

Sunil Kumar Khetan Vs. State

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Court : Orissa

Decided On : Jul-18-2007

Reported in : 2008CriLJ536

Judge : M.M. Das, J.

Appellant : Sunil Kumar Khetan

Respondent : State

Advocate for Pet/Ap. : Mr. H.P. Nayak

Judgement :

ORDER

M.M. Das, J.

1. This is the third time that the petitioner is before this Court in connection with G.R. Case No. 1344 of 2005 relating to Jharsuguda P.S. Case No. 413 of 2005 which is now pending before the Court of learned Addl. Sessions Judge, Jharsuguda in S.T. No. 24 of 2006.

2. The co-accused-Bimal married to the daughter, namely, Manisha (hereinafter referred to as 'the deceased') of one Gajanand Agrawal, the informant. The marriage took place on 9-5-2005. Within five months of the marriage, the deceased was found dead in her bed-room in the matrimonial home on 1-10-2005.

An information was lodged by said Gajanand Agrawal in the Jharsuguda Police Station alleging, inter alia, that the deceased was being tortured on account of demand of dowry, by her husband and other in-laws. The FIR, was registered under Sections 498A/302/304B/ 406/34, IPC read with Section 4 of the D.P. Act.

3. The petitioner is the brother of the husband of the deceased. The husband of the deceased Bimal Kumar Khetan was arrested on 3-10-2005. The petitioner and other co-accused persons, being father-in-law and mother-in-law of the deceased were found to be absconding and in spite of all efforts by the police, they were not able to apprehend them. The prosecution filed an application under Sections 82 and 83 of the Cr.P.C. The father-in-law and mother-in-law of the deceased filed an application before this Court under Section 438, Cr.P.C. for grant of anticipatory bail. Process under Section 82 of the Cr.P.C. was issued by the learned S.D.J.M. on 19-12-2005. The petitioner, on 24-1-2006, filed an application under Section 438, Cr.P.C. along with another co-accused-Sujata Khetan. The said bail application was rejected by this Court by order dated 24-1-2006. The anticipatory bail application of the father-in-law and mother-in-law of the deceased was also rejected by this Court on 27-1-2006. Orders were issued by the learned trial Court in terms of Section 83, Cr.P.C. to attach the movable properties of the accused. Charge-sheet was submitted on 30-1-2006 before the learned S.D.J.M, indicating that a prima facie case has been made out against Kailash'nath (father-in-law), Kanta Devi (mother-in-law), Sunil (present petitioner) and Bimal (husband of the deceased) under Sections 498A/302/304B/406/34, IPC read with Section 4 of the D.P. Act. The prosecution also made a prayer to permit the Investigating Agency to continue investigation in terms of Section 173(8) Cr.P.C. on the ground that some of the accused persons are still absconding and have not been arrested. The petitioner after being taken to custody, moved a regular bail application before this Court and by order dated 7-4-2006, his prayer for grant of bail was rejected granting liberty to renew his prayer for bail after the case is committed to the Court of Session. After commitment, the petitioner approached the learned Addl. Sessions Judge, Jharsuguda for grant of bail. The petitioner also took a ground in the said petition that his father Kailashnath Khetan who has been released on bail pursuant to the order passed by this Court is required to undergo further treatment at Apollo Hospital and there is no male member to accompany him. A medical

certificate was also filed along with the bail application. The prayer for bail was rejected by the learned Addl. Sessions Judge by his order dated 3-5-2006. The petitioner, thereafter, approached this Court in BLAPL No. 4185 of 2006. By order dated 18-5-2006, learned single Judge of this Court directed that the petitioner shall be released on bail on the terms and conditions as stated in the said order. The said order was challenged before the Apex Court as well as the order dated 22-6-2006 by which this Court directed that the husband of the deceased, namely, Bimal, shall be released on bail. The Apex Court set aside both the orders by which the petitioner as well as his brother Bimal were directed to be released on bail and remitted the matter back to this Court for hearing the bail application afresh in accordance with law.

