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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 10.09.2025
Judgment pronounced on: 25.09.2025

\+ W.P.(C) 8609/2024

AMITESH HARMUKH .....Petitioner

Through: Ms. Maitrayee Das Gupta, Mr. Abhishek Kukkar and Mr. Mohit Kumar, Advs.

versus

UNION OF INDIA & ORS. .....Respondents

Through: Mr. Ishkaran Singh Bhandari and Mr. Piyush Yadav, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
HON'BLE MR. JUSTICE OM PRAKASH SHUKLA

JUDGMENT

% 25.09.2025

OM PRAKASH SHUKLA, J.

INTRODUCTION

1. The present writ petition has been filed under Article 226 of the Constitution of India challenging the impugned order dated 22.03.2024 passed by the learned Armed Forces Tribunal[1], Principal Bench at New Delhi, whereby the learned AFT refused to suspend the sentence of rigorous imprisonment for ten years and release the petitioner on bail pending appeal before the learned AFT.

2. Briefly stating, the petitioner was commissioned in the Indian Air Force[2] on 19.12.2015 as a Fighter Controller and after

[1] "AFT" hereinafter
[2] "IAF" hereinafter

approximately six years of service, he came to be posted to the Air Force Administrative College at Coimbatore in August of 2021 to undertake the 2 Professional Knowledge Course ("2PKC").

3. It has been stated that on 09.09.2021, a party was held at the AFAC Officers' Mess, which was attended by the petitioner and Ms. X[3] along with their other course-mates. Earlier that evening, the prosecutrix had sustained an ankle injury while playing basketball and was prescribed "Combiflam" tablet and "Diclofenac gel" and a crepe bandage was applied on her ankle. It is the case of the prosecution that the prosecutrix consumed alcohol along with the medication, rendering her in an incomprehensible state, and causing her to vomit in the portico area of the Mess, after which she was escorted back to her room by Flight Lieutenant Tania Singh (PW1) and Flight Lieutenant Jaspreet Singh (PW2). Once inside, PW1 is stated to have assisted the prosecutrix in removing her lower garment, while the kurta she was wearing remained on since it could not be taken off. After the party concluded at the Mess, it is stated that there was an impromptu gathering in another room, which was attended by the petitioner, PW1 and PW2, but not by the prosecutrix.

4. Apparently, the prosecutrix having passed out, was unable to recollect the subsequent events of the night, including the alleged incident of sexual assault, owing to her state of intoxication. Hence, the case of the prosecution finds its footing in the accounts of PW1 and PW2. It is further alleged that on 10.09.2021, around 12:30 a.m., while the prosecutrix was in her room, the petitioner entered her room.

[3] "the prosecutrix" hereinafter

An hour later around 1:30 a.m., PW1, the roommate of the prosecutrix, came to the said room, finding it locked from the inside, she called out to the prosecutrix. The prosecutrix opened the door for her and returned to bed where the petitioner was lying. It is stated that PW1 found the petitioner lying next to the prosecutrix with his arm over her chest and the bedsheet thrown on the floor. Around 3:15 a.m., PW1 is said to have woken up the petitioner and asked him to leave the room since his course-mates were searching for him, following which, the petitioner left the room. On this basis, the alleged incident is said to have occurred between 12:30 a.m. and 3:15 a.m. on 10.09.2021, which is also reflected in the CCTV footage. After the petitioner had left the room, PW1 alleges that she detected four to five semen stains on the mattress and on the prosecutrix, and that around 3:30 a.m., she called PW2 to inform him about what she had seen.

5. The next morning, i.e., on 10.09.2021, the prosecutrix discovered that she was unclothed from the waist down. PW1 narrated the events of the previous night to her and after becoming aware of the said events, the prosecutrix told PW1 that the petitioner had tried to kiss her and she had asked him to leave because she was in pain and wanted to sleep. Subsequently, PW2, who had been earlier informed by PW1 regarding the alleged incident, went to their room and attempted to verify the sequence of the events. Upon inspection of the room, he claimed that he detected semen-like stains on the kurta of the prosecutrix and also observed two to three stains on the right side of the mattress.

6. Further, it is stated that on the same day i.e., 10.09.2021, around 8:58 p.m., the petitioner allegedly sent a text message to PW1, apologizing for the previous night and wanting to speak to her. In pursuance thereof, around 9:30-10:00 p.m., the petitioner went to her room to tender an apology and explain the events of the previous night but found PW2 present there as well. The petitioner is said to have made an alleged confession before PW1 and PW2 which was discreetly video-graphed by PW2. In the said alleged confession, the petitioner has purportedly admitted that while the prosecutrix was not in her senses, he had kissed her, inserted his fingers into her vagina, disrobed her, masturbated near her and thereafter slept beside her. This alleged video confession was shown to the prosecutrix. It is further alleged that the petitioner made other extra-judicial confessions to his course-mates (PW4, PW5, PW6, PW7 and PW9) admitting that he had sexual intercourse on the previous night.

