

(2011) 06 GUJ CK 0067

In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 7460 of 2011 in Criminal Appeal No. 647 of 2011

Dharmendrabhai Nandubhai Patel and Another

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 06-06-2011

Acts Referred:

Arms Act, 1959 — Section 25(1), 27
Criminal Procedure Code, 1973 (CrPC) — Section 389
Penal Code, 1860 (IPC) — Section 120B, 302, 307, 323, 34

Citation : (2011) 06 GUJ CK 0067

Hon'ble Judges : J.B. Pardiwala, J

Bench : Single Bench

Advocate : H.L. Patel, No. 1, for the Appellant; J.K. Shah, APP, for the Respondent

Judgement

J.B. Pardiwala, J.—Rule returnable forthwith. Mr. J.K. Shah, learned APP for the State waives service of notice of rule for and on behalf of the Respondent State.

2. This is an Application u/s 389 of the Code of Criminal Procedure preferred by the accused-applicant, praying for suspension of the substantive order of sentence imposed by the Additional District and Sessions Judge, Sabarkantha at Himmatnagar (camp at Idar), dated 21st May 2011 passed in Sessions Case No. 159/2007, whereby the Additional District and Sessions Judge convicted the accused-applicant for the offences punishable under Sections 397, 395, 342, 506(2) read with Section 120B of the Indian Penal Code.

3. The trial Court, while convicting the accused-applicant for the offences punishable -

(a) u/s 395 IPC, has ordered the accused-applicant to undergo rigorous imprisonment for a term of 7 years with fine of Rs. 5,000,00 and in default of payment of fine, further simple imprisonment of one year.

(b) u/s 397 IPC, has ordered the accused applicant to undergo rigorous imprisonment for a term of 7 years.

(c) u/s 342 IPC, has ordered the accused applicant to undergo rigorous imprisonment for a term of one year with fine of Rs. 1,000,00 and in default of payment of fine, further simple imprisonment of one month.

(d) u/s 120B IPC, has ordered the accused applicant to undergo rigorous imprisonment for a term of 7 years with fine of Rs. 5,000,00 and in default of payment of fine, further simple imprisonment of one years.

(e) u/s 506(2) IPC, has ordered the accused applicant to undergo rigorous imprisonment for a term of one year with fine of Rs. 1,000,00 and in default of payment of fine, further simple imprisonment of one month.

All the sentences have been ordered to run concurrently.

4. The accused-applicant was acquitted for the offences punishable under Sections 323, 504 IPC and Sections 25(1)(b) and 27 of the Arms Act.

5. Learned Counsel for the accused-applicant would submit that the accused-applicant has challenged the judgment and order of conviction by filing a substantive appeal raising manifold grounds of challenge. He would further submit that the sentence imposed for all offences is for a fixed period and the maximum sentence which the accused-applicant has to undergo is rigorous imprisonment for a term of 7 years. He would further submit that pending the trial the accused-applicant was on bail and during the period of bail, the accused-applicant has not abused the process. He would further submit that the appeal would take a considerable long time before it is taken up for hearing and if the substantive period of sentence is not suspended and the accused-applicant is not released on bail, then the valuable right of appeal would get defeated. He would further submit that it takes a considerable long time before the appeals are taken up for final hearing in this High Court and by the time the appeal would be taken up for final hearing, practically 80 to 90 percent of the sentence period would be over. He would further submit that, therefore, in the interest of justice and with a view to protect the valuable right of appeal as provided by the Code, the accused-applicant should be released on bail pending the final disposal of the appeal, subject to terms and conditions.

6. I have given my anxious thoughts and considerations to the submissions canvassed by learned Counsel for the accused-applicant. It is true that the sentence which has been imposed by the trial Court is for a fixed period and the maximum sentence is 7 years. It is also true that pending the trial, the accused-applicant was on bail and has not misused the liberty granted to him. It is also true that the appeal would take a considerable long time before it is taken up for final hearing. However, all these aspects cannot be the sole consideration for suspending the substantive order of sentence once the trial Court has held the accused-applicant guilty of the offences and has imposed a maximum sentence

of 7 years" rigorous imprisonment.