4. After the matter was remitted back to this Court learned single Judge who dealt with the matter previously, heard the applications and disposed of the same by accepting the prayer for bail made on behalf of the present petitioner as well as his brother Bimal, the husband of the deceased. The said orders passed by this Court, after rehearing the bail applications, was again challenged before the Apex Court in Criminal Appeal Nos. 543-544 of 2007. The Apex Court by its judgment dated 12-4-2007 which has been reported in 2007 (3) Supreme 434 Gajanand Agrawal v. State of Orissa holding that the orders passed by this Court granting bail to the petitioner and his brother is indefensible, allowed the appeals and set aside the orders passed by this Court.

5. It would be pertinent to mention that pursuant to the order of this Court granting bail to the petitioner in BLAPL No. 4185 of 2006, the petitioner was released on bail but immediately after the order of this Court was set aside by the Apex Court, the petitioner surrendered and is now in custody. The learned Addl. Sessions Judge, Jharsuguda has framed charge against the petitioner under Sections 498A/304B/406/34, IPC read with Section 4 of the D.P. Act.

6. Mr. H.P. Nayak, learned Counsel for the petitioner submitted that after charge has been framed against the petitioner under the above sections though originally Section 302, IPC was included in the charge-sheet, as no charge has been framed against the petitioner under Section 302, IPC, there is a change in circumstances

which gave rise to the petitioner for a cause to file a fresh bail application and, accordingly, the petitioner moved the learned Addl. Sessions Judge for grant of bail. By order dated 1-5-2007, the learned Addl. Sessions Judge rejected the prayer of the petitioner for which, the petitioner has again approached this Court in the present application for grant of bail.

7. Before taking up this matter for hearing, this Court made a query to both Mr. H.P. Nayak, learned Counsel for the petitioner as well as the learned Counsel for the State as to whether this Bench should hear this bail application or the same should be heard by the learned single Judge who previously heard the other bail applications filed by the petitioner as has been observed in the case of Harjeet Singh alias Seeta v. State of Punjab : 2002 CriLJ571 , Mr. Nayak relying upon the decision in the case of Mehboob Dawood Shaikh v. State of Maharashtra 2004 SAR (Criminal) 194 : 2004 Cri LJ 1359 submitted that if this Court hears the application, no prejudice will be caused to the petitioner and, therefore, he has no objection if this Court takes up the matter. In the case of Mehboob Dawood Shaikh (supra), the Apex Court held as follows: Observations made in Harjeet Singh v. State of Punjab : 2002 CriLJ571 was relied upon for that purpose. As noted above, in the said judgment, there is a long standing convention and requirement of judicial discipline which has held the field for a long period that subsequent application for grant or cancellation of bail application should be placed before the same learned Judge who had passed the earlier order. This certainly is a desirable course. But at the same time, the party who makes a grievance that the course has not been followed has to indicate as to in what manner he was in prejudice by the deviation. The question of prejudice arises only when on the same set of facts, a different order is passed by another learned Judge canceling the bail or granting the bail as the case may be. But where the cancellation is sought for on grounds different from those which existed at the time of granting bail, the conventional practice of placing the matter before the same learned Judge need not be followed as if it is a statutory requirement....

8. Learned Counsel for the State also submitted that he has no objection if this Court takes up the matter and in that context, the matter was taken up for hearing.

9. To substantiate his case that the petitioner herein is entitled to an order of bail, Mr. Nayak canvassed the following points:

(i) Though the Apex Court in the Criminal Appeal filed against the order of this Court under which the petitioner was granted bail, set aside the said order, but the said case related to a point of time, when charger-sheet under Section 302/304B/498A/406/34, IPC read with Section 4 of the D.P. Act was filed and the minimum punishment that can be imposed under Section 302, IPC is imprisonment for life whereas it is not so under Section 304B, IPC. Therefore, after omission of Section 302, IPC from the charge framed against the petitioner, there is a definite change of circumstances. Further, the case is not at the stage of evidence whereas when the Apex Court heard the appeal, no charge was then framed;

(ii) While allowing the appeal and setting aside the order of bail, the Apex Court has not come to any prima facie finding that there is a case under Section 304B, IPC made out against the present petitioner.

