

Judgment Sheet

PESHAWAR HIGH COURT, PESHAWAR

JUDICIAL DEPARTMENT

Cr.Misc:/B.A No. 926-P of 2022.

JUDGMENT

Date of hearing.....15.06.2022.....

Announced on:.....05.07.2022.....

Petitioner (Doctor Khan) By Mr. Asghar Ali Khan, Advocate .

Respondent (State) By Mr. Muhammad Nisar Khan, AAG.

**ISHTIAQ IBRAHIM J:-** Doctor Khan son

of Jamal Khan, the petitioner, has submitted the

instant Criminal Miscellaneous application under

section-426 (2B) Cr.PC for suspension of his

sentence and his release on bail till final disposal

of the main Criminal Appeal filed by him before

the Hon'ble Supreme Court, whereby he

impugned the judgment dated **29.06.2016**

rendered by this Court in **Criminal Appeal**

**No.269-P/2014**, in case **FIR No. 147/2013** dated

**24.03.2013** under **Section-9 (c) CNSA**,


registered at Police Station City, Hangu.

2. The brief facts of the prosecution case are that on 24.03.2013 Azmat Ali SHO posted at Police Station City Hangu, alongwith police party had laid nakabandi at the place of occurrence and received spy information that huge quantity of contraband would be smuggled by Javed Khan in truck bearing registration No.GLT-7214; that at about 16:30 hours, the said truck reached the Nakabandi, which was stopped for the purpose of checking; that the driver of the truck was deboarded, who on query disclosed his name as Doctor Khan son of Jamal Khan while the other person sitting on front seat disclosed his name as Javed Iqbal son of Abdul Ghani; that during search of the truck 104 packets of charas was recovered; that on weighment the total weight of contraband charas came to 113 KG; that sample of ten grams from each packet of charas garda was separated for chemical analysis, sealed into separate parcels

while the remaining quantity of contraband charas were sealed into separate parcels. The complainant arrested the accused, took into possession the contraband alongwith vehicle in question through recovery memo, drafted murasila and sent the same to police station for registration of case FIR against the accused.

3. On completion of investigation, challan against the accused was submitted before the learned trial Court. On conclusion of trial, the learned trial Court vide **judgment dated 02.04.2014** convicted the petitioner and his co-accused Javed Iqbal u/s-9(c) CNSA and both were **sentenced to imprisonment for life with a fine of Rs.5,00,000/- each** or in default whereof, they shall further undergo three years S.I. **Petitioner Doctor Khan filed Criminal Appeal No.269-P/2014** while the co-accused Javed Iqbal filed **Criminal Appeal No.232-P/2014** before this

Court challenging the legality of the judgment passed by the learned trial Court. After hearing arguments of learned counsel for the parties, **this Court vide judgment dated 29.09.2016** dismissed the appeal filed by the petitioner Doctor Khan; while the appeal filed by the co-accused Javed Iqbal was allowed and he was acquitted of the charges leveled against him.



4. The petitioner Doctor Khan impugned the judgment **dated 29.06.2016** passed by this Court before the Hon'ble Supreme Court of Pakistan by filing **Jail Petition No.604/2016 and vide order dated 21.10.2021** leave to appeal was granted.

5. Arguments heard. Record perused.

6. This Court derives its power to grant bail pending appeal before the Hon'ble Supreme Court against the judgment of this Court in a criminal case from **section 426 (2B) of the Criminal Procedure Code**, which reads as follows:

*“426. Suspension of sentence pending appeals--  
Release of appellant on bail: (1) .....*

*(2-B) Where a High Court is satisfied that a convicted person has been granted special leave to appeal to 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 the said person is in confinement, that he be released on bail.”*

7. The section indeed has a chequered history.

It got enacted vide **Act No. IV of 1946**. Before that, the High Courts had varying interpretations of the bail power pending special leave to appeal.

