

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

Reserved on: 01.08.2022
Pronounced on: 13.09.2022

CJ Court

Case: CRA No. 1 of 2018

Hilal Ahmad Yatoo

...Petitioner(s)/Appellant(s)

Through: Sh. S. T. Hussain, Sr. Advocate
with Ms. Nida Nazir, Advocate.

v/s

State of J&K.

.... Respondent(s)

Through: Sh. D. C. Raina, Advocate General
with Sh. Faheem Shah, GA.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

ORDER

13.09.2022

01. In criminal appeal No. 1 of 2018, '*Hilal Ahmed Yatoo vs. State of J&K*' arising out of the conviction order dated 30.12.2017 passed by the Principal District Judge, Budgam, sentencing the appellant *inter alia* for life imprisonment and fine of ₹ 1,00,000/- in a case under Section 302 read with Section 120 B of Ranbir Penal Code in which investigations commenced pursuant to the First Information Report (FIR) No. 10 of 2012, an application for bail being CrIM No.914/2021 has been moved solely on the ground that the appellant had remained in jail for over nine years continuously and, as such, is entitled to bail pending the appeal as there is no likelihood of it to be heard in near future.

02. It is not in dispute that appellant in connection with the above offence was taken into custody on 31.12.2012 and had remained in jail till date of his conviction, i.e., 30.12.2017 for a period of five years ten months and twenty

nine days. He is in jail without any break even after his conviction till date, i.e., continuously from 31.01.2012 till date, i.e., for a period of nine years and over eight months. It is in view of the aforesaid continuous prolong detention that the appellant has now applied for grant of bail on the strength of certain recent pronouncements of the Supreme Court.

03. Article 21 of the Constitution of India provides for the protection of life and personal liberty and it *inter alia* guarantees that no person shall be deprived of his personal liberty except according to the procedure established by law. It is well recognized that speedy trial is an essential ingredient of reasonable, fair and just procedure and that under trial prisoners languishing in jail for long are entitled to approach the higher court by invoking their extra ordinary jurisdiction.

04. Since every criminal offence is a crime against the State, there is a heavy burden upon the State to prosecute the offender and to ensure that the trial comes to an end speedily. The power to grant bail is to restore liberty of the person without jeopardising the objective of arrest. The bail order, therefore, must reflect the balance between the conflicting interests of the individuals' liberty and the interest of the society.

05. In the words of Justice V. R. Krishna Iyer in '*Gudikanti Narashimulu and others vs. Public Prosecutor, High Court of Andhra Pradesh*', (1978) 1 SCC 240 the issue of bail is one of liberty, justice, public safety, and a burden on public treasury, all of which necessitates development of jurisprudence of bail as an integral part to a socially sensitized judicial process.

06. A person is innocent unless proved guilty in the court of law. This presumption of innocence being a facet of Article 21 of the Constitution must enure to the benefit of the accused but it is not so when the accused has been

convicted and an appeal which is a continuation of the trial against conviction is pending.

07. The term 'bail' has not been defined but it ordinarily means release of the accused person either by orders of the Court or by the Police or the Investigating Agency. The 14th Edition of Wharton's Law Lexicon defines bail as '*to set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a certain place, which security is called bail..*'

08. In other words, setting at liberty a person arrested or imprisoned in connection with an offence on security for his appearance is bail. It is in a way an interim order restoring liberty of a person arrested during investigation, trial or post conviction during statutory appeal which is nothing but continuation of the trial.

09. There is, however, difference between grant of bail in case of pre-trial arrest and grant of bail, post conviction. In earlier case there is presumption of innocence and the courts are liberal on the principle that bail is the rule and jail is an exception. In case of post conviction bail there is a finding of guilt and the question of presumption of innocence does not arise and therefore there has to be strong and compelling reasons for granting bail in such cases.

10. Life and liberty are the cherished attributes of every individual. Denial of bail and keeping the trial or the appeal pending indefinitely amounts to deprivation of personal liberty.

11. The Supreme Court in '*Kashmira Singh vs. State of MP*' **AIR 1977 SC 2147**, which was a case of imprisonment of life under Section 302 of Indian Penal Code (IPC), very categorically held that so long as the court is not in a position to hear the appeal of the accused within the reasonable time, the court

should ordinarily, unless there are cogent reasons for acting otherwise, release the accused on bail.

