

(1995) 01 OHC CK 0037

Orissa High Court

Case No: Mis. Case No"s. 371, 438, 476, 477 and 517 of 1994 arising out of Criminal
Appeal No"s. 170, 318, 331, 333 and 400 of 1994

Benzamin Khirro alias Kiro,
Ananta Sharan Hota, Rajendra
Prasad, Udayanath Behera and
Hemanta Kumar Patnaik

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision: Jan. 2, 1995

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 389

Citation: (1995) CriLJ 1682 : (1995) 1 OLR 503

Hon'ble Judges: A. Pasayat, J

Bench: Single Bench

Advocate: Jayant Das, S.K. Mund, D.P. Das, J.K. Panda and S.N.B. Ray in Misc. Case Nos. 371 and 438/94, D. Nayak, S. Swain, M. Mohanty, A. Ahad, P.K. Misra, D.P. Patnaik, D.P. Pradhan and J. Pal in Misc. Case No. 477/94, Deepak Misra, Anil Deo, B.S. Tripathy, P. Panda and D.K. Sahoo in Misc. Case No. 517/94, S.K. Behera, D. Mahanta, J. Katkia and R. Mohapatra in Misc. Case No. 476/94, for the Appellant; B. Dash, A.S.C. and Sanjit Mohanty for Republic of India, for the Respondent

Judgement

A. Pasayat, J.

Since all these applications involve identical prayer, they are disposed of By this common" judgment which shall govern each one of them. The controversy in short is whether conviction can be suspended u/s 389 of the Code of Criminal Procedure, 1973 (in short, the "Code"). The petitioners assert that it can be done, and in any event, according to them, same can be put in eclipse, white it is under challenge in a higher forum. According to the opposite parties, u/s 389 of the Code what is to be suspended is the sentence, or the order appealed against, and to release the appellant on bail, it he is in confinement, and nothing beyond it. The controversy

centres round the scope and ambit of Section 389.

2. Section 389 of the Code deals with "suspension , of sentence pending the appeal; release of a appellant on bail", as the heading shows. Sub-section (1) deals with the powers of the appellate Court for reasons to, be recorded in writing, to suspend execution of sentence or order appealed against; and if the convicted person is in confinement, to release him on bail. or on his own bond. Sub-Section (3) deals with a stage prior to filing of appeal before the appellate Court. It provides that where filing of an appeal is intended and 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). During this period the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended. It is to be noted that the question of bail is dealt with in Chapter XXXIII. The granting of bail which is referred to in that Chapter, which consists of Sections 436 to 450 both inclusive, in the granting of bail to accused persons. The only provision in the Code which refers to the grant of bail to a convicted person is contained in Section 389. It may be noted that Section 432 of the Code empowers the appropriate Government to suspend the execution of sentence and Arts. 72 and 161 of the Constitution of India, 1950 (in short, the "Constitution") empower the President and Governors of States to suspend the execution of a sentence. In Sub-Sections (1i) and (2) of Section 389, the words "convicted Person" are used. One essential condition for application of Sub-section (3) is that the convicted accused must have been on bail at the time of conviction. If he was on bail and the offence for which he is convicted is also bailable. Clause (ii) will apply. If the offence is not bailable but the convicted person is sentenced to imprisonment not exceeding three years, then Clause (i) will apply, and in either case the Court shall order that he be released on bail. The bail shall be for a period which may enable the convicted person to file his appeal and obtain necessary orders under Sub-Section (1) from the appellate Court. Sub-section (3) has no application where the accused has been sentenced to imprisonment for a period exceeding three years. It will also have no application where the accused was in jail when the judgment was pronounced. Sub-section (1) of Section 389 only provides for suspension of execution of sentence or order appealed against. Reason for such suspension is that the conviction or sentence or both is subject matter of challenge in any appeal, and it may not be proper for a convicted person to suffer sentence which is consequential to conviction till a final decision is taken in the matter. But