7. The prosecutrix, upon learning of the alleged incident through the aforesaid video recording, submitted a written complaint to Wing Commander Ajita on 11.09.2021, leading to initiation of Court of Inquiry[4] proceedings. This, however, came to be withdrawn by the prosecutrix on the following day. Subsequently, on 20.09.2021, the prosecutrix lodged a formal complaint, resulting in the registration of Crime No. 09 of 2021 at the All Woman Police Station[5], Coimbatore, pursuant to which the petitioner was arrested on 25.09.2021. Thereafter, the civil police collected the bed sheet and mattress cover from the room where the alleged incident took place and the Report of

[4] "COI" hereinafter
[5] "AWPS" hereinafter

the Central Forensic Science Laboratory, Hyderabad indicated that semen was not detected on these articles. However, the video of the alleged confession was found to be genuine by Government Forensic Lab, Chennai *vide* report dated 18.03.2022. Subsequently, the COI resumed, and the petitioner was transferred to Bengaluru for pre-trial proceedings under Rule 24 of the Air Force Rules of 1969 and Summary of Evidence (SOE) culminating in a trial before the General Court-Martial[6].

8. The petitioner, however, disputes the prosecution case and the allegations based thereon, save to the extent of holding of the party at the Officers' Mess which was followed by an impromptu gathering that took place in another room. The petitioner alleges that he and the prosecutrix knew each other since their training days at the Air Force Academy in July 2015 and having reconnected at the 2PKC course, they had grown familiar. He points out that even on the date of the alleged incident, earlier in the evening, the prosecutrix and the petitioner were playing basketball together along with other course-mates. The petitioner admits going into the room which belonged to the prosecutrix on the relevant night, but contends that the incident was consensual in nature, which, he alleges, is supported by the reluctance and subsequent withdrawal of complaint by the prosecutrix. He further alleges that PW1 had entered into the said room to find the prosecutrix and the petitioner sleeping together on the same bed and according to the petitioner, PW1 did not raise any alarm and only woke him around 3:15 a.m. since his course-mates were trying to find

[6] "GCM" hereinafter

him. The petitioner further alleges that he concealed the consensual nature of the incident in order to safeguard the reputation of the prosecutrix. The petitioner also maintains that on 10.09.2021, the prosecutrix approached him and requested him to speak to PW1 to resolve the matter and conceal it from others. In pursuance thereof, the petitioner went to PW1 to resolve the issue privately, where PW2 was also present, and the alleged confessional video came to be recorded. The petitioner alleges that both PW1 and PW2 pestered him and under such duress, he had made false statement to protect the prosecutrix.

9. In the backdrop of these rival contentions, seven charges were framed against the petitioner on 09.12.2021 before the GCM under Section 71 for commission of civil offence punishable under Sections 376(1), 354, 354B & 451 of Indian Penal Code, 1860 and Sections 45 & 65 of the AF Act. The charges framed are as follows:

First Charge Section 71 Air Force Act, 1950	**COMMITTING A CIVIL OFFENSE, THAT IS TO SAY, USING CRIMINAL FORCE TO A WOMAN WITH INTENT OF DISROBING HER, PUNISHABLE UNDER SECTION 376(1) OF IPC, 1860** In that he, at Air Force Administrative College, Coimbatore, on the intervening night 09 and 10 Sep 2021, committed rape of the prosecutrix by inserting his fingers into her vagina.
Second Charge Section 71 Air Force Act, 1950	**COMMITTING A CIVIL OFFENSE, THAT IS TO SAY, USING CRIMINAL FORCE TO A WOMAN WITH INTENT OF DISROBING HER, PUNISHABLE UNDER SECTION 354 OF IPC, 1860** In that he, at Air Force Administrative College, Coimbatore, on the intervening night 09 and 10 Sep

	2021, kissed the prosecutrix several times and touched her pelvic area and breasts without her consent intending thereby to outrage her modesty.
Third Charge Section 46(a) Air Force Act, 1950	**DISGRACEFUL CONDUCT OF AN INDECENT KIND** In that he, at Air Force Administrative College, Coimbatore, on the intervening night 09 and 10 Sep 2021, masturbated in the proximity of the prosecutrix in room no. 303
Fourth Charge Section 65 Air Force Act, 1950	**AN ACT PREJUDICL TO GOOD ORDER AND AIR FORCE DISICIPLNE** In that he, at Air Force Administrative College, Coimbatore, on the intervening night 09 and 10 Sep 2021, lain himself down beside the prosecutrix on her bed without her consent in Room No. 303 of Building No. 119 of the Officers' Mess.
Fifth Charge Section 71 Air Force Act, 1950	**COMMITTING A CIVIL OFFENSE, THAT IS TO SAY, USING CRIMINAL FORCE TO A WOMAN WITH INTENT OF DISROBING HER, PUNISHABLE UNDER SECTION 354B OF IPC, 1860** In that he, at Air Force Administrative College, Coimbatore, on the intervening night 09 and 10 Sep 2021, in room no. 303 with the intention of disrobing the prosecutrix
Sixth Charge Section 65 Air Force Act, 1950	**COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, HOUSE-TRESSPASS IN ORDER TO COMMIT OFFENCE PUNISHABLE WITH IMPRIOSNMENT, PUNISHABLE UNDER SECTION 451 OF IPC, 1860** In that he, at Air Force Administrative College, Coimbatore, on the intervening night 09 and 10 Sep 2021, committed house-trespass by entering Room No. 303 of Building No. 119 of the Officers' Mess to use criminal force and outrage the modesty of the prosecutrix.
Seventh Charge Section 45 Air Force Act, 1950	**BEHAVING IN AMANNER UNBECOMING THE POSITION AND CHARACTER OF AN OFFICER**

	In that he, At Air Force Administrative College, Coimbatore, on the intervening night 09 and 10 Sep 2021, behaved in a unbecoming manner by committing the acts which have been stated above in the 1st, 2nd, 3rd, 4th, 5th, & 6th charges contained herein.

