

SUPREME COURT OF INDIA

Masood Ali Khan

Vs.

State of U.P.

CrI.A.No.....of 2009

(Dr. Arijit Pasayat and Asok Kumar Ganguly JJ.)

05.02.2009

JUDGMENT

Dr. Arijit Pasayat, J.

1. Leave granted.
2. Challenge in this appeal is to the order of a Division Bench of the Allahabad High Court granting bail to the respondent Nos. 2 to 4 during the pendency of Criminal Appeal No. 3693 of 2007.
3. Background facts as projected by the complainant in FIR Case Crime No.198 of 2005 of P.S. Kotwali district, Rampur, Uttar Pradesh are as follows:

“The FIR was lodged on 29.5.2005 stating that the respondent armed with deadly weapons alongwith co-accused Chhote and Raza came to a milk dairy where brother of the appellatant namely Javed (hereinafter referred to as the `deceased`) was milking the buffaloes. He was attacked with Patala Daon - a sharp edged weapon, knife and dagger due to which he fell down after receiving the fatal injuries. The accused persons thereafter fled away towards the forest after terrorizing people by firing in the air. Prior to this incident, respondents Lalam and Murshad and co-accused Chhote had stolen a buffalo of the deceased and for that they were required to pay Rs.20,000/- as per the decision of the panchayat held earlier. Appellant brought the injured to the hospital where he was declared dead. The incident had taken in a broad day light in a busy Hazratpur crossing at Rampur City and was witnessed by many persons.

After investigation, charge sheet was filed. On the basis of statement made by respondent Lalam recovery of a Patal was made. Subsequently, blood stained dagger was also recovered. Similarly, one country made pistal and five life cartridges were recovered. Accused Raza Ali could not be apprehended and he has absconded. Learned Additional Sessions Judge, Rampur, placing reliance on the evidence of the witnesses found the respondents guilty. Each of the respondents 2 to 4 and co-accused

Chhote was awarded life sentence. An appeal (Criminal Appeal No. 3693 of 2001) was filed before the High Court. The respondents filed an application for release on bail. By the impugned order bail has been granted.”

4. Learned counsel for the appellant submitted that the High Court's order is indefensible. By a practically non-reasoned order, bail has been granted. Various other factors have been pointed out, they are essentially as follows:

“(a) No opportunity was given by the High Court to public prosecutor as required under amended proviso (1) of Section 389 Cr.P.C.

(b) The Division bench completely ignored the fact that respondents Lalam and Akbar during the trial had fled from the custody and were convicted for this offence by C.J.M. Rampur.

(c) High Court ignored the fact that it was the case of brutal broad daylight murder for which accused were not granted bail by the Sessions or High Court during Trial.

(d) No cogent or detailed reasons were given by the High Court while granting bail to Respondents in their appeal against their conviction which is a mandatory requirement of Section 389 Cr.P.C,

(e) Division Bench of High Court ironically and without applying its judicial mind granted bail to the Respondents in their appeal and suspended their sentence of life imprisonment during pendency of their appeal even when there was no application under Section 389 Cr.P.C. for suspension of sentence by respondents.

(f) The Division Bench of the High Court also ignored the criminal history of the accused persons and did not take into consideration the possibility of misuse of liberty by respondents.”

5. There is no appearance on behalf of respondents in spite of service of notice.

6. At the outset it needs to be noticed that the High Court has not referred to any circumstance which warrants grant of bail. The only reason given reads as follows: "The allegations made in the FIR and the nature of injuries mentioned in the post mortem report and the weapons alleged to have been used by the present appellants in the incident are sufficient to grant bail to the appellants as the fatal ante-mortem injuries appear to have been caused by Patal (Dav), which has been assigned on the co-accused Chhotey."

7. Section 389 of the Code empowers the Court to suspend the sentence pending the appeal and for release of the appellant on bail. Section 389 so far relevant reads as follows:

“389. Suspension of sentence pending the appeal; release of appellant on bail –

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall, -

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.”

8. 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.

9. 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.

10. In *Vijay Kumar v. Narendra and others*¹ and *Ramji Prasad v. Rattan Kumar Jaiswal*² and another, 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 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. These aspects have not been considered by the High Court, while passing the impugned order.

11. The parameters governing Section 389 of the Code were highlighted in *Kishori Lal v. Rupa and Ors.*³, *Vasant Tukaram Pawar v. State of Maharashtra*⁴, *Gomti v. Thakurdas and Ors.*⁵.

12. Looked at from any angle the order of the High Court is clearly indefensible and is set aside. Respondents 2 to 4 shall surrender to custody forthwith.

13. The appeal is allowed.

¹(2002 (9) SCC 364)

²(2002 (9) SCC 366)

³(2004 (7) SCC 638)

⁴(2005 (5) SCC 281)

⁵(2007 (11) SCC 160)