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Gore Lal and ors. Vs. State

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Court : Allahabad

Decided On : Apr-03-1958

Reported in : AIR1958All667; 1958CriLJ1107

Judge : B.R. James, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 369, 382, 388(1), 426(2B) and 561A; Constitution of India - Articles 132(1), 134(1), 136 and 225; High Court Rules; High Court Orders; Allahabad High Court Rules - Rules 28 and 29

Appeal No. : Criminal Misc. No. 217 of 1957

Appellant : Gore Lal and ors.

Respondent : State

Advocate for Def. : Shri Rama, Dy. Govt. Adv.

Advocate for Pet/Ap. : S.N. Mulla and ;D.N. Wali, Advs.

Disposition : Application dismissed

Judgement :
ORDER

B.R. James, J.

1. Certain persons were tried before the Sessions Judge of Mirzapur for offences under Sections 307, 324 and 148, I. P. C. found guilty and sentenced to imprisonment. They appealed to this Court and were released on bail for the pendency of the appeal. The appeal came up for hearing before me. Dismissing it I maintained their conviction and sentences and ordered them to surrender forthwith. After duly surrendering they applied under Article 134(1)(c) of the Constitution for the grant of a certificate of fitness to appeal to the Supreme Court. The required certificate was granted by me. They now pray for bail for the pendency of their appeal before the Supreme Court.

2. The case raises the question; does the High Court possess the power to grant bail to a convict, or suspend the execution of his sentence, after it has granted him a certificate of fitness under Article 134(1)(c), or indeed under Article 132(1). The question is of considerable importance inasmuch as it and allied questions constantly arise before the High Courts; it is a controversial question inasmuch as the views of Individual Hon'ble Judges on it are not uniform Having regard to the importance of the matter I have heard Mr. S.N. Mulla for the applicants and Mr. Shri Rama for the State at considerable length.

3. In urging that the High Court does possess the necessary power Mr. Mulla's first line o argument is based on Chapter XXXIX and Section 561-A of the Code of Criminal Procedure, whereas Mr. Shri Rama contends that these provisions have no relevance to the matter of issue and that the only section in the Code which can apply is Section 426 but it is of no avail to the applicants.

4. Now, for arriving at my own conclusion I propose to lean heavily on the classic judgment of the Judicial Committee of the Privy Council in Jairam Das v. Emperor , a decision which, if I may say so with the profoundest respect, still embodies sound law inasmuch as our Supreme Court has not disagreed with it hitherto. It might be pointed out that in those days there was no statutory provision for the grant by the High Court of a certificate of fitness to appeal, and convicted persons could only approach the Privy Council by way of special leave to appeal.

In Jairam Das's case (A), the question was whether a High Court had power to grant bail to a person who had been convicted and sentenced to imprisonment

and to whom His Majesty in Council had given special leave to appeal against his conviction and sentence. The Privy Council in their judgment examined the various aspects of the question. Their Lordships observed that from a review of the authorities in India the several views which had prevailed could be summarised thus:

1. If leave to appeal has been obtained from His Majesty in Council and the Judicial Committee has said that an application for hail must be dealt with by the High Court, the latter will have power under Section 498 of the Code to release a convicted person on bail pending the hearing of his appeal;

2. the High Court has an inherent power to do so if special leave to appeal has been obtained from His Majesty in Council;

3. the High Court possesses no inherent power as regards bail;

4. after disposal of a criminal appeal by the High Court it is functus officio; has no longer any seisin of the case, and cannot grant bail to a convicted person unless special leave to appeal has been obtained from His Majesty an Council;

5. in addition there must also be a direction received, from 'their Lordships of the Privy Council';

6. the High Court's seisin of a criminal

case, and its power to grant bail under Section 498 of the Code, is revived when the Judicial Committee gives leave to appeal and directs the High Court.

5. Emphasising that they had never given any formal direction to a High Court on the matter, nor had any reference to bail been made in Orders in Council granting special leave to appeal, their Lordships stated:

'Moreover, their Lordships find it impossible to appreciate how any suggestion or direction by them in regard to an application for bail to the High Court, made or given when they decide to advise His Majesty that special leave to appeal from a sentence or conviction should be granted, can in any way determine or affect the question under consideration on this appeal. The High Court either does possess

power to grant bail in the given circumstances or it does not. If it possesses the power it possesses it independently of any suggestion or direction made or given by their Lordships. If it does not possess it, no suggestion or direction made or given. By their Lordships could confer such a power.'

Their Lordships then addressed themselves to the question whether the alleged existence of a power in a High Court to grant bail in the stated circumstances could be established on other grounds. They observed that if the power exists, it must be either because it was conferred on the High Courts by the Code, or because it was one of those inherent powers which are referred to in Section 561-A of the Code.

