KHILARI

v.

STATE OF U.P. & ORS.

(Criminal Appeal No. 141 of 2009)

JANUARY 23, 2009

[DR. ARIJIT PASAYAT AND ASOK KUMAR GANGULY, JJ.]

Code of Criminal Procedure, 1973:

s. 389 – Suspension of sentence pending appeal – Release of appellant on bail – On facts, conviction of appellant u/s. 302 and 506 IPC – Bail application during pendency of appeal – Case of accused that injuries could not have been caused with iron rods as alleged and some unknown assailants were involved – Prosecution case that evidence of eye witnesses and independent witnesses found to be credible and cogent and trial court examined the aspect relating to injuries – Grant of bail by High Court – Sustainability of – Held: Not sustainable – Order shows complete non-application of mind and non-consideration of relevant aspects – Bail granted to co-accused also set aside – Thus, grant of bail cancelled – Matter remitted to High Court for afresh consideration.

s. 389 – Suspension of sentence pending appeal – Application for bail – Parameters to be adopted – Reiterated.

Kishori Lal v. Rupa and Ors. **2004 (7) SCC 638;** *Anwari Begum v. Sher Mohammad and Anr.* **2005 (7) SCC 326 and** *Pancham Chand and Ors. v. State of Himachal Pradesh and Ors.* **2008 (3) SCALE 379, relied on.**

Case Law Reference:

2004 (7) SCC 638	**Relied on.**	**Para 9**

A **2005 (7) SCC 326 Relied on. Para 10**

2008 (3) SCALE 379 Relied on. Para 11

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 141 of 2009.

B

From the Judgment and Order dated 3/12/2007 of the High Court of Judicature at Allahabad in Crl. Appeal No. 7567 of 2006.

S. Chandra Shekhar, for the Appellant.

C

Shobha Dixit, T.N. Singh, Rajeev Dubey and Kamlendra Mishra, for the Respondent.

The Judgment of the Court was delivered by

D

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

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 nos.2 and 3 during the pendency E 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 nos. 2 and 3 were convicted for offences punishable under Section 302 and Section 506 of the Indian Penal Code, 1860 F (in short 'IPC') and each was sentenced to undergo imprisonment for life and one year for the offences respectively. The accused persons were convicted allegedly for committing murder of Shiv Kumar. Challenging the conviction appeal has been filed and simultaneously prayer for being released on bail G during the pendency of the appeal was filed. By the impugned order the Division Bench accepted the prayer and granted bail to the respondent nos. 2 & 3. The High Court noted that the allegation was that the incident took place on 8.6.2000 at about 8.30 p.m. and accused persons assaulted Shiv Kumar H (hereinafter referred to as the 'deceased') mercilessly with iron

rods and he succumbed to the injuries. A

3. The only stand taken before the High Court 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. It was also submitted that by order dated 15.11.2006 the co-accused has been released on bail. B

4. The prosecution and the present appellant opposed the prayer for grant of bail. It was their stand that PWs 1 and 2 and the informant had seen the attacks and were eye-witnesses to the occurrence and PW3 is an independent witness. Their evidence has been analysed in great detail by the trial Court who found it to be credible and cogent. So far as the possibility of injuries is concerned, that aspect was also examined by the trial Court. C D

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

> "Considering fact and circumstances of the case but without making any opinion on the merit of the appeal at this stage, we are of the view that the accused-appellants Dharmendra and Manoj shall also be released on bail."

F

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 some of the injuries were 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. G

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

H

A 8. Learned counsel for the respondent nos.2 and 3 accused submitted that it is common knowledge that appeals in the High Court take a long time for disposal. A 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 B of relevant factors and has granted bail.

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 C 638) it was noted as follow:

"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 D 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 E 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 F matter of routine.

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 G 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."

H 10. In *Anwari Begum v. Sher Mohammad and Anr.* (2005

(7) SCC 326) it was, *inter alia*, observed as follows: A

"**7.** Even on a cursory perusal the High Court's order shows complete non-application of mind. Though a 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. B C

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: D

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

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

3. *Prima facie* satisfaction of the court in support of the charge.

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 & Ors.* (2002 (3) SCC 598), *Puran etc. v. Rambilas and Anr. etc.* (2001) (6) SCC 338) and in *Kalyan* G H

A *Chandra Sarkar v. Rajesh Ranjan Alias Pappu Yadav & Anr.* (JT 2004 (3) SC 442)."

11. As the extracted portion of the High Court's order goes to show there was complete non-application of mind and non-consideration of the relevant aspects. The order relating to grant B of bail in respect of co-accused by order dated 15.11.2006 was the subject matter of challenge in *Pancham Chand & Ors. v. State of Himahal Pradesh & Ors.* (2008 (3) SCALE 379) and the order was set aside.

C 12. The impugned order, therefore, is not sustainable and is set aside. The bail granted to the respondent nos. 2 and 3 is cancelled. The matter is remitted to the High Court for fresh consideration in accordance with law.

D 13. The appeal is allowed to the aforesaid extent.

N.J. Appeal allowed.