10. The petitioner pleaded not guilty to the abovementioned charges, thereby proceedings were initiated against him. Upon conclusion of the trial, the GCM found the petitioner guilty of all seven charges levied against him. *Vide* order dated 07.11.2022, the petitioner was cashiered and sentenced to ten years of rigorous imprisonment.

11. The GCM found the alleged video confession to be valid by holding that it was voluntary, made without any duress and was not hit by Section 24 of the Indian Evidence Act of 1872 since PW1 and PW2 were juniors to the petitioner and not 'person in authority'. Additionally, the confessions made to PW4, PW5, PW6, PW7 & PW9 were found to be valid. The GCM found the prosecutrix to be in an intoxicated state without medical proof by placing reliance on the CCTV footage wherein it was observed that she was not able to walk on her own and had to be escorted by PW1 and PW2.

12. The petitioner assailed the aforesaid Finding and Sentence Order of the GCM by way of statutory application under Section 161(1) of the AF Act on 23.12.2022 before the learned Air Officer Commanding-in-Chief[7], Training Command, Indian Air Force, Bengaluru. However, the application was rejected *vide* order dated 15.06.2023 by the learned CAS opining that the reasons attributed by

[7] "CAS" hereinafter

the GCM were cogent, thereby confirming the Finding and Sentence order. This came to be promulgated on 19.06.2023, pursuant to which, the petitioner was sent for incarceration at Tihar Central Jail, New Delhi, where he continues to remain in custody.

13. Aggrieved by the aforementioned orders of sentencing by the GCM dated 07.11.2022, the subsequent confirmation order dated 15.06.2023 as well as the promulgation order dated 19.06.2023, the petitioner approached the learned AFT by way of an appeal *vide* Original Application No. 3091/2023, which was preferred along with a Misc. Application No. 4257/2023 seeking suspension of sentence, during pendency of the appeal. The learned AFT, however, by way of the impugned order dated 22.03.2024, rejected the said application by placing reliance on the statements of PW1, PW2 and PW12 (Prosecutrix) on the ground that there was no reason to disbelieve the statements of the above witnesses.

14. It is against the said rejection by the learned AFT that the petitioner has preferred the present writ petition, seeking quashing and setting aside of the impugned order dated 22.03.2024 and suspension of sentence during the pendency of the appeal before the AFT.

SUBMISSIONS

15. Ms. Maitrayee Das Gupta, the learned Counsel for the petitioner, submits that there are certain palpable errors in the impugned order of the learned AFT. The first being that the sole basis of conviction of the petitioner is an extra-judicial confession, the

probative value of which has not been deliberated upon by the AFT. To substantiate the premise that extra-judicial confessions are weak pieces of evidence, reliance is placed on ***Sahadevan and Anr. v. State of Tamil Nadu***[8]***,*** wherein it was held that to constitute an extra-judicial confession as the sole basis of a conviction, it must inspire confidence and be corroborated by other independent evidence i.e., its veracity shall be proved in the same manner as any other fact in issue. The learned Counsel relied on the judgment of ***Kishore Chand v. State of Himachal Pradesh***[9] and ***State of Rajasthan v. Raja Ram***[10] for the said proposition. According to the learned Counsel, the petitioner has consistently maintained that the video confession was extracted under duress and was made solely to prevent a scandal and protect the reputation of the prosecutrix and because the prosecutrix requested him not to disclose the incident to anyone.

16. The second alleged error brought forth by the learned Counsel pertains to the finding that the prosecutrix was not in her senses. It was submitted that the learned AFT accepted her alleged intoxicated and unconscious state as sacrosanct without any corroboration, although there is no credible evidence to substantiate the level of intoxication of the prosecutrix at the relevant time. According to the learned Counsel, the act of intoxication and thereafter not being in her senses, was a voluntary act of the prosecutrix. It is urged by the learned Counsel that both the prosecutrix and the petitioner were well known to each other and used to visit each other's rooms voluntarily during the training period. According to her, the conduct of the

[8] **(2012) 6 SCC 403**
[9] **(1991) 1 SCC 286**
[10] **(2003) 8 SCC 180**

prosecutrix after the alleged incident belies the allegation of assault and rather points towards consensual intimacy. In this regard, it was submitted that the prosecutrix had messaged the petitioner several times on the very next day of the alleged incident i.e., on 10.09.2021. Further, she voluntarily visited the room of the petitioner on the same day all alone and engaged in a conversation for about 15 minutes without disclosing the same to anyone. Further, it has come on record that the prosecutrix was unwilling to lodge a complaint in the first place and had withdrawn the same within twelve hours of submitting the written complaint. The prosecutrix had also refused medical examination and sought a compromise with the petitioner through PW2 and PW9, indicating that she would withdraw the complaint provided the petitioner agreed to leave the course. In support of the 'unbecoming' conduct of the prosecutrix, the learned Counsel placed on record the decision in ***Smt. Rachna Singh v. State & Anr***[11]**.** The learned Counsel draws parallels with the said decision wherein the prosecutrix had refused the medical examination and her testimony was found to be unreliable considering the contradictions in her statement. It was emphasised by the learned Counsel that, in the present case, the alleged incident was highly improbable. According to the learned Counsel, as per the CCTV footage and witness testimonies, the alleged incident occurred between 12:30 a.m. and 3:15 a.m. However, it is on record and an admitted fact that PW1 had come to the room at around 1:30 a.m., where both the petitioner and the prosecutrix were present, wherein the prosecutrix herself had opened the door for PW1 and thereafter, returned to the same bed

[11] **AIR Online 2019 Del 757**

where the petitioner was lying and neither the prosecutrix nor PW1 raised any alarm at that time.

