Hare Ram Mahto @ Hare Ram Singh Vs State Of Bihar

Court: Patna High Court

Date of Decision: July 4, 2022

Acts Referred: Code Of Criminal Procedure, 1973 â€" Section 389, 389(1), 439
Indian Penal Code, 1860 â€" Section 34, 149, 302

Hon'ble Judges: Chakradhari Sharan Singh, J; Khatim Reza, J

Bench: Division Bench

Advocate: Kanhaiya Prasad Singh, Surya Narayan Roy, Pratik Mishra, Shashi Bala Verma, Ajay Kumar Thakur, Md.Imteyaz Ahmad, Ashwani Kumar Sinha, Abhimanyu Sharma, Sujit Kumar Singh, Ajay Mishra, Mirityunjay Kumar, Jitendra Kumar Pandey, Shiwesh Chandra Mishra, Dr. Mayanand Jha

Final Decision: Allowed

Judgement

1. All these appeals have been placed before us for consideration of the appellantsÃ¢â‚¬â„¢ prayer for their release on bail upon suspension of sentence

under Section 389 (1) of the Cr.P.C., during the pendency of these appeals.

2. The same judgment of conviction and order of sentence dated 10.04.2019/15.04.2019 passed by the learned Additional Sessions Judge-I Rosera

(Samastipur) in Sessions Trial No. 688 of 2005 is under challenge in all these criminal appeals. By the aforementioned judgment and order, the

appellants stand convicted of the offences punishable under Section 302/149 of the Indian Penal Code and other provisions of the Indian Penal Code

and have been sentenced to undergo imprisonment for life for the offence under Section 302/149 of the Indian Penal Code.

3. The State has filed written objection in terms of the first proviso to Section 389 (1) of the Cr.P.C. in Cr. Appeal (DB) No. 645 of 2019 and Cr.

Appeal (DB) No. 571 of 2019. However, despite opportunity having been granted to the State, no such written objection has been filed in Cr. Appeal

(DB) No. 581 of 2019 and Cr. Appeal (DB) No. 665 of 2019.

4. We have heard Mr. Kanhaiya Prasad Singh, learned Senior Counsel with Mr. Surya Narayan Roy, learned counsel, and Mr. Pratik Mishra, learned

counsel appearing on behalf of the appellant in Cr. Appeal (DB) No. 645 of 2019; Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of

the appellant in Cr. Appeal (DB) No. 571 of 2019; Mr. Sujit Kumar Singh, learned counsel appearing on behalf of the appellant in Cr. Appeal (DB)

No. 581 of 2019; Mr. Mirityunjay Kumar, learned counsel appearing on behalf of the appellant in Cr. Appeal (DB) No. 665 of 2019; Kumari Sashi

Bala Verma, learned Additional Public Prosecutor for the State in Cr. Appeal (DB) No. 645 of 2019; Mr. Abhimanyu Sharma, learned Additional

Public Prosecutor for the State in Cr. Appeal (DB) No. 571 of 2019; Mr. Ajay Mishra, learned Additional Public Prosecutor for the State in Cr.

Appeal (DB) No. 581 of 2019; and Dr. Maya Nand Jha, learned Additional Public Prosecutor for the State in Cr. Appeal (DB) No. 665 of 2019.

5. In the light of rival submissions advanced at the bar we have considered it apt to briefly narrate at the outset, prosecutionÃ¢â‚¬â„¢s case as disclosed in

the FIR, before considering the said submissions.

6. The occurrence is said to have taken place at 6:00 a.m. on 05.05.2005, as mentioned in the fardbayan of the infromant Sita Devi, based on which,

the F.I.R. i.e. Rosera P.S. Case No. 44 of 2005 came to be registered. The informant disclosed in her fardbayan recorded by the police officer at 8:15

a.m. at the Sub-Divisional Sadar Hospital, Rosera that, when they were about to proceed for Rosera in a Rickshaw in front of their house, the

accused Dharamchand Mahto suddenly came and started abusing. She further alleged that Ram Charitra Mahto, Haricharan Mahto, Ram Deo Mahto,

Bade Lal Mahto, Dharmendra Mahto, Jitendra Kumar, Bharat Mahto, Sri Narayan Mahto, Jai Kumar Mahto, and ten others, whose names she did not

know came there, carrying brickbats and acid. They pulled down the informant and her son Ram Ratan Das from Rickshaw.