7. When an appeal is preferred against conviction in the High Court, the Court has ample power and discretion to suspend the sentence, but that discretion has to be exercised judiciously depending on the facts and circumstances of each case. While considering the suspension of sentence, each case is to be considered on the basis of nature of the offence, manner in which occurrence had taken place, whether in any manner bail granted earlier had been misused. In fact, there is no strait jacket formula which can be applied in exercising the discretion. The facts and circumstances of each case will govern the exercise of judicial discretion while considering the application filed by the convict u/s 389 of Criminal Procedure Code.

8. Reference can be made to the decision of the Supreme Court in the case of Kashmira Singh Vs. The State of Punjab, where the Supreme Court has observed that:

Now, the practice in this Court as also in many of the High Court has been not to release on bail a person who has been sentenced to life imprisonment for an offence u/s 302 of the Indian Penal Code. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person: "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?" What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a Judge not to be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a

person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence.

9. The Court going by the said consideration held that:

so long as the Supreme Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail where special leave has been granted to the accused to appeal against his conviction and sentence. The other consideration, however, is equally important and relevant. When a person is convicted by an appellate Court, he cannot be said to be an innocent person until the final decision is recorded by the superior Court in his favour.

10. In the case of Babu Singh and Others Vs. State of U.P., it was observed that:

the significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19. Indeed, the considerations I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bifocal interests of justice - to the individual involved and society affected.

10. In the case of Emperor Vs. H.L. Hutchinson, it was observed that:

As to the object of keeping an accused person in detention during the trial, it has been stated that the object is not punishment, that to keep an accused person under arrest with the object of punishing him on the assumption that he is guilty even if eventually he is acquitted is improper. This is most manifest. The only legitimate purposes to be served by keeping person under trial in detention are to prevent repetition of the offence with which he is charged where there is apparently danger of such repetition and to secure his attendance at the trial. The first of those purposes clearly to some extent involves an assumption of the accuser's guilt, but the very trial itself is based on a prima facie assumption of the accuser's guilt and it is impossible to hold that in some circumstances it is not a proper ground to be considered. The main purpose however is manifestly to secure the attendance of the accused.

11. In the case of Bhagwan Rama Shinde Gosai and Others Vs. State of Gujarat, the Supreme Court has stated that when a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right,

suspension of sentence can be considered by the appellate Court liberally unless there are exceptional circumstances. The Court has observed:

When a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate Court liberally unless there are exceptional circumstances. Of course if there is any statutory restriction against suspension of sentence it is a different matter. Similarly, when the sentence is life imprisonment the consideration for suspension of sentence could be of a different approach. But if for any reason the sentence of a limited duration cannot be suspended every Endeavour should be made to dispose of the appeal on merits more so when a motion for expeditious hearing of the appeal is made in such cases. Otherwise the very valuable right of appeal would be an exercise in futility by efflux of time. When the appellate Court finds that due to practical reasons such appeals cannot be disposed of expeditiously the appellate Court must bestow special concern in the matter of suspending the sentence. So as to make the appeal right, meaningful and effective. Of course appellate Courts can impose similar conditions when bail is granted.

12. The Supreme Court in the case of Suresh Kumar and Ors v. State, (2001) 10 SCC 338 where the Appellants had been convicted u/s 307 read with Section 34 of the Indian Penal Code and each was sentenced to imprisonment for a period of three years and to pay fine of Rs. 2000/-, when they moved an application u/s 389 of Code of Criminal Procedure for suspension of the sentence of imprisonment, the High Court had rejected the application, the Supreme Court, following the observations made in the case of Bhagwan Rama Shinde Gosai, while allowing the appeal filed by the convict, had kept in abeyance the order of conviction passed by the trial Court till the disposal of the appeal filed by the convict and also had directed the release of the convict on bail.

13. In the case of Kishori Lal Vs. Rupa and Others, , the Supreme Court has indicated the factors that require to be considered by the Courts while granting benefit u/s 389 in cases involving serious offences like murder etc., it is useful to refer to the observations made therein. They are:

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.

