

Nilambar Das Vs. State of Orissa

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Court : Orissa

Decided On : Sep-18-1986

Reported in : 1987CriLJ1470

Judge : G.B. Patnaik, J.

Appellant : Nilambar Das

Respondent : State of Orissa

Judgement :

G.B. Patnaik, J.

1. Though this revision came up for admission and I was not inclined to admit this revision, yet the learned Counsel for the petitioner insisted that a reasoned order may be passed and keeping in view the importance of the point urged, I think it appropriate to dispose of the revision by giving a reasoned order.

2. The petitioner was convicted under Section 354, Indian Penal Code, and was sentenced to undergo rigorous imprisonment for nine months, by the learned Additional Sessions Judge, Bhawanipatna. On appeal, this Court has affirmed the conviction and recorded a finding that considering the gravity of the offence involving a young married girl, the sentence is lenient and dismissed the appeal by judgment dated 14th of August, 1986. Thereafter the petitioner filed an application before the Sessions Judge praying therein that in view of the order passed by this

Court on 20-10-1981 while admitting the Criminal Appeal No. 212 of 1981, no warrant of arrest should be issued against the petitioner and he should not be taken into custody. The said application having been rejected by the learned Sessions Judge, the present revision has been preferred.

3. On 20-10-1981, the learned single Judge of this Court passed the following order : -

Heard learned Counsel on behalf of the appellant. Admit. The execution of the sentence be stayed pending disposal of this appeal. The appellant be released on bail of Rs. 5,000/- with one surety for the like amount to the satisfaction of the learned Additional Sessions Judge, Bhawanipatna. A copy be handed over if applied for.

The learned Counsel appearing for the petitioner contends that the execution of the sentence having been suspended by this Court, the period for which such suspension continued, that is to say, till the disposal of the appeal, shall be taken to be the period of detention and, therefore, the petitioner cannot be re-arrested to serve the sentence in question. In support of his aforesaid contention, the learned Counsel relied on the decision of this Court in the case of R. K. De v. State of Orissa (1971) 37 Cut LT 402; the decision of the Supreme Court in the case of K. M. Nanavati v. State of Bombay (now Maharashtra), : 1961 CriLJ173 and the decision in the case of Karim Shaikh v. Emperor, AIR 1926 Nag 279 : (1926-27 Cri LJ 319). I shall deal with these decisions later, but the only provision of the Code of Criminal Procedure which is relevant for consideration is Section 389. Section 389 of the Code of Criminal Procedure (hereinafter referred to as the 'Code') may be extracted hereunder : -

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.

(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 a 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.

This section corresponds to Section 426 of the old Code. Sub-section (1) of Section 389 no doubt authorises the appellate Court to suspend execution of the sentence or order appealed against for reasons to be recorded by it in writing and also to release the convict on bail. But such an order of suspension of execution of the sentence can be done only by recording the reasons therefor in writing. The intention of the Legislature is clear that an order of suspension of sentence should only be passed when very special cause is shown. This power of suspension regarding execution of sentence is in addition to the power of ordering release of the convict on bail. Sub-section (4) of Section 389 indicates that when the appeal fails, the time during which the accused is released under Section 389 should be excluded in computing the term for which he is sentenced. In other words, what the said sub-section means is that in calculating the term, the period of release

should be left out of account. The corresponding provision of the old Code of Criminal Procedure, namely, Section 426, came up for consideration before the Allahabad High Court in the case of Narain Singh v. Emperor, AIR 1936 All 12 : (1935-36 Cri LJ 1479), and the Allahabad High Court has taken the aforesaid view. But the question with which the petition is concerned in the present problem is not regarding the petitioner's release on bail, but regarding the meaning of the order passed on 20-10-1981 and what is its effect. According to the learned Counsel for the petitioner, the meaning of the interim order passed by this Court on 20-10-1981 is that the execution of the sentence has been suspended and the effect of such order is that the entire period, i.e. from the date of the suspension till the date of dismissal of the appeal shall be taken into account while considering the question of the sentence and, therefore, since in the present case, the sentence is only nine months' rigorous imprisonment, the petitioner cannot be taken to custody again.