17. The third ground sought to be urged by the learned Counsel pertained to the alleged contradictions in the statements of the prosecutrix, as well as that of PW1 & PW2. The learned Counsel relied on the judgment of ***Suraj Mal v. State (Delhi Administration)***[12], to demonstrate that if a witness makes inconsistent statements at different stages, the testimony is rendered unreliable and consequently, cannot form the basis of conviction. It was submitted that in the present case, PW1 and PW2 are unreliable witnesses and have deposed diametrically opposite views at different stages. Further, the learned Counsel vehemently emphasised that the present case is based on circumstantial evidence only and it is a settled principle that if two equally possible views arise from circumstantial evidence, the one favourable to the accused must be adopted. It is further submitted that both PW1 and PW2 are interested witnesses and it has been highlighted by the petitioner that out of 25 prosecution witnesses, only evidence of three witnesses i.e., PW1, PW2 and PW12 (prosecutrix herself) was relied upon, while the evidence of others was discarded by the learned AFT in the impugned order.

18. Lastly, the learned Counsel for the petitioner highlighted the factum of lack of medical evidence in the present case to support the account of the prosecution. It is contended that there were no injuries on either the prosecutrix or the petitioner, despite the allegation of the prosecutrix that she, in her limited physical capacity, initially resisted

[12] **1979 4 SCC 725**

the petitioner. While PW2 claimed to have seen and smelt semen on the bed of the prosecutrix, the FSL report did not find any traces on the bedsheet or mattress-cover. Similarly, no semen was detected in medical examination of the prosecutrix. It is contended that the prosecutrix did not submit the undergarment that she was wearing at the time of alleged incident even though she was aware that all clothes worn at the time should be submitted for medical examination. Further, it was submitted that the kurta worn by the prosecutrix at the relevant time could not be examined since it had already been washed.

19. Thus, the learned Counsel, while placing reliance on ***Bhagwan Rama Shinde Gosai & Ors. v. State of Gujarat***[13] has urged that the case of the petitioner squarely falls within the ambit of this judgment wherein it was held that if the appeal cannot be disposed of expeditiously, the sentence of an accused should be suspended in the meantime. The learned Counsel submits that the petitioner has no criminal antecedents. It is also submitted that the petitioner has been in custody since 25.09.2021 and has thereby undergone incarceration for around 4 years, and the appeal preferred under Section 22 of AFT Act, bearing No. 3091 of 2023, is pending consideration and it would take some time in disposal of the said appeal before the learned AFT. The learned Counsel for the petitioner has also placed reliance on the decisions in ***Rama Narang v. Naresh Narang***[14]***, Atul @ Ashutosh v. State of Madhya Pradesh***[15]***, Narcotics Control Bureau v. Lakhwinder Singh***[16] ***and Vishnubhai Ganpatbhai Patel & Anr. v.***

[13] **(1999) 4 SCC 421**
[14] **1995 (2) SCC 513**
[15] **(2024) 3 SCC 663**
[16] **2025 SCC OnLine SC 366**

State of Gujarat[17]**,** to emphasise the scope of power conferred on an Appellate Court to suspend the sentence and demonstrated that in cases of present nature, involving fixed-term sentences, where the disposal of appeals is not likely to be concluded before the completion of the sentence, the suspension of sentence should be granted by this Court. It was also submitted that there existed no stringent requirement mandating that an accused must serve one-half of the sentence awarded in order to become eligible for suspension of sentence and relied on ***Vishnubhai Ganpatbhai Patel*** (supra), to substantiate that the Hon'ble Supreme Court had suspended the sentence wherein forty per cent of the sentence awarded had been undergone by the convict in that case.

20. Per contra, the learned Counsel for the respondent vehemently opposed the prayer for suspension of sentence by reiterating that guilt has been duly attributed to the petitioner by the GCM and confirmed by the learned CAS thereafter, and that, considering the heinous nature of the offence, no leniency is warranted. Further, the learned Counsel relied on the findings of the learned AFT, highlighting that the learned AFT did not see any illegality in the conviction and did not deem it fit to suspend the sentence of the petitioner.

