

JUDGMENT SHEET
PESHAWAR HIGH COURT,
PESHAWAR.

(Judicial Department)

Cr. Misc No. 323-P/2017 in Cr. A No. 341-P/2014.

Date of hearing:..... **10.4.2018.**

Date of announcement: **03.5.2018.**

Applicants (Niaz Been & others) by: Mr. Hizar Hayat
Daudzai, Advocate.

Respondent-the State by: Mr. Muhammad
Riaz Khan, AAG.

SYED AFSAR SHAH, J.- Niaz Been and three others, the

petitioners, have filed the instant petition seeking suspension of their sentences and grant of bail during pendency of the appeal, pending adjudication in the Hon'able Supreme Court, after the grant of leave to appeal by invoking the provisions of sub-section 2-B of Section 426 of the Code of Criminal Procedure.

2. Briefly stated facts of the instant petition as spelt out from the record are that the petitioners were accused in case FIR No. 301 dated 27.10.2013, registered against them in Police Station, Mattani Peshawar, under sections 324/353/34 PPC/5 Explosive Substances Act/7 ATA. They were tried by the learned Judge, Anti Terrorism Court-I, Peshawar, who, vide judgment recorded on 21.5.2014, convicted and sentenced them as under:-

(i) Accused Niazbeen is convicted and sentenced u/ss 324/34 PPC r/w 7 ATA and to suffer ten years RI with a fine of Rs.20, 000/- or in default to suffer further one month SI. He is also convicted and sentenced u/ss 353/34 PPC r/w 7 ATA for one year RI with a fine of Rs. 20,000/-and in default to

suffer further one month SI. He is also convicted and sentenced u/ss 5 Exp: Act r/w 7 ATA and to suffer fourteen (14) years RI, with a fine of Rs. 20,000/- or in default to suffer further one month SI. He is also convicted and sentenced u/s 13 A.O r/w 7 ATA and to suffer seven years RI, with a fine of Rs. 20,000/- or in default to suffer further one month SI. All the aforesaid sentences shall run concurrently. The benefit of section 382-B Cr.P.C is extended to the accused.

(ii) Accused Shiraz Khan is convicted and sentenced u/ss 324/34 PPC r/w 7 ATA and to suffer ten years RI with a fine of Rs. 20,000/- or in default to suffer further one month SI. He is also convicted and sentenced u/ss 353/34 PPC r/w 7 ATA and to suffer one year RI, with a fine of Rs. 20,000/- or in default to suffer further one month SI. He is also convicted and sentenced u/ss 5 Exp: Act r/w 7 ATA to suffer fourteen years RI with a fine of Rs. 20,000/- or in default to suffer further one month SI. He is also convicted and sentenced u/s 13 A.O r/w 7 ATA and to suffer three years RI with a fine of Rs. 20,000/- or in default to suffer further one month SI. All the aforesaid sentences shall run concurrently. The benefit of section 382-B Cr.P.C is extended to the accused.

(iii) Accused Asif is convicted and sentenced u/ss 324/34 PPC r/w 7 ATA and to suffer ten years RI with a fine of Rs. 20,000/- or in default to suffer further one month SI. He is also convicted and sentenced u/ss 353/34 PPC r/w 7 ATA and to suffer one year RI with a fine of Rs. 20,000/- or in default to suffer further one month SI. He is also convicted and sentenced u/ss 5 Exp: Act r/w 7 ATA and to suffer fourteen years RI with a fine of Rs. 20,000/- and in default to suffer further one month SI. He is also convicted and sentenced u/s 13 A.O r/w 7 ATA and to suffer three years RI with a fine of Rs. 20,000/- or in default to suffer further one month SI. All the aforesaid sentences shall run concurrently. The benefit of section 382-B Cr.P.C is extended to the accused.

(iv) Accused Haji Habib is convicted and sentenced u/ss 324/34 PPC r/w 7 ATA and to suffer ten years RI, with a fine of Rs. 20,000/- or in default to suffer further one month SI. He is also convicted and sentenced u/ss 353/34 PPC r/w 7 ATA and to suffer one year RI, with a fine of Rs. 20,000/- or in default to suffer further one month SI. He is also convicted and sentenced u/ss 5 Exp: Act r/w 7 ATA and to suffer fourteen years RI with a fine of Rs. 20,000/- or in default to suffer further one month SI. He is also convicted and sentenced u/s 13 A.O r/w 7 ATA and to suffer three years RI, with a fine of Rs. 20,000/- or in default to suffer further one month SI. All the aforesaid sentences shall run concurrently. The benefit of section 382-B Cr.P.C is extended to the accused.

3. They questioned the legality and validity of their conviction and sentences by filing a Criminal Appeal No. 341-P/14 in this Court, which was dismissed, vide judgment handed down on 03.2.2015 maintaining the conviction and sentences recorded by the learned trial Court.

