

ANGANA & ANR.

v.

STATE OF RAJASTHAN  
(Criminal Appeal No. 221 of 2009)

FEBRAURY 6, 2009

**[TARUN CHATTERJEE AND H.L. DATTU, JJ.]**

*Code of Criminal Procedure, 1973:*

s.389 – *Suspension of sentence and grant of bail pending appeal – Conviction u/s.326/34 IPC – High Court while admitting appeal, rejecting prayer for suspension of sentence and bail pending appeal – Held: When an appeal is preferred against conviction in High Court, Court has ample power and discretion to suspend the sentence, but that discretion has to be exercised judiciously depending on the facts and circumstances of each case – In the instant case, the convicts were on bail pending trial – Most of their co-accused were acquitted – When the convicts were on bail, they did not commit any offence – Nor were they responsible for prolonging the proceedings – High Court could have suspended the sentence and granted them bail – In exercise of power under Article 136 of the Constitution, the sentence is suspended and convicts are directed to be released on bail – Constitution of India, 1950 – Article 136 – Bail.*

*Takhat Singh and Others vs. State of M.P., (2001) 10 SCC 463; Bhagwan Rama Shinde Gosai vs. State of Gujarat (1999) 4 SCC 421 and Suresh Kumar and Others vs. State (NCT of Delhi) (2001) 10 SCC 338, relied on.*

*Kashmira Singh vs. State of Punjab (1997) 4 SCC 291; Babu Singh vs. State of U.P., 1978 (1) SCC 579; Kishori Lal vs. Rupa and Others, (2004) 7 SCC 638, Vasant Tukaram Pawar vs. State of Maharashtra, (2005) 5 SCC 281; Gomti*

A *vs. Thakurdas and Others, (2007) 11 SCC 160 and Sidharth Vashisht @ Manu Sharma vs. The State (N.C.T. of Delhi) (2008) 5 SCC 230, referred to.*

B Emperor vs. H.L. Hutchinson AIR 1931 All 356, referred to.

**Case Law Reference:**

	(2001) 10 SCC 463	relied on	para 11
C	(1997) 4 SCC 291	referred to	para 13
	1978 (1) SCC 579	referred to	para 14
	AIR 1931 All 356	referred to	para 15
	(1999) 4 SCC 421	relied on	para 16
D	(2001) 10 SCC 338	relied on	para 17
	(2004) 7 SCC 638	referred to	para 20
	(2005) 5 SCC 281	referred to	para 20
E	(2007) 11 SCC 160	referred to	para 20
	(2008) 5 SCC 230	referred to	para 20

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 221 of 2009.

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From the interim Order dated 22.8.2008 of the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in S.B. Criminal Misc. Bail (SOS) Application No. 781 of 2008 in S.B.Criminal Appeal No. 758 of 2008.

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H.D. Thanvi, Archana Tiwari, A.V. Kotemath and Pratibha Jain for the Appellants.

Dr. Manish Singhvi, A.A.G. and Milind Kumar for the Respondent.

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The following Order of the Court was delivered:

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### ORDER

(1) Leave granted.

(2) This appeal is directed against the order passed by the High Court of Judicature for Rajasthan, Bench at Jaipur, in S.B. Cr. Misc. (SOS) Application No. 781/2008 in Criminal Appeal No. 758/2008 dated 22.8.2008. By the impugned order, the High Court while admitting the appeal has rejected the application seeking bail/suspension of sentence filed by the appellant.

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(3) Facts in brief are as follows; Complainant PW/2, namely, Bhubal submitted a written report at police station on 6.3.1993, stating that on 6.3.1993, complainant and other members were sleeping in the house when accused/appellants and others who are acquitted, with the intention of stealing/looting and killing, came inside the house. One Shanti heard some noise and started shouting. Listening to her cries other members came out and saw that accused/appellants and other were having kattas. Then accused/appellants and other started assaulting them by gun fire and pelting stones which in turn caused serious injuries to complainant and other. Investigation was conducted and a case was registered under sections 147, 148, 149, 323, 452 and 307 of the IPC against fourteen persons on 6.3.1997 and was committed to the Additional District & Session Judge, Deeg. Accused/appellants and others have stated that in this case first information report of the cross-case of this matter was lodged with the same police station prior to the present incident, in which death of one Samunder Singh has been caused. Also they argued that the first information report has been lodged by the complainant falsely to be saved of that cross-case. Trial court after hearing the parties convicted Angna and Chouthi for the charge under section 326 read with section 34 of IPC and acquitted them from all other charges and all the other accused persons were

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A acquitted vide judgment dated 24.7.2008. Accused were awarded sentence of four years rigorous imprisonment with a fine of Rs. 2000/-.

