

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

Tuesday, the 14th day of January 2025 / 24th pousha, 1946

CRL.M.APPL.NO.1/2023 IN CRL.A NO.1042 OF 2023

SC 3/2021 OF THE ADDITIONAL SESSIONS COURT-I, THRISSUR

PRITIONER/APPELLANT:

ARUNKUMAR, AGED 34 YEARS,
S/O. VIJAYAN, KONNAYIL THEKKETHIL HOUSE,
SAKTHIKULANGARA DESOM, SAKTHIKULANGARA VILLAGE,
KOLLAM DISTRICT, PIN - 691581

RESPONDENT/RESPONDENT:

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM, PIN - 682031.

Application praying that in the circumstances stated therein the High Court be pleased to suspend the sentence and fine imposed in Sessions Case No.3 of 2021 on the file of the First Additional District and Sessions Court, Thrissur till the disposal of the appeal.

This Application coming on for orders upon perusing the application and upon hearing the arguments of M/S.P.MOHAMED SABAH, LIBIN STANLEY, SAIPOOJA, SADIK ISMAYIL, R.GAYATHRI, M.MAHIN HAMZA, ALWIN JOSEPH, Advocates for the applicant and of the PUBLIC PROSECUTOR for the respondent, the court passed the following:

P.T.O.

C.S.SUDHA, J.

**Crl.M.Appl. No.1 of 2023
in
Crl. Appeal No.1042 of 2023
&
Crl. Appeal No.1042 of 2023**

Dated this the 14th day of January 2025

ORDER

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This application under Section 389(1) Cr.P.C., has been filed seeking suspension of sentence of the applicant/first accused in S.C.No.3 of 2021 on the file of the Court of Session, Thrissur.

2. The learned counsel for the applicant/first accused submits that the latter has been undergoing imprisonment from 12/08/2020 onwards, which means that he has served nearly 4½ years of his sentence. He being a first offender, is entitled to the benefit of the first proviso to Section 479 of the Bharatiya Nagarik Suraksha Sanhita, 2023, (BNSS) and so the sentence is liable to be suspended.

3. The learned Public Prosecutor submitted that the Apex Court is seized of the matter and is monitoring the implementation of Section

479 BNSS relating to undertrial prisoners. The benefit has not been extended to convicted prisoners and hence the applicant/accused is not entitled to the benefit claimed for.

4. The applicant/first accused as per the impugned judgment dated 04/03/2023 has been found guilty of the offence punishable under Section 20(b)(ii)C of the NDPS Act and has been sentenced to undergo rigorous imprisonment for 10 years and to a fine of ₹1,00,000/- and in default to undergo rigorous imprisonment for three months. Section 479 BNSS the benefit of which is sought for reads thus:-

“479. Maximum period for which undertrial prisoner can be detained.

(1) Where a person has, during the period of investigation, inquiry or trial under this Sanhita of an offence under any law (not being an offence for which the punishment of death or life imprisonment has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court

on bail:

Provided that where such person is a first-time offender (who has never been convicted of any offence in the past) he shall be released on bond by the Court, if he has undergone detention for the period extending up to one-third of the maximum period of imprisonment specified for such offence under that law:

Provided further that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail bond instead of his bond:

Provided also that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation.-In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

(2) Notwithstanding anything in sub-section (1), and subject to the third proviso thereof, where an investigation, inquiry or trial in more than one offence or in multiple cases are pending against a person, he shall

not be released on bail by the Court.

(3) The Superintendent of jail, where the accused person is detained, on completion of one-half or one-third of the period mentioned in sub-section (1), as the case may be, shall forthwith make an application in writing to the Court to proceed under sub-section (1) for the release of such person on bail.”

5. It is the first proviso sub section (I) that has been pressed into service. The incident in the case on hand took place on 12/08/2020 at 04:00 p.m. The BNSS came into effect w.e.f. 01/07/2024 apparently much after the commission of the crime in this case. Here it would be apposite to refer to the order dated 23/08/2024 of the apex court in Re-Inhuman Conditions in 1382 prisons (W.P. (C)No.406/2013).

“1. This order is in continuation of the order passed on 13th August, 2024. On the last date of hearing, Mr. Gaurav Agrawal, learned Amicus Curiae had submitted that the Bharatiya Nagarik Suraksha Sanhita, 2023, which has replaced the Code of Criminal Procedure, 1973 w.e.f. 01st July, 2024, contains a provision under Section 479 relating to the 'Maximum period for which an undertrial prisoner can be

detained'. The attention of this Court was drawn to the first proviso to Section 479 to urge that a first-time offender (who has never been convicted for any offence in the past) is required to be released on bond by the Court, if he has undergone detention for the period extending up to one-third of the maximum period of imprisonment specified for such an offence under a particular law.

2. Having regard to the fact that the substituted provision under the BNSS is more beneficial vis-a-vis Section 436A of the Code of Criminal Procedure, 1973, wherein the period undergone by the first time offender was prescribed as up to half of the maximum period of imprisonment specified for such an offence, this Court had called upon the learned Additional Solicitor General to obtain instructions from the Department and submit a clarification regarding application of the said provision to all undertrials across the country.

3. Today, Ms. Aishwarya Bhati, learned Additional Solicitor General, submits that pursuant to the aforesaid order, instructions have been obtained from the Department to the effect that the aforesaid provision under the BNSS shall apply to all undertrials in pending cases irrespective of whether the case was registered against them before 01 July, 2024, the date when the newly minted legislation has come into effect.

4. In that view of the matter, it is deemed appropriate to direct immediate implementation of Section 479 of the BNSS by calling upon Superintendents of Jails across the country

wherever accused persons are detained as undertrials, to process their applications to the concerned Courts upon their completion of one-half/one-third, as the case may be, of the period mentioned in sub-section (1) of the said provision, for their release on bail. This step will go a long way in easing overcrowding in jails which is the primary focus of this Court in the present petition.”

Therefore, the benefit of the first proviso to sub section (1) has only been given to the under-trial prisoners with retrospective effect and not to the convicted prisoners. The learned counsel for the applicant/accused referred to the dictum in **Satender Kumar Antil v. Central Bureau of Investigation, 2022 (4) KHC 570 : AIR 2022 10 SCC 51** in which it has been held that appeal or revision shall also be construed as a facet of trial. It was also held that delay in taking up the appeal coupled with the benefit conferred under Section 436A Cr.P.C. among other factors shall be considered for a favorable release on bail. Section 479 BNSS which has substituted Section 436A Cr.P.C. is more beneficial and hence the benefit is to be granted to the applicant/accused, goes the argument.

Here the crucial question is not whether Section 479 BNSS is

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applicable to appeal and revisions, but the question is whether retrospective effect of the provision can be given to convicted prisoners also. The Apex Court as per the aforesaid order has extended the benefit of the first proviso to Section 479 BNSS with retrospective effect only to under-trial prisoners. When the Apex Court is presently seized of the matter and is monitoring implementation of Section 479 BNSS, propriety demands that this Court refrain from interpreting and passing orders regarding its applicability to convicted prisoners retrospectively. Hence, the relief claimed by the applicant/first accused cannot be granted.

In the result, Crl.M.A.No.1/2023 is dismissed.

Interlocutory applications, if any pending, shall stand closed.

SD/-

C.S.SUDHA
JUDGE

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