A GOMTI

v.

THAKURDAS AND ORS.

APRIL 13, 2007

B [DR. ARIJIT PASAYAT AND D. K. JAIN, JJ.]

Code of Criminal Procedure, 1973—s. 389—Suspension of execution of sentence and grant of bail –Grant of bail by appellate court on the ground C *of absence of allegation of misuse of liberty while on bail during trial—Propriety of—Held: the order directing suspension of execution of sentence and grant of bail should not be passed as a routine—Such order should record reasons in writing—Misuse of liberty while on bail during trial does not* **per se** *warrant such order—Order of appellate court was not passed keeping the correct principles.*

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Criminal Law—Bail and Suspension of execution of sentence—Distinction between.

Respondent Nos. 1 to 5 were convicted u/s 302 r/w s. 149 IPC, u/ss. 148 and 201 IPC and u/s 3(2) and 5 of Schedule Castes and Scheduled Tribes E **(Prevention of Atrocities) Act. They filed appeals before High Court. During pendency of the appeal, the respondents were granted bail in exercise of power u/s 389 Cr.PC, on the ground that during the period when they were on bail during trail, they did not misuse their liberties – Hence the present appeal by the complainant opposing grant of bail.**

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Allowing the appeal, the Court

HELD: 1. Section 389 Cr.P.C. deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. There is a distinction between bail and suspension of sentence. One of the essential G **ingredients of Section 389 is the requirement for the appellate Court to record reasons in writing for ordering suspension of execution of the sentence or order appealed. If he is in confinement, the said court can direct that he be released on bail or on his own bond. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of**

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bail should not be passed as a matter of routine. [Para 11] [93-H; 94-A-B] A

2. The appellate Court is duty bound to objectively assess the matter and to record reasons for the conclusion that the case warrants suspension of execution of sentence and grant of bail. In the instant case, the only factor which seems to have weighed with the High Court for directing suspension of sentence and grant of bail is the absence of allegation of misuse of liberty B **during the earlier period when the accused-respondents were on bail.**

[Para 12] [94-C]

3. The mere fact that during the trial, they were granted bail and there was no allegation of misuse of liberty, is really not of much significance. The effect of bail granted during trial looses significance when on completion of C **trial, the accused persons have been found guilty. The mere fact that during the period when the accused persons were on bail during trial there was no misuse of liberties, does not per se warrant suspension of execution of sentence and grant of bail. What really was necessary to be considered by the High Court is whether reasons existed to suspend the execution of** D **sentence and thereafter grant bail. The High Court does not seem to have kept the correct principle in view. [Para 13] [94-D-E]**

Vijay Kumar **v.** *Narendra and Ors.*, **[2002] 9 SCC 364;** *Ramji Prasad* **v.** *Rattan Kumar Jaiswal and Anr.*, **[2002] 9 SCC 366;** *Kishori Lal* **v.** *Rupa and Ors.*, **[2004] 7 SCC 638 and** *Vasant Tukaram Pawar* **v.** *State of Maharashtra,* E **[2005] 5 SCC 281, relied on.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 555 of 2007.

From the Judgment and Order dated 16.12.2002 & 23.01.2003 of the High F Court of Judicature at Allahabad in Crl. Appeal Nos. 3876 of 2002 and 3777 of 2002 respectively.

Dr. Nafis and A. Siddiqui for the Appellant.

Nalin Tripathi, Anurag Sharma, Rameshwar Prasad Goyal, Sahdev Singh, G Shahid Ali Rao, Musharraf Chawdhry and Javed Mahmud Rao for the Respondents.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted. H

A 2. Challenge in this appeal is to the orders passed by a learned Single Judge of the Allahabad High Court accepting prayer for bail, which has been filed by the respondent Nos. 1 to 5, during pendency of the appeals (i.e. CRLA 3876/2002 and 3777/2002) before the High Court. The present appeal is by the complainant alleging that her husband has been killed by the B respondents 1 to 5 on 12.9.1998, and the concerned respondents are not entitled to bail.

3. Background facts in a nutshell are as follows:

4. The respondent Nos. 1 to 5 faced trial of alleged commission of C offences punishable under Sections 147, 148, 149, 302, 201 , 120(B) and 323 of the Indian Penal Code, 1860 (in short the 'IPC') and under Sections 3(2) and (5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (in short the 'SCST Act') and Sections 3(2) and (5) of the Arms Act, 1954 (in short the 'Arms Act') in Sessions Trial Nos. 11 and 12 of 1999.

D 5. All the accused were found guilty and sentenced to imprisonment for life and were convicted in terms of Section 302 read with Section 149 IPC, and other sentences in respect of Sections 148, 201 and Section 3(2) and 5 of the SCST Act. However, they were acquitted of the charges relatable to Sections 25 of the Arms Act and Section 120 B IPC. The respondents 1 to 5 filed Criminal Appeal Nos.3876 of 2002 and 3777 of 2002 before the High Court. By E the impugned orders dated 16.12.2002 and 23.1.2003, the prayer for bail was accepted. In the Criminal Appeal No.3876 of 2002 the following order was passed.