10. Mr. Nayak further submitted that prima facie case means evidence satisfying requirements of all the ingredients of the offence alleged. According to him, the prosecution has not ruled out natural death and intentionally avoided to put the chemical examination report and the post-mortem report together before the concerned Medical Officer for obtaining his opinion with regard to the nature of death as to whether the death was 'suicidal' or 'homicidal'. He further contended that had those been put together, it would have been clearly established that the death was due to sudden cardiac arrest. He, therefore, argued that for constitution of an offence under Section 304B, IPC, the prosecution must prima facie show that the death was unnatural and that soon before the death, the victim was tortured on account of demand of dowry. Both the ingredients having not been satisfied, no case under Section 304B, IPC can be said to have been made out against the present petitioner. Mr. Nayak strenuously urged, that, from the post-mortem report, there is no indication that death was homicidal in nature. The deceased was found dead in the early morning in her bed room where she slept with her husband and the present petitioner slept in his own bed room. Merely,

staying under the same roof is not sufficient to implicate the petitioner with the alleged offences. Mr. Nayak relying upon the decision in the case of Gurucharan Singh v. State AIR 1978 SC 179 : 1978 Cri LJ 129 submitted that even if there is a prima facie case under Section 304, IPC, the same being not punishable with sentence of death or imprisonment for life, the bail as a rule is to be granted, unless prosecution places material to prove that his release will defeat fair trial.

11. Learned Counsel for the State, on the contrary, emphasizes that in a bail application though detailed examination of evidence and elaborate documentation of the merit of the case are to be avoided by the Court, yet, the Court should be satisfied as to whether there is prima facie case and accordingly, though while framing charge, charge under Section 302, IPC has not been framed against the petitioner that does not bring any change to the case of the prosecution as it stood before framing charge and after filing of the charge-sheet, at which stage, the Apex Court dealt with the matter and allowed the appeal setting aside the order of this Court in which the petitioner was granted bail. Thus, the petitioner cannot contend that there is a changed circumstance in the case. He highlighted the relevant portion from the statements recorded under Section 161, Cr.P.C. during investigation as made by the informant, Gourav Agrawal, Smt. Soraj Agrawal, and Shankarlal Agrawal and submitted that these witnesses have categorically implicated the petitioner with regard to causing mental and physical torture for fulfillment of demand of dowry, on the deceased. Learned Counsel for the State also submitted that it is well settled that while considering an application for bail, the Court should keep in mind the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence, reasonable apprehension of tampering of the witnesses or apprehension of threat to the complainant and prima facie satisfaction of the Court in support of the charges.

12. In order to consider the rival contentions made by the parties, on the touch stone of the guidelines prescribed by the Apex Court, for consideration of an application for bail coupled with the fact that this matter was twice brought before the Apex Court, previously, this Court felt it necessary to peruse the judgment of the Apex Court by which the Criminal Appeal filed by the informant in the case of

Gajanand Agrawal (supra) was allowed and the order of bail granted by this Court in favour of the petitioner was set aside.

13. The Apex Court, while examining the order impugned before it which was passed by this Court earlier in case of the petitioner, laid down the following principles in paragraphs 13, 14 and 18 of the said judgment, for consideration of application for bail:

13. There is a need to indicate in the order, reasons for prima facie concluding why bail was being granted particularly where an accused was charged of having committed a serious offence. It is necessary for the Courts dealing with application for bail to consider among other circumstances, the following factors also before granting bail, they are:

1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;
2. Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;
3. Prima facie satisfaction of the Court in support of the charge.

14. Any order dehors of such reason suffers from non-application of mind as was noted by this Court, in Ram Govind Upadhyay v. Sudarshan Singh : 2002 CriLJ1849 , Puran etc. v. Rambilas : 2001 CriLJ2566 and in Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav : 2004 CriLJ1796 :

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18. The High Court was also not correct in saying that there was no likelihood of the accused persons absconding in view of what has been pointed out by learned Counsel for the appellant about his not surrendering requiring issuance of notice in terms of Sections 82 and 83 of the Act.