B (4) Both the accused persons being aggrieved by the said judgment have filed criminal appeal before the Hon'ble High Court and also have filed criminal application under section 389 Cr.P.C. for suspension of execution of sentence and for releasing the accused/appellants on bail during pendency of the appeal.

C (5) The learned counsel for the accused/appellants contended before the High Court that in the personal defence, the accused fired the gun shot on the complainant and the complainant also received injuries. Further, the injuries received by the complainant are not grievous in nature. It was stated that D from the side of the accused also, one person Samundar died on the spot due to injuries inflicted by the complainant side. Because it was a free fight and in private defence, the fire arm was used. It was further contended that during trial, the accused E appellants were on bail, therefore, looking to facts and circumstances of the case, the sentence awarded to accused/appellants be suspended during pendency of the appeal.

F (6) The High Court while rejecting the application filed under Section 389 of Cr.P.C has observed :- "Having heard rival submissions of the respective parties and upon careful perusal of judgment impugned, record of the case, more particularly, medical report and statements of doctors, without expressing any opinion on merits and demerits of the case G stated that, the inevitable conclusion is that the application seeking suspension of sentence deserves to be rejected and thus, the bail/suspension of sentence application stands H rejected."

(7) Aggrieved by the impugned order passed by the High Court accused/appellants have come before us seeking H suspension of execution of sentence and for releasing the

appellants on bail during pendency of the appeal.

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(8) We have heard learned counsel for the accused/ appellants and learned counsel for the respondents.

(9) Learned counsel for the appellants, submitted that High Court of Judicature at Jaipur was not justified in not suspending the sentence of the petitioner and not releasing them on bail during the pendency of the appeal by merely placing reliance on the medical reports and statements of doctors. It is contended by the learned counsel, that, High Court failed to consider the fact, that, during trial, the appellants were on bail and have already undergone 6 months 26 days and 2 months 24 days sentence respectively of their actual sentence. It is further contended that the appeal pending before the High Court is in continuation of the proceedings. It is argued that the complainants were the actual aggressors causing injuries to several persons including appellants and created a false and frivolous case against the appellants. It is also submitted that the High Court ignored the testimony of the medical jurist and the medical reports, who did not support respondent's case. It can be said that injuries caused to the respondents are not of grievous nature caused by fire-arm. Therefore, learned counsel would submit that the High Court erred in denying the suspension of sentence or granting bail.

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(10) Learned counsel for the appellants in support of his submissions has relied on the decisions of this court. Reference to those decisions will be made while discussing the issue canvassed by learned counsel for the appellants.

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(11) In the instant case, an application under Section 389 of Cr.P.C. is filed for suspension of sentence by a convict in a pending appeal. The accused was on bail when the matter was pending before the Sessions court. It is not the case of the prosecution that the accused who is released on bail would abscond during the pendency of the appeal. When an appeal is preferred against conviction in the High Court, the Court has

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- A ample power and discretion to suspend the sentence, but that discretion has to be exercised judiciously depending on the facts and circumstances of each case. While considering the suspension of sentence, each case is to be considered on the basis of nature of the offence, manner in which occurrence had
- B taken place, whether in any manner bail granted earlier had been misused. In fact, there is no strait jacket formula which can be applied in exercising the discretion. The facts and circumstances of each case will govern the exercise of judicial discretion while considering the application filed by the convict
- C under Section 389 of Criminal Procedure Code.

(12) This Court in the case of *Takhat Singh and Others vs. State of M.P.*, (2001) 10 SCC 463, has held that, “the appellants are already in jail for over three years and 3 months. There is no possibility of early hearing of the appeal in the High

D Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore.”

(13) Reference can made to the decision of this court in the case of *Kashmira Singh vs. State of Punjab*, (1997) 4 SCC 291, where this Court has observed that:

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“Now, the practice in this Court as also in many of the High Court has been not to release on bail a person who has been sentenced to life imprisonment for an offence under Section 302 of the Indian Penal Code. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. 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,

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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. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

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A The Court going by the said consideration held that:-

“that so long as the Supreme Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail where special leave has been granted to the accused to appeal against his conviction and sentence. The other consideration, however, is equally important and relevant. When a person is convicted by an appellate court, he cannot be said to be an innocent person until the final decision is recorded by the superior court in his favor.”

(14) In the case of *Babu Singh vs. State of U.P.*, 1978 (1) SCC 579, it was observed, that, the significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19. Indeed, the considerations I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice—to the individual involved and society affected.

