IN THE HIGH COURT OF SINDH, KARACHI

CR.APPEAL No.28 of 2016

Applicant : Juman s/o. Aloo
through Mr. Aziz-ur-Rehman Akhund, Advocate.

The State, through Ms. Seema Zaidi, APG

Date of hearing: 07th March, 2016

Date of Order: 07.03.2016

O R D E R

SALAHUDDIN PANHWAR, J:- Through instant application, appellant seeks suspension of sentence awarded in Sessions Case No.10 of 2014, passed by District & Sessions Judge, Thatta, whereby appellant has been convicted and sentenced to Rigorous Imprisonment of five years and to pay a fine of Rs.10,000/- under section 376 read with Section 511 PPC.

2. Precisely relevant facts, *as per prosecution*, are that complainant Dr. Ishrat Parveen lodged FIR contending therein that she was WMO at Taluka Hospital Sujawal; on the fateful day i.e. 03.12.2013 when she was present in the hospital; she noticed one stranger in front of her office and asked her peon Bilawal Memon that why such person is sitting there on which peon tried to expel him but he refused, thus said peon went to report Medical Superintendent. Meanwhile unknown person along-with dagger intruded in the office of complainant (lady doctor), closed the door from inside and while issuing threats of dire consequences he dragged the complainant towards examination room, attempted to commit Zinna and in result of resistance complainant received injuries.

3. Learned counsel for applicant *inter alia* contends that conviction is only five years, which falls within the scope of short term, hence, appellant is entitled for bail. Besides, he contends that impugned judgment suffers from material irregularities; learned judge has failed to appreciate contradictions brought on record.

4. Conversely, learned A.P.G. has contended that ample evidence is available against appellant; in cases of short sentence there is no hard and fast rule to grant bail; that nature of case is very heinous, hence, appellant is not entitled for bail.

5. Heard and perused the record.

6. *No doubt,* it is now well settled that the principles for exercise of jurisdiction under section 497 and 426 Cr.P.C, one pertaining to grant of bail after arrest at the stage of trial and the other relating to suspension of sentence and release on bail at the stage of appeal against conviction, are essentially the same as the two provisions are analogous, they deal with a similar relief and are parts of the same statute, so has been held in the case of *Nazir Ahmed & another v. State & ors* PLD 2014 SC 241, wherein honourable Supreme Court held that:-

> '9. In the context of the issue under discussion it may be pertinent to mention that on a number of occasions this Court has held that the principles for exercise of jurisdiction under section 497 and 426 Cr.P.C, one pertaining to grant of bail after arrest at the stage of trial and the other relating to suspension of sentence and release on bail at the stage of appeal against conviction, are essentially the same as the two provisions are analogous, they deal with a similar relief and they are parts of the same statute. A reference in this respect may be made to the cases of *Maqsood v. Ali Muhammad & another (1971 SCMR 657), Bashir Ahmed v Zulfiquar & another (PLD 1992 SC 463), Muhammad Nabi & 4 others v. The State (2006 SCMR 1225) and Raja Shamshad Hussain v. Gulraiz Akhtar and others (PLD 2007 SC 564).*

The deeper appreciation of evidence in exercising *discretionary* jurisdiction under either of two provisions is *however* not permissible. In Section 497 Cr.P.C. the existence and non-existence of the reasonable grounds for believing that the person is guilty of the offence or otherwise are the criteria/hallmarks while for suspending conviction one has to show that conviction is based on no evidence/being based on inadmissible evidence or is not ultimately sustainable; later is rather narrower though analogous to Section 497. Worth to add here that since in matter of appeal it is not a case of proving guilt or innocence but *'maintainability of conviction or otherwise'* hence presumption of *innocence* normally attached with an accused is *no more* available for one (*accused)* who after conviction turns into *convict.*

In the case of MAZHAR AHMED vs. State [2012 SCMR 997]

"8……..