4. In the Orissa Case (1971) 37 Cut LT 402 on which reliance was placed by the learned Counsel for the petitioner, a learned single Judge of this Court had initially admitted, the appeal and released the accused therein on bail pending disposal of the appeal. Later on, on an application being moved, the learned single Judge passed an order to the effect that the sentence appealed against be suspended pending disposal of the appeal. This order was further modified when the learned single Judge passed the order :

In modification of order No. 3 dated 5-3-1970, the order of conviction appealed against and the sentence imposed therein be suspended pending disposal of the appeal.

In another case when a similar prayer was made by another appellant in Criminal Appeal No. 7 of 1971, a Division Bench to which the learned single Judge who had passed the order of suspension was also a party, came to the conclusion that such an order was untenable in law and, therefore, the learned single Judge who had passed the order himself got the matter listed to consider the correctness of his order and ultimately recalled the order of suspension of sentence. While recalling the order, the learned single Judge observed : -..The correct view seems to be

that suspension, of execution of the sentence though within the powers of the appellate Court is to be ordered only in exceptional circumstances where special cause exists and not invariably whenever the appellant is released on bail....

In my view, the aforesaid observation is the correct interpretation of Sub-section (1) of Section 389 of the Code (S. 426 of the old Code), but there is an additional requirement, that is that 'for reasons to be recorded in writing'. Therefore, the Court which passes an order suspending execution of sentence must record the reasons in writing for the same. The aforesaid Orissa case, therefore, is not an authority for the proposition which the learned Counsel for the petitioner makes, nor the said proposition had come up for decision in the said case, though incidentally the decision of the Nagpur High Court AIR 1926 Nag 279: (1926-27 Cri LJ 319) to which reference has been made deals with the problem.

5. In the Nagpur decision AIR 1926 Nag 279 : (1926-27 Cri LJ 319) the effect of an order of suspension of sentence came up for consideration directly, but in a somewhat different situation. In the said case, the accused persons who had been convicted had appealed against their conviction to the Court of Session and before the Sessions Judge they moved for bail. The learned Sessions Judge having rejected their prayer for bail, they moved the Judicial Commissioner's Court at Nagpur for bail. Their prayer for bail was also rejected by the Judicial Commissioner. Then, alternatively it was argued that in the event of their prayer for bail not being granted, execution of the sentence may be suspended. The learned Judge while rejecting the said alternative prayer held :.As Section 426, Criminal P. C, stands, the result of suspension of sentence is only that if the appeal finally fails, the convicted person only serves the original period of his sentence less the period of suspension...

I do not know the reasons behind such a conclusion. It is this observation of the learned Judicial Commissioner on which the learned Counsel for the petitioner relies in support of his contention.

6. In the Supreme Court case AIR 1961 SC 112 : (1961 (1) Cri LJ 173) on which the learned Counsel for the petitioner relies, the scope and ambit of Article 161 of the Constitution was being considered. In that case, the Governor in exercise of

his powers under Article 161 has passed an order granting suspension of sentence of the convict on the ground that he intends to file an appeal to the Supreme Court. The question arose as to whether such an order is exempted from the operation of Order 21, Rule 5 of the Supreme Court Rules and ultimately it was held by the Supreme Court that the order of the Governor granting suspension of the sentence would only operate until the matter became sub judice in the Supreme Court on the filing of the petition for special leave to appeal. After the filing of such a petition, when the Supreme Court is in seisin of the case, it is for the said-Court to deal with the application in accordance with law and it may apply the provisions of Rule 5, Order 21 of the Supreme Court Rules or exempt the petitioner from the operation of that Rule. It is for the Supreme Court to pass such orders as it thinks fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass such order as the Court may deem fit in the circumstances of the case, and, therefore, the Governor has no power to grant suspension of sentence for the period during which the matter is sub judice in the Supreme Court. In this case, therefore, the effect of an order of suspension of sentence within the ambit of Section 426 of the old Code of Criminal Procedure which corresponds to Section 389 of the Code of Criminal Procedure, 1973, had not come up for consideration. In my opinion, therefore, the aforesaid Supreme Court case is of no assistance to the petitioner in the present case.