She further alleged that Ram Charitra Mahto threw acid on the body of the said Ram Ratan Das (deceased) who sustained injuries. In the meanwhile,

when her son Manoj Das and nephew Vishwanath Das came to rescue, they were also assaulted with brickbats and acid was thrown upon them too.

The informantÃ¢â‚¬â„¢s dauther-in-law had also rushed to the place of occurrence to rescue who too was attacked with brickbats and acid. Police came

in the meanwhile and all injured were taken to hospital for treatment. Vishwanath Das died on the spot whereas the appellantÃ¢â‚¬â„¢s son and daughter-

in-law were undergoing treatment at the time when her fardbayan was recorded. The names of such persons who had participated in the commission

of the offence but not named in the FIR would be disclosed by her son and the daughter in law who were undergoing treatment, the informant said.

As is evident from the judgment under appeal, the injured Manoj Das subsequently died on 24.07.2005 and another injured Ram Ratan Das died on

19.06.2005. The postmortem reports suggest that the cause of death was the burn injury caused by acid on person of the deceased Manoj Das and

Ram Ratan Das. As regards Vishwanath Das, his cause of death is injury caused by hard and blunt substance, as per the postmortem report.

7. Mr. Kanhaiya Prasad Singh, learned Senior Counsel appearing on behalf of the appellant in Cr. Appeal (DB) No. 645 of 2019 has submitted that

this appellant was not named in the F.I.R., though, the informant claimed to have identified most of the perpetrators of the offence. He has submitted

that his name surfaced on the basis of protest petition filed by the informant. He has further submitted that, as a matter of fact, before registration of

the F.I.R. one F.I.R. was already registered in respect of an occurrence which had taken place almost at the same time and place on the same date

based on the fardbayan of Ram Charitra Mahto, as Rosera P.S. Case No. 43 of 2005, recorded by the police officer at 7:00 am at Sub-Divisional

Sadar Hospital, Rosera, in which he had named Ram Ratan Das, Manoj Das and Vishwanath Das, alleging that they had poured acid on his body

causing grievous acid burn injuries. He also alleged in his fardbayan that a dacoity was committed in his house nearly 3-4 years ago in which the

persons named in the F.I.R. relating to dacoity were sent to jail, because of which the persons named in Rosera P.S. Case No. 44 of 2005 had

developed animosity and, therefore, they had attacked the informant of the said case and his family members.

8. Mr. Kanhaiya Prasad Singh, learned Senior Counsel has made two fold submissions for the purpose of exercise of discretion by this Court under

Section 389 (1) of the Cr.P.C. He has firstly, submitted that the informant who claims to be the eye witness to the occurrence, had not named the

appellant Hare Ram Mahto in the F.I.R. Subsequent implication of the appellant is apparently with ulterior motive because of previous animosity. He

has secondly submitted that there is no evidence adduced at the trial suggesting any definite overt act against this appellant. He contends that

accusation against him is general in nature. He accordingly contends that, though, prosecution miserably failed to establish commission of any offence

against this appellant based on the evidence adduced at the trial, the trial Court has recorded finding of appellantÃ¢â‚¬â„¢s conviction which is patently

erroneous. He has further submitted that this appeal was filed nearly three years ago and there is no likelihood of the same being taken up for final

hearing in near future. For the said reason also, he contends that a case is made out for exercise of discretion under Section 389 (1) of the Cr.P.C.

9. Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of the appellant in Cr. Appeal (DB) No. 571 of 2019 has submitted that though the

appellant is named in the F.I.R., none of the prosecution witnesses examined have attributed any specific overt act in commission of the offence,

except general allegation of his participation when the occurrence had taken place. He has contended that the evidence adduced at the trial would

manifestly disclose that the son of the informant and her nephew had a shop for repair/manufacture of batteries. He has submitted that acid is used

for repair and manufacture of car batteries. He contends, accordingly, that it is highly probable that the acid burn injuries sustained by both the sides

were caused by acid available in the house of the informant. He submits that it is highly improbable that persons will go with brickbats and acid to

assault the victims. He accordingly submits that the prosecution, though miserable failed to establish its case before the Trial Court, the Trial Court

wrongly recorded the order of conviction without adequate evidence, which is patently erroneous.

10. We must not fail to notice at this stage the common submission made by Mr. Singh and Mr. Thakur that as the appellants were all along on bail

during the investigation and at the trial and there is no material to demonstrate that they ever misused the said privilege of bail granted to them, their

case for grant of bail and suspension of sentence deserves to be considered favourably.

11. Mr. Sujit Kumar Singh, learned counsel appearing on behalf of the appellant in Cr. Appeal (DB) No. 581 of 2019 and Mr. Mirityunjay Kumar,

learned counsel appearing on behalf of the appellant in Cr. Appeal (DB) No. 665 of 2019 have adopted the submission advanced by Mr. Kanhaiya

Prasad Singh, learned Senior Counsel and Mr. Ajay Kumar Thakur, learned counsel as noted above.

12. It is noted at this juncture that appellant of Cr. Appeal (DB) No. 581 of 2019 was also not named in the F.I.R.

13. Learned Additional Public Prosecutor appearing on behalf of the State of Bihar, on the other hand, has submitted that considering the gravity of

the offence and the fact that three persons died of the injuries sustained by them in the occurrence, this Court should decline to exercise discretion in

favour of the appellants under Section 389 (1) of the Cr.P.C. It is their contention that thought no specific role has been attributed to these appellants

in the evidence of witnesses, their participation has been proved at the trial to be active and, therefore, they do not deserve the privilege of suspension

of sentence and release on bail during the pendency of this appeal.

14. Before proceeding to consider rival submissions made on behalf of the parties as noted above, we consider it appropriate to notice the relevant

requirements of exercise of discretion under Section 389 (1) of the Cr.P.C. with reference to the language of the said provision and the judicial

pronouncements in this regard of the Supreme Court and this Court in this regard.

15. It is considered apt to reproduce hereinbelow Section 389 (1) of the Cr.P.C.:-

Ã¢â‚¬Å“389. Suspension of sentence pending the appeal; release of appellant on bail.Ã¢â‚¬

(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.

[Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence

punishable with death or imprisonment for life or imprisonment for a term of not less than then years, shall give opportunity to the Public

Prosecutor for showing cause in writing against such release:

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application

for the cancellation of bail.]Ã¢â‚¬â€‹

16. A plain reading of the aforesaid provision makes it clear that recording of reasons while exercising discretion under Section 389 (1) of the Cr.P.C.

is mandatory. The Supreme Court in case of Mauji Ram Vs. State of Uttar Pradesh and Anr. reported in 2019 (8) SCC 17 has laid emphasis on the

requirement of assigning reasons for exercising jurisdiction under Article 389 (1) of the Cr.P.C.. The requirement of recording of reasons clearly

indicates that there has to be careful consideration of the relevant facts and the order directing suspension of sentence and grant of bail cannot be

passed as a matter of routine. The appellate Court has a duty to objectively assess the matter and to record reasons for the conclusion that the case

warrants suspension of execution of sentence and grant of bail. {See. (2014) 2 PLJR 756, Chandrashekhar Bharti Vs. State of Bihar, Para-55)

17. It would be useful here to refer to the Supreme CourtÃ¢â‚¬â„¢s decision in case of Gomti Vs. Thakur Das and Ors. reported in (2007) 11 SCC 160

wherein it has been clearly laid down that the mere fact that during the trial, the appellants were granted bail and there was no allegation of misuse of

liberty, is really not of much significance. The fact of bail granted during trial looses its significance when, on completion of the trial, the accused

persons are found guilty. The mere fact that during the period when accused persons were on bail during the trial, there was no misuse of liberties,

does not per se warrant suspension of execution of sentence and grant of bail.