21. The learned Counsel placed reliance on the decision in ***Omprakash Sahni v. Jai Shankar Chaudhary***[18]**,** particularly *paragraphs 20, 23, 25, 26, 33 & 34*, to buttress his argument that once an accused is convicted, the presumption of innocence vanishes and

[17] **Crl. Appeal No. 3145 of 2023 arising out of SLP (Crl.) No. 12853 of 2023**
[18] **(2023) 6 SCC 123**

while considering suspension of sentence, a Court may only examine *prima facie*, without re-appreciating evidence, whether there is a likelihood of acquittal in appeal. If the answer is in the affirmative, the liberty of accused should not be curtailed any further till the conclusion of the appeal. The learned Counsel placed further reliance on the decision in ***Ash Mohammad v. Shiv Raj Singh @ Lalla Babu & Anr.***[19] and ***Preet Pal Singh v. State of U.P. and Anr.***[20]**,** to highlight the difference in considerations and factors that a Court must look into while granting pre-arrest bail and while granting suspension of sentence after the conviction under the CrPC.

22. The judgment of ***Charanjit Lamba v. Army Southern Command***[21] was relied upon to emphasise that as an officer of a disciplined force, like the petitioner herein, is expected to maintain the highest standards of honesty and refrain from conduct that is unbecoming of an officer holding that rank.

23. It was contended by the learned Counsel that on the night of the incident, the prosecutrix was offered a drink by the petitioner and that she was reluctant in accepting the same. It was submitted that the state of intoxication of the prosecutrix can be corroborated by the testimony of PW1, PW2, PW5 and PW8. It was highlighted by the learned Counsel that the room of the prosecutrix was latched from the outside by PW2, as admitted by him. However, it can be seen from CCTV footage and from the admission of the petitioner that he had opened the door and entered the room of the prosecutrix on the relevant date

[19] **(2012) 9 SCC 446**
[20] **(2020) 8 SCC 645**
[21] **(2010) 11 SCC 314**

and time. The learned Counsel pointed out that there is no proof of any invitation by the prosecutrix allowing the petitioner to do so.

24. It was strongly urged by the learned Counsel that the extra-judicial confession was voluntary and not extracted under duress. The video confession was corroborated by the evidence of PW1 and PW2 and hence, was found credible by the GCM. Further, besides the video confession, other extra-judicial confessions were also made by the petitioner before PW4, PW5, PW6, PW7 and PW9. The petitioner categorically told PW5 that he had indulged in sexual intercourse on the previous night before.

25. The learned Counsel further submitted that, although the prosecutrix was reluctant to lodge a formal complaint against the petitioner, she consistently maintained that the incident was not consensual. It was submitted that, as per the Findings and Sentence order, the prosecution case has been duly corroborated and the same came to be confirmed by the CAS and reaffirmed by the learned AFT in the impugned order.

ANALYSIS AND FINDING

26. This Court has given its anxious thoughts to the rival contentions of the learned Counsels for both the parties and carefully examined the material on record.

27. At the outset, we proceed to examine the legal framework and principles governing suspension of execution of a sentence. We deem it fit to consider the relevant statutory provisions, judicial precedents

and the settled parameters that guide the Courts in exercising their discretion while granting suspension of sentence. However, it is necessary to bear in mind that this Court under Article 226 of the Constitution of India is not governed by the statutory remedy under Section 389 of the Criminal Procedure Code, 1973 or Section 430 of the Bharatiya Nagarik Suraksha Sanhita, 2023 but this Court possesses extraordinary power under its writ jurisdiction to exercise its power of judicial review while granting or rejecting suspension of sentence.

28. There exists a rich history of precedents which have held that the power of judicial review under Article 226 of the Constitution is highly circumscribed and limited. The Hon'ble Supreme court in ***Syed Yakoob v. K.S. Radhakrishnan & Ors.***[22], delved into the scope and limits of Article 226 pertaining to the issuance of the writ of certiorari. The said judgment, relevant to the context, went on to hold; in the following words:

> *"**7.** ……A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals : these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or properly, as for instance, it decides a question without giving an opportunity, be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact,*

[22] **1963 SCC OnLine SC 24**

> *however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised (vide Hari Vishnu Kamath v. Syed Ahmad Ishaque [(1955) 1 SCR 1104] Nagandra Nath Bora v. Commissioner of Hills Division and Appeals Assam [(1958) SCR 1240] and Kaushalya Devi v. Bachittar Singh [AIR 1960 SC 1168]*

29. Therefore, it can be well inferred from the above that this Court may intervene when the **Tribunal had erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which influenced the impugned finding** or that the finding led to failure of justice or that the jurisdiction vested with the Tribunals have been exercised improperly and illegally.

30. Although the presumption of innocence is a cardinal principle of the Indian criminal system and is often described as the *"golden thread"* running through criminal jurisprudence, this presumption fades into darkness once a person is convicted upon conclusion of the trial. Suspension of sentence is an aftermath activity, when apparently the said *"golden thread"* has been broken and/or compromised. Thus,

suspension of sentence, pending the hearing of an appeal, is a statutory remedy that may be availed once the said presumption extinguishes on account of conviction. It is pertinent to mention herein that this power is not to be construed as a matter of right of a convicted person; rather, it takes form of a relief which may be granted at the discretion of a court of law, keeping in view the various factors and the well-established judicial precedents. However, at the centre of such discretion must lie the interests of justice.

