
(2014) 03 JH CK 0063

In the Jharkhand High Court

Case No : I.A. No. 8195 of 2013 in Cr. Appeal (DB) No. 438 of 2011

Bidhata Singh @ Gullu Singh

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision : 24-03-2014

Acts Referred:

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

Citation : (2014) 03 JH CK 0063

Hon'ble Judges : Dhirubhai Naranbhai Patel, J; Amitav Kumar Gupta, J

Bench : Division Bench

Advocate : P.P.N. Roy, Sr. Advocate and Mr. Ashok Kumar Sinha, Sailesh and L.C.N. Sahdeo, Advocate for the Appellant

Final Decision : Dismissed

Judgement

Dhirubhai Naranbhai Patel, J.—This interlocutory application has been preferred u/s 389 of the Code of Criminal Procedure for suspension of sentence awarded to the appellant by the Sessions Judge, Dhanbad in Sessions Trial No. 204 of 2010, whereby, the appellant has been convicted for the offences punishable u/s 302 of the Indian Penal Code for causing murder of Nishant Kumar @ Kundan Singh and this appellant has been awarded punishment for life imprisonment and fine of Rs. 10,000/- and in case of default of payment of fine, he has further been ordered to undergo rigorous imprisonment for six months.

2. This Court has received the records and proceedings of Sessions Trial No. 204 of 2010 and we have perused the same and heard the learned counsel for the appellant as well as learned A.P.P. and learned counsel for the informant, at length.

3. Looking to the evidences on record, there is prima facie case against this appellant-accused. As the criminal appeal is pending, we are not much analyzing the evidences on record, but, suffice it to say that :-

(i) The case of the prosecution is based upon more than one eye witnesses, who are P.W. - 1, P.W. - 2 and P.W. - 3 and looking to their deposition, they have clearly narrated the role played by this appellant-accused in causing murder by using firearm.

(ii) Looking to the evidence given by P.W. - 4 Dr. Shailendra Kumar, who has carried out the postmortem of the body of the deceased, it appears that his deposition is getting enough corroboration to the deposition given by the eye witnesses.

(iii) Looking to the deposition given by the Investigating Officer i.e. P.W. 11, there is corroboration to the deposition given by the eye witness. (iv) Learned counsel appearing for the appellant has argued the case at length and raised several points including that so called eye witness is not eye witness, at all and the firearm, which is alleged to have been used and seized during course of investigation and the cartridges, which were seized during the course of investigation were never sent to the Forensic Science Laboratory and there is no evidence that the said firearm was ever used. This contention raised by the learned counsel for the appellant is not accepted at the stage of suspension of sentence u/s 389 of the Code of Criminal Procedure mainly for the reasons that:-

(a) There was recovery of firearm and cartridges, as per the seizure list, which has been proved and marked as Exts. - 10 & 12 (as submitted by the learned counsel for the appellant as well as by the learned A.P.P. and learned counsel for the informant).

(b) Benefit of fortify investigation or defective investigation cannot be given to the accused. Here the seizure articles were not sent to the Forensic Science Laboratory by the Investigating Officer, that error committed by the investigating agency does not render the eye witnesses, who are P.Ws. - 1, 2 & 3 untrustworthy and unreliable, if they are otherwise trustworthy and reliable witnesses, lethargic Investigating Officer cannot convert trustworthy witnesses into untrustworthy witnesses and therefore, at this stage, no benefit can be given to the accused because lethargic Investigating Officer has not sent the firearm and cartridges to the Forensic Science Laboratory for report.

(c) Looking to the cross examination of the P.Ws. - 1, 2, & 3 i.e. eye witnesses, prima facie there is involvement of this appellant-accused in causing murder of the deceased and prima facie nothing has come out in favour of this appellant-accused from the cross examination of these eye witnesses.

4. For the aforesaid reasons, we are not inclined to accept the defence of the learned counsel for the appellant as the firearm and cartridges were not matched properly and usage thereof is also not proved and therefore, the sentence awarded to this appellant-accused may be suspended. This contention is devoid of any merit. There are several other reasons for discarding this argument, but, as the criminal appeal is pending, we are not putting further dissection of the evidence on record.