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.

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.

14. Taking into consideration the position of law as can be gathered from various judgments of the Supreme Court, it is very clear that discretion at the time of considering the plea of the accused for suspension of sentence pending final hearing of appeal has to be exercised judiciously and not as a matter of course. The fact that the sentence is for a fixed period and that the accused was on bail pending trial can be one of the relevant considerations for the purpose of suspending the substantive order of sentence but, they cannot be the sole consideration.

15. I am of the view that while considering the application for suspension of substantive order of sentence, the Endeavour should be to see as to whether the case presented by the prosecution and accepted by the trial Court can be said to be a case in which, ultimately, the accused-Appellant stands for fair chances of acquittal. If the answer to the above stated question is in the affirmative, as a necessary corollary, I shall have to see that if ultimately the accused-Appellant appears to be entitled to have acquittal at the hands of this Court, he should not be kept behind the bars for a pretty long time till the conclusion of the appeal, which, usually takes very long time for decision and disposal.

16. I have gone through the case of the prosecution. I have also gone through the judgment of the trial Court and considering the nature of the evidence on record, though at the stage of considering an application u/s 389 of the Code for suspension of sentence the Court cannot appreciate the evidence but, at least the Court can look into the reasoning assigned by the trial Court along with some evidence on record.

17. In the present case, prima facie, I am of the view that the offences punishable under Sections 395 and 397 IPC are not sustainable. This is my prima facie opinion. The reason for this is obvious. Case of the prosecution right from the beginning appears to be very specific and clear. It appears that the first informant, the injured, developed some intimacy with a girl named Gitaben Patel.

As a result of this intimacy they got married. The accused-applicant herein and the other co-accused who have been convicted by the trial Court are all very close relatives of Gitaben Patel. They did not approve the relations of the first informant, the injured with Gitaben and also got annoyed by the fact that the first informant got married with Gitaben without the consent of the family members of Gitaben. Due to this reason, it appears that on the fateful day of the incident a quarrel ensued, as a result of which the first informant was badly thrashed by the accused-applicant along with the other co-accused and this was with the sole intention of teaching him a lesson for taking the extreme step of getting married with Gitaben surreptitiously.

18. Now, in this background, it appears that the prosecution came forward with a case that when the first informant was being assaulted, at that point of time, the accused-applicant and the other co-accused snatched away some gold ornaments, a watch, mobile phone and some cash. It is the case of the prosecution that the first informant i.e. the injured and his witnesses were robbed of these articles on a gun point. Firstly, it deserves to be noted that the accused-applicants have been acquitted from the charge under the Arms Act.

19. Now, in this background of the entire prosecution case and the evidence on record, can it be said that the common object of the unlawful assembly was to commit an offence of dacoity. Can it be said that the motive behind the crime was commission of dacoity or whether the common object of the unlawful assembly was to thrash the first informant for the reason that he developed intimacy with Gitaben and got married with Gitaben surreptitiously without seeking any permission from the family members of Gitaben. This is the core issue which, prima facie, needs to be considered in the appeal. However, prima facie, I am of the view that without going much into appreciation of evidence the conviction under Sections 395 and 397 appears to be unsustainable. I am of the view that the Court owes a duty to consider, as to whether the accused has a fair chance of succeeding in the appeal or not ? I may consider my prima facie opinion in light of what has been explained by the Division Bench of this High Court so far as Section 390 of IPC is concerned. The Division Bench of this High Court, in the case of Himatsing Shivsing Vs. The State of Gujarat, has observed as under:

