

(2009) 09 JH CK 0015

Jharkhand High Court

Case No: Criminal Appeal (DB) No. 301 of 2009

Nageshwar Mandal and Godai
Mandal

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision: Sept. 11, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 389
- Penal Code, 1860 (IPC) - Section 302

Hon'ble Judges: R.R. Prasad, J; D.N. Patel, J

Bench: Division Bench

Advocate: Mahersh Tiwari, for the Appellant; Awani Kant Prasad, Assistant Public
Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

D.N. Patel, J.

Having heard learned Counsel for both the sides and looking to the evidence and the judgment and order of conviction and sentence, passed by the trial court, this appeal is Admitted for final hearing.

2. Records and proceedings of Sessions Case No. 51 of 2006/46 of 2006, arising out of Jama P.S. Case No. 76 of 2005, are called for from the court of learned 4th Additional Sessions Judge, F.T.C., Dumka.

3 Registry is directed to get heatly typed paper books prepared and kept on record, as required under Rule, 191 of the Jharkhand High Court Rules, 2001.

4 We have also heard learned Counsel for both the sides for suspension of sentence, u/s 389 of the Code of Criminal Procedure, 1973, awarded to the appellants-accused persons by the trial court for the offence mainly punishable u/s 302 of the Indian

Penal Code, during pendency of this appeal.

5 Learned Counsel for the appellants-accused persons has argued the case much at length and in much detail and fine nicety of the prosecution witnesses and depositions have been pointed out and submitted that the sentence, awarded to the appellants-accused persons by the trial court may be suspended, during pendency of this appeal.

6. Having heard learned Counsel for both the sides and looking to the evidences of the prosecution witnesses, it appears that there is a prima facie case against the present appellants-accused persons. As the Criminal Appeal is pending, we are not much analyzing the evidence on record. Suffice it to say that the whole case of the prosecution is based upon the deposition of several prosecution witnesses, including eye witness i.e. P.W. 6 who is mother of the deceased. Looking to her deposition, prima facie, it appears that there is a case against both the appellants-accused persons. Secondly her version is corroborated by the depositions of other prosecution witnesses, especially by P.W. 1 and P.W. 2, who have rushed immediately, upon hearing the alarm, raised by the eye witness (P.W. 6). Thus, P.W. 1 and P.W. 2 come immediately after the attack upon the deceased. Looking to their depositions also, it appears that there is corroboration to the deposition of the eye witness. Moreover, looking to the deposition of P.W. 5, who is Dr. Chandeshwar Prasad Sinha, it appears that there is enough corroboration to the deposition of the eye witness (P.W. 6). Thus, looking to the evidences of the prosecution witnesses, it appears that there is a prima facie case against both the appellants-accused persons.

7. Learned Counsel for the appellants-accused persons has vehemently submitted that there is contradiction between the ocular evidence and the medical evidence.

8. We have perused the evidences of P.W. 6, P.W. 1, P.W. 2 and P.W. 5, who is Dr. Chandeshwar Prasad Sinha. Looking to their depositions and looking to the gravity of offence, quantum of punishment and the manner in which the occurrence has taken place, as alleged by the prosecution, and also looking to the present stage u/s 389 of the Code of Criminal Procedure, at this stage, we are not inclined to grant the benefit of suspension of sentence by deciding fine nicety as to whether the injury was caused on the neck or upon head of the deceased. Looking to the medical evidence, though it appears that there are injuries on the head of the deceased, but, one of the prosecution witnesses has used the word "neck" also. We, therefore, do not want to suspend the sentence, only on the narration of a word "neck" and "head", looking to the head injuries sustained by the deceased, as per the medical evidence.

9. It has been held by the Hon'ble Supreme Court in the case of [Ramji Prasad Vs. Rattan Kumar Jaiswal and Another](#), in paragraph No. 3, as under:

3. Absolutely no reason is shown by the learned Single Judge for adopting this exceptional course in a case where an accused was found guilty by the trial court u/s 302 of the Indian Penal Code. The normal practice in such cases is not to suspend the sentence and it is only in exceptional cases that the benefit of suspension of sentence can be granted.

(Emphasis supplied)

10. It has been held by the Hon"ble Apex Court in the case of [State of Haryana Vs. Hasmat](#), in paragraph Nos. 6 to 9, as under:

6. 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. 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.

7. 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 period the accused-respondent was granted parole.

8. The learned Sessions Judge, Gurgaon by a judgment dated 24-10-2001 had found the accused-respondent guilty Criminal Appeal No. 100-DB of 2002 was filed by the respondent. The fact that during the pendency of the appeal the accused-respondent was on parole goes to show that initially the accused-respondent was, not given the benefit of suspension of execution of sentence. The mere fact that during the period of parole the accused has not misused the 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 was 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.

9. In *Vijay Kumar v. Narendra and Ramji Prasad v. Rattan Kumar Jaiswal* it was held by this Court that in cases involving conviction u/s 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 it was held that in considering the prayer for bail in a case involving a serious offence like murder punishable u/s 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, which passing the impugned order."

(Emphasis supplied)

11. It has been held by the Hon"ble Supreme Court in the case of [Khilari Vs. State of U.P. and Another](#), in paragraph No. 10 as under:

10. In [Anwari Begum Vs. Sher Mohammad and Another](#), it was, inter alia, observed as follows:

7. Even on a cursory perusal of the High Court's order shows complete non-application of mind. Though detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the Court while passing orders on bail applications, yet a court dealing with the bail application should be satisfied as to whether there is a prima facie case, but exhaustive exploration of the merits of the case is not necessary. The court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course.

8. 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.

Any order devoid of such reasons suffers from non-application of mind as was noted by this Court, in [Ram Govind Upadhyay Vs. Sudarshan Singh and Others](#), ; [Puran Vs. Rambilas and Another etc. etc.](#), and in [Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another](#), ."

(Emphasis supplied)

12. In the aforesaid case, bail was granted only on the ground that some of the ante mortem injuries could not have been caused by iron rod and it has been held that such an order was not unsustainable, at the stage of suspension of sentence u/s 389 of the Code of Criminal Procedure. In the facts of the present case also, much has been argued out about the discrepancies between the medical evidence and the

ocular evidence. As Stated hereinabove, we are not inclined to suspend the sentence, awarded to both the appellants-accused persons by the trial court, by fine analysis of the evidences, at this stage. There is no substance in the prayer for suspension of sentence and, hence, the same is hereby rejected.