

Shakti Behal Vs. State

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Court : Delhi

Decided On : Jul-20-1993

Reported in : 1993(3)Crimes648; 51(1993)DLT354; II(1993)DMC257

Judge : Y.K. Sabharwal and; D.K. Jain, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 366 and 389

Appeal No. : Criminal Miscellaneous Appeal No. 170 of 1993 and Criminal Appeal No. 72 of 1993

Appellant : Shakti Behal

Respondent : State

Advocate for Pet/Ap. : D.C. Mathur,; K.B. Andley,; N.K. Handa and;

Judgement :

Y.K. Sabharwal, J.

(1) Shanti Behal, the appellant, by this application seeks suspensions of sentence and grant of bail pending decision of appeal filed by her against the judgment of conviction dated 20th April 1993 and order of sentence dated 21st April 1993 passed by Sh. S. N.Kapoor, learned Additional Sessions Judge, Delhi.

(2) By judgment impugned in the appeal learned Additional Sessions Judge has held that the appellant Shanti Behal is guilty for the offences under Sections 302 and 498A, Indian Penal Code . Jagdish Behal, her son, has been found guilty of offence under Section 498A, Indian Penal Code . As regards the offence under Section 302 Indian Penal Code , the learned Additional Sessions Judge has awarded sentence of death to Stot. Shanti Behal and has directed that she shall be hanged by neck till she is dead, after confirmation of sentence by this court. As required by Section 366 of Code of Criminal Procedure (for short 'the Code') the proceedings of the case against Shanti Behal have been submitted to this court for the purpose of confirmation of sentence of death (Murder Reference 2/93).

(3) Sh. Handa, learned advocate appearing for the State, has raised a preliminary objection that the application is not maintainable. The contention is that, a convict, in respect of whom confirmation proceeding under Section 366 read with Section 368 of the Code are pending in the High Court, is not entitled to file an application under Section 389 of the Code. Counsel submits that the sentence of death does not come into existence till it is confirmed and contends that as there is no sentence the question of considering its suspension does not arise. We do not agree. It is only when Court of Session passes a sentence of death, the proceedings are submitted to the High Court and as provided in Section 366(1) of the Code the said sentence cannot be executed unless it is confirmed by the High Court- In case order for sentence of death is not passed by the Court of Session the question of its confirmation by the High Court would not arise. Reliance was, however, placed by Mr. Handa on the observations of Supreme Court in the Constitution Bench decision in Smt. Triveniben' Vs . State of Gujarat, : 1990 CriLJ1810 . that :

'IT is therefore clear that the prisoner who is sentenced to death and is kept in Jail custody under a warrant under S, 366(2) is neither serving rigorous imprisonment nor simple imprisonment. In substance he is in jail so that he is kept safe and protected with the purpose that he may be available for execution of the sentence which has been awarded and in this view the aspect of solitary confinement has already been dealt with in the above noted case but it must be said that the life of the condemned prisoner in jail awaiting execution of sentence

must be such which is not like a prisoner suffering the sentence but it is also essential that he must be kept safe as the purpose of the jail custody is to make him available for execution after the sentence is finally confirmed'.

(4) In this case the point for consideration before the Supreme Court was not which is being canvassed by Mr. Handa but was whether prolonged delay in execution of death sentence renders such sentence inexecutable and entitles the convict to demand the alternate sentence of life imprisonment. The observations of Supreme Court are on the nature of the custody of a convict committed to jail custody under a warrant under Section 366(2) and have no relevance to the contention urged by learned State counsel.

(5) Learned State counsel further contends that the confirmation proceedings in this court are. a continuation of the trial and as trial has not concluded and is deemed to be pending, the question of availability of the remedy under Section 389 of the Code does not arise since that remedy can be invoked only in appeal. We have no difficulty in accepting the first limb of the contention that the confirmation proceedings are in substance a continuation of the trial. This aspect is well settled. In *State of Maharashtra Vs . Sindhi alias Raman. : 1975 CriLJ1475* , it has been held that so far as an accused person sentenced to death is concerned, his trial does not conclude with the termination of the proceedings in the court of session. The reason being that the death sentence passed by the court of session is subject to confirmation by .the High Court and the trial cannot be deemed to have been concluded till an executable sentence is passed by the competent court and that the confirmation proceedings are in substance a continuation of the trial. The convict has, however, filed the present application for grant of bail not in the Murder Reference but in her appeal challenging the judgment of conviction and order of sentence and as such the contention. that confirmation proceedings are in substance a continuation of the trial is not relevant for the decision of the application. Section 368 of the Code sets out in clauses (a), (b) and (c) various orders the High Court may make in any case submitted to it under Section 366. Proviso to Section 368, however, envisages that no order of confirmation shall be made until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is