Theft amounts to "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. Before theft can amount to "robbery", the offender must have voluntarily caused or attempted to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. The second necessary ingredient is that this must be in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the

theft. The third necessary ingredient is that the offender must voluntarily cause or attempt to cause to any person hurt etc., for that end, that is, in order to the committing of the theft or for the purpose of committing theft or for carrying away or attempting to carry away property obtained by the theft. It is not sufficient that in the transaction of committing theft hurt etc., had been caused. If hurt etc., is caused at the time of the commission of the theft but for an object other than the one referred to in Section 390, I.P. Code, theft would not amount to robbery. It is also not sufficient that hurt had been caused in the course of the same transaction as commission of the theft. The three ingredients mentioned in Section 390, I.P. Code, must always be satisfied before theft can amount to robbery, and this has been explained in *Bishambhar Nath v. Emperor*, AIR 1941 Oud 476, in the following words:

The words "for that end" in Section 390 clearly mean that the hurt caused by the offender must be with the express object of facilitating the committing of the theft, or must be caused while the offender is committing the theft or is carrying away or is attempting to carry away the property obtained by theft. It does not mean that the assault or the hurt must be caused in the same transaction or in the same circumstances.

20. In *Karuppa Gounden v. Emperor* AIR 1918 Mad 321, which followed two Calcutta cases of *Otaruddi Manjhi v. Kafiluddi Manjhi* 5 C.W.N. 372, and *Kind Emperor v. Mathura Thakur* 6 C.W.N. 72, it has been observed at page 824 as follows:

Now it is our duty to give effect to the words "for that end". It would have been open to the legislature to have used other words which would not raise the difficulty that arises here. The Public Prosecutor has been forced to argue that "for that end" must be read as meaning "in those circumstances". In my opinion we cannot do that in construing a section in the Penal Code. Undoubtedly, words "in those circumstances" would widen the application of the section and we are not permitted to do that. The matter has been considered in two judgments of the Calcutta High Court one of which is reported as *Otaruddi Manjhi v. Kafiluddi Manjhi* 5 C.W.N. 372. Their Lordships put the question in this way:

It seems to us that the whole question turns upon the words "for that end". Was any hurt or fear of instant hurt, that was caused in the present case, caused for the end of the commission of the theft ? We think not. It seems to us that whatever violence was used for the purpose of dispossessing the persons who were already in possession of the premises in question and had no relation to the commission of theft, although theft was committed at the same time.

21. The language used in another case reported as *King Emperor v. Mathura Thakur* 6 C.W.N. 72, is as follows:

The question here arises whether Mathura Thakur when he attacked Soman Dhania, did so for the end referred to, namely, for the purpose of carrying away the paddy, which had been harvested.

22. Those judgments in my opinion state the obvious intention of the section and we are bound to give effect to it and I, therefore, follow the decisions in those two cases.

23. In the last paragraph of the judgment, the Division Bench observed as under:

Ordinarily, if violence or hurt etc. is caused at the time of theft, it would be reasonable to infer that violence or hurt was caused for facilitating the commission of theft or for facilitating the carrying away of the property stolen or for facilitating the attempt to do so. But, there may be something in the evidence to show that hurt or violence was caused not for this purpose but for a different purpose.

24. In the overall conspectus of the entire matter, I am of the view that the accused-applicant is entitled to seek suspension of the substantive order of sentence imposed by the trial Court pending final disposal of the Appeal. No exceptional circumstances have been brought on record by the State to deny suspension of sentence pending trial.

25. It goes without saying that any observation touching the merits of the case is purely for the purpose of deciding the questions of suspension of substantive order of sentence pending appeal and grant of bail and shall not be construed as an expression of final opinion in the main matter.

26. In this view of the matter, the Application succeeds and the same is allowed. The substantive order of sentence imposed by the trial Court vide judgment and order dated 21st May 2011 passed in Sessions Case No. 159/2007 is suspended till the final disposal of the substantive appeal and the accused-applicant is ordered to be released on bail on his furnishing a bond of Rs. 25,000,00 (Rupees Twenty Five Thousand Only) with solvent surety of the like amount to the satisfaction of the trial Court, on the following terms and conditions that the accused-applicant:

(a) shall maintain law and order.

(b) shall not indulge in any activity leading to breach of public peace and tranquility.

(c) shall not, in any manner, try to approach the prosecution witnesses.

(d) shall not leave the State of Gujarat without prior permission of this Court.

Rule made absolute.