F (15) In *Emperor v. H.L. Hutchinson*, AIR 1931 All 356, it was observed that:-

“As to the object of keeping an accused person in detention during the trial, it has been stated that the object is not punishment, that to keep an accused person under arrest with the object of punishing him on the assumption that he is guilty even if eventually he is acquitted is improper. This is most manifest. The only legitimate purposes to be served by keeping person under trial in detention are to prevent repetition of the offence with which he is charged where there is apparently danger of such

repetition and to secure his attendance at the trial. The first of those purposes clearly to some extent involves an assumption of the accused's guilt, but the very trial itself is based on a prima facie assumption of the accused's guilt and it is impossible to hold that in some circumstances it is not a proper ground to be considered. The main purpose however is manifestly to secure the attendance of the accused."

(16) In the case of *Bhagwan Rama Shinde Gosai v. State of Gujarat*, (1999) 4 SCC 421, this Court has stated that when a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances. The Court has observed :

"3. When a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances. Of course if there is any statutory restriction against suspension of sentence it is a different matter. Similarly, when the sentence is life imprisonment the consideration for suspension of sentence could be of a different approach. But if for any reason the sentence of a limited duration cannot be suspended every endeavour should be made to dispose of the appeal on merits more so when a motion for expeditious hearing of the appeal is made in such cases. Otherwise the very valuable right of appeal would be an exercise in futility by efflux of time. When the appellate court finds that due to practical reasons such appeals cannot be disposed of expeditiously the appellate court must bestow special concern in the matter of suspending the sentence. So as to make the appeal right, meaningful and effective. Of course appellate courts can impose similar conditions

A when bail is granted.”

(17) This Court in the case of *Suresh Kumar and Others Vs. State (NCT of Delhi)*, (2001) 10 SCC 338, where the appellants had been convicted under Section 307 read with Section 34 of the Indian Penal Code and each was sentenced to imprisonment for a period of three years and to pay fine of Rs. 2000/-, when they moved an application under Section 389 of Code of Criminal Procedure for suspension of the sentence of imprisonment, the High Court had rejected the application. This Court following the observations made in the case of *Bhagwan Rama Shinde Gosai*, while allowing the appeal filed by the convict, had kept in abeyance the order of conviction passed by the trial court till the disposal of the appeal filed by the convict and also had directed the release of the convict on bail.

D (18) In *Kishori Lal Vs. Rupa and Others*, (2004) 7 SCC 638, this Court has indicated the factors that require to be considered by the courts while granting benefit under Section 389 in cases involving serious offences like murder etc., it is useful to refer to the observations made therein. They are :-

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 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.

6. 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 loses 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 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."

(19) The aforesaid view is reiterated by this court in the case of *Vasant Tukaram Pawar Vs. State of Maharashtra*, (2005) 5 SCC 281 and *Gomti Vs. Thakurdas and Others*, (2007) 11 SCC 160.

(20) In *Sidharth Vashisht @ Manu Sharma Vs. The State (N.C.T. of Delhi)*, (2008) 5 SCC 230, this Court after considering all the earlier decisions on the issue of consideration of an application under Section 389 of the Code of Criminal Procedure, has concluded, that in serious offences like murder, sentence would generally be not suspended by court.

(21) In the present case, the appellants were on bail during the pendency of the case before the Sessions Court. The

- A Sessions Court has acquitted most of the accused persons after trial except the appellants. It is not the case of the other side, that, when the accused were on bail they had indulged themselves in any offence either under the provisions of Indian Penal Code or any other Statute. It is also not the case of the
- B prosecution that when the appellants were on bail they had either jumped the bail or were any way responsible for prolonging the proceedings before the Sessions Court, and it is also not the case of the other side that they would abscond and would not be available, to undergo the sentence if the
- C appellate court affirms the order passed by the Sessions Court.

(22) Taking into consideration over all view of the matter and in particular offence alleged and sentence imposed and further taking into consideration the acquittal of other accused persons, who were also charge sheeted in the same offences as that of the appellants and further taking into consideration the conduct of the appellants during the trial before the Sessions Court when they were on bail, in our view the High Court could have suspended the sentence and granted bail to the appellants. Therefore, this Court would be justified under Article

D 136 of the Constitution in interfering with the discretion exercised by the High Court. We, therefore, suspend the sentence and direct the appellants to be released on bail on each one of them executing a bond with two solvent sureties to the

E satisfaction of Additional District and Sessions Judge, Deeg.

F (23) The appeal is disposed of, ordered accordingly.

R.P.

Appeal disposed of.