18. In case of Gomti Vs. Thakur Das (supra), the Supreme Court has noted with approval, earlier decisions rendered in the case of Kishori Lal Vs.

Rupa and Ors. reported in (2004) 7 SCC 638 and Vasant Tukaram Pawar Vs. State of Maharashtra reported in (2005) 5 SCC 281 laying down the

factors to be considered for exercise of discretion under Section 389 (1) of the Cr.P.C.. Paragraphs 4 to 8 of the Supreme CourtÃ¢â‚¬â„¢s decision in

case of Kishori Lal (supra) deserve to be usefully reproduced, which read as under:-

Ã¢â‚¬Å“4. Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the appellant on bail.

There is a distinction between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement for the

appellate court to record reasons in writing for ordering suspension of execution of the sentence or order appealed against. If he is in

confinement, the said court can direct that he be released on bail or on his own bond. The requirement of recording reasons in writing

clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant

of bail should not be passed as a matter of routine.

5. The appellate court is duty-bound to objectively assess the matter and to record reasons for the conclusion that the case warrants

suspension of execution of sentence and grant of bail. In the instant case, the only factor which seems to have weighed with the High Court

for directing suspension of sentence and grant of bail is the absence of allegation of misuse of liberty during the earlier period when the

accused-respondents were on bail.

6. The mere fact that during the trial, they were granted bail and there was no allegation of misuse of liberty, is really not of much

significance. The effect of bail granted during trial loses significance when on completion of trial, the accused persons have been found

guilty. The mere fact that during the period when the accused persons were on bail during trial there was no misuse of liberties, does not

per se warrant suspension of execution of sentence and grant of bail. What really was necessary to be considered by the High Court is

whether reasons existed to suspend the execution of sentence and thereafter grant bail. The High Court does not seem to have kept the

correct principle in view.

7. A similar question was examined in State of Haryana v. Hasmat [(2004) 6 SCC 175 : 2004 SCC (Cri) 1757 : JT (2004) 6 SC 6] .

8. In Vijay Kumar v. Narendra [(2002) 9 SCC 364 : 2003 SCC (Cri) 1195] and Ramji Prasad v. Rattan Kumar Jaiswal [(2002) 9 SCC 366 :

2003 SCC (Cri) 1197] it was held by this Court that in cases involving conviction under Section 302 IPC, it is only in exceptional cases that

the benefit of suspension of sentence can be granted. The impugned order of the High Court does not meet the requirement. In Vijay Kumar

case [(2002) 9 SCC 364 : 2003 SCC (Cri) 1195] it was held that in considering the prayer for bail in a case involving a serious offence like

murder punishable under Section 302 IPC, the court should consider the relevant factors like the nature of accusation made against the

accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, and the desirability of releasing the

accused on bail after they have been convicted for committing the serious offence of murder. These aspects have not been considered by the

High Court, while passing the impugned order.Ã¢â‚¬â€‹

19. In case of Vasant Tukaram Pawar (supra), the Supreme Court has held in paragraph 7 as under :-

Ã¢â‚¬Å“7. Section 389 of the Code of Criminal Procedure, 1973 (in short Ã¢â‚¬Å“the CodeÃ¢â‚¬) deals with Ã¢â‚¬Å“suspension of execution of sentence

pending the appeal and release of the appellant on bailÃ¢â‚¬. There is a distinction between bail and suspension of sentence. One of the

essential ingredients of Section 389 is the requirement of the appellate court to record reasons in writing for order of suspension of

execution of the sentence or an order of release if the accused is in confinement. The said court can direct that he be released on bail or on

his own bond. Requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant

aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine.Ã¢â‚¬â€‹

20. In case of Atul Tripathi Vs. State of Uttar Pradesh and Ors. reported in (2014) 9 SCC 177, the Supreme Court has laid down in paragraph 15 as

under:-

Ã¢â‚¬Å“15.To sum up the legal position:

15.1.The appellate court, if inclined to consider the release of a convict sentenced to punishment for death or imprisonment for life or for a

period of ten years or more, shall first give an opportunity to the Public Prosecutor to show cause in writing against such release.

