

SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Appellate Jurisdiction)

PRESENT:

Kh. Muhammad Nasim, ACJ.
Raza Ali Khan, J.

Civil Misc. No.16 of 2022
(Filed on 11.08.2022)

Malik Zaffar S/o Ghulam Sarwar R/o Kotla, Phagwan,
Tehsil & District Kotli, presently in judicial lock-up District
Jail Kotli.

... APPLICANT

VERSUS

1. Rashid Hussain Shah, S/o Shah Pir Shah, Caste Syed
R/o Phagwari Tehsil & District Kotli.
2. State through Advocate General Azad Government of
the state of Jammu & Kashmir, having his office at
Supreme Court Building, Muzaffarabad.
3. Mehfooz Fatima, widow,
4. Arshad Hussain,
5. Asjad Shah S/o Shah Pir Shah,
6. Mst. Ishrat Naz W/o Aftab Hsusain Shah,
7. Uzma Batool W/o Rashad Hussain Shah R/o Village
Phagawri, Tehsil Kotli.
8. Mst. Kosar Parveen W/o Tanveer Hussain Shah R/o
Village Hill Kalan Tehsil Kotli,
9. Musarrat Bibi W/o Ibrar Hussain Shah R/o Village
Dabsi Tehsil Nakial District Kotli.

.... RESPONDENTS

10. Imran Mansha,
11. Muhammad Yousaf,

12. Muhammad Taj S/o Sher Dil,
13. Muhammad Aziz S/o Shan,
14. Qamar Bashir S/o Muhammad Bashir,
15. Sajid Mehmood S/o Mehmood Ahmed Caste Malik
R/o Kotli Tehsil & District Kotli.
16. Hafiz Aurangzeb S/o Muhammad Khan, Caste Malik
R/o Kekani,
17. Imtiaz S/o Muhammad Iqbal Caste Malik,
18. Muhammad Itefaq s/o Muhammad Khan r/o Kekani,
19. Muhammad Yaqub s/o Muhammad Khan, caste Malik
r/o Phagwari,
20. Rizwan s/o Muhammad Yousaf, caste Malik r/o Kotla
Phagwari, Tehsil and District Kotli.

... PROFORMA RESPONDENTS

[Application for suspension of sentence under
section 426, Cr.P.C.]

FOR THE APPLICANT:	Ch. Mehboob Ellahi, Raja Inamullah Khan, Ch., Shoukat Aziz and Khawaja Attaullah Chak, Advocates.
FOR THE RESPONDENTS:	Raja Sajjad Ahmed Khan, Babar Ali Khan and Syed Zulqarnain Raza Naqvi, Advocates.
FOR THE STATE:	Kh. Muhammad Maqbool War, Advocate General.

Date of hearing: 05.09.2022

ORDER:

Kh. Muhammad Nasim, ACJ.— The captioned application has been filed under section 426, Cr.P.C. for suspension of sentence awarded to the convict-applicant by the learned Shariat Appellate Bench of the High Court (High Court), vide impugned judgment dated 03.08.2022 and placed before the Court during pendency of main appeals in the registry office.

2. The facts of the case briefly stated are that a case in the offences under sections 324, 147, 148, 149 and 337, APC was registered against the applicants and others on 23.09.2003, at Police Station, Kotli. The applicant, herein, was challaned along with the other accused on the charge of murder of Amir Asif Shah, the brother of complainant (Rashid Hussain Shah) in the offences under section 302, 324, 147, 148 and 149, APC on 22.11.2003. At the conclusion of trial, vide judgment dated 19.05.2008 one of the Members of the District Court of Criminal Jurisdiction i.e., the learned Sessions Judge acquitted the accused of all the charges by extending the benefit of doubt, however, the other Member i.e., District Qazi, Kotli awarded death

sentence as Tazir to the applicant, herein, under section 302(b), APC coupled with five years' imprisonment under section 13/20/65 of Arms Act, 1965. The accused, Imran, was also convicted and sentenced to five years' imprisonment under section 13 of Arms Act, 1965. On difference of opinion, reference was sent to the High Court (Shariat Court at that time), whereas, two separate appeals were also filed by the convicts and the complainant, one for acquittal and other for conviction. The learned High Court, after necessary proceedings, through the impugned consolidated judgment, disposed of the reference and appeals in the following manner:-