They drew attention to the fact that Chapter XXXIX of the Code referred only to the granting of bail to accused persons; and that there was no reference therein to the granting of bail to persons who had been tried and convicted. They also pointed out that the view in certain Indian decisions that Section 498 included cases of convicted persons was a misapprehension based upon a mistaken reading of the words of that section. And they concluded:

'In truth the scheme of Chapter XXXIX is that Sections 496 and 497 provide for the granting of bail to accused persons before trial, and the other sections of the Chapter deal with matters ancillary or subsidiary to that provision.

They proceeded to emphasise that the only provision in the Code which refers to the grant of bail to a convicted person is to be found in Section 426, and they held that, irrespective of the convicted person having obtained leave from His Majesty in Council to appeal, the Code conferred no power On a High Court to grant bail in the case of a person whose conviction it had affirmed in appeal.

6. Their Lordships then turned to an examination of the inherent powers of a High Court under Section 561-A (which had been introduced into the Code only in 1923), and ruled that that section confers no fresh powers, that it merely safeguards all existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice, and that it does not include the power to grant bail. They pointed out that a power to grant bail would in certain

circumstances result in defeating the ends of justice, and that it would also result in an alteration by the High Court of its judgment, which is prohibited by Section 369 of the Code. They finally concluded:

'... .Chapter XXXIX of the Code together with Section 426 is, and was intended to contain, a compete and exhaustive statement of the powers of a High Court in India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail.'

The declaration of the law by the Privy Council renders Mr. Mulla's contentions, founded as they are on Chapter XXXIX and Section 561-A of the Code, untenable..

7. Their Lordships were further of the opinion that the power to grant bail in a case like the one before them would be a proper and useful power to vest in a High Court, but they pointed out that this desirable object could only be achieved by legislation. In consequence the Central Legislature stepped in and by Act 4 of 1946 introduced Clause (2B) in Section 426 of the Code, which by the Adaptation of Laws Order, 1950, was replaced by the present clause, which runs as follows :

'Where a High Court is satisfied that a convicted person has been granted special leave to appeal to the Supreme Court against any sentence which the High Court has imposed or maintained the High Court may, if it so thinks fit, order that pending the appeal the sentence or order appealed against be suspended, and also if such person is in confinement, that he be released on bail.'

It is on this clause that Mr. Shri Rama takes his stand. In my opinion its wording is not open to any ambiguity. The authority it confers on the High Court to grant bail to a person whose conviction it has affirmed is confined strictly to those cases where it is satisfied that special leave to appeal to the Supreme Court has been granted. But this is a contingency covered exclusively by Article 136 of the Constitution, and does not relate to Article 134 or Article 132.

In other words, the High Court has no statutory or inherent power to grant bail to, or suspend the execution of the sentence of, a person whose conviction and

sentence it has maintained, except where that person has been granted special leave to appeal under Article 136 of the Constitution, and in no other case. Indeed, except for the purpose of granting a certificate under Article 132(1) or Article 134(1)(c) of the Constitution, or granting bail or suspending the sentence under Section 426 (2B) of the Code the High Court becomes functus officio. Attention might be drawn to the fact that any other view would result, as pointed out in Jairam Das case (A), in defeating the ends of justice in certain circumstances and in an alteration by the High Court of its judgment contrary to Section 369 of the Code.

8. I might add that the only provisions in the Code which deal with the suspension of sentences are to be found in Section 382; Section 388 (1) (b) and Chapter XXIX. The first enjoins a High Court to postpone the execution of the sentence of death passed on a woman found to be pregnant; the second relates to the execution of the sentence of imprisonment on a person who has been awarded a fine: the third confers certain powers of suspension exclusively on the Government. None of these provisions therefore affects the findings given above.

9. As regards case-law supporting the contention all that Mr. Mulla has been able to do is to cite Girja Prasad Suudar Lal v. Divisional Forest Officer, Dudhi : AIR1955 All589 . But that decision is not of the slightest assistance to him because it deals with purely civil proceedings and is based on the terms of Order 45, Rule 13, of the Code of Civil procedure, which has no relevance to proceedings before a criminal Court. On the other hand Mr. Shri Rama relies on Kalawati v. The State ,, decided by the Judicial Commissioner of Himachal Pradesh, and Bhagwan Singh v. State, AIR 1956 Madh B 129 (D), decided by the Gwalior Bench, of the Madhya Bharat High Court.

In the former case, Kalawati as a result of a Government Appeal under Section 417, Cr. P. C. had been sentenced to transportation for life under Section 302 read with Section 114, I. P. C. Her application for a certificate of fitness for appeal to the Supreme Court was granted. She then applied for the grant of bail to enable her to present her appeal to the Supreme Court.