reasons have to be recorded in writing before the appellate Court exercises that power on consideration of the question whether it would be desirable to suspend the sentence or the order appealed against, pending decision in the appeal, or the sentence or the order appealed against should continue to be operative. When the execution of sentence is suspended, and the convicted person is in confinement, he may be released on bail on -his own bond, or otherwise, notwithstanding the suspension, he shall be deemed to be in confinement. Sub-Section (4) throws light on this aspect. It is provided that when the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released in terms of Sub-section (1) or Sub-Section (3), shall be excluded in computing the term for which he is so sentenced, that the Sub-section lays down is that the period of bail shall be excluded in computing the term. I.e., the period will be left out in making the calculation.

3. Conviction and sentence are conceptually different. The word "convicted" or "conviction of a person accused is equivocal. "In " common parlance no doubt it is taken to mean the verdict at the time: of trial; but in strict legal sense it is used to denote the judgment of the Court" per Tindal C. J. *Burgess v. Bostefeur* 13 LJVIC 126. A conviction is complete as soon as the person charged has been found and has pleaded guilty, though it seems that the Court has a focus pagenitentiso before the conviction is actually drawn up (See *R v. Manchester Justices* : (1937) 2 K. B. 96. To convict means to declare guilty after trial. In other words conviction is determination of guilt of a person accused of having committed an offence under the Indian Penal Code or any other law. In cases of conviction a Magistrate has to pass a sentence according to law unless he takes recourse to Section 360 or other analogous provision. A sentence follows and does not precede a conviction.

4. "Sentence" may bear the wider meaning of judgment or the decision or the narrower sense of pronouncement of punishment according to the context, but the primary meaning is punishment imposed. Sentences which can be awarded by various Courts are indicated in Section 28 and 29 of the Code. The Code first enumerates the Courts by which different offences can be tried, and then proceeds to define the limits of sentences which they can pass. These limits show the maximum sentences which a Court can pass ; they have nothing to do with the maximum penalty provided for an offence. The question of sentence is always a difficult and complex question. Sentencing is always a matter of judicial discretion subject to any mandatory minimum prescribed by law. Where a fine is imposed on an accused, and it is not paid, Section 30 of the Code provides that he can be imprisoned for a further term in addition to the substantive imprisonment awarded, if any. There is a limit to the power of Magistrates to award fines in terms of Section 29, but the powers of a Sessions Court or the High Court are unlimited. Section 63, IPC provides that where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive. Section 31 of the Code deals with sentence in cases of conviction of several offences

at one trial. Section 354 of the Code provides that every judgment referred to in Section 353 shall inter alia specify the offence, if any, of which, and the section of the IPC or other law under which, the accused is convicted and the punishment to which he is sentenced. Sub-section (2) of Section 354 provides that when the conviction is under the IPC and it is doubtful under which of two sections, or under which of two parts of the same section, and under which Chapter of the IPC, the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative. The sentence in the case of a conviction is a part of the judgment. If the judgment is one of acquittal, it shall state the offence of which the accused is acquitted. The judgment shall contain : (i) the point for determination, (ii) the decision thereon; and (iii) reason for the decision. Section 354(1)(c) clearly requires that the Court should apply its mind to the offence or offences committed by each of the accused and record its finding thereon, and further that it should specify the punishment which it proposes to impose upon the accused. This aspect was highlighted by me in [Krushna Chandra Barik Vs. State of Orissa](#), .

5. Conviction continues to be operative unless it is set aside by the higher Court. The word "execution" as appearing in Sub-section (1) of Section 389 governs both sentence and order appealed against. The order of conviction is not executable, and therefore, the question, of suspension thereof does not arise. The effect of order passed under Sub-section (1) of Section 389 of the Code is not to affect conviction, and to get over the difficulties encountered on account of the conviction. The conviction is not obliterated by passing of an order under Sub-section (1) of Section 389.