31. In light of this, the words of Bhagwati, J. in ***Kashmira Singh v. State of Punjab***,[23] echo in our ears. We reproduce them below:

> *"2. ……..Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?" What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing.."*

[23] **(1977) 4 SCC 291**

32. Having noted the prevailing law and the balance to be maintained while considering an application for suspension of sentence, this Court finds that the learned AFT, while deciding the application of the petitioner seeking suspension of sentence, although recorded the contention of the petitioner relating to serious infirmities and discrepancies in the statement of the witnesses and conduct of the prosecutrix in trying to withdraw the complaint at certain stage and thereafter trying to re-lodge the same, it has, at *paragraph 10* of the impugned order, shrugged aside the said contention by observing that, at the stage of granting suspension of sentence it was not necessary for the learned AFT to meticulously analyse each and every aspect of the matter and record a finding either way. However, thereafter, the learned AFT relied upon the judgment passed by the Apex Court in ***Preet Pal Singh*** (supra) and ***Ranjit Hazarika v. State of Assam***[24] and went on to hold at *paragraph 14* of the impugned order:

> *"14……..Apart from this, nothing has been brought to our notice to say as to why the prosecutrix would make a false allegation against the appellant and try to implicate him falsely. That apart, PW1 Tania Singh and PW2 Jaspreet Singh are all course mates and there is not an iota of evidence or material to indicate as to why they would make a false allegation or statement against the appellant. On the contrary a complete reading of the statement of PW1 and PW2 read along with the evidence of the prosecutrix indicates that on the date of the incident the course mates have assembled in the Mess, everyone had drinks, the prosecutrix also had drinks, she was already suffering the consequence of heavy dose of medicines taken for her ankle injury, she had vomited and was taken to her room by PWI and PW2, she was seen along with the appellant in and around the Mess during the night, thereafter PW1 had seen the appellant in the bed of the prosecutrix and in the early morning at 3 AM when she went to the room of the prosecutrix, i.e., her own room and when the prosecutrix was*

[24] **(1998) 8 SCC 635**

woken up in the morning at 6 AM, indicates what could have happened in the night where the appellant is said to have committed the offence without the consent of the prosecutrix when she was not in her senses and was completely unaware of what was happening."

33. The learned AFT, in its wisdom, examined the statements of the witnesses and the materials brought on record through the prism of ascertaining as to whether the petitioner has a fair chance of acquittal or not. No doubt, the observation of the learned AFT may be correct as to the prism utilized for examining the case at hand, but it shall always be remembered that in an appeal, the entire material as well as the evidence on record are thrown open in their entirety for re-appreciation before the AFT, and then a just decision is to be arrived at as per law, so as to withstand the test of judicial review of this Court. In any case, therefore, an order for suspension of sentence is an issue incidental to the appeal, which is pending hearing before the learned AFT.

34. This Court finds that, from the Findings and Sentence Order dated 07.11.2022, something very apparent and gross has emerged on the face of the record, which is very significant for deciding the present application for suspension of sentence. Apparently, the entire case seems to be guided and founded on the basis of statements made by PW1, PW2 and PW12 (the prosecutrix) to the GCM along with the alleged video confession. The present case is unique in nature since it is not the prosecutrix, who being a victim, has of her own volition, complained about the alleged incident, but it is PW1 and PW2, who have told the prosecutrix about the alleged incident. Further, a plain reading of the statement of the prosecutrix seems to indicate that she

was initially reluctant to believe the incidents put forth by the PW1 and PW2, after which the latter proceeded to create a video recording of the petitioner, purportedly to support and substantiate their version of events. This Court does not wish to comment on the doubts it harbours, in arriving at a wholesome reading of the evidence and material brought on record, as doing so may adversely affect the merits of the pending appeal. However, suffice to say that the Findings and Sentence Order dated 07.11.2022 records the examination-in-chief of the prosecutrix in the following words:

> *"……. Thereafter, the prosecutrix remembers waking up in the morning on 10 Sep 21 with an urge to pee. When she woke up, she was not feeling well. She noticed that she was not wearing anything down below her waist and saw her underwear lying at the right foot end of her bed. As she started limping towards the washroom, PW -1 woke up and told her that she wanted to talk and to sit. The prosecutrix then proceeded to describe the conversation that took place between her and PW-1 and the events that followed thereafter. The prosecutrix used the washroom and then slept. She woke up at around ll30hrs and took a bath. By that time, PW-1 had woken up and asked her to sit and talk again. Both of them had a conversation again which has been described in detail by the prosecutrix. After such conversation, the prosecutrix decided to confront the accused. Thereafter, the prosecutrix had gone to the accused's room and had a conversation with him. When she came to her room, PW-1 and PW-2 told her the entire sequence of events from the previous night. They showed her the semen stains on the mattress cover and bed sheet…."*

Therefore, not only the story but also the evidence has been guided and led at the behest of PW1 and PW2. Further, in the cross-examination of the prosecutrix, as recorded in the Order dated 07.11.2022, this Court finds that the same observation has been mentioned; to quote:

> *"……**It is correct to say that the prosecutrix does not have any personal knowledge of the charges against the accused** i..e. she did not physically feel or comprehend or see and hear that on the intervening night of 09 I 10 Sep 21, the accused raped and*

> *molested her while inserting his fingers into her private part, touched her pelvic area and breasts, masturbating in her proximity, laying besides her on her bed and removing her underwear (panty). However, she has a memory of the accused placing his hand on her inner thigh while he was forcibly kissing her.* ***She became aware of what the accused had done on 10 Sep 21, at around 2200-2230hrs after she had watched the video which was recorded on the mobile phone of PW-2 containing the conversation between PW -1, PW -2 and the accused."***