The learned Judicial Commissioner (now Mr. Justice R.K. Chowdhry of our High Court) rejected, her application on the ground that special leave was quite different from a certificate of fitness and that bail could be granted by the High Court under Section 426 (2B) of the Code only where the Supreme Court had already granted special leave to appeal and not before or merely upon the certificate of the High Court under Article 132(1) or Article 134(1)(c) of the Constitution. The same reasoning was adopted in the other case, the Gwalior one and the Bench further held that Section 561-A of the Code could not be invoked to suspend the execution of sentence. With respect, I agree with these views.

10. Mr. Mulla's second line of argument is based on Rule 29 of Chapter XXIII of our Rules of Court, and he contends that this Rule confers an unrestricted power on the High Court to grant, bail in a case like the present. I quote both Rules 28 and 29 below, for I am of opinion that the two should be read together:

'28. An application for a certificate Under Article 132(1) or 134(1)(c) of the Constitution in a criminal proceeding shall be' made in writing, stating the grounds on which the leave, is sought, within thirty days from the date of the judgment, final order or sentence passed by the Court. The provisions of Sections 4, 5 and 12 of the Indian Limitation Act, 1908, shall apply to such an application and the remaining provisions shall not apply.'

29. On the applicant executing a bond with or without sureties undertaking to lodge an appeal in the Supreme Court within the prescribed time the Court may

(i) order that the execution of the sentence or order be stayed; or

(ii) where the applicant is in confinement admit him to bail on Such terms as the Court may think fit pending the disposal of the application or where a certificate is granted, pending the lodging of an appeal in the Supreme Court.

Provided that a person applying for bail under Section 426 (2B) of the Code of Criminal Procedure shall make an averment to the effect that he has not applied to the Supreme Court for grant of bail.

Where the application is by the Government, no such bond shall be required before an order under this Rule is made.'

These Rules imply that where an application for a certificate under Article 132(1) or Article 134(1)(c) has been made the High Court may release the applicant on bail, or suspend the execution of his sentence, on his executing a bond undertaking, to lodge an appeal in the Supreme Court within the prescribed time. The Rules therefore favour Mr. Mulla. But Mr. Shri Rama firmly contends that Rule 29 as it stands is invalid. Accordingly the question of the validity of the Rule calls for consideration.

11. Now, our Rules of Court have been made in exercise of the powers conferred by Article 225 of the Constitution, according to which they must be 'subject to the provisions of this Constitution and to the provisions of any law of the appropriate legislature made by virtue of powers conferred on that legislature by this Constitution'. The Constitution is silent on the matter of bail or suspension of sentence. The Court's power to grant bail or suspend the sentence is derived exclusively from the Code of Criminal Procedure. But I have shown earlier what exactly these powers are, and these powers certainly do not include cases falling under Article 132(1) or Article 134(1)(c). Consequently Rule 29 in so far as it is inconsistent with the powers conferred on the High Court by the Code is invalid.

12. It has been suggested that Rule 29 can be justified by the Proviso to Article 134(1). This Proviso is in these words :

'Provided that an appeal under Sub-clause (c) shall lie subject to such provisions as may be made in that behalf under Clause (1) of Article 145 and to such conditions as the High Court may establish or require.'

But Article 145(1) is confined to Rules made by the Supreme Court for regulating generally its practice and procedure, and under Sub-clause (d) of it that Court alone has authority to frame Rules as to the entertainment of appeals under Article 134(1)(c). With regard to the second part of the above-quoted Proviso it would be putting unbearable strain on its plain language to think that 'such conditions as the High Court may establish or require' can conceivably include the grant of bail or

the suspension of sentence. In my opinion this part of the Proviso merely entitles the High Court to lay down conditions under which an aggrieved party may lodge his appeal, but does not authorise it to release him on bail or, suspend the execution of his sentence pending the lodging of his appeal.

13. In support of his contention that under Rule 29 this Court possesses the power to grant bail Mr. Mulla has cited two unreported cases of this Court, Rishipal v. State of U.P. Criminal Misc. Case No. 50 of 1956 (E), and Shaukat Ali Khan y. State of U. P., Criminal. Misc. Case No. 35 of 1956: (Since reported in : AIR1956 All523 , both decided on 24th April, 1956 by different Division Benches.