7. In the case of *Emperor v. Masuria*, AIR 1936 All 107: (1935-36 Cri LJ155), one of the questions that arose for consideration was whether the period during which the accused would remain on bail should be excluded from the period of one year for which he had been bound down, if his appeal is ultimately dismissed. It was observed in that case. : -..In cases where a person has been convicted of an offence and the Sessions Court on appeal admits him to bail, the Court may not necessarily pass a separate order suspending the execution of the sentence or pass an order releasing him on bail under Section 426. It may simply pass an order under Section 498 admitting him to bail. The necessary result of the release on bail is that the person does not serve out his sentence of imprisonment during the period that he is released on bail. When therefore his appeal is dismissed and he surrenders to his bail he must serve out the remaining portion of his sentence so as to complete the full period of imprisonment passed against him. It seems to

us that the same principle should apply to cases where a person has been bound over for a particular period, is released on bail by the Sessions Judge and has to surrender after the dismissal of his appeal. The necessary result of his being allowed to be at large is that he has for that period neither furnished any security as required by the order of the Magistrate nor been detained in jail, but has been set free by the order of the appellate Court. It cannot therefore be said that during this period the order of the Magistrate has been carried out and has therefore partially exhausted itself. We think that on the analogy of the release on bail of persons convicted of offences it must follow that the period during which the person bound over is released on bail by an order of the Appellate Court should be excluded from the term prescribed under the order of the Magistrate who bound him over.

8. Section 426(3) of the old Code also came up for consideration in Narain Singh's case AIR 1936 All 12 : (1935-36 Cri LJ 1479). It was held:

Section 426(3), Criminal P. C, does not lay down that the period during which a person is released shall be excluded from the term. What it lays down is that this period will be excluded in computing the terms which means that this period will be left out in making calculation. The period during which a person is released on bail cannot reduce the term of the sentence. On the other hand it will not affect the term at all as it will not be taken into consideration in computing the period of the term which the applicant has to serve on the dismissal of his appeal.

(quoted from the Headnote)

To the same effect is the decision of the Allahabad High Court in the case of Darsu v. Emperor, AIR 1934 All 845 : (1935-36 Cri LJ 177).

9. The learned Counsel for the petitioner, however, contends that the aforesaid two Allahabad decisions do not consider the case of suspension of sentence and are, therefore, no direct authorities on the point which is being canvassed for the petitioner in the present case. The only decision some observations of which support the contention of the learned Counsel for the petitioner is the one reported in AIR 1926 Nag 279 : (1926-27 Cri LJ 319) (supra) which has been noted but not

followed in the Allahabad decision, namely AIR 1936 All 12: (1935-36 CriU 1479). But as has been observed by the learned single Judge of this Court in R.K. Dey's case (1971) 37 Cut LT 402 (supra) no reasons have been ascribed in the Nagpur case for coming to the said conclusion. It must be noted that in the Nagpur case, there was a positive order suspending the execution of the sentence by the appellate Court. In my opinion, the observations of the learned Judicial Commissioner of Nagpur cannot be held to be the correct proposition since such a view shall be repugnant to the interests of justice. A person who is convicted by the Sessions Judge and ultimately whose appeal stands dismissed, will not be required to serve the sentence merely because the appellate Court had passed an order suspending the sentence and the period for which the appeal continued is more than the period of sentence awarded to the appellant. There is no provision in the Code of Criminal Procedure which warrants such inference. That apart, so far as the present case is concerned, I do not find that the learned Judge has passed any order suspending execution of the sentence. What the learned Judge has ordered is to stay execution of the sentence. Then again, the requirements of Sub-section (1) of Section 389 have not at all been complied with since there are no reasons recorded by the learned single Judge, as to why he thought it fit to pass such an order. Therefore, the order dated 20-10-1981 is not an order in conformity with Sub-section (1) of Section 389 so as to confer any right or advantage on the petitioner. Since the appeal of the petitioner has ultimately been dismissed by the High Court, in all fairness, the petitioner must serve the sentence that has been awarded against him. It will be a travesty of justice if the petitioner is permitted not to serve the sentence even though his appeal has been dismissed by this Court. In my opinion, therefore, the petitioner must be required to serve the sentence that has been passed against him.

10. In the result, therefore, I am not inclined to admit this revision which is accordingly dismissed.