
WHAT IS THE RECOURSE OF A CONVICT FOR HIS RELEASE
ON BAIL IF HIS APPEAL IS PENDING BEFORE THE APEX
COURT?



RESEARCH CENTER, HIGH COURT OF BALUCHISTAN



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COURT: HON'BLE MR. JUSTICE ZAHIR-UD-DIN KAKAR

SUBJECT: CRIMINAL LAW

DATE: 02TH MAY 2024

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QUERY: WHAT IS THE RECOURSE OF A CONVICT FOR HIS RELEASE ON BAIL IF HIS APPEAL IS PENDING BEFORE THE APEX COURT?

LEGAL FRAMEWORK

- The relevant legal provisions are section 426(2B) of the Cr.P.C., which allows the High Court to suspend a sentence and grant bail if special leave to appeal has been granted by the Supreme Court, and Article 185(3) of the Constitution of Pakistan, which outlines the appellate jurisdiction of the Supreme Court and the process for granting leave to appeal

JUDICIAL PRECEDENTS: -

2023 P Cr. L J 139 [Lahore (Multan Bench)] Before Sardar Muhammad Sarfraz Dogar and Tariq Saleem Sheikh, JJ AHMAD ALI and another---Petitioners Versus The STATE and another---Respondents

- This case demonstrates the application of Section 426(2-B) of the Criminal Procedure Code, where the High Court has the discretion to suspend a sentence pending appeal if special leave has been granted by the Supreme Court and if the High Court finds it appropriate to do so. An excerpt of the pertinent paragraph of the judgment is quoted for kind perusal as under:-

"In Para No. 6. "(2-B) Where a High Court is satisfied that 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 said person is in confinement, that he be released on bail."

Bare reading of the above-said provision of law manifests that two conditions have been laid down in the above mentioned section 426(2-B), Cr.P.C. i.e. where this Court is satisfied that a convicted person had been granted special leave to appeal by the Supreme Court of Pakistan and the other if this Court thinks fit that sentence or order appealed against be

suspended. Reliance is placed on "*Faraz Shaukat v. The State and another*" (PLD 2016 Lahore 408) and "*Talib Hussain v. The State*" (PLD 2014 Lahore 564), wherein it has been observed as under:-

"When against any sentence, imposed or maintained by a High Court, a convicted person was granted special leave to appeal by the Supreme Court then under section 426(2B), Cr.P.C. a High Court, pending the appeal before the Supreme Court, may suspend the sentence or order appealed against, and release the convict on bail."

2024 P Cr. L J 252 [Lahore (Multan Bench)] Before Sadiq Mahmud Khurram and Muhammad Amjad Rafiq, JJ MUHAMMAD IQBAL and others---Petitioners Versus The STATE and another---Respondents

- In this case, the High Court declined to invoke its jurisdiction under Section 426(2B) of the Cr.P.C. to suspend the sentences of the petitioners. The court reasoned that the provision is applicable only when the High Court itself grants a special leave to appeal to the Supreme Court, which involves a substantial question of law regarding the interpretation of the Constitution. Since the Supreme Court has its own powers to stay the execution of any sentence under the Supreme Court Rules, 1980, there is no need for the High Court to exercise its discretion under Section 426(2B) of the Cr.P.C. after the Supreme Court has granted leave to appeal. The judgment reads as under: -

*"In other words, the High Court has no statutory or inherent power to grant bail to, or suspend the execution of the sentence of, a person whose conviction and sentence it has maintained, except where that person has been granted special leave to appeal under Article 136 of the Constitution, and in no other case. Indeed, except for the purpose of granting a certificate under Article 132(1) or Article 134(1)(c) of the Constitution, or granting bail or suspending the sentence under section 426(2B) of the Code, the High Court becomes functus officio. Attention might be drawn to the fact that any other view would result, as pointed out in *Jairam Das case (A)*, in defeating the ends of justice in certain circumstances and in an alteration by the High Court of its judgment contrary to section 369 of the Code."*

*Above view was further fortified when while exhaustively dealing with the issue by High Court of Andhra Pradesh in a case reported as "*Madan Lal v. The State*" (AIR 1960 AP 622), it had ruled that applicability of subsection (2B) of section 426 Cr.P.C. is conditional to grant of fitness certificate by the High Court for appeal to Supreme Court.*

The confusion was finally eliminated when later in Indian Code of Criminal Procedure, 1973, in the corresponding section 389 parametria to section 426, Cr.P.C., provision like subsection (2B) was omitted.

23. The above discussion leaves no further confusion that subsection (2B) of section 426, Cr.P.C. is parametria to section 382A, Cr.P.C. which is further reflected from the enacted sequence of subsections (2), (2A) and (2B) in section 426, Cr.P.C.; all subsections are of same kind dealing with different situations in which accused seeks bail enabling him to present appeal against the impugned judgment of conviction. If it was a different provision for vesting a special jurisdiction on High Court, then it could have been numbered differently within the section 426, Cr.P.C. which is usually required in the format of an enactment pursuant to legislative drafting technique which is mentioned in "LEGISLATIVE DRAFTING MANUAL HANDBOOK FOR PARLIAMENTARY LEGISLATIVE DRAFTERS January 2019" issued by Pakistan Institute for Parliamentary Services, explanation is as follows;

(35) While amending an Act, certain provisions are to be substituted, added, inserted or omitted, but the words "inserted" and "added" are often confused while giving the command in an amending Bill. The golden rule is that if something is sandwiched in the same genre then it would be inserted and if genre is not same then added. For instance, if one more subsection is added after the last subsection then it would be added because after last subsection, new section starts hence the genre changes.

