Shahzad Hasan Khan

Vs

Ishtiaq Hasan Khan and Another

Criminal Appeal No. 464 of 1986

(M. P. Thakkar, K. N. Singh JJ)

28.04.1987

ORDER

1. Special leave granted.

2. This appeal is directed against the order of the High Court of Allahabad, Lucknow Bench, dated June 7, 1986, granting bail to respondent 1, Ishtiaq Hasan Khan. We allowed the appeal and set aside the order of the High Court and issued directions that respondent 1, Ishtiaq Hasan Khan be taken into custody forthwith. In that order we had directed that the reasons will follow. Hence this order articulating our reasons.

3. Ishtiaq Hasan Khan, respondent 1 and three others, namely, Naseem, Shiva Kant Sharma and Asghar are facing trial for the murder of Zaheer Hasan Khan at about 9 a.m. on March 3, 2985, in a public place in Mahmood Nagar leather market. After the occurrence respondent 1 absconded and he surrendered in court on April 22, 1985. He applied for bail before the Session Judge, Lucknow, which was rejected. He approached the Lucknow Bench of the High Court of Allahabad with an application for grant of bail. The application was opposed by the complainant as well as by the Public Prosecutor. Justice Kamleshwar Nath by his order dated September 18, 1985 refused to enlarge the respondent the bail application. After a lapse of two months' time respondent 1, Ishtiaq Hassan Khan filed another bail application before the High Court. That application was placed before Justice Kamleshwar Nath who rejected the same by his order dated January 21, 1986. Within a few days thereafter respondent 1 made another application before Justice P. Dayal. The learned judge having regard to the judicial discipline and prevailing practice in the High Court, directed that the bail application be placed before Justice Kamleshwar Nath who had passed orders rejecting earlier applications for bail. In pursuance of that order the bail application was placed before Justice Kamleshwar Nath. Meanwhile, respondent 1 made two futile attempts before the trial court for the grant of bail even though his application for bail was pending before the High Court. On March 18, 1986 Justice Kamleshwar Nath was sitting in a Division Bench and the respondent's counsel appeared before him seeking his permission for listing the bail application before him. The learned Judge passed an order releasing the bail application, but it appears that in spite of that order the bail application was not listed before any other Judge, instead it again came up for orders before Justice Kamleshwar Nath on March 24, 1986. On that date counsel for respondent 1 for some unknown reasons did not press the bail application; on his request the application was dismissed as withdrawn.

4. Meanwhile, one of the accused Shiva Kant Sharma filed an application for transfer of the trial from the court of the First Additional Sessions Judge to any other court. The complainant had also filed an application in the High Court for the cancellation of bail granted to Shiva Kant Sharma.

Respondent 1 also made an application from jail for the transfer of the case. All the three miscellaneous cases were heard by D. N. Jha, J. By a composite order dated December 10, 1985, Justice D. N. Jha refused to transfer the case and he further refused to cancel the bail granted to Shiva Kant Sharma. The learned Judge, however, made observations that the trial should be concluded expeditiously and if necessary the court should hold day - to-day trial to conclude the same at an early date. In pursuance to the order of Justice D. N. Jha, the First Additional Session Judge fixed several dates for the trial of the case but the accused persons the trial could not be commenced or completed within three months as desired by Justice D. N. Jha. Meanwhile, respondent 1 made another application on June 3, 1985 before Justice D. S. Bajpai, Vacation Judge for grant of bail. The learned judge directed that the application be placed before Justice Kamleshwar Nath who was sitting as a Vacation Judge with effect from June 23, 1986. Two days later, another application was made on behalf of respondent 1 before justice D. S Bajpai for recalling his order dated June 3, 1986, the application was directed to be placed before the court on June 6, 1986. On June 6, 1986 when the application was taken up the Assistant Government Advocate for the prosecution and the complainant's advocate both appeared and filed their appearance. Justice D. S. Bajpai directed the application to be listed on June 7, 1986. On that date the complainant's counsel filed application raising objections against the hearing of the bail application on a number of grounds and he further sought three days time to file detailed counter-affidavit in reply to the allegations made in bail application. Justice D. S. Bajpai, did not grant time. Instead he heard the arguments, he recalled his order dated June 3, 1986 for placing the matter before Justice Kamleshwar Nath and enlarged respondent 1 on bail. Aggrieved, Shahzad Hasan Khan the complainant, who is the son of the deceased Zaheer Hasan Khan, has approached this Court by means of this appeal.