disposed of. Thus, the order confirming the death sentence can be made by the High Court only after the disposal of the appeal which may have been filed by the accused convicted under Section 302 Indian Penal Code and where no appeal has been filed, after the period for preferring the appeal has expired. It is thus evident that Chapter XXVIII of the Code which deals with submission of death sentences for confirmation does not affect the right of a convict to prefer an appeal to this court as provided in Section 374(2) of the Code. Section 368 not only recognises right of a convict to file an appeal but, in a way, places that right on a higher pedestal as the order of confirmation can be made only after the disposal of such appeal. As noticed above, it has to be kept in view that the present application has been filed in the appeal filed by the appellant and not in the Murder Reference. Chapter XXIX of the Code deals with appeals. It cannot be said that the law has conferred on the convict, in respect of whom death sentence has been passed by Court of Session, only a right to prefer appeal under Chapter XXIX but it intended to take away from such convict the right to seek relief under Section 389 of the Code. Section 389 does not stipulate that in a case where court of session has passed a sentence of death, the convict cannot be ordered to be released on bail. No such limitations can be read in Section 389 of the Code. Under Section 389, pending an appeal by a convicted person, the appellate court can order the suspension of the execution of the sentence or the suspension of, the order appealed against. The use of the words 'order appealed against' in Section 389 is very significant. These words are of wide connotation and show that the appellate court in exercise of jurisdiction under Section 389 is empowered to even direct suspension of the order of conviction. Thus, we fail to see how it can be successfully urged that a convict in respect of whom death sentence has been passed by the court of session cannot in her appeal prefer an application under section 389 of the Code. We may also notice a decision of a learned single Judge of this Court in S. M. Malik & Ors. Vs. State and another, : 41(1990)DLT504, cited by Mr. Mathur, in which construing Section 389 of the Code it was held that under the said provision the court is, entitled to even suspend the order of conviction against which the appeal has been preferred. If the Legislature intended that the convict in respect of whom sentence of death has been passed by Court of Session and who has, also filed appeal would not be entitled to seek bail in his appeal because

of pendency of confirmation proceedings, it would have expressly provided that. Far from that it cannot be even impliedly inferred. We, therefore, overrule the preliminary objection and hold that the present application is maintainable. It is, however, a different matter whether on consideration of the facts and circumstances of the case the convict pending her appeal is entitled to be released on bail or not or the order of conviction is liable to be suspended or not.

(6) The principles governing the grant or refusal of bail are well settled and; have been laid down repeatedly in catena of judgments and we need not restate those principles but we would like to make a note of a passage, from the decision of Full Bench of Kerala High Court on which strong, reliance was placed by Mr. Mathur, learned Senior Advocate appearing for the appellant. .The reference to Full Bench was made because Division Bench doubted the correctness of observations made by another Division Bench to the effect that in a case where the Sessions Judge has after taking evidence entered a conviction for murder it should not be assumed that there are no reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life and the presumption should be otherwise. Counsel for the petitioners contended before Full Bench that if these observations were allowed to stand) in every case where there is conviction and sentence of life imprisonment, a motion for bail would be a mere formality, as that would necessarily be rejected on the premises that once a person is convicted he must be found to be prima facie guilty of commission of an offence punishable with imprisonment for life and that would be sufficient to dismiss the plea for bail. Dealing with the aforesaid aspect, the Full Bench of Kerala High Court said in 'Uthaman and others v. State of Kerala, 1983 Criminal Law Journal 74(4), that :

'WE find no warrant for any dogmatic approach that when once a person accused of an offence under Section 302 of the Indian Penal Code has been convicted and sentenced to life imprisonment the appellate court is not to enlarge the accused on bail pendente lite. To state the proposition in such categorical terms would be to self impose a restriction on the exercise of power by the appellate court under Section 389 read with Section 439(1) of the Criminal Procedure Code. That will be to read into the power of the High Court a limitation not warranted by the

provisions of the Criminal Procedure Code. After referring to The decisions of the Supreme Court in Gudaikanti Narasimhulu Vs . Public Prosecution, A.P. : 1978 CriLJ502 Babu Singh Vs . State of Up : 1978 CriLJ651 , Kshmiria Vs . State of Punjab, : 1977 CriLJ1746 and Gurcharan Singh V State (Delhi Admn), Air 1978 Sc 179; : 1978 CriLJ129 , the learned Judges of the Division Bench in Rajan V. State, maker. Lt 285; (1981 Cri. Lj 206) concluded thus:

'It follows that in disposing of an application' for bail the High Court and the Court of Session are obliged to consider whether there are reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life. It that be so, the identical consideration should weigh with the High Court in the matter of suspension of sentence and grant of bail after the accused is found guilty of an offence punishable with death or imprisonment for life and is convicted for such an offence. It is true that Section 389 'does not specify the grounds on which suspension of sentence can be allowed. But the very fact that the Section directs that reasons should be stated before suspension is allowed shows that suspension of sentence is not to be taken as a matter of course. Considerations which should weigh with the Court in the matter of granting bail pending trial should mutates mutants apply and should not be ignored while disposing of an application for suspension of sentence after a conviction' is entered In a case where the Sessions Judge has after taking evidence entered a conviction for murder, it- should not be assumed tha: there are no reasonable grounds for be living that the accused has been guilty of an offence punishable with death or imprisonment for life. The presumption should be otherwise.

