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Court : Madhya Pradesh

Decided On : Jun-20-2000

Reported in : 2000(3)MPHT486

Judge : J.G. Chitre, J.

Acts : [Evidence Act, 1872](#) - Sections 32; [Indian Penal Code \(IPC\), 1860](#) - Sections 304B; Code of Criminal Procedure (CrPC) , 1974 - Sections 439

Appeal No. : Misc. Criminal Case No. 2952/99

Appellant : Ashok

Respondent : State of M.P.

Advocate for Def. : Seema Sharma, Panel Lawyer

Advocate for Pet/Ap. : Hemant Kumar, Adv.

Disposition : Application dismissed

Judgement :

ORDER

J.G. Chitre, J.

1. Shri Hemant Kumar placed reliance on the judgment of the Supreme Court in the matter of Maqsoodan and Ors. v. State of U.P. (1983 Cr.L.J. 218) and a

judgment of this Court in the matter of Raghunandan Singh v. State of M.P. (1995 MPLJ 321). Shri Hemant Kumar submitted that the deceased Jyotibai was in expectation of death when her dying declaration was recorded by the Executive Magistrate in the presence of Medical Officer who was medically treating her. In view of that, he submitted that the said statement would not be coming under the purview of the dying declaration, and therefore, it should not be used for the purpose of rejecting the prayer for bail made by the petitioner. Shri Hemant Kumar further placed reliance on the judgment of this Court in the matter of Raghunandan Singh v. State of M.P. (supra) by pointing out that this Court has held in the said matter that the law of bails, which constitutes an important branch of procedural law, is not static one; and in a welfare State, it cannot indeed be so. It has to dovetail two conflicting demands, namely on one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person, alleged to have committed the crime; and on the other, the fundamental canon of Criminal Jurisprudence, viz. the presumption of innocence of an accused till he is found guilty. There are indeed conflicting equities highlighting the law of bails, but the shield in no case should be allowed to be the sword. Jurisprudence of bail has shown new dimensions and can be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice. Where the opposition by the prosecution is only for the sake of opposition, without just, fair or reasonable ground, bail may be granted by the Court.

2. True, he is entitled to get the benefit of the above stated observation. However, the further portion of that judgment cannot be ignored which speaks that the provisions of Section 439 of Cr.P.C. has given a wider discretion to the Court while dealing with the application made by the accused for bail. An appeal to a Judge's discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with, established principles of law. Therefore, the discretion has to be used properly informing oneself about the liberty as fundamental right of a citizen so also restraints put on him by the legal provision and the circumstances brought forth by the prosecution for putting restraints on fundamental right of liberty of accused will have to be given due weightage in the light of legal precedents. In this context, allegations made against

such accused by the prosecution have to be considered. Keeping oneself in a dispassionate mood and being not swayed away by emotions, it is to be seen whether the offence is too harsh, damaging permanently the society at large.

3. No Court likes the fetters on the fundamental rights of a citizen and no Court likes that fundamental right to be eclipsed by the expectation of a trial. At the time of weighing the demand for protection of fundamental right, the Court is bound to be equally circumspect on the material which has been collected by the prosecution against such accused. The protection is to be rendered to such an accused who is facing a trial on the material which has been collected against him by the investigating agency and has to be also watchful towards the possibility of such accused tampering with the evidence, availability for the fair course of the trial. The interest of the society at large should also be kept in mind while deciding the bail matter. The liberty of such an accused has to be curtailed to avoid the danger to the legal course and for securing freedom of the prosecution witness to go to the Court for the purpose of giving evidence in the trial. At the same time, the larger interest of the society and possibility of growing the evil in future has also to be kept properly in mind. One cannot afford himself to be swayed away by emotions by golden words of 'liberty', ignoring the material collected during investigation. Equally the interest of the society has to be considered. A golden mean has to be found in between these two important factors, and therefore, the strength of the material which has been collected by the prosecution against such an accused has to be given due weight.

4. In the present case, it is true that when the said statement was recorded, the victim was expecting the death, but this is not a case in which after the said statement was recorded, she came back from the gate of death. Unfortunately, the victim died and, therefore, now her statement so recorded would be definitely admissible in view of the provisions of Section 32 of the Evidence Act, in context with the inquiry about her death. At the same time, the presumption which is available in favour of the prosecution in context with the provisions of Section 304B of the Indian Penal Code will have to be given due importance. This Court does not wish to say anything more in respect of the merit of the case, because any opinion expressed is likely to cause prejudice to either side at the time of trial.

5. Shri Hemant Kumar, the counsel appearing for the petitioner pointed out that in the present case, the petitioner has the evidence of alibi in his favour which can be exhibited by him by use of a video cassette. He also submitted that there are other circumstances in favour of the accused also which indicate his innocence. But all these things pertain to domain of adjudication by the trial Judge at the time of trial after being tested by cross-examination. This Court cannot express the opinion either way about its truthfulness or otherwise, judging that at this stage, would be too premature and would be definitely causing prejudice to either side. It is true that the Court has to be conscious about the liberty to the accused and the Court has to inform itself that pretrial detention is not the good phenomena. However, the Court is equally bound to see that the prosecution gets proper opportunity of adducing evidence at the time of the trial. Judicial process in that context cannot be permitted to be subverted in that context by too liberally thinking of the liberty of a person who has to face the trial when material collected in investigation prima facie shows otherwise. The seriousness of the offence, seriousness of allegation and possible sentence which such accused is likely to get after the trial has to be kept in mind.

6. Shri Hemant Kumar further submitted that other co- accused have been released on bail, therefore, this accused be also released on bail. Parity on such ground cannot be claimed by each accused. The strength of the material which has been collected by the investigating agency against the particular accused has to be considered. In a crime where there is participation of mind then one accused or more accused are likely to get the benefit of weaker link of the prosecution case. But that does not mean that every accused is entitled to have the benefit of that. If the Court is in a position to focus its attention to the crime against a particular accused, he has to face the consequence of that. Shri Hemant Kumar further submitted that if after the trial, the present accused gets acquitted, he would be unnecessarily put to deprivation of the right of liberty. I do not see anything well on this point, but only indicate that this is not a case of that type.

7. Thus, this bail application stands dismissed. For safeguarding the interest of the accused (present petitioner it is hereby made clear that the observations made by this Court in this Order should not be given weightage at the time of trial prejudicial

to the defence of the accused, the present petitioner.

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