12. The relevant portion of the said judgment is quoted below:

“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 Indian penal Code. 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.”

13. In ‘*Akhter Bi vs. State of MP*,’ **AIR 2001 SC 1528** it was observed that the trial court’s verdict does not attain finality during the pendency of the appeal and that an appeal being a statutory right, the trial is deemed to be continuing despite conviction. Therefore, if an appeal is not disposed of within the reasonable time of five years, for no fault of the convicts, such convicts may be released on bail on such conditions as may be deemed fit and proper by the court. It was also observed that keeping the convict (appellant) further in jail is likely to deprive him of his personal liberties.

14. In ‘*Sandeep alias Raja Acharya v. State of Orissa*’ **AIR 2017 SUPREME COURT 1568**, the Supreme Court while dealing with the Criminal Appeal arising from the rejection of the bail observed that as appeal before the High Court continues to remain pending as on the date and in the normal course

is not likely to be taken up for disposal, it is a fit case where he should be released on bail, when he has already remained in jail for nine years,.

15. The accused in the said case was convicted for an offence of murder and the appeal pending in the High Court was not likely to be heard for further sometime whereas the accused completed nine years in Jail.

16. In '*Union of India versus K. A. Najeeb*' **AIR 2021 SC 712**, the Supreme Court observed that the respondent has been in jail for much more than five years and about 276 witnesses are still left to be examined which connotes that the trial is not likely to be completed soon. In such a situation, under trials cannot be indefinitely detained pending trial and, therefore, it is essential for the courts to enlarge the accused on bail if timely trial is not possible.

17. In '*Thana Singh versus Central Bureau of Narcotics*' **(2013 2 Supreme Court Cases 603)**, the court was dealing with a case under NDPS Act 1985 where grant of bail was restricted in terms of Section 37 of the Act, however, the Supreme Court noting that the accused was languishing in jail for a period of over 12 years with no conclusion of the trial insight, emphasized the need for speedy trial and that though some amount of deprivation of the personal liberty cannot be avoided but if the period of deprivation pending trial becomes unduly long, fairness assured by Article 21 of the Constitution would be undermined to an unacceptable extent. Therefore, it was observed that where the accused person has suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualized by Article 21 of the Constitution of India. Thus, bearing in mind that accused had been in custody for more than 12 years and there was seemingly no prospect of the conclusion of the trial in near future it was held to be a fit case where he should be granted bail forthwith.

18. In '*Saudan Singh vs. The State of Uttar Pradesh*' **Criminal Appeal No. 308 of 2022** decided on 25th February 2022 wherein the appellant was in custody for around eight years and the appeal was not being decided, the appellant was granted bail on terms and conditions to the satisfaction of the trial Court.

19. The Supreme Court of India in recent case '*Brijesh Kumar alias Ramu vs. The State of Uttar Pradesh*,' **Criminal Appeal No. 540 of 2022**, decided on 1st April 2022 by expressing concern over bail pleas being rejected on the ground that the appeal filed by the convict itself should be heard observed as under:

'The bail application of the appellant was rejected by the order dated 12.12.2019 stating that the paper books should be prepared within two weeks and case be listed immediately thereafter for hearing. We are informed that thereafter three times appellant had moved the application for listing and it was listed on 25.10.2021 and was not taken up. Thus, orders which instead of examining bail merely rejected on the ground that the appeal itself should be heard appears to serve no purpose because of the large number of appeals pending in the Allahabad High Court. The approach to bail matters is causing a further strain on the Court. This is not the only case of this kind which we have seen. As on date the appellant has undergone more than 14 years of actual sentence and 16 years with remission while the appeal is pending for seven years. Even if the date of the order of the High Court is taken into account which is about a little more than two years ago, the appellant would have spent about 12 years in custody by then and if the appeal is pending, we see no reason why in this kind of a single incident case, bail should not be granted. We really cannot appreciate the approach of the High Court in rejecting the bail application with a simple sentence that the appeal should be heard while hearing of the appeal looks almost impossibility. Insofar as the aspect of remission is concerned, we are informed that 16 years actual sentence and 20 years with remission is the period before which the case of remission of sentence is taken up. In this behalf in