> "Section 426(1) though has made essential the recording of reasons in case of suspension of sentence but has not prescribed any guideline or the manner in which such a discretion is to be exercised as how and what would be the criteria for the recording of the reasons. Since these provisions, under section 426(1) are analogous to the one contained in section 497 Cr.P.C, as in both the cases the sentence or detention is to be suspended pending hearing of the appeal/trial and the convict or the detenue is to be released on bail with only difference that in the former case the person is a convict one, already found guilty, while in the latter he has been charged only and to face trial and is still to be proved guilty. It would be appropriate , in the absence of any guideline, to follow ' the one provided under section 497 Cr.P.C. on the principle that where a Statute lays down certain principles for doing 'some acts they may be taken as a guidelines for doing something of the same nature which is in the discretion of the court as held in the case of Maqsood vs. Ali Muhammad 1971 SCMR 657 and which principle, as later on, was reaffirmed by this Court in the case of Peer Mukaram-u-Haq vs. National Accountability Bureau NAB through Chairman and others 2006 SCMR 1225. In section 497 Cr.P.C. the existence and non-existence of the reasonable grounds for believing that the person is guilty of the offence and the scope of further inquiry are the criteria/hallmarks and for arriving at such conclusion the tentative assessment and not the minute or detailed assessment of the evidence has been made permissible, the principle laid down by this Court and reaffirming repeatedly. Similarly, the

same guidelines have been laid down by the superior Courts that in case of suspension of sentence, only the tentative assessment of the material available evidence and the judgments has been made permissible and the detailed appraisal of evidence was held to be avoided as held by this Court in the cases of Allah Ditta Khan (supra) and Farhat Azeem (supra). However, the principles laid down by this Court in the aforesaid judgments qua following the guidelines prescribed under section 497 Cr.P.C while deciding application under section 426(1) Cr.P.C but without being controlled by the aforesaid section i.e 497 Cr.P.C as held in the case of The State v. Shah Sawar 1969 SCMR 151 and such powers i.e the suspension of sentences and grant of bail under section 426 Cr.P.C are not wider than the power to release a person on bail under section 497 Cr.P.C as held in the case of Bahar Khan vs. The State 1969 SCMR 81 **but rather narrower'**

(Underlining is provided for emphasis)

In the case of Manzoor Ahmed v. Fazal Ahmed & 3 others 2013 SCMR 1403.

"8. Having considered the submissions made by learned counsel for the parties and learned Law Officer, we find that in suspending the sentence the learned High Court discussed the prosecution evidence in a manner which is the preserve of the Appellate Court. This amounted to deeper appreciation of evidence which exercise could not have been undertaken in a petition under section 426 Cr.P.C. The observations made in para 4 of the impugned judgment are likely to prejudice the case of the prosecution in appeal and the learned Court, we may observe with respect, did not keep in view the principles laid down by this Court for exercise of jurisdiction under section 426 Cr.P.C. *In Muhammad Saleem v State* (PLD 2006 SC 483), this Court held as follows:-

'(7) *There is no cavil to the proposition that appellate court in exercise of its power under section 426 Cr.P.C. may in a suitable case, suspend the sentence of a convict and grant him bail pending disposal of his appeal and notwithstanding any material difference in the principle governing for grant of bail under sections 497 and 426 Cr.P.C, the consideration for suspension of sentence and grant of bail pending trial may not be the same, therefore, the distinction must be adhered to for exercise of power under the above provisions in proper manner. The power of appellate court under section 426(1) Cr.P.C is not limited and the court may, pending disposal of an appeal, suspend the sentence of a convict in an appropriate case in its discretion for good and sufficient reasons but this power of suspension of sentence and grant of bail is not wider than that of under section 497 Cr.P.C and unless it is shown that conviction is based on no evidence or being based on an*

> *inadmissible evidence, is not ultimately sustainable, the grant of bail under section 426 (1) Cr.PC with the consideration of ascertaining the question of guilt or innocence on merits through appraisal of evidence is not justified as the bail either under section 497 or 42691) Cr.PC could be allowed only the basis of tentative assessment of evidence.'*
>
> *(8) The High Court in the present case, after……..The finding of the trial Court was also that the two fatal injuries , sustained by the deceased on head were caused by the above named two accused and unless it could be shown from the evidence that the finding of the trial Court was in utter disregard to the factual position on the record, the mere possibility of another view of the evidence would not be a valid and sufficient ground to suspend the sentence under section 426(1) Cr.PC and grant bail to a life convict pending disposal of his appeal against the conviction on capital charge.* There is difference between tentative assessment and deep appraisal of evidence and rule is that appellate court may on the basis of tentative assessment for reason to be recorded, suspend the sentence and grant bail to a convict but the exercise of the power of grant of bail through suspension of sentence on the basis of deep appraisal of evidence is against the principle governing the exercise of powers under section 426(1) Cr.P.C. **This is settled law that appellate Court should not go deep into the evidence for the purpose of suspension of sentence by giving the reasons which may amount to express its views on the merits of the case prejudicing the case of one or the other Party in appeal.**
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> 9. In the instant case in the F.I.R. and in the evidence led during trial, respondents Liaquat Hussain and Nazar Hussain were attributed specific role of causing injuries to the deceased. **The question *inter alia* whether there was sufficient corroboration of the ocular account entailed deeper appreciation of evidence which exercise ought to have been left to the Appellate Court during hearing of the appeal. In absence of legal infirmity in the impugned judgment with regard to the findings against the respondents named above, their sentence could not have been suspended.'**
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> (Underlining is provided for emphasis).