Thus, it seems that the entire controversy has stemmed out of the discrete video recorded by PW2 on his mobile phone. The excerpt of the transcript, as also recorded in the said order dated 07.11.2022, shows that it is in a question-answer form and more like an interrogation, rather than a confession. Most of the questions asked are leading in nature, wherein a particular trend in answer as apparently solicited by PW1 and PW2 can be seen. No doubt, a crime of sexual assault is of heinous nature; however, that does not by itself ordain labelling PW1 & PW2 as beyond reproach or their statements to be sacrosanct. The supervening circumstances and the evidence has to be taken into consideration together, with special emphasis on medical evidence at the time of hearing of appeal. Further, this Court finds that as far as medical evidence is concerned, the same Order dated 07.11.2022 (supra) records that; to quote:

> *"....She only requested for more time to decide, given her apprehension, whether or not to go ahead with the complaint and further subject herself to the invasive medical test. It is correct to say that on the proforma for examination of alleged rape case (female), she wrote by her own hand. "I hereby state that I do not want this medical investigation to proceed further".*

35. From the aforesaid findings brought on record, coupled with the rigmarole that the incident complained of occurred on the intervening night of 9/10 September, 2021; it is pertinent to note that the initial

complaint was filed on 11.09.2021, which came to be withdrawn on 14.09.2021 and again was pressed by way of a written communication on 17.09.2021 and ultimately, the FIR came to be registered on 20.09.2021, this creates a doubt on the conduct and willingness of the prosecutrix in proceeding with the matter. Although, these facts and the evidence on record would be considered by the learned AFT when the appeal is taken up for final hearing; however, this Court, at the *prima facie* stage, finds the balance of benefit of doubt tilted in favour of the petitioner, which may or may not be ultimately sustainable.

36. The Hon'ble Supreme Court in the case of ***Omprakash Sahni*** (supra), drew an important distinction between cases wherein the sentence is life imprisonment and where it is of a fixed term. The Hon'ble Court held in the said judgment that in all such cases of fixed term imprisonment, the Courts should be liberal while granting suspension. Further, we see that the Apex Court in ***Atul @ Ashutosh*** (supra), opined that in cases of fixed-term sentences, especially, if the accused has undergone a considerable period of sentence, bail should be granted and further, the Apex Court in ***Vishnubhai Ganpatbhai Patel & Anr.*** (supra) considered two factors i.e., antecedents of the accused and period of custody undergone which, in that case, was forty per cent of the sentence awarded, similar to the petitioner before us, for grant of suspension of sentence, during the pendency of the appeal.

37. The learned Counsel for the respondent placed reliance on ***Ash Mohammad*** (supra) to highlight the societal impact of releasing convicts and emphasises that release of a convict cannot be viewed in

isolation. However, while this decision poses a just and fair tipping scale between individual liberty and the interest of society, it is in the context of pre-conviction bail where the presumption of innocence still operates and the risk of fleeing or tampering with evidence is paramount. In contrast, at the stage of suspension of sentence, in our view, different considerations apply, such as the nature and gravity of the offence, the manner in which it was committed, the antecedents of the convict and so on. Furthermore, the element of rehabilitation arises owing to the incarceration undergone. Thus, while preservation of societal fabric remains an important consideration, we believe that it cannot eclipse the constitutional right of personal liberty especially in fixed-term imprisonment cases.

38. In ***Preet Pal Singh*** (supra), the Hon'ble Supreme Court differentiates between pre-arrest bail and post-conviction bail. It was held that, while considering an application under Section 389 of Criminal Procedure Code of 1973, the only aspect a Court should examine is whether there exists any patent illegality in the order of conviction. We are of the view that compelling reasons exist in the present case warranting suspension of the sentence of the petitioner since the prosecutrix does not recollect the incident herself and the primary basis of conviction is a disputed video confession. Further, extra-judicial confessions have low probative value, requiring independent corroboration to inspire confidence, which is lacking in the present case. We reiterate that grant of suspension is not akin to exoneration, it merely operates as a temporary stay on the operation/execution of a sentence.

39. The decision in ***Charanjit Lamba*** (supra) was relied upon by the learned Counsel for the respondent, which lays down the general standards of probity to be followed by uniformed officers. No doubt, an officer is expected to maintain highest standards of honesty, integrity and commitment and shall not compromise values of the Armed Forces. This Court is mindful of the high standards of discipline and rectitude expected of officers to preserve the credibility and stature of the Armed Forces and this Court agrees that such deviations should not be treated lightly. However, while these considerations are of utmost importance to determine fitness to continue in service, they cannot govern the decision of this Court while considering grant of suspension of execution of sentence. In the latter, the Court must primarily weigh principles of personal liberty, right to rehabilitation, nature and gravity of offence committed, period of incarceration etc., rather than considerations of morality and rectitude.