Both cases, it should be noted, were heard ex parte and no notice was issued to the counsel for the State. In the former case Rishipal had been sentenced to death under Section 302, I. P. C: and to rigorous imprisonment for other offences; and his conviction and sentences were upheld by the Bench. He then applied for a certificate of fitness to appeal to the Supreme Court, which was refused. Next he prayed for the suspension of his execution as he intended to move the Supreme Court for special leave. The Bench held :

'Under Chapter XXIII (Section B), Rule 29 (1) of the Rules of Court, this Court has the power to direct the execution of a sentence or order to be stayed. We think we should grant this prayer. We, therefore, direct that the execution of the sentence of death passed on petitioner Rishipal shall be stayed for a period of one month from today in order to enable petitioner Rishipal to lodge a petition for special leave in the Supreme Court.'

The Bench, if I may say so with respect, did not consider the terms of Section 426 (2B) of the Code, nor did it examine the vires of Rule 29. Consequently its view that it had the power to suspend the sentence was mere obiter.

14. In the second case, that of ShaukatAli Khan v. State of U. P. (F), the sentences, ofcertain convicted men were enhanced to imprisonment by a Bench of the High Court.Their application for a certificate of fitnessunder Article 134(1)(c) was rejected. They thenfiled an application praying for the suspensionof their sentence pending a petition for specialleave which they proposed to move before

theSupreme Court.

The Bench examined the provision of Rule 29 of Chapter XXIII of our Rules of Court and various relevant sections of the Code: It had no hesitation in holding that neither under Rule 29 nor under any provision of the Code did it have power to suspend the operation of the sentencepending the proposed application for specialleave. But in the course of its discussion ofRules 28 and 29 it observed at one place asfollows :

'When these two Rules are read together the only way in which these Rules can Be interpreted is that Rule 29 contemplates only cases where the petitioner has applied for leave, to appeal to the Supreme Court in this Court and if the application is pending, pending the disposal of the application the sentence can be suspended; In the event of the certificate having been granted pending the lodging of the appeal the execution of sentence can be suspended.'

The Bench is thus found laying down that when an application under Art, 134(1)(c) has been made, the sentence of the applicant can be suspended both during the pendency of the application and when the certificate prayed for has been granted. But can it be said that the Deuch has laid down the law on this subject? It had already rejected the application made under Article 134(1)(c); it was dealing only with the application for suspending the sentence pending a petition for special leave which the applicants proposed to move before the Supreme Court. Its views on the power to suspend sentence in connection with an application under Article 134(1)(c) had no bearing on the decision of the question it was called upon to answer. Its observations must therefore be treated as obiter dicta.

15. As stated earlier, in neither of these two cases relied on by Mr. Mulla was the counsel for the State heard, nor the vires of Rule 29 examined. Besides, as already seen, the remarks in the judgments in both the cases are found to have been in the nature of obiter dicta. With great respect to both the Benches, those remarks do not possess binding authority. The finding earlier given that Rule 29 to the ex-tent that it purports to confer powers on the High Court in excess of those possessed by it under the Code is invalid, must continue to hold good, and the aid of this Rule cannot be invoked by the applicants. Thus Mr. Mulla's second line of

argument too is discovered to be untenable.

16. From the foregoing it follows that this Court has no power to grant bail to the present applicants. The principle can be extended. If a person desires to lodge an appeal with the Supreme Court against a judgment of the High Court affirming his conviction, and he wants the High Court to grant him bail or suspend the execution of his sentence, the following situations are likely to arise:

(a) The convict makes an application for the grant of a certificate under Art, 134(1)(c) or Article 132(1) and the application is pending;

(b) the application for the certificate under Article 134(1)(c) or Article 132(1) has been granted, and the convict wants to file his appeal before the Supreme Court;

(c) The application under Article 134(1)(c) or Article 132(1) has been rejected, and the convict wants to apply to the Supreme Court for special leave under Article 136 but has not made his application;

(d) the convict has made an application for special leave and that application is pending before the Supreme Court;

(e) the convict has made his application for special leave to the Supreme Court and that applicaticn has been granted.

In view of the discussion attempted in the foregoing I am firmly of opinion that the High Court has the power to grant bail or suspend the sentence only in the case of (e); neither under the Constitution nor the Code of Criminal Procedure nor any valid rule framed by our High Court under Article 225 of the Constitution does it possess such a power under any of the cases (a) to (d). The present application refers to the situation described in (b) above. For reasons given in the foregoing the question posed at the start of this judgment is answered in the negative. Accordingly the present application fails and is dismissed.

17. Before parting with this case I should like to point out that it would be desirable for the High Court to also possess powers to grant appropriate relief in the cases (a) to (d) mentioned above. But these powers can only be conferred by a suitable

amendment in the Code of Criminal Procedure. I should like to invite the attention of Parliament to this.

(Note: It has just been brought to my notice that the judgment in Shaukat Ali Khan v. State of U. P., above has been reported in : AIR1956 All523 .)

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