4. Feeling aggrieved from the conviction and sentences rendered by the two courts, the petitioners filed a petition for leave to appeal in the Hon'able Supreme Court, which was granted on 18.10.2016. The relevant portion of leave granting order of the Hon'able Supreme Court is reproduced as under:-

Learned counsel for the convict-petitioners (in both petitions) while relying on the judgment of this court in Irfan and another v. Muhammad Yousaf (2016 SCMR 1190) has contended that the petitioners have been charged under section 324/34 PPC read with section 7 of the Anti Terrorism Act, 1997, under section 353/34 PPC read with section 7 of the Anti Terrorism Act, 1997, under section 5 of the Explosive Substances Act read with section 7 of the Anti Terrorism Act, 1997 and section 13 of

*the Arms Ordinance read with section 7 of the Anti Terrorism Act, 1997 to face trial and were subsequently convicted/sentenced under the aforementioned provisions of law; that this court in the afore-referred judgment has categorically held that it is mandatory for the learned trial court that after finding the accused guilty of one or more offences, upon recording conviction, separate sentence must be clearly awarded and that where a specific sentence for a distinct offence was not awarded, it could not be construed that same was impliedly awarded as the very judgment to that extent becomes illegal and violative of the mandatory provisions of section 367(2) & (3) of the Code of Criminal Procedure. The learned counsel went on to argue that in the light of the observations of this court in **Irfan and another** (supra), the learned trial court, in the instant case, has fallen in error in not recording the conviction/sentence against the petitioners separately for each distinct offence, which is not permissible under the law.*

3. *Contentions raised need consideration. Leave to appeal is therefore, granted in both the petitions to examine the aforesaid questions and also to reappraise the entire prosecution evidence for safe administration of criminal justice.*

5. Now, the petitioners have filed the instant Cri; Misc application under section 426(2-B) of the Code of Criminal Procedure for suspension of their sentences and grant of bail in the case till the final decision of the appeal pending before the apex Court.

6. Learned counsel representing the petitioners contended that since leave to appeal has been granted to the petitioners by Hon'able Supreme Court, therefore, they are entitled to be released on bail in view of the jurisdiction vested in this court under section 426(2-B) Cr.P.C.

As against that, learned AAG, appearing on behalf the State, argued that in cases tried by Anti Terrorism Court, the said power is not available to this Court in view of the bar contained in Section 25(8) of the Anti Terrorism Act, 1997. He went on to say that since the petitioners/ convicts during pendency of appeal in this Court were not on bail then how the said jurisdiction can be exercised after the decision of appeal by invoking provisions of Section 426 (2-B) Cr.P.C, the moreso, when the sentences awarded to the applicants are not short.

7. The moot question which falls for determination before the Court is the applicability of the provisions of Section 426 Cr.P.C to the cases tried by the Anti Terrorism Court as there is a specific bar in Section 25(8) of the Anti Terrorism Act, 1997. To appreciate the proposition, a careful appraisal of section 25 of the Act, *ibid*, is necessary, which runs as under:-

25 Appeal.- (1) An appeal against the final judgment of an Anti Terrorism Court shall lie to a High Court.

(2).....

(3).....

(4).....

(4-A).....

(4-B)

(5) An appeal under this section shall be heard and decided by a High Court within **seven working days.**

(6&7) omitted.

(8) Pending the appeal in the High Court shall not release the accused on bail.

A bare perusal of the provisions of Sub-Section 8 of Section 25 of the Act, *ibid*, would show that because of specific bar, sentences awarded by a Special Court cannot be suspended by the High Court during the pendency of appeal, but it should not be read in isolation as in sub-section 5 of Section 25, there are clear cut directions

with respect to the decision of appeal by the Court within seven working days and here the question would be that if the appeal is not decided within the stipulated period, and, as such, remained pending for many years due to heavy work load of the Court then what remedy is available to the convict that too, when his case is otherwise that of *coram non judice* or short sentence or when he is suffering from ailment, which could not be treated in the jail. There is no two opinion about the fact that shocking delay in prosecution of a criminal cases amounts to abuses of process of court and in a situation like the one, the court earns the right for the grant of bail notwithstanding the bar contained in Section 25(8) of the Act in respect of release of a convict on bail during pendency of his appeal.

Simple is that the High Court is not deprived of the jurisdiction to grant bail to the convict while exercising extra ordinary jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan. Needless to say that the barring clause being legislation is subordinate to the Constitution. We, in the circumstances, are clear in mind that this court can suspend the sentence and release a convict on bail despite the barring clause if his case is that of *coram non judice* or the sentence is short and there is no possibility of hearing of appeal in near future or where the convict during the pendency of appeal developed an ailment of such a nature which could not be treated in jail.

8. Adverting to the merit of the instant petition, it will be more appropriate to reproduce section 426 (2-B) Cr.P.C , which reads as under:-

426. Suspension of sentence pending appeal: Release of appellant on bail:

- (1).....
- (1-A).....
- (2).....
- (2-A).....

(2-B) where a High Court is satisfied that a convicted person has been granted special leave to appeal by the Supreme Court against any sentence which it has imposed or maintained, it may if it so thinks fit order that pending the appeal the sentence or order appealed against be suspended, and also, if said person is in confinement, that he be released on bail.

It appears from the above provisions of law that for the suspension of the sentence granting leave to appeal is one of the conditions, but the sentence could only be suspended if the High Court thinks it fit, meaning thereby that discretion still rests with the High Court. In the present case, the first requirement to avail the remedy under section 426 (2-B) Cr.P.C is satisfied, but at the same time, the convict is required to show that during the pendency of appeal before the Hon'able Supreme Court, the appeal could not be disposed of within the stipulated period, the judgment sought to be suspended suffers from legal error and the convict was on bail during the appeal before the High Court. Definitely while dealing with an application under section 426(2-B) Cr.P.C, neither the merits of the case nor reappraisal of the evidence is permitted. In the present case, during the pendency of appeal before this court the convicts were not on bail.

9. In view of the above, we have no doubt in our mind that the petitioners/ applicants have not been able to show good grounds to give them relief by adhering to the provisions of 426 (2-B) Cr.P.C and such being the position the petition stands dismissed.

J U D G E

Announced.

J U D G E