“The crux and epitome of the above discussion is, the impugned judgment to the extent of accused Zafar Iqbal recorded by Sessions Judge is differed and set at naught whereas judgment recorded by District Qazi is modified in the manner that accused Zaffar Iqbal is hereby convicted under section 302(c), APC by awarding 14 years rigorous imprisonment and also sentenced to 3 years simple imprisonment under section 13/20/65 Arms Act. Convict Zaffar Iqbal shall also pay Rs.10,00,000/- as compensation to the legal heirs of deceased under section 544-A, Cr.P.C., in case of failure same shall be recovered in accordance with the provisions of Land Revenue Act. Benefit of section 382, Cr.P.C shall be extended in favour of convict. Accused Imran s/o Mansha is hereby acquitted of the charges by extending benefit of

doubt. The impugned verdict to the extent of rest of the accused persons is hereby sustained. The reference sent by the District Qazi is denied to affirm. The police is directed to take Zaffar Iqbal convict into their custody and send him to judicial Lockup Kotli to serve his sentence in accordance with law.”

Against the aforesaid judgment of the High Court, the appeals filed by convict-applicant and the legal heirs of the deceased are awaiting completion in the registry office.

3. Ch. Mehboob Ellahi, the learned Advocate, appearing on behalf of the applicant contended that the alleged offence was not proved beyond the shadow of doubt, hence, the learned Sessions Judge, Kotli has rightly acquitted the applicant of all the charges but the learned District Qazi has illegally convicted him. The legality and correctness of the judgment recorded by the learned District Qazi was challenged through appeal before the High Court. The learned High Court vide impugned judgment dated 03.08.2022 illegally sentenced the applicant to 14 years’ rigorous imprisonment under section 302(c), APC and 3 years’ simple imprisonment under section 13 of Arms Act, 1965. For making out a case for suspension of sentence, he referred to different statements of eye witnesses and submitted that much improvements have been made in the prosecution story. All the witnesses tried to fill up the lacunas,

which is not permissible under law. He strongly contended that the convict-applicant is stated to be present at point No.9, whereas, the victim/deceased is shown at point No.1 in the site sketch. It is evident from the record that point No.1 was invisible from point No.9. It is unbelievable that a person who was out of sight was shot dead by the convict-applicant creating thereby serious dent in the prosecution story. Furthermore, the prosecution witnesses were also unable to see the convict-applicant on the point at which he was standing, hence, their statements could have not been relied upon for conviction. He further contended that as per the report of the Forensic Science Laboratory, the bullet of 30 bore pistol was recovered from the skull of the deceased, whereas , according to prosecution story the convict-applicant was armed with a Kalashnikov. It shows that the medical report is in conflict with ocular account, hence, the case is full of doubts. The alleged recoveries are also doubtful. The motive set up by the prosecution i.e., previous enmity is also not proved through cogent evidence. He added that the applicant, being a political figure, was mala fide implicated in the charge, whereas, he is not involved in the commission of offence of murder. The fire alleged to him is not proved and also not corroborated by the medical report and Arm Experts. In these circumstances the impugned judgment is not

sustainable in the eye of law, hence, the impugned sentence is liable to be suspended while releasing the applicant on bail. He also stated that the applicant is a notable and respectable citizen, who remained present during the trial and in appeal before the High Court. He never misused the concession of bail. Furthermore, according to the certification issued by the Superintendent District Jail, Kotli the period of imprisonment served out by the applicant including the remissions comes to 5 years, 5 month and 3 days, whereas, the remaining period of imprisonment comes to 8 years, 6 months and 27 days. As the applicant has already served out the major portion of sentence, hence, this fact also makes the case one of the bail. In support of his contentions, he referred to and relied upon the cases reported as *Zia Akbar vs. State & others* [PLJ 2012 SC(AJ&K) 32], *Muhammad Arshad vs. The State & another* [2022 SCMR 1555], *Muhammad Juman vs. The State & others* [2018 SCMR 318], *Naseeb Khan vs. Hakim Ali & others* [2006 SCMR 1532] and *Makhdoom Javed Hashmi vs. The State* [2007 SCMR 246].