(emphasis supplied)

For subsection (2B) in section 426, Cr.P.C., the amending Act titled "The Code of Criminal Procedure (Second Amendment) Act, 1946 (Act No. IV of 1946)" used the word "inserted" and not "added". The guidance is also sought from a Book titled "Drafting Matters: Guidance" of Scottish Government, available at <https://www.gov.scot/drafting-matters>. Its Part-1 relating to drafting technique says as under;

"to adding a provision at the end of an existing series of provisions of the same kind (for example, a subsection at the end of a section or a schedule at the end of the schedules) the numbering should continue in sequence from the last existing number."

(emphasis supplied)

That is the reason, legislature for showing subsection (2B) as provision of same kind inserted it after subsection (2A) in section 426, Cr.P.C.

24. Through section 205 of Government of India Act, 1935, when the High Court certifies to file an appeal before the Federal Court which of course was a special leave to appeal to the Federal Court and when by virtue of section 209(3) of said Act, Federal Court was authorized to stay execution of any sentence on filing an appeal from the judgment of the High Court, therefore, there was no necessity to insert subsection (2B) in

section 426, Cr.P.C. because purpose was already being served. This provision was, therefore, introduced in year 1946 for those convicts whom special leave to appeal to His Majesty in Council was granted by the High Court and it is learnt that Court of His Majesty in council was 6000 miles away, therefore, it was expected that by the time appeal is filed, lest convict should not serve out his entire sentence. His Majesty in Council remained part of Federal Court Rules, because on granting leave to appeal by the Federal Court one can file appeal before His Majesty in Council against the Judgment of Federal Court. Under Order XIX, Rule-7 of Federal Court Rules, 1950, the Federal Court was authorized to stay the execution of sentence pending the appeal against the judgment of High Court. With the promulgation of Constitution of Pakistan, 1956, remedy before His Majesty in Council was eliminated but the appellate forum for High Court was designated as Supreme Court. Similarly, under Order XXIV, Rule 5-B of Supreme Court Rules, 1956 and Order XXIII, Rule 8, of Supreme Court Rules, 1980, the power to stay the execution of any sentence was available to the Supreme Court at the time when petition for leave to appeal is filed or leave is granted by the Supreme Court; therefore, there is no need to recourse to the High Court for suspension of sentence.

P L D 2014 Lahore 574 Before Muhammad Qasim Khan and Muhammad Tariq Abbasi, JJ TALIB HUSSAIN---Petitioner Versus The STATE and others---Respondents

- The High Court, in this case, analyzed the historical context and amendments to section 426(2B) of the Cr.P.C., tracing back to the Privy Council judgment in "Lala Jairam Das and others v. Emperor," which led to the legislative insertion of the provision allowing High Courts to suspend sentences and grant bail in cases where special leave to appeal has been granted. The court also distinguished between the grant of leave to appeal by the Supreme Court and the issuance of a certificate by a High Court that a case is fit for appeal to the Supreme Court, clarifying that the former is within the exclusive prerogative of the Supreme Court. Few passages are reproduced for easy reference hereunder:-

“From the above mentioned provisions and discussion, it is clear that special leave to appeal/leave to appeal and certificate issued by a High Court that a case is fit for appeal to the Supreme Court are two different proceedings. "Special Leave to appeal," which at present is termed as "leave to appeal" is always granted by the Supreme Court of Pakistan, whereas, the above mentioned certified is issued by a High Court.

19. There is no provision, in any law of Pakistan, which provides any authority to any High Court to issue leave to appeal, in any manner. The same is only the prerogative of the Supreme Court of Pakistan being vested to it by the Constitution and the Rules.

20. Resultantly, we are of the confirmed view that when against any sentence, imposed or maintained by a High Court, a convicted person is granted special leave to appeal by the Supreme Court of Pakistan, then under section 426(2B) of the Cr.P.C., a High Court, pending the appeal, before the Supreme Court, may suspend the sentence or order, appealed against and release the convict on bail. As a necessary corollary, the objection raised by the learned Deputy Prosecutor General is overruled.”

P L D 2018 Peshawar 131. Before Syed Afsar Shah and Muhammad Ayub Khan, JJ NIAZ BEEN and others---Petitioners Versus THE STATE---Respondent

- In the above referred case, the High Court considered the provisions of section 426(2-B) of the Criminal Procedure Code and section 25(8) of the Anti-Terrorism Act, 1997. The court noted that while leave to appeal is a condition for the suspension of the sentence, the High Court must also find it fit to suspend the sentence. Relevant para of the judgment is copied as under:-

In para NO. 8. *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'ble 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.*

Conclusion: -The provisions of section 426(2B) of the Cr.P.C. and the constitutional mandate under Article 185(3) provide the legal basis for such relief. Judicial interpretations, as seen in the precedents discussed, have clarified the scope and limitations of this relief. The High Court's discretion to suspend a sentence and grant bail is contingent upon the grant of special leave to appeal by the Supreme Court and the High Court's satisfaction that it is fit to do so.

Annexure(s)
Full Judgments

RCBHC