

(2009) 04 AHC CK 0808

Allahabad High Court

Case No: Criminal M. Application No. 90741 of 2009 in Cr. A. No. 1472 of 1989

Irfan and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: April 17, 2009

Acts Referred:

- Companies Act, 1956 - Section 267
- Criminal Procedure Code, 1973 (CrPC) - Section 389, 389(1)
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 302, 307
- Representation of the People Act, 1951 - Section 8(3), 8(4)

Citation: (2009) 3 ACR 2615

Hon'ble Judges: K.N. Pandey, J; Imtiyaz Murtaza, J

Bench: Division Bench

Advocate: Yaduvansh Kumar Shukla, Prabhat Kumar Srivastava and M.P. Yadav, for the Appellant; A.G.A., for the Respondent

Final Decision: Dismissed

Judgement

Imtiyaz Murtaza J.

1. The application in hand has been preferred on behalf of Ahsan u/s 389 of the Code of Criminal Procedure, 1973. The applicant-Appellant is one of the Appellants in the above mentioned pending appeal. The prayer made in the application is that the judgment and order of conviction and sentences recorded against the Appellant be suspended pending appeal.

2. The appeal impugning the judgment and order of conviction was preferred in this Court on 3.7.1989 and the same was admitted by means of order dated 4.7.1989 attended with further order to enlarge the Appellant on bail pending appeal. The reason for preferring this application as assigned in the application is that the Appellant intends to contest the Lok Sabha election and 18.4.2009 being the last

date for filing nomination, the learned Counsel insisted on disposal of the application. Regard being had to urgency of the matter as pointed out by the learned Counsel, the matter was heard at length and having considered the matter in all its ramifications, the application was rejected studded with the observation that detailed orders shall follow. The detailed order runs as under:

3. It would transpire from the record that the Appellant alongwith co-Appellants was convicted in S.T. No. 163 of 1987 for offences under Sections 147, 148, 323/149 and 302/149, I.P.C. and, each of them were sentenced to undergo R.I. for one year, six months and imprisonment for life respectively.

4. According to prosecution case, relations between the parties were strained on account of litigation going on between the complainant on one hand and Shabbir father of Irfan and others on the other hand over a piece of land. On 21.7.1985, there was some commotion hearing which the mother of complainant came out. Immediately as she came out, she was inflicted lathi blow by Irfan Appellant. In the meanwhile, the complainant also came back from the market to whom the injured narrated the incident of assault on her. After a short while, i.e., at 6 p.m. the accused persons out of which Appellant Ahsan was armed with country made pistol came at the roof. Out of curiosity, the wife of complainant namely Hazra stood near the window and the accused persons including Appellant, noticing her standing near the window, fired at Hazra, inflicted fire arm injuries on her head, fingers and mouth and she died on the spot. In so far as Ahsan Appellant is concerned he was convicted of the charge under Sections 148 and sentenced to two years R.I., again u/s 323/149 and sentenced to six months S. I. and lastly u/s 302/149 and sentenced to imprisonment for life. An old enmity is cited as causative factor for assault in which father of Appellant Ahsan was attacked who was rushed to A.I.I.M.S. where he expired next day.

5. The learned Counsel for the Appellant submitted that initially, the father of Appellant namely Shabbir was assaulted which case was registered as Case Crime No. 33 of 79 under Sections 147, 148, 452, 307 and 149, I.P.C. The case was tried vide S.T. No. 12 of 1981 and the trial culminated in conviction vide judgment and order dated 29.3.1982. Subsequently a criminal appeal was filed. According to learned Counsel, the said appeal was decided in terms of false statement made by the counsel for the Appellant in that case that a compromise has been brought about between the parties further stating that the complainant of that case was not inclined to proceed with the prosecution of the Appellant in appeal, and in consequence the Appellant of that case was sentenced to pay fine of Rs. 5,000 in lieu of sentence awarded by the trial court. According to further submission of the learned Counsel, no such compromise was arrived at and on coming to know of the tricks played by the Appellant of that case, his client has already preferred appropriate application.

6. The learned Counsel further submitted that the conviction recorded against the Appellant hinges on very feeble ground and the judgment and order of the court below is not likely to be sustained at the time of final hearing of the appeal attended with further submission that the appeal having been filed in the year 1989 is likely to linger on without there being any prospects in the offing of early hearing.

However coming to the merit of the present application, the learned Counsel stated across the bar that the Appellant is a peace loving citizen and belongs to a reputed family and has also been dabbling in social works manifesting his dedication and devotion to the service of the poor and therefore, looking to the background of his family, he intends to contest the election but he is hampered by disqualification stemming from order of conviction which is operating against him. The learned Counsel for the Appellant also cited the case of Navjot Singh Sidhu 2007 (1) JIC 707: 2007 (1) ACR 812 (SC), in which the Apex Court quintessentially held as under:

The legal position is therefore clear that an appellate court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate court to the consequences that may arise if the conviction is not stayed. Unless the attention of the Court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case.