> "Heard learned counsel for the appellants Sri Sanjay Tripathi for complainant and the learned A.G.A.
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> Perused the order of Sessions Judge and lower court's record. The appellants were on bail during trial.
>
> Pending appeal, appellants-Thakur Das, Hanshraj & Dillan convicted in S.T. No. 12/99 shall be released on bail on each of them executing
> G a personal bond and on furnishing two sureties each in the like amount to the satisfaction of the court concerned.
>
> Until further orders realisation of fine shall also remain stayed."

6. In the other appeal i.e. Criminal Appeal No. 3777 of 2002 following
H order was passed:

"Heard appellants' counsel, Sri Sanjay Tripathi for complainant's counsel and the learned A.G.A. for the State. A

Appellant's counsel submits that other co-accused persons, who are said to have fired have already been released on bail. Appellant's counsel further submits that presence of Kali Charan at the time of occurrence is highly doubtful as he was medically examined on 13.9.98 at 5.15 p.m. whereas the report was lodged on 12.9.98 at 7.15 p.m. and he had also gone to lodge the report alongwith the complainant and the applicants have been in jail for the last more than four years. B

Pending appeal appellants Gyasi & Balkhandi convicted in S.T. No. 2/99 be released on bail on each of them executing a personal bond and on furnishing two sureties each in the like amount to the satisfaction of court concerned. C

Until further orders the realization of fine shall also remain stayed."

7. The appellant has questioned correctness of the orders urging that in the first order there is no reason indicated except stating that the accused appellants were on bail during trial and in the other case the only additional ground indicated is that the presence of Kali Charan at the time of occurrence is highly doubtful as he was medically examined on 13.9.1998 at 5.15 P.M. whereas the report was lodged on 12.9.1998 at about 7.15 P.M. and he had gone to lodge the report along with the complainant. The further reasons indicated is that the applicant is in jail for about four years. D E

8. Learned counsel for the appellant has submitted that while exercising power relatable to Section 389 of the Code of Criminal Procedure, 1973 (in short the 'Code'), it is imperative that the reasons have to be recorded. The reasons indicated have to be germane to justify grant of bail. The factors which have weighted with the High Court are not only irrelevant but also show non-application of mind. F

9. On the contrary learned counsel for respondents 1 to 5 has submitted that grant of bail being discretionary, the High Court was justified in taking note of the relevant factors and granting bail. G

10. Learned counsel for the State supported the stand of the appellant.

11. Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. There is a H

A distinction between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement for the appellate Court to record reasons in writing for ordering suspension of execution of the sentence or order appealed. If he is in confinement, the said court can direct that he be released on bail or on his own bond. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the B relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine.

12. The appellate Court is duty bound to objectively assess the matter and to record reasons for the conclusion that the case warrants suspension C of execution of sentence and grant of bail. In the instant case, the only factor which seems to have weighed with the High Court for directing suspension of sentence and grant of bail is the absence of allegation of misuse of liberty during the earlier period when the accused-respondents were on bail.

13. The mere fact that during the trial, they were granted bail and there D was no allegation of misuse of liberty, is really not of much significance. The effect of bail granted during trial looses significance when on completion of trial, the accused persons have been found guilty. The mere fact that during the period when the accused persons were on bail during trial there was no misuse of liberties, does not per se warrant suspension of execution of sentence and grant of bail. What really was necessary to be considered by E the High Court is whether reasons existed to suspend the execution of sentence and thereafter grant bail. The High Court does not seem to have kept the correct principle in view.

14. In *Vijay Kumar* v. *Narendra and ors.*, [2002] 9 SCC 364 and *Ramji* F *Prasad* v. *Rattan Kumar Jaiswal and anr.*, [2002] 9 SCC 366, it was held by this Court that in cases involving conviction under Section 302 IPC, it is only in exceptional cases that the benefit of suspension of sentence can be granted. The impugned order of the High Court does not meet the requirement. In *Vijay Kumar's* case (supra) it was held that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 G IPC, the Court should consider the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder.

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15. The above position was highlighted in *Kishori Lal* v. *Rupa and Ors.*, [2004] 7 SCC 638 and in *Vasant Tukaram Pawar* v. *State of Maharashtra,* [2005] 5 SCC 281. A

16. The order directing suspension of sentence and grant of bail is clearly unsustainable and is set aside. Learned counsel for the accused-respondents stated that fresh applications shall be moved before the High Court. In case it is done, it goes without saying, that the High Court shall consider the matter in accordance with law, in its proper perspective. B

17. Considering the principles set out above, we are of the view that the impugned orders of the High Court cannot be maintained and are set aside. C

18. The appeal is allowed to the aforesaid extent.

K.K.T. Appeal partly allowed.