

KHILARI

v.

STATE OF U.P. AND ANR.

(Criminal Appeal No. 481 of 2008)

MARCH 13, 2008

[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]

Code of Criminal Procedure, 1973: s.389 – Suspension of sentence pending appeal – Release of person convicted in murder case on bail by High Court by a cryptic order – Sustainability of – Held: Not sustainable – There was non-application of mind and non consideration of relevant aspects, thus order set aside – Matter remitted to High Court for fresh consideration.

It is alleged that respondent No.2 and his two sons mercilessly assaulted S with iron rods and S succumbed to the injuries. Respondent no.2 was convicted and sentenced for offences punishable under s.302 and s.506 IPC. Respondent filed an appeal challenging the conviction. He also filed bail application during pendency of appeal on the ground that the ante mortem injuries on the body of the deceased could not have been caused by iron-rods; and that some unknown assailants caused the injuries to the deceased. High Court granted bail. Hence the present appeal.

Appellant-informant contended that the impugned order was unsustainable; that the conviction was recorded by believing three eye witnesses; and that discarding the stand that the injuries were not possible by iron rods, the High Court should not have granted bail by a cryptic order.

Appellant no 2-accused contended that it is common knowledge that appeals in the High Court take long time

A for disposal; that the balance has to be struck between the right to speedy trial and need for accused being in custody; and that High Court took note of relevant factors and granted bail.

B Allowing the appeal and remitting the matter to High Court, the Court

C HELD: The order of High Court shows that there was complete non-application of mind and non consideration of the relevant aspects. Therefore, the impugned order is not sustainable and is dismissed. The bail granted to the respondent no.2 is cancelled. The matter is remitted to the High Court for fresh consideration in accordance with law. (Para 11 and 12) [908-C, D]

D *Kishori Lal v Rupa and Ors* 2004 (7) SCC 638; *Anwari Begum v Sher Mohammad* (2005) 7 SCC 326 – relied on.

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal No. 481 of 2008

E From the final Judgment and Order dated 15.11.2006 of the High Court of Judicature at Allahabad in Crl. A. No. 6724/2006

S. Chandra Shekhar and Jogendra Kumar for the Appellant.

F Shail Kumar Dwivedi, A.A.G., Vishwajit Singh, Javed Mahmud Rao, Kamendra Mishra, Vandana Mishra and Vibha Dwivedi for the Respondents.

The Judgment of the Court was delivered by

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

H 2. Challenge in this appeal is to the order passed by a Division Bench of the Allahabad High Court allowing the prayer for bail made by respondent no.2 during the pendency of Criminal Appeal no.6724 of 2006. Challenge before the High

Court was to the conviction recorded by learned Sessions Judge, Bagpat, in Sessions Trial no.299 of 2000. Respondent no.2 was convicted for offences punishable under Section 302 and Section 506 of the Indian Penal Code, 1860 (in short 'IPC') and was sentenced to undergo imprisonment for life and one year for the offences respectively. He and his two sons were also convicted allegedly for committing murder of Shiv Kumar. Challenging the conviction appeal has been filed and simultaneously prayer for being released on bail during the pendency of the appeal was filed. By the impugned order the Division Bench accepted the prayer and granted bail to the respondent no.2. The High Court noted that the allegation was that the incident took place on 9.3.2000 at about 8.30 p.m. and accused no.2 and his two sons assaulted Shiv Kumar (hereinafter referred to as the 'deceased') mercilessly with iron rods and he succumbed to the injuries.

3. The only stand taken was that the ante mortem injuries on the body of the deceased included three contusions, one abraded contusion and four lacerated wounds of different dimensions on various parts of the body which could not have been caused by iron rods. It was their stand that some unknown assailants caused the injuries to the deceased.

4. The prosecution and the present appellant opposed the prayer for grant of bail and PWs 1 and 2 and the informant had seen the attacks and were eye witnesses to the occurrence and PW 3 is an independent witness. Their evidence has been analysed in great detail by the trial Court who found that credible and cogent. So far as the possibility of injuries is concerned, that aspect was also examined by the trial Court.

5. After noticing the rival stands the High Court by the impugned order granted the bail with the following conclusions:

"Looking to all facts and circumstances of the case and particularly the antemortem injuries and after consideration the submissions made on behalf of the parties we find it appropriate to release appellant on bail during pendency

A of the appeal.”

B 6. Learned counsel for the informant appellant submitted that the approach of the High Court is clearly erroneous. After the conviction has been recorded by believing three eye witnesses and also discarding the stand that it was not possible by iron rods, the High Court should not have by a cryptic order directed grant of bail. It was, therefore, submitted that the impugned order is unsustainable.

C 7. Learned counsel for the State supported the stand of the informant.

D 8. Learned counsel for the appellant no.2 accused submitted that it is common knowledge that appeals in the High Court take long time for disposal. The balance has to be struck between the right to speedy trial and the need for the accused being in custody. The High Court has taken note of relevant factors and has granted bail.

E 9. The parameters to be adopted while dealing with the application for bail by suspension of sentence during the pendency of the appeal has been examined by this Court in several cases. In *Kishori Lal v. Rupa and Ors.* (2004 (7) SCC 638) it was noted as follows:

F “4. 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 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 against. 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 bail should not be passed as a

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matter of routine.

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5. 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 during the earlier period when the accused-respondents were on bail.”

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10. In *Anwari Begum v. Sher Mohammad and Anr.* (2005 (7) SCC 326) it was, inter-alia, observed as follows:

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“7. Even on a cursory perusal the High Court’s order shows complete non-application of mind. Though detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the Court while passing orders on bail applications, yet a court dealing with the bail application should be satisfied as to whether there is a prima facie case, but exhaustive exploration of the merits of the case is not necessary. The court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course.

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8. There is a need to indicate in the order, reasons for prima facie concluding why bail was being granted particularly where an accused was charged of having committed a serious offence. It is necessary for the courts dealing with application for bail to consider among other circumstances, the following factors also before granting bail, they are:

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1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;

2. Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

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A 3. Prima facie satisfaction of the Court in support of the charge.

B Any order dehors of such reasons suffers from non-application of mind as was noted by this Court, in *Ram Govind Upadhyay v. Sudarshan Singh and Ors.* [(2002) 3 SCC 598], *Puran etc. v. Rambilas and Anr. etc.* [(2001) 6 SCC 338] and in *Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav & Anr.* [JT 2004 (3) SC 442].”

C 11. As the extracted portion and the High Court's order goes to show there was complete non-application of mind and non-consideration of the relevant aspects.

D 12. The impugned order, therefore, is not sustainable and is dismissed. The bail granted to the respondent no.2 is cancelled. The matter is remitted to the High Court for fresh consideration in accordance with law.

13. The appeal is allowed to the aforesaid extent.

N.J.

Appeal allowed.