7. However, in the facts and circumstances of the case, the Apex Court suspended the sentence and conviction till the decision of the appeal.

8. Per contra, the learned A.G.A opposed the prayer stating that it would be a sublime public policy that the convicted person be kept under disability of the conviction and it would be highly improper to suspend the order of conviction in which one of the lady has lost life and the other suffered serious injuries and disability. The learned A.G.A. also referred to a recent order of this Court passed by the Apex Court in Sanjay Dutta's case in which the Apex Court turned down the plea of Sanjay Dutta to contest election.

9. As stated supra, learned Counsel appearing for the Appellant laid great emphasis on Navjot Singh Sidhu's case arguing that the Petitioner has been serving the poor for their social upliftment in the society. In substance the argument is that he is a sort of social worker and has dedicated himself to the service of the poor and downtrodden people and therefore, to actualise his dream of bringing in change in their condition in the society, he intends to contest the election and therefore he has made fervent plea for suspension of order of conviction passed against him in order to pave way for his contesting the election. The Appellant is already on bail and execution of sentence is already under suspension and he now seeks order of suspension of the operation of order of conviction which is already appealed

against. The order appealed against is the order of conviction.

10. In the light of submissions aforesaid, we feel called to analytically examine the ratio flowing from Navjot Singh Sidhu's case and also subsequent decisions of the Apex Court on the point.

11. In Navjot Singh Sidhu's case the position of law is clearly reflected that an appellate court while exercising powers u/s 389(1) can suspend the operation of the order of conviction. In Ravikant S. Patil's case AIR 2006 SCW 6365: 2007 (1) ACR 496 (SC), it is quintessentially stated that an order granting stay of conviction must not be a rule, but shall be an exception and such exception shall be made only in rare cases depending upon the facts of a case. What has been ruled by the Apex Court in Ravi Kant S. Patil's case is excerpted below.

It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay of course, does not render the conviction non-existent but only non-operative.

12. In connection with the arguments advanced across the bar, we feel called to refer to the decision in [State of Tamil Nadu Vs. A. Jaganathan](#), and in [K.C. Sareen Vs. C.B.I., Chandigarh](#), which were cases arising out of orders of conviction on charges of corruption, the Court held that it would be sublime public policy that the convicted person is kept under disability of the conviction instead of keeping the sentence of imprisonment in abeyance and it would be highly improper to suspend the order of conviction of a public servant which would enable him to occupy the same office which he misused. It bears no dispute that the cases of A. Jagannathan and K. C. Sareen were the cases which arose out of charges of corruption but there can be no gain saying that these two cases make it quite clear that it is not in every case that an order of conviction can be suspended. In both the cases, the legal position was reiterated that only in exceptional cases the Court should exercise the power of stay of conviction. To the same effect and avail, in my considered view, the law laid down is in [Navjot Singh Sidhu Vs. State of Punjab and Another](#), inasmuch as the Apex Court in Sidhu's case echoed the same view that grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case.

13. The learned Counsel switched over to next submission which is that there are extenuating circumstances and the trial court erroneously entered the verdict of conviction against him and that he has sanguine anticipations that he may be purged of the charges at the time of final hearing of the appeal as there are good points for arguments and that appeal having been preferred in the year 1989, it is yet to mature for hearing and it would occasion irreparable loss to the Petitioner in case his disqualification to contest the election is not obviated at this stage.

14. In Navjot Singh Sidhu's case the Apex Court clearly observed that for the purpose of taking a decision on the question of staying or suspending the order of conviction, it was not necessary to minutely examine the merits of the case but at the same time, it is clearly indicated that a prima facie satisfaction is required to be reached by the Court as regards the merit of the appeal. As discussed above, it is not in dispute that the order of conviction should be suspended in very rare case and for special reasons. The merit of the appeal may be minutely examined at final hearing stage but from whatever narrow hole that is available, having examined the case ex facie, we are of the view that strong and overwhelming evidence is available on record which inhibits us from exercising power u/s 389 of the Cr. P.C. Coming to the next submission, we have carefully examined the points urged before us and looked at all aspect including ramification of keeping such conviction in abeyance and in the perspective of the points before us, we are afraid, there is hardly any special ground inasmuch as mere intention to contest election as he has dabbled in public service and served the poor people as a social worker for their upliftment would not be suffice to constitute special ground.