some other proceedings, Ms. Aishwarya Bhati, learned ASG had assured that due to election process it was not possible to take up the revisiting of the policy but post election, the needful would be done. We expect the State to examine this issue more so in the context of policies as prevalent in other States and the huge backlog of the criminal cases in the State of Uttar Pradesh both at the trial and High Court stage as also the fact that the appeals are not taken up for hearing for years together. Thus if a practical approach is adopted by the State to see at least the remission is examined after 14 years of actual sentence, some of these appellants may be satisfied with that aspect itself instead of prosecuting the appeal. We have thus no hesitation in setting aside the impugned order and opining that this is an incorrect approach being adopted and we grant bail to the appellant on terms and conditions to the satisfaction of the trial Court. Insofar as the aspect of remission of sentence is concerned, the case of the appellant can be examined once the policy has been revisited and if the appellant falls within the policy. The appeal is allowed in the aforesaid terms. We require the order to be placed before Hon'ble the Chief Justice of the Allahabad High Court and also to be circulated to the Hon'ble Judges of the Allahabad High Court so that we can see some change in the approach which, apart from providing succor to the people in long detention, would prevent unnecessary load coming on to this Court”

20. In another recent decision of Supreme Court dated 25th March 2022 in the case of ‘Suleman versus The State of Uttar Pradesh’ **Criminal Appeal No. 491 of 2022**, the only issue was whether in a criminal appeal of the year 2012 pending before the High Court with no a prospect of early hearing, the appellant having undergone twelve years of incarceration is still to be denied bail. The Supreme Court disagreeing with the High Court opined that in such cases the bail should have been granted on the mere asking. The order of the High Court refusing bail was set aside and the appellant was granted bail on terms and

conditions to the satisfaction of the trial court. The court even called for a report from the Registrar General of the High Court wherein pending criminal appeals the convicts have spent more than fourteen years in actual custody as also the cases where they have been incarcerated for more than ten years.

21. A Division Bench of the Supreme Court recently in ***Satender Kumar Antil v. Central Bureau of Investigation & anr in SLP (Crl.) No.5191 of 2021 decided on 11.07.2022***, while elaborating on the entire case law governing the subject of bail apart from issuing several directions directed that “bail applications ought to be disposed of within a period of two weeks (months) except if the provisions mandate otherwise, with the exception being an intervening application.

22. The ratio of the aforesaid decisions makes the legal preposition manifestly clear that where the convicts have already suffered incarceration for a period of more than five years and the appeal continues to remain pending with no likelihood of it being heard in near future, it becomes necessary on the principles of personal liberty to enlarge such convicts on bail *inter alia* depending upon the scores of other factors.

23. It is in the above legal scenario that we have been called upon in this appeal whether the appellant who has undergone nine years of incarceration is still to be denied bail or enlarged on bail looking to the fact that there is hardly any scope for immediate hearing of the appeal rather it is likely to take time as after translation of the evidence paper-books have to be prepared before the appeal could be heard on merits.

24. In the present case, a missing report was lodged by one Abdul Rahid Dar on 22nd January 2012 at Police Station Chadoora that his brother Nazir Ahmad Dar who was running a jewellery shop had gone to his shop on the previous

morning had not returned. He is missing and his mobile is switched off. During the search of the aforesaid missing person, Police got information on the next day that a dead body of a person is lying near a mosque under a culvert. It appeared that the said person was killed and the dead body was dumped under the culvert. On examination, he was found to be the person missing. Accordingly, FIR 10 of 2012 was registered for an offence punishable under Section 302 of RPC. The investigation commenced and on the basis of the phone call details of the deceased it was found that last call made by him was to the appellant Hilal Ahmed Yatoo and, as such, his house was inspected which revealed blood stains on the door frame of the tin shed. Accordingly, he was taken into custody on 23rd January 2012 and ultimately was convicted to life imprisonment vide order and judgment impugned in the appeal.