14. Learned Addl. Sessions Judge, Jharsugda while rejecting the prayer for bail made by the present petitioner after framing of charge on the ground of changed circumstances, came to the conclusion that although the accused Sunil (the

petitioner) has not been charged under Section 302, IPC, but possibility cannot be ruled out for altering the charge if sufficient evidence is found during examination of the witnesses. In my view, possibility of framing charge for grievous offence in the event sufficient evidence is found during the trial, cannot be a ground for refusing bail to an accused. But, however, since the petitioner has been charged for commission of offence under Section 304B IPC, in my considered view, the nature of accusation and severity of punishment in case of conviction is serious as punishment of imprisonment for life can also be awarded to a person convicted for an offence under Section 304B, IPC.

15. With regard to reasonable apprehension of tampering of the witnesses, since charge has already been framed and trial of the case is to commence, I am of the view that at this juncture, there cannot be any apprehension of tampering of the prosecution witnesses, by the petitioner. However, from the statements recorded under Section 161, Cr.P.C. during investigation, I find that there is prima facie allegation against the petitioner made by the father of the deceased as well as the other witnesses, namely, Gourav Agrawal, Smt. Soraj Agrawal, and Shankarlal Agrawal examined during investigation, with regard to commission of offence under Section 304B, IPC.

16. With regard to the submission of Mr. Nayak on the post-mortem report which does not disclose that the death was homicidal in nature, I find from the case diary that during inquest, the bed sheet, two pillow covers and vomiting like substances were sent for chemical examination to the Forensic Science Laboratory. The result of examination shows that there was some human blood stain found on the bed sheet, but no saliva or vomiting matter was detected from the said bed sheet. No blood stain, saliva and vomiting substances were detected from the pillow covers. With regard to the vomiting matter, the report of the Toxicology/Chemistry Division of the Forensic Science Laboratory shows that no insecticidal, al-kaloidal, metallic poisons and drugs like barbifurate and benicodia upine group could be detected from the said vomiting matters. No doubt, it appears that the said chemical report was not put up before the Medical Officer who conducted the post-mortem on the body of the deceased, seeking his opinion with regard to the nature of death. However, it cannot be conclusively said at this juncture that the death of the

deceased was not homicidal in nature as it is revealed from the post-mortem report that dried blood mixed with fluid was present on both nostrils and mouth though there was no external injury on the body. Section 304B, IPC can be made applicable where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of the marriage and it is shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with any demand for dowry. This section, therefore, applies to the case where the death is an unnatural one. The deceased in the present case, was a young lady. The circumstance of death points towards an unnatural death which may be suicidal or homicidal. No doubt, the post-mortem report does not reveal the nature of death. However, on this ground alone, I am unable to accept the contention of Mr. Nayak that where the Medical Officer conducting the post-mortem has not come to the conclusion that the death was homicidal or suicidal, the same should be taken to be a natural death. Further, in my view, the phrase 'under normal circumstances' as appears in Section 304B, IPC can only be applied where the Medical Officer conducting the post-mortem opines that the deceased died due to suffering from any disease or on account of cardiac arrest. But, where the Medical Officer reserves his opinion on the cause of death, no inference can be drawn nor it can be presumed that the death was caused under normal circumstances. This fact has to be gone into during the trial of the case and according to me, cannot be a consideration for coming to the conclusion that no prima facie case under Section 304B, IPC has been made out.

17. The fact that the petitioner has not been charged for an offence under Section 302, IPC ipso facto does not suggest any change of the facts and circumstances of the case which was under consideration of the Apex Court and considering which the Apex Court set aside the order of grant of bail to the petitioner.

18. On consideration of the above materials as well the previous orders passed by this Court and the Hon'ble Apex Court with regard to grant of bail to the petitioner, I am of the view that the petitioner is not entitled to be released on bail.

19. The BLAPL is accordingly dismissed.