40. The prosecution case primarily rests on circumstantial evidence, i.e., evidence of PW1 and PW2 along with the alleged extra-judicial confessions of the petitioner. Direct evidence is available to a limited extent, i.e., the CCTV footage, to place the petitioner at the relevant place and time, a fact which is otherwise admitted by the petitioner himself. Since the prosecutrix is unable to recollect the alleged incident and thus has no personal knowledge of the events, as admitted by her, her account is largely based on what was shown to her in the disputed video confession. In contrast, the petitioner asserts that the alleged incident was consensual in nature and that the alleged confessions were involuntary, made under duress and tailored to a

great extent to safeguard the reputation of the prosecutrix. The petitioner also draws our attention to the fact that medical examination of the prosecutrix was not done, the kurta worn at the relevant time was washed and thereby not examined. Further, no semen traces were found on the bedsheet and mattress cover as per the FSL report and no physical injuries were found on the person of the petitioner or of the prosecutrix to buttress the claim that prosecutrix had initially resisted.

41. This Court is in complete agreement with the decisions laid down in ***Bhagwan Rama Shinde Gosai*** (supra) and ***Atul @ Ashutosh*** (supra), wherein it is held that if an appeal is not likely to be decided expeditiously, the sentence of the accused may be suspended during its pendency. Further, in light of the decision in ***Vishnubhai Ganpatbhai Patel & Anr.*** (supra), wherein the sentence of accused was suspended due to lack of any antecedents and the fact that he had undergone more than 40 per cent of his sentence. In the present case, the petitioner has already endured a period of custody spanning nearly four years, which warrants our careful consideration in light of the aforementioned principles.

42. While the decision in ***Omprakash Sahni*** (supra) stipulates the prominent principles governing suspension of sentence, the matter has since been revisited and developed, and this Court is now guided by the subsequent decision in ***Aasif v. State of U.P. & Ors.***[25] The former decision crystallised the guiding principles for adjudication such as nature and gravity of the offence, the manner in which the offence is committed, antecedents of the accused, etc. Through the decision in

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Aasif (supra), the Apex Court reaffirms these principles as well-settled law, but also introduces additional considerations. The Court laid down that where the appeal is unlikely to be decided in the near future, the continued incarceration would render the very purpose of the appeal infructuous. It can be construed from the decision that a liberal view is to be taken in cases of fixed-term imprisonment since the appellant may end up serving substantial portion of, or even the entire sentence awarded, before the appeal is heard. In such cases, suspension should be awarded unless there are compelling reasons to indicate that the release of the convict would be to the detriment of public interest, *inter alia*. The emphasis, therefore, shifts from balancing the legitimate concerns of public interest against the meaningful right of appeal and that the same should not be diluted to a mere formality.

43. The learned Counsel for the respondent has vehemently urged that since the present case involves a heinous offence, suspension ought not to be granted. While we are conscious of the gravity and nature of the offence, however, we note that only **one** of the numerous factors weighs against the petitioner i.e., the seriousness of the offence. On the other hand, in our considered opinion, several factors weigh in favour of the petitioner i.e., the period of custody undergone and antecedents of the petitioner. In the present case, the petitioner does not have any antecedents and has already undergone 4 years out of a 10-year sentence. Given that his appeal was preferred in 2023 and is not likely to be disposed of in the near future, there exists a real and pertinent risk of completion of a substantial portion or the entirety of the sentence in detention while awaiting conclusion of the appeal. In

these circumstances, after carefully balancing all relevant factors, we are inclined to exercise discretionary power conferred upon us in favour of granting suspension of sentence to the petitioner.

44. Having considered the facts and circumstances of the present case in *toto*, we are mindful that while conviction can be lawfully based on the sole testimony of the prosecutrix, in the present case, the prosecutrix does not have personal knowledge of the alleged incident. The knowledge of the prosecutrix primarily comes from the alleged video confession recorded by PW2 along with the accounts of PW1 and PW2. The reliability of these witnesses is disputed, *inter alia*, on the ground that PW2 initially denied the video recording before COI but subsequently furnished it, and that PW1, though present at the relevant time and having witnessed the petitioner and prosecutrix together, did not raise any alarm and only voiced her concerns the next day, allegedly as an afterthought. Moreover, the purported extra-judicial confessions are vehemently disputed by the petitioner, who asserts that they were made under duress and false statements were given to protect the reputation of the prosecutrix. In these circumstances, the credibility and veracity of the extra-judicial confessions, witness testimonies and other evidence on record, has to be believed with a pinch of salt, while considering the application for suspension of execution of sentence.

45. Further, upon application of the law governing suspension of sentence including the catena of decisions of the Apex Court and the relevant principles, this Court is inclined to allow the present writ

petition and thereby suspend the sentence of the petitioner pending his appeal before the learned AFT.

46. Accordingly, the impugned order dated 22.03.2024 passed by learned AFT is quashed and set aside. The petitioner is directed to be released on bail with two sureties of Rs. 5 Lakhs each, subject to the satisfaction of the learned AFT, Principal Bench, New Delhi.

47. Keeping in view the entirety of the facts and circumstances, we request that the learned AFT, may take up the present appeal expeditiously and dispose of the same at an early date.

48. Pending application(s), if any, shall stand disposed of.

49. Needless to state that, nothing mentioned hereinabove, is an opinion on the merits of the appeal pending before the learned AFT and any observations made herein are only for the purposes of the present petition.

50. Copy of judgment to be sent to the learned AFT and the concerned Jail Superintendent for necessary information and compliance.

OM PRAKASH SHUKLA, J.

C.HARI SHANKAR, J.

SEPTEMBER 25, 2025*/rjd/At/gunn*