25. It is in these circumstances that the appellant is in jail ever since his arrest and has already undergone continuous imprisonment of more than nine years. His first bail application in appeal was rejected vide order 16th November 2018 on merits. The second bail application was rejected on 15th December 2020 on the ground that he has not completed five years of imprisonment. The instant bail application is not technically a statutory application for grant of bail but an application to restore the liberty of the appellant in view of the fundamental right to life guaranteed under Article 21 of the Constitution of India as no person can be deprived of his liberty for an unlimited period without being convicted finally or keeping the appeal against the conviction pending for long.

26. The bail has been opposed on the ground that it is the third bail application of the appellant and since the two earlier ones including the one on the ground of long detention were rejected, he is not entitled to maintain this

third bail application. The judgment and order of conviction is well reasoned and sound and there is no scope of the appellant being acquitted.

27. We are not impressed by the submission that the bail application is not maintainable, inasmuch, as it has been moved on changed situation as the appellant has completed nine years of continuous imprisonment and there is no likelihood of the appeal being heard and decided in near future.

28. The appellant, as such, cannot be deprived of his personal liberty for unlimited period without completion of the trial. More, particularly, he has already undergone imprisonment of more than nine years.

29. We would not like to part with our opinion without referring to '*Kalyan Chandra Sarkar vs. Rajesh Ranjan alias Pappu Yadav and another*' (2004) 7 SCC 528. In this case, the Apex Court had an occasion to consider the relevant factors for grant of bail and observed that amongst other circumstances, the factors which are relevant in such matter are:

- a) Nature of the accusation and severity of punishment;
- b) Reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant; and
- c) Prima facie satisfaction of the court in support of the charge.

30. The Court disapproved the order of the High Court granting bail to the accused solely on the ground that he had been in custody for more than 3 ½ years and there was no possibility of the conclusion of the trial in near future. It was held that mere fact that the accused undergone certain period of incarceration by itself would not entitle the accused for bail, nor the fact that the trial is not likely to be concluded in near future, would be sufficient for enlarging the accused on bail when the gravity of the offence alleged is severe and there are allegation of tampering with the witnesses by the accused during the period he was on bail.

31. The facts and circumstances of the above case are quite distinct from that of the instant case.

32. In the present case, the convict has undergone not only 3½ years of incarceration but continuous incarceration for over nine years and there is no allegation of tampering with the witnesses. Insofar as gravity of the offence is concerned, it may be serious one, i.e., of murder under Section 302 of RPC (now IPC) but even in such cases of severe offences, the courts have been enlarging the accused on bail on the above ground.

33. It may not be out of context to mention here that appellant is not said to be a hardened criminal. He appears to be a first time offender. There is no allegation that he is likely to repeat the offence if enlarged on bail or that he would jump the bail or abscond or will not cooperate with the completion of the trial. This apart, there is no question of tampering of evidence or influencing the witnesses by him at this stage when the evidence part is already over. Therefore, we are of the opinion that, in the facts and circumstances of the case, on the larger anvil of Article 21 of the Constitution of India rather than narrow approach for grant of bail under the statutory provisions that he is entitled to be enlarged on bail. Thus, in the light of the legal discussion we had earlier, in the facts and circumstances of the present case, the appellant having undergone more than nine years of continuous imprisonment in a case of life imprisonment with no certainty as to when his appeal would be considered, we feel inclined to grant bail to him.

34. In the aforesaid background of the case, the application is allowed and the petitioner is admitted to bail subject to the following terms and conditions:

- (i) That he shall furnish personal bond in the amount of Rs.1,00,000/ with one surety of the like amount to the satisfaction of the Registrar Judicial of this Court;
- (ii) That he shall appear before this court on each and every date of hearing;
- (iii) That he shall not leave the territorial limits of Union Territory of J&K without prior permission of this court;

35. The bail application CrIM No.914/2021 is, accordingly, disposed of. It is made clear that observations made hereinabove shall not be construed as expression of an opinion on the merits of the appeal.

36. List the main appeal along with the connected appeal and the reference on 22nd December, 2022.

(WASIM SADIQ NARGAL)
JUDGE

(PANKAJ MITHAL)
CHIEF JUSTICE

Srinagar
13.09.2022
SUNITA.

Whether the order is speaking?
Whether the order is reportable?

Yes/No
Yes/No