6. It is pleaded by the petitioners that the expression "order appealed against" is wide enough to engulf conviction, and in other words "order appealed against" includes conviction. The plea though attractive is without any substance. As indicated above, the word "execution" relates to both sentence and the order appealed against. The expression "order appeal against" appearing in Sec. 389 (1) relates to appeals as set out in Section 45 of the Code, and does not encompass conviction. The word "suspend" means to postpone, defer, arrest, delay. Question of suspending "conviction" does not arise because it operates till set aside in either appeal or revision.

7. Strong reliance was placed on certain observations" made by Delhi High Court in Capt. Satish Kumar Sharma v. Delhi Administration and others : 1991 Cri L J 950 and in [S.M. Malik and Others Vs. State and Another](#), . In S. M. Malik's case (supra) Delhi High Court observed that where the order appealed against is the order of conviction, the Court is entitled to suspend it u/s 339. Reference was made by the learned Judge to a decision of the Court in Rathi. Desabandhu v. State of Andhra Pradesh : AIR 1977 SC 1385 to buttress the view. In the said case the apex Court was concerned with maintainability of an appeal where a person had already suffered the sentence. In that context it was observed that a person who has been convicted

and sentenced, wants other evil consequences following his conviction not to visit him is also to wipe out the stigma that sticks to him, and therefore, files the appeal. Reference was also made to Workmen, U. P. State Electricity Board Upper Ganges Valley Electricity Supply Co. (1966) 1 LLJ 730 where it was observed that after the appeal is admitted and bail is granted, there is no final judgment against the appellant. There is nothing in the above decisions which support the view that a conviction can also be suspended.

A decision is a determination arrived at after consideration of facts, and in the legal context, law related to the facts of a particular case. It is an authority for what is decided and not what consequentially or incidentally flows from the conclusion. . Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, "It may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret words of statutes, their words are ♦ not to be interpreted as statutes. Observations of the Judges are not to be read as Euclid's theorems, not as provisions of the statute : (See [Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others](#), : [Amar Nath Om Prakash and Others Vs. State of Punjab and Others](#), . There is always peril in treating the words of a speech of judgment, as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case (See Harrington v. British Railways Board (1972) 2 WLR 587 It is needless to repeat the oft quoted truism of Lord Halsbury that a case is only an authority for what it actually decides and not for what may seem to follow logically from it. Therefore, the decision in S. M. Malik's case (supra) is of no assistance to the petitioners.

9. Reliance is also placed on a decision of the Andhra Pradesh High Court in [V. Sundararami Reddi Vs. State](#), . In the said decision a Division Bench of the said High Court observed that the expression "order appealed against" is wide enough to include a conviction. In a later decision of the said High Court, the learned Single Judge observed that there is no provision in either the Code or under any Rules or Regulations under any other enactment for suspension of the conviction. The views of the Division Bench in V. Sundararamireddi's case (supra) were analysed. It was noticed that though the Division Bench held that even if it were held that u/s 389(1) of the Code a conviction cannot be suspended, yet the convicted person may invoke Section 482 of the Code. In my view Section 482 does not come into operation at all in such a case, Conviction is a conclusion, a determination of guilt, the question of keeping the same in abeyance or suspending it does not arise. Further, I am unable to agree with the view of the Division Bench of the Andhra Pradesh High Court in [M. Srinivasulu Reddy Vs. State Inspector of Police, Anti Corruption Bureau, Nellore Range, Nellore](#), that the expression "order appealed against, includes conviction, in view of analysis made above.

10. The petitioners pleaded that in view of conviction, each of them may be affected in service. While exercising power under the Code, a Court is not empowered to look into this aspect. It is for the employer to take appropriate decision in such matters.

11. In the ultimate analysis, therefore, the conclusion is inevitable that a conviction cannot be suspended u/s 388(1) or under any other provision of the Code. What would be the effect of a conviction so far as it relates to the employment of a convicted person is a matter for the employer, and the appellate Court under the Code is not concerned with that aspect. The prayer in each case to keep the conviction under suspension is untenable, and is rejected.