5. Learned counsel appearing for the appellant has further submitted that strangely this murder case is recorded separately and an offence under the Arms Act was registered. The recovery of pistol and cartridges was registered as separate offence vide Katras (Angarpathra) P.S. Case No. 29 of 2010. This fact has also been recorded in paragraph 21 of the impugned judgment and order of sentence passed by the Sessions Judge, Dhanbad in Sessions Trial No. 204 of 2010 and it is submitted by the counsel for the appellant that the said case is numbered as G.R. No. 380 of 2010 and there is acquittal order passed on 16.03.2012 by the Judicial Magistrate 1st Class, Dhanbad vide order dated 16.03.2012 and therefore there is no use of firearm by this appellant-accused and hence, the sentence passed by the Sessions Judge, Dhanbad in Sessions Trial No. 204 of 2010 may be suspended. This contention is also not accepted by this Court mainly for the reasons that :-

(a) Both the cases are registered separately and therefore both the cases are separate on the basis of the evidence on record.

(b) In the facts of the case of Sessions Trial No. 204 of 2010 as stated hereinabove, the case of the prosecution is based upon more than one eye witnesses i.e. P.Ws. - 1, 2 & 3 and they have prima facie proved the case against this appellant-accused.

(c) Moreover, looking to the acquittal order dated 16.03.2012 passed in G.R. Case No. 308 of 2010, it appears that the said lethargic Investigating Officer of this case had never gone to the trial court i.e. Judicial Magistrate 1st Class, Dhanbad because he was the eye witness of the seizure list. In the State of Jharkhand, overall this is the routine practice of the Investigating Officer not to go to the trial court as prosecution witness and this case is not exceptional of the general rule prevailing in the State of Jharkhand. Benefit of lethargic approach of Investigating Officer cannot be given to the accused.

(d) Moreover, looking to the acquittal order passed by the Judicial Magistrate 1st Class, Dhanbad in G.R. Case No. 380 of 2010, it appears that only one witness was examined by the prosecution. Thus, there is again lethargic prosecution sign especially by the Investigating Officer and therefore, benefit cannot be given to the accused in Sessions Trial No. 204 of 2010, as stated hereinabove. Firearm and cartridges were not sent to the Forensic Science Laboratory by the said Investigating Officer. Thus, prima facie, it appears that the Investigating Officer is helping the accused.

(e) In G.R. Case No. 380 of 2010, the informant was police officer, who is of the rank of Sub-Inspector of Police, he had also not gone to the court as prosecution witness. Thus, there is point of acquittal by the Judicial Magistrate 1st Class, Dhanbad in G.R. Case No. 380 of 2010 because of hostile attitude of the prosecution.

(f) Moreover, looking to the order of acquittal passed by the Judicial Magistrate 1st Class, Dhanbad in G.R. Case No. 380 of 2010, it is not honourable acquittal of

the accused. Paragraph 11 of the said decision rendered by the Judicial Magistrate 1st Class, Dhanbad reads as under :-

11. On the above fact, I come to the conclusion that prosecution has not brought sufficient evidence on record to rope the present accused in this case and has not been able to prove above charges beyond the shadow of all reasonable doubts against him.

6. Thus, as per the Judicial Magistrate 1st Class, Dhanbad, the prosecution has failed to brought the sufficient evidence on record. Thus, it appears that both the cases handled differently. The present one is Sessions Trial No. 204 of 2010, there are three eye witnesses and they could have examined as prosecution witnesses in G.R. Case No. 380 of 2010. Neither Investigating Officer was vigilant nor the Superintendent of Police, Dhanbad was vigilant at the relevant time and because of indifferent approach of the Investigating Officer, no benefit can be given to the accused in Sessions Trial No. 204 of 2010.

7. It has been held by the Hon"ble Supreme Court in the case of Khilari Vs. State of U.P. and Another, , which reads as under:

10. In Anwari Begum v. Sher Mohammad and Anr. [2005 (7) S.C.C. 326] it was, inter alia, observed as follows:

7. Even on a cursory perusal 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 dehors 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)

8. It has been held by the Hon''ble Supreme Court in the case of Ramji Prasad Vs. Rattan Kumar Jaiswal and Another, , 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)

9. It has been held by the Hon''ble Supreme Court in the case of State of Haryana Vs. Hasmat, , 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)

10. As a cumulative effect of the aforesaid facts, reasons, judicial pronouncement and looking to the evidence on record and also looking to the fact that previously also, the prayer for suspension of sentence of this appellant was not granted by this Court vide order dated 17.10.2011 and thereafter again I.A. No. 1041 of 2012 was preferred for suspension of sentence in Cr. Appeal (DB) No. 438 of 2011 and after the argument, the said I.A. was not pressed and it was disposed of as not pressed vide order dated 03.08.2012 and there is no change in the circumstance, thereafter, except efflux of time. This is the third attempt for getting order of suspension of sentence

11. Accordingly, I.A. No. 8195 of 2013 stands dismissed.