15.2. On such opportunity being given, the State is required to file its objections, if any, in writing.

15.3.In case the Public Prosecutor does not file the objections in writing, the appellate court shall, in its order, specify that no objection

had been filed despite the opportunity granted by the court.

15.4. The court shall judiciously consider all the relevant factors whether specified in the objections or not, like gravity of offence, nature of

the crime, age, criminal antecedents of the convict, impact on public confidence in court, etc. before passing an order for release.Ã¢â‚¬â€‹

21. We may, at this juncture, refer to the legal proposition enunciated by the Supreme Court in case of Atul Tripathi (supra) with reference to the first

proviso of Section 389 (1) of the Cr.P.C. apropos the requirement of giving the public prosecutor an opportunity to show-cause in writing arises only

when the Appellate Court is inclined to consider the release of a convict, sentenced to punishment of death or imprisonment for life, or for a period of

10 years or more. In case the public prosecutor does not file the objection in writing, the Appellate Court, recording this fact that no objection had been

filed, despite opportunity granted by the Court may pass appropriate order on a prayer for suspension of sentence considering judicially all relevant

factors as noted in paragraph 15.4 of the Supreme CourtÃ¢â‚¬â„¢s decision in case of Atul Tripathi (supra). We have noted hereinabove that despite

opportunity having been granted to the State in terms of the proviso to Section 389(1) of the Cr.P.C., no such written objection has been filed in Cr.

Appeal (DB) No. 581 of 2019 and Cr. Appeal (DB) No. 665 of 2019.

22. In a relatively recent decision of the Supreme Court in case of Preet Pal Singh Vs. State of Uttar Pradesh and Anr. reported in 2020 (8) SCC 645,

the Supreme Court has noticed the apparent distinction between grant of bail under Section 439 of the Cr.P.C. pre Trial arrest and suspension of

sentence under Section 389 of the Cr.P.C and grant of bail, post conviction. The Supreme Court has held that a Court considering application for

suspension of sentence and grant of bail is to consider the prima facie merits of the appeal coupled with other factors. There should be strong

compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence and those strong compelling reasons must be

recorded in the order granting bail as mandated in Section 389 (1) of the Cr.P.C. Paragraphs 35 and 38 of the decision in case of Preet Pal Singh Vs.

State of Uttar Pradesh (supra) is of significane and are being reproduced hereinbelow:-

Ã¢â‚¬Å“35. There is a difference between grant of bail under Section 439 CrPC in case of pre-trial arrest and suspension of sentence under

Section 389 CrPC and grant of bail, post conviction. In the earlier case, there may be presumption of innocence, which is a fundamental

postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle

that bail is the rule and jail is an exception, as held by this Court in Dataram Singh v. State of U.P. [Dataram Singh v. State of U.P., (2018)

3 SCC 22 : (2018) 1 SCC (Cri) 675] However, in case of post-conviction bail, by suspension of operation of the sentence, there is a finding

of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception

attracted, once there is conviction upon trial. Rather, the court considering an application for suspension of sentence and grant of bail, is

to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail,

notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order

granting bail, as mandated in Section 389(1) CrPC.

38. In considering an application for suspension of sentence, the appellate court is only to examine if there is such patent infirmity in the

order of conviction that renders the order of conviction prima facie erroneous. Where there is evidence that has been considered by the

trial court, it is not open to a court considering application under Section 389 to reassess and/or re-analyse the same evidence and take a

different view, to suspend the execution of the sentence and release the convict on bail.Ã¢â‚¬â€‹

23. Further, before considering the prayer on behalf of the appellants herein for suspension of sentence, we consider it relevant to refer to paragraph

28 of the Full Bench decision of this Court in case of Anurag Baitha reported in (1987) 1 PLJR 485, which read as under:-