15. The next submission advanced across the bar is that an appellate court in exercise of power u/s 389(1), Cr. P.C. can suspend an order of conviction. A bare reading of Sub-section (1) of Section 389 would evince that pending any appeal by a convicted person, the appellate court may, for reasons to be recorded in writing, order that execution of the sentence or order appealed against be suspended. In connection with this argument, Rama Narang's case, (1995) 2 SCC 513, was also cited across the bar, In that also, the Apex Court did observe that in a fit case if the High Court feels satisfied that the order of conviction needs to be suspended or stayed so that the convicted person does not suffer from a certain disqualification provided for in any other statute, it may exercise the power because otherwise the damage done cannot be undone, the disqualification incurred by Section 267 of the Companies Act and given effect to cannot be undone at a subsequent date if the conviction is set aside by the appellate court. The Apex Court however cautioned in the said decision that while granting a stay or suspension of the order of conviction, the Court must examine the pros and cons and if it feels satisfied that a case is made out for grant of such an order it may do so and in so doing it may if it considers it appropriate impose such conditions as are considered appropriate to protect the interest of the shareholders and the business of the Company. That case has its genesis in company law and not in a crime of the gravity as it involves in the present case. The Apex Court rightly observed that in the facts of that case that there is no reason to give a narrow meaning to the expression "order appealed against" appearing in Section 389(1), Cr. P.C. and debar the appellate court from suspending conviction if the facts of a given case so warrant. The quintessence that flows from the said case is that the order of conviction needs to be suspended or stayed in a fit case if the facts and circumstances so warrant.

16. The ex-cathedra decision on the point is a recent decision of the Apex Court in Sanjay Dutt's case, Crl. M. P. Nos. 4087 of 2009, 5229 of 2009, 5230 of 2009, 5237 of 2009 and 5314 of 2009 stemming from Criminal Appeal No. 1060 of 2007, it is a decision in which cases of Rama Narang and Navjot Singh Sidhu were taken into reckoning in all pros and cons. The Apex Court also dwelt upon the power of the Court u/s 389 of the Cr. P.C. The relevant part of the observation of the Apex Court is excerpted below:

We have carefully considered the contentions advanced by the Petitioner. The Petitioner has been convicted for serious offences. Of course, his conviction and sentence have been challenged before this Court in an appeal. Though our attention was drawn to the various findings recorded by the Special Judge and also the nature of evidence adduced by the prosecution, we do not propose to consider these facts at this stage as it may seriously prejudice either of the parties when the appeal filed by the Petitioner is considered by this Court. The Petitioner is a well-known cine artist and because of his contribution to art and cinema he has got large number of fans throughout the country and abroad. His father was also a well-know film actor and he was deeply involved in politics. At one point of time, Petitioners father was Minister in the Union Cabinet. The Petitioner is not a habitual criminal nor it has been brought to our notice that he had involved in any other criminal case. Despite all these favourable circumstances, we do not think that this is a fit case where conviction and sentence could be suspended so that the bar u/s 8(3) of the Representation of Peoples Act, 1951 will not operate against the Petitioner. Law prohibits any person who has been convicted of any offence and sentenced to imprisonment for not less than two years from contesting the election and such person shall be disqualified for a further period of six years since his release. In the face of such a provision, the power of the Court u/s 389, Cr. P.C. shall be exercised only under exceptional circumstances.

The Apex Court further observed--

The learned Counsel appearing for the Petitioner has placed reliance on the decision of this Court in Navjot Singh Sidhu's case (supra). But in that case, the Petitioner was a sitting M. P. and he could have continued as an M. P. even after his conviction and sentence in view of Section 8(4) of the Representation of People Act, 1951. The Petitioner in Navjot Singh Sidhu's case (supra) resigned and expressed his desire to contest the election. In fact, that was a case where the trial court acquitted the Petitioner and the High Court, in reversal, found the Petitioner guilty. It was in those circumstances this Court granted stay of the order of conviction and sentence in that case.

Lastly, the Apex Court observed--

In the present case, no such circumstances are in favour of the Petitioner. In view of the serious offence for which he has been convicted by the Special Judge, we are not

inclined to suspend the conviction and sentence awarded by the Special Judge in the present case. We make it clear that we do not express any opinion on the merit and, if any of the observations made in this order, even it has remote possibility to prejudice either parties, we state that the same is only made for the purpose of disposal of Cr. M.P. No. 4087 of 2009- application for suspension/ stay of conviction.

17. The Apex Court quintessentially observed that the law prohibits any person who has been convicted of any offence and sentenced to imprisonment for not less than two years from contesting the election and such person shall be disqualified for a further period of six years since his release and therefore, it was laid down that the power of the Court u/s 389, Cr. P.C. shall be exercised only under exceptional circumstances. Distinguishing Navjot Singh Sidhu's case (supra), the Apex Court observed that the said case was given in different perspective inasmuch as the Petitioner in that case was a sitting M.P. and he could have continued as an M. P. even after his conviction and sentence in view of Section 8(4) of the Representation of People Act, 1951. The Apex Court also observed that it was a case in which the trial court recorded acquittal and the High Court in reversal found the Petitioner guilty.

18. In the above conspectus, the application being devoid of merit is accordingly dismissed in limine.