

7. Considering the rival submissions and examining the impugned judgment and order on sentence along with the depositions of the prosecution witnesses, this court is of the view that it is a fit case in which the appellant ought to be granted bail pending the final disposal of the appeal. The judgment rendered by the learned Special Judge, (POCSO, Act) North Sikkim at Mangan (the learned Special

² (2001) 9 SCC 211

³ (1999) 4 SCC 421

Judge) dated 28.08.2021 has acquitted the appellant for the charge under section 7 of the POCSO Act holding that the prosecution is unable to prove it. The conviction under section 354 IPC and 506 IPC is for a year each and it has been directed to run concurrently. The appellant having already served more than seven months, there is less than three months further for the appellant to complete the sentence awarded. The appeal having been admitted is unlikely to be heard within the period of three months as the lower court records must be called for, paper books prepared and matter heard finally. If the appeal is not heard within the three months next, it would be rendered infructuous. This court, therefore, deems it appropriate to suspend the sentence passed on the appellant during the pendency of the appeal and direct him to be released on bail on his executing a bond with two solvent sureties to the satisfaction of the learned Special Judge. Additionally, he shall appear personally on every date of hearing before this court, stay away from the victim and not leave Sikkim without the permission from the learned Special Judge. He shall also provide his active mobile number as well as his active email address (if any) to the registry of this court as well as the court of the learned Special Judge before whom he shall be produced on Monday 15.11.2021.

8. The application for suspension of sentence and bail is accordingly allowed and disposed. This order in addition to the regular mode shall also be communicated electronically to all concerned.

**(Bhaskar Raj Pradhan)
Judge**

Approved for reporting : **Yes**
Internet : **Yes**

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