Ã¢â‚¬Å“28. In concrete terms, therefore, it must be held that it would be sound practice that unless there are cogent grounds for acting

otherwise, on conviction an appellant on a capital charge perhaps having already been through the mill of a delayed trial would become

entitled to a favourable consideration for his liberty and grant of bail when even after one year of incarceration and pendency of the

appeal the High Court is unable to bring it to a final hearing. Indeed, I am of the view that so long as the delay in the hearing of such

appeals extends to three or four years, the persons who are vicariously convicted on capital charges with the aid of S. 34 or 149, Penal

Code, may well be granted bail on the admission of the appeal itself during the pendency its hearing after such time. It is, however, made

clear that this can apply only to the ordinary run of the mill cases and not to the peculiar and exceptionally heinous crimes outlined

hereinafter.Ã¢â‚¬â€‹

(highlighted for emphasis)

24. The Full Bench of this Court in case of Anurag Baitha (supra) has opined that so long the delay in hearing of such appeals extends to 3 or 4 years,

the persons who are vicariously convicted on capital charges, with the aid of Section 34 or 149 of the Indian Penal Code may well be granted bail on

the admission of the appeal itself during the pendency of its hearing after such time. The Full Bench has distinguished between the cases of convicts

to whom primal role under capital crime is attributed and are held guilty on the substantive charge of murder or other capital offences from such

persons who are vicariously convicted on capital charges with the aid of Section 34 or 149 of the Indian Penal Code. Paragraph 28 of the decision in

case of Anurag Baitha (supra) is useful to appreciate the distinction created between the persons to whom primal role is attributed in case of murder

etc and those convicted with the aid of Section 34 and Section 149 of the Indian Penal Code.

25. For the purpose of present order, we have kept in mind that no primal role has been attributed to these appellants and their conviction, as is evident

from the judgment of conviction itself, that the same is with the aid of Section 149 of the Indian Penal Code.

26. The absence of names of the appellants in the F.I.R. in Cr. Appeal (DB) No. 645 of 2019 and Cr. Appeal (DB) No. 581 of 2019 by the informant

who claims to be an eye witness of the occurrence is a significant factor, there being overwhelming evidence on record that the informant and the

accused persons are next door neighbours, well known to each other. Non-examination of the rickshaw puller without any cogent explanation, whose

evidence would have been crucial for reaching to truth of the matter is another significant aspect affecting the prosecutionÃ¢â‚¬â„¢s case.

27. Further, we find substance in submissions made on behalf of the appellants that no primal role in commission of the offence is attributed to these

appellants, though, there are material against co-convicts, Dharamchand and Ram Charitra Mahto. No ante-mortem acid burn injury has been found

on the deceased Vishwanath Das contrary to the prosecutionÃ¢â‚¬â„¢s case that acid was thrown upon him also. There is evidence to suggest that the

informantÃ¢â‚¬â„¢s son was running a shop for repair and manufacture of car batteries for which acid is used. In normal circumstance thus, availability of

acid in the house of the informant cannot be ruled out. P.W.-4 has deposed in her evidence that the appellant, Dharmendra Mahto and two others had

assaulted the deceased Manoj Das by smashing him with bricks. The postmortem report does not corroborate the said evidence.

28. Considering the facts and circumstances and evidence on record as noted above, in our opinion, case is made out for exercise of discretion under

Section 389 (1) of the Cr.P.C. taking into account Full Bench decision in case of Anurag Baitha (supra). Accordingly, prayer made on behalf of the

appellants for suspension of sentence and their release on bail is allowed.

29. Let the appellants, above named, be released on bail during the pendency of the appeal on furnishing bail bond of Rs. 10,000/- (Ten Thousand

Only) with two sureties of the like amount each to the satisfaction learned Additional Sessions Judge-I, Rosera (Samastipur) in connection with

Sessions Trial No. 688 of 2005 arising out of Rosera P.S. Case No. 44 of 2005.

30. The sentence shall remain suspended in the meanwhile.