The Privy Council in *Jairam Das V.s King-Emperor*, *A.I.R 1945 PC 94* set at rest the

conflicting viewpoints and concluded that the

High Court lacked jurisdiction to entertain bail, in

case where appeal against the judgment of High


Court is pending before the Hon'ble Supreme

Court. However, in the concluding para, it

suggested conferring such power on the High

Court.

8. Significantly, while the Privy Council ruled that the High Court lacked jurisdiction to grant bail, it did not suspend the sentence in any of the cases. Instead, it referred to Section 401 Cr. PC about the provincial government powers to be exercised in appropriate case for the ends of justice.



9. After independence of India and Pakistan, being alive to the situation, the **Indian Law Commission recommended in forty-first report published in 1969**, that the *ibid* section needs omission from the statute. The relevant passage from the law commission report is as follows:

*“Sub-section (2-B) was inserted in 1945, when special leave could be granted only by the Privy Council which was far away. The Adaptation Order of 1950 substituted “Supreme Court” for “Privy Council” without considering whether there is any practical need for the provision. The Supreme Court is not far away, and when the party has taken the trouble and incurred the necessary expense in obtaining special leave from the Supreme Court, he could easily request that Court, while granting special leave to be given*

appropriate interim relief. We recommend the omission of the sub-section (2B).

We have also considered the suggestions to amend sub-section (2B) enabling the High Court to grant interim relief to a person during the interval between the date of the dismissal of his appeal by the High Court and the date of grant of special leave by the Supreme Court. In our view any such widening of the scope of the sub-section is neither necessary nor desirable. With the quick means of transport available nowadays, it should not be difficult for a party to approach the Supreme Court and obtain appropriate interim relief without delay.”

*(Emphasis provided)*

Given the above suggestion, the law was amended, and now the relevant section of the Indian Criminal Procedure Code reads as follows:

*“389. (1) 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.*

*(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.*

*(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,*

*(i) Where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or*

*(ii) Where the offence of which such person has been convicted is a bailable one, and he is on bail.*

*Order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.*

*(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."*

10. It is clear that the reasons cited in the *ibid* judgment do not apply in the post-independence period. Similarly, Hon'ble Supreme Court of Pakistan has taken care of the matter in question while framing its Rules as mandated by Article-191 of the Constitution of Islamic Republic of Pakistan, 1973.



**Chapter-XXII Rule-11 of the Supreme Court of Pakistan Rules, 1980**, which reads as under;

*“11. Pending the disposal of any appeal under this Order the Court may order that the execution of the sentence or order appealed against be stayed on such terms as the Court may think fit.”*

In several cases, Honorable the Supreme Court of Pakistan suspended the sentence: see for instance, **Anwarul Haq v National Accountability Bureau, (PLD 2009 SC 388)**, and **Sattu Khan v the State, (1988 SCMR 24)**.

11. But as is clear from the verdict, the preposition was not resolved. Doubtlessly, the High Court becomes *functus officio* after ruling on a *lis*. Until and unless it can be shown why a petition for the suspension of the sentence could not be lodged in the first instance before the Honorable Supreme Court, the High Court's seisin does not revive.

12. From the above discussion, when the Hon'ble Apex Supreme Court has already taken

cognizance of the matter and while this Court has already dismissed the appeal and has maintained his conviction recorded by the learned trial Court and when there is no legal impediment in the way of the petitioner to approach the Hon'ble Apex Court, we deem it not proper to suspend the sentence awarded to the petitioner and confirmed by this Court. Hence, the instant Criminal Miscellaneous Petition / Bail application under section-426 (2B) Cr. PC filed by the petitioner for suspension of his sentence is dismissed.

**Announced on:**  
**Dated. 05.07.2022.**

  
JUDGE

(D.B of)  
Hon'ble Mr. Justice Lal Jan Khattak,  
Hon'ble Mr. Justice Ishtiaq Ibrahim.  
(K.Ali PS)

  
JUDGE