It is the idea conveyed in the last two sentences of the passage quoted that is seriously objected to by learned: counsel for the petitioners- Sri. P. V. Ayyappan. May be in considering the possibility for the accused jumping bail the question whether there is reasonable ground to believe that the accused had committed a serious crime is relevant. It is in that view that the High Court takes note of this circumstance under Section 439(1) of the Code.' If either because the evidence is so meagre that the accused is not likely to take the risk of jumping bail anticipating conviction in appeal or there are other reasons why on the facts of a case the court could form the opinion that the accused would not jump bail if released then

bail may be granted unless it be that the court may have reason to believe that the release of the accused may be of danger to others or to himself or he may cause self-effacement. In determining whether there are reasonable grounds for believing that the accused has committed an offence punishable with death-or life imprisonment the court looks into materials - then available to it, whether it be at the stage of investigation or at the stage of trial. Such would be the case even in the appeal. Merely because the appeal is against a conviction there should not be presumption that the accused has committed the offence as that would be to foreclose on the plea of the accused that on the materials available there it no justification to refuse bail. Inasmuch as the learned Judges of the Division Bench have categorically indicated that a presumption of existence of reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment would arise by reason of a conviction, we must respectfully disagree. That is not a correct statement of the law. To that extent the dictum laid down in the Division Bench decision requires to be read as modified.'

(7) We are in respectful agreement with the opinion expressed by the Full Bench, of Kerala High Court. It is evident that acceptance of the view of the Division Bench which was overruled by the Full bench, would make the right to file application seeking bail in cases where punishment of life imprisonment or death sentence has been indicted, a mere formal one and not of substance. The concept of life and personal liberty is of expanding horizon. It has been expanding with rapid speed ever since independence of the country. The acceptance of the view of the Division Bench of Kerala High Court.would amount to putting a brake on the Speed of expansion. We do not see any compelling reason to do that It would, of course, depend upon merits of each case to grant or not to grant the bail.

(8) Reverting to the merits of the case, Mr. Mathur contends that the,, injuries found on the person of the deceased are inconsistent withthe.dying declarations alleged to have been made by the deceased and also that the ingredients of Section 300 Indian Penal Code have not been made out and, thus, prima facie, conviction under Section 302 Ipc cannot be sustained. It is, also contended that the cause of death as per the testimony of the ...doctor who conducted the post mortem examination Was septicemia subsequent upon fire burns and that the

death took place after 13 days after the incident of , burning and as such too, prima facie, offence under Section 302 is not made out. Further counsel submits that the convict is an old lady of .about , years of age; she is suffering from Tuberculosis and was on bail during the trial of the case which lasted for more six years and there has been no grievance about her conduct, and she is entitled to be enlarged on bail.

(9) Learned State Counsel, on the other hand, contends that this is yet another unfortunate incident of gruesome murder of a young girl by the barbaric process of pouring kerosene oil over her body and setting her on fire and demands of husband and mother-in-law were not met by the parents of the deceased. Strong emphasis was laid on the history recorded in the MLC by the doctor soon after the victim was taken to hospital at 1.30 pm whereas she had been set on fire at about 12.15 pm at her residence, which counsel submits, fully implicates the appellant. Likewise, strong reliance was placed on the statement of the deceased recorded by the Executive Magistrate between 5.25 and 5.30 P.M. in which the deceased stated that while she was washing hands after coming out of toilet on washbasin her mother-in-law, namely, the appellant had poured kerosene oil on her and set her ablaze with a match stick. The marriage between deceased and son of the appellant took place on 29th November 1985 and the burning incident took place on 4th September 1986. It was also urged that the husband had left the deceased at the house of her parents on 2nd June, 1986 and she stayed with her parents for about three months but the parents' prevailed upon her and sent her with the husband on 30th August, 1986. Reference was also made to two letters written by the deceased to her in-laws on 3rd September 1986 indicating the harassment and that she apprehended danger to her life. Learned State counsel also submitted that there has been no precedent of grant of bail to a convict on whom court of session has awarded death sentence pending the confirmation proceeding or pending the decision of the appeal, filed by the convict. It may be so, but in our view. As dealt with hereinbefore, there is no illiar.

(10) We would refrain from expressing any opinion on the merits of the case at this stage lest it may prejudice either the Convict or the prosecution. The Supreme Court says that detailed examination of the evidence and elaborate documentation

of the merits of the case should be avoided while passing orders on bail application. No party should have the impression that his case has been prejudiced. To be satisfied about a prima facie case is needed, but it is not the same as exhaustive exploration of the merits in the order itself (See : *Niranjan Sing v. Prabhakar Raja Ram Kharote*, 1980 CRLJ 426).

(11) Having given our thoughtful consideration to the respective contentions and the totality of the circumstances, we do not find it to be a fit case for grant of bail. The application is accordingly, dismissed.

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