5. Normally this Court does not interfere with bail matters and the orders of the High Court are generally accepted to be final relating to grant or rejection of bail. In this case, however, there are some disturbing features which have persuaded us to interfere with the order of the High Court. The matrix of facts detailed above would show that three successive bail applications made on behalf of respondent 1 had been rejected and disposed of finally by Justice Kamleshwar Nath. In that view it would have been appropriate and desirable and also in keeping with the prevailing practice in the High Court that the bail application which was filed in June 1986 should have been placed before Justice Kamleshwar Nath for disposal. In fact on June 3, 1986, Justice D. S. Bajpai being conscious of this practice and judicial discipline himself passed order directing the bail application to be placed before justice Kamleshwar Nath but subsequently on June 7, 1986 he recalled his order. We are of the opinion that Justice D. S. Bajpai should not have recalled his order June 3, 1986 keeping in view the Judicial discipline and the prevailing practice in the High Court. Justice D. S. Bajpai was persuaded to the view the Justice Kamleshwar Nath had passed orders on March 18, 1986, releasing the bail application, the matter was therefore not tied up to him. However, the learned Judge failed to notice that when the bail application was listed before Justice Kamleshwar Nath on March 24, 1986 respondent 1, for reasons known to him only, withdrew his application, as a result of which Justice Kamleshwar Nath dismissed the same as withdrawn. This fact was eloquent enough to indicate that respondent 1 was keen that the bail application should not placed before Justice Kamleshwar Nath. Longstanding convention and judicial discipline required that respondent's bail application should have been placed before Justice Kamleshwar Nath who had passed earlier orders, who was available as Vacation Judge. The convention that subsequent bail application should be placed before the same Judge who may have passed earlier orders has its roots in principle. It prevents abuse of process of court inasmuch as an impression is not created that a litigant is shunning or selecting a court depending on whether the court is to his liking or not, and is

encouraged to file successive applications without any new factor having cropped up. If successive bail application on the same subject are permitted to be disposed of by different Judges there would be conflicting orders and a litigant would be pestering every Judge till he gets an order to his liking resulting in the credibility of the court and the confidence of the other side being put in issue and there would be wastage of courts' time. Judicial discipline requires that such matters must be placed the same Judge, if he is available for orders. Since Justice Kamleshwar Nath was sitting in court on June 23, 1986 the respondent's bail application should have been placed before him for orders. Justice D. S. Bajpai should have respected his own order dated June 3, 1986 and that order ought not to have been recalled, without the confidence of the parties in the judicial process being rudely shaken.

6. As regards merits, for granting the bail, the learned Judge appears to be influenced by two factors, firstly, he observed that the trial could not be commenced or completed as directed by Justice D. N. Jha by his order dated December 10, 1985. In this respect the complainant has filed a detailed affidavit giving the details of the proceedings before the trial court. On a perusal of the same it is evident that the accused persons obtained adjournment after adjournment on one pretext or other and they did not allow the court to proceed with the trial. On June 7, 1986 complainant's counsel had filed a written application seeking three days time to file counter-affidavit giving the details of the proceedings before the trial court. We are constrained to observe that Justice D. S. Bajpai refused to grant the prayer and proceeded to grant bail simply on the ground that the liberty of a citizen was involved which is the case in every criminal case particularly in a murder case where a citizen who let alone losing liberty has lost his very life. Another ground for granting bail was that trial was delayed, therefore the accused was entitled to bail. This also cannot be helped if a litigant is encouraged to make half a dozen applications on the same point without any new factor having arisen after the first was rejected. Had the learned Judge granted time to the complainant for filing counter-affidavit, correct facts would have been placed before the court and it could have been pointed out that apart from the inherent of tempering with or intimidating witnesses and aborting the case, there was also the danger to the life of the main witnesses or to the life of the accused being endangered as experience of life has shown to the members of the profession and the judiciary, and in that event, the learned Judge would have been in a better position to ascertain facts to act judiciously. No doubt liberty of a citizen must be zealously safeguarded by court, nonetheless when a person is accused of a serious offence like murder and his successive bail applications are rejected on merit there being prima facie material, the prosecution is entitled to place correct facts before the court. Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution. Learned Judge was unduly influenced by the concept of liberty, disregarding the facts of the case.

7. The learned Judge also failed to consider the question that there were serious allegations of tampering of evidence on behalf of the accused persons. Vishram and Jagdish, two eye-witnesses had filed written applications before the trial court making serious allegations against Masod and Masroof brothers of respondent 1. They alleged that they had been kidnaped and their signatures and thumb impressions had been obtained on some blank papers and they requested the court for being granted police protection. One of the salutary principles in granting bail is that the court should be satisfied that the accused being enlarged on bail will not be in a position to tamper with the evidence. When allegations of tampering of evidence are made, it is the duty of the court to satisfy itself whether those allegations have basis (they can seldom be proved by concrete evidence) and if the allegations are not found to concocted it would not be a proper exercise of jurisdiction in

enlarging the accused on bail. In the instant case there were serious allegations but the learned Judge did not either consider or test the same.

8. Having regard to the facts and circumstance of this case we are of the opinion that the learned Judge committed serious error in recalling his order dated June 3, 1986 and enlarging the respondent on bail. The occurrence took place, in broad daylight, in a busy market place and there are a number of eye-witnesses to support the case against the respondent who was named as an assailant in the first information report. Immediately after the occurrence he could not be traced (it was alleged that he had absconded) for more than a month, attempts were made on his behalf to tamper with evidence. In view of these facts and circumstances 1 was not entitled to bail it the seriousness of the matter was realised and a judicious approach was made. We had accordingly set aside the order of the High Court and directed the respondent 1, Ishtiaq Hasan Khan shall be taken into custody forthwith and the trial shall proceed in accordance with law expeditiously.

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