4. Raja Sajjad Ahmed Khan, Advocate, the learned counsel for the complainant-respondents argued with vehemence that the arguments advanced by the learned counsel for the applicant are irrelevant being pertaining to the merits of

the case. According to the settled law, at this stage, the Court is supposed to have a bird eye view of the record and deep evaluation of the evidence is prohibited. He added that the applicant has filed the application for suspension of sentence under section 426, Cr.P.C., the pre-requisite for which is the delay in decision of appeal. While reading out the provisions of section 426, Cr.P.C. he submitted that in the referred provisions the legislature has divided the sentences into three categories i.e., (i) where the sentence awarded is less than three years; (ii) where the sentence awarded is more than three years but less than seven years; and (iii) where the sentence awarded is either life imprisonment or imprisonment for more than seven years. Having graded the sentences thereafter the legislature in its wisdom fixed the periods of six months, one year and two years, respectively. If the appeal of the convict is not decided within the referred period, he becomes entitled for suspension of sentence under section 426, Cr.P.C. In the instant case, the applicant has been awarded 14 years' rigorous imprisonment under section 302(c), APC and three years' simple imprisonment under section 13 of Arms Act, 1965, hence, his sentence can only be suspended if his appeal is not likely to be decided within two years, whereas, no such eventuality exists and prayed for dismissal of the application. In support of his

contentions, he referred to and relied upon the cases reported as *Abdul Khaliq vs. Jehangir & others* [PLJ 1999 SC(AJ&K) 219], *Ahmad Din & others vs. Muhammad Tazeem & another* [2002 SCR 195] and *Ch. Muhammad Riasat & others vs. Muhammad Asghar & others* [2010 SCR 1] and *Allah Warrayo alias Jabbal vs. The State* [2010 YLR 1178]

5. Kh. Muhammad Maqbool War, the learned Advocate General, seconded the arguments advanced by the learned counsel for the complainant-respondents and added that at this stage the deep appreciation of the evidence is not permissible as per the dictum laid down by this Court in a number of cases.

6. In rebuttal, Raja Inamullah Khan, the learned Advocate, one of the counsel representing the applicant, submitted that the applicant has not come for aid of this Court on the ground of delay occasioned in decision of appeal rather his case is that the impugned judgment of the High Court is suffering from material infirmities and illegalities. While disputing the quantum of sentence awarded by the High Court, he submitted that the applicant could have been punished with death as Qisas under section 302(a), with death or imprisonment for life as ta'zir under section 302(b) or with imprisonment of

either description for a term which may extend to twenty-five years under section 302(c), however, through the impugned judgment the learned High Court has awarded the sentence to the applicant which is totally alien to the relevant provisions of law. He further added that the impugned judgment of the High Court is not sustainable for the reason that on one hand it has been declared that the investigation was faulty and at the same time on the basis of said investigation the applicant has been convicted. He also submitted that the findings of the High Court in relation to visibility of point No.1 from point No.9 are also not sustainable. He further argued that it is a cardinal principle of law that benefit of doubt always goes to the accused but amazingly in the instant case the benefit of doubt has been given to the prosecution. He referred to and relied upon the cases reported as *Muhammad Juman vs. The State & others* [2018 SCMR 318] and *Soba Khan vs. The State & another* [2016 SCMR 1325].

6. We have heard the arguments of the learned counsel for the parties and gone through the record made available along with the impugned judgment. According to the stated facts, the applicant was implicated in the case of murder of Amir Asif Shah. After conclusion of trial, he was acquitted by one of the

members of trial Court and sentenced to death by the other member, however, the learned High Court vide impugned judgment awarded him the rigorous imprisonment of 14 years under section 302(c), APC and three years' simple imprisonment under section 13 of Arms Act, 1965. Against the impugned judgment of the High Court, both the convict-applicant and legal heirs of the deceased, have filed separate appeals, which are awaiting completion in the registry offices, one at Mirpur and other at Muzaffarabad. In the light of the arguments of the learned counsel for the parties, along with available record, we deem it appropriate to decide the appeals on merits immediately after summer vacations instead of deciding this application. In this state of affairs, the office is directed to complete the main appeals within a period of three weeks. The connected file from registry office, Mirpur shall be summoned accordingly. The appeals shall be placed before the Court for final arguments on 4th of October, 2022.

ACTING CHIEF JUSTICE

JUDGE

Muzaffarabad.

07.09.2022

Mallik Zaffar VS Rashid Hussain Shah

ORDER:

The order has been signed. The concerned shall be intimated, accordingly.

ACTING CHIEF JUSTICE

JUDGE

Muzaffarabad.
07.09.2022