7. A sail through the provision of Section 426 of the Criminal Procedure Code leaves no *legal* justification for suspending a legally recorded conviction merely its being *short.* The provision of Section 426(1A) does entitle one for release of bail if his case *squarely* falls within meaning thereof which is:-

> **426(1A).** An Appellate Court shall, except where it is of the opinion that the delay in the decision of appeal has been occasioned by an act or omission of the appellant or any other

person acting on his behalf, order a convicted person to be released on bail who has been sentenced –

(a) to imprisonment….;

(b) to imprisonment for a period ***exceeding three years*** but not exceeding seven years and whose appeal has not been decided within a period of ***one year of his conviction***; or

(c) to imprisonment…;

8. Admittedly, appellant was convicted on 21.12.2015; instant appeal is fresh and *prima facie* period of ***one year*** has not passed hence ground of statutory delay *even* is not available to appellant. Further, term *'short'* is also not defined by the Criminal Procedure Code or by its provisions which deal with the question of *release* of an accused or *convict* even mere non-falling of an offence within prohibitory clause does not *necessarily* earn right of release. Since, offence with one is charge is always of a consideration and offence, *relating* to moral turpitude is itself a circumstances resisting release of accused on bail if bail is *purely* being claimed on any other ground not falling within meaning of *'further inquiry'* or *'conviction not likely to sustain or based on inadmissible evidence'***.** The appellant is admittedly convicted for an offence which *squarely* falls within meaning of a sexual assault upon complainant (lady doctor) while using dagger on her person. Plea of learned counsel that injuries received by victim are not mentioned in FIR, suffice to say that FIR is not a substantial piece of evidence although description of injuries is not mentioned but it is stated by the complainant that she has pain in the injuries. For the sake of brevity, relevant examination in chief is as under:-

> *"In the meantime the same person took the opportunity and entered in my room and bolted the door from inside and held me from my shoulder and dragged me into patient's examination room which is situated inside the office. I was so terrified due to such physical act of the accused on me. I attempted to cry but the accused with exerting all pressure pressed my mouth so that I could not cry. He was pressing my mouth so hard with his hands that I could hardly take breath. He took me in this position for about 5/10 minutes. I resisted and attempted to move towards the door but accused strongly grasped me by pressing my neck and shoulders. During my such resistance and on the counter act of the accused I received hurts on my different parts of body including neck, knee joint, shoulders etc. My voice was chocking due to*

> *the pressure of accused and I was praying for help of someone else. In the meantime accused took out a dagger from the pocket of his shirt and brandished on her and threatened if I told to anyone he would kill me. Such act made me even more terrified and I was trembling with fear. He also touched the said dagger on my arms and legs which caused me injuries and I was bleeding. The accused was also moving his hands on my private parts forcibly and attempted to commit sexual assault with me. I was so helpless in the clutches of the accused and I prayed and called Almighty Allah and I received Allah's help and door of my room was opened with the bang sound."*

Thus, appellant has failed in *prima facie* establishing with tentative assessment of *judgment* that conviction is based on no evidence; on inadmissible evidence or is not ultimately sustainable hence I am of the clear view that appellant has failed in making out a case for his release pending determination of *legality* or *otherwise* of awarded conviction. Accordingly, instant application was dismissed by short order dated 07.03.2016. These are the detailed reasons. Needless to mention that observation hereinabove is of tentative in nature and will not prejudice the case of appellant on merits.

J U D G E

Sajid