

(2001) 08 OHC CK 0040
In the Orissa High Court
Case No : Misc. Case No. 261 of 2001

Konark Patnaik and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 02-08-2001

Acts Referred:

Arms Act, 1959 — Section 25(1)
Criminal Procedure Code, 1973 (CrPC) — Section 374, 378, 389
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 341

Citation : (2001) 08 OHC CK 0040

Hon'ble Judges : P. Ray, J;A.S. Naidu, J

Bench : Division Bench

Advocate : Bijan Ray, A.K. Choudhury, C. Choudhury, B. Mohanty and S. Mohanty, for the Appellant;

Judgement

A.S. Naidu, J.—This is an application for bail pending nearing of Criminal Appeal No. 127 of 2001. Out of II accused persons, the Appellants are convicted by the learned Addl. Sessions Jharsuguda for the offences under Sections 147/148/341/read with Section 149 I.P.C. as well as u/s 302 Indian Penal Code, read with 149 I.P.C. and Appellant No. 3 Kanta Dash alias Srikanta and Appellant No. 4 Sk. Jalaluddin, apart from other sections, stated above, u/s 25(1) (a) of the Indian Arms Act. All the Appellants have been sentenced to undergo R.I. for life besides other punishments by judgment dated June 7th, 200 I. Being aggrieved by the aforesaid judgment and order of conviction, Criminal Appeal No. 127 of 2001 has been filed before this Court which has been admitted only on July 13th, 2001.

2. Mr. Bijan Ray, learned Senior Counsel for the Appellant's relying upon the ratio of the decision in the case of Kashmira Singh Vs. The State of Punjab, , contended that pending hearing of the appeal, the Appellants should be released on bail. It was further submitted that the learned Addl. Sessions Judge has acted illegally and committed material errors which are apparent on record and it is a fit case where the Appellants, most of whom were enlarged on bail in course of trial and have not misutilised their liberty, should be released on bail. On the

other hand, the learned Addl. Standing Counsel vehemently opposed the application. for bail.

3. The short facts of the case as unfolded from the F.I.R. are as follows: It is alleged that the informant Babula alias Pradeep Mishra (P.W. 3) along with Bulu Das (deceased), Anup Kumar Rout alias Landa (P.W. 9), Binod Singh (P.W. 11) and Ajaya Sahu (P.W. 8) had gone to the G.M. Office, IB Valley area for filing tender papers in respect of a contract work. It is alleged that by the time the informant party arrived at G.M. office of IB Valley area, the accused Kanta Das (Appellant No. 3), Jyoti Mishra (Appellant No. 5), Jiten Mishra (Appellant No. 2), Tilu Agarwalla (Appellant No. 7), Julu (Appellant No. 4) and Ors. were present there. They did not allow P. Ws. 2, 8, 9 and 11 and the deceased Bulu Das to enter into the office and submit their tender papers. As the informant party protested, the accused-appellants became enraged and attacked them with sword, lathi and pistol with a view to do away with the life of Bulu. They also inflicted sword blows and lathi blows on the informant. After some time, the informant and Ors. removed Bulu who was lying unconscious outside the G.M office, to Mandalia hospital for treatment. It is alleged that the accused-appellants again chased and assaulted P.W. 2 and others.

4. The prosecution examined as many as 23 witnesses out of whom P.W. 2 is the informant-injured and P. Ws. 8, 9 and 10 are the eye-witnesses to the occurrence.

5. The plea of the accused persons is that of complete denial. It is stated that they had gone to put the tender papers of one Arun Agrawal-Appellant No. 7 at the Civil Section of G.M. Office of IB Valley area where they were assaulted by the informant's party.

6. The learned Addl. Sessions Judge, after discussing the evidence in a judgment consisting of 101 pages, found the Appellants guilty and convicted them as stated above.

7. The moot question which arises for consideration in the present case is as to whether the Appellants who are found guilty of capital charges can be released on bail pending adjudication of the Appeal. Chapter-XXIX of the Code of Criminal Procedure confers a substantive right of appeal in case of conviction for more than seven years on a capital charge by the Sessions Judge to the High Court (Section 374). By virtue of Section 378 it also confers a right on the State to prefer an appeal against acquittal. By statutory mandate, the appeal must be heard by two or more High Court Judges. It is well settled by precedent that in such an appeal, the High Court must itself re-appraise the evidence afresh, examine the whole record and then come to its own conclusion, whether the conviction is justified or not. The Code also provides in detail the mode of preferring appeals and manner of their admission and hearing thereafter : It is manifest that the nature of a Criminal Appeal under the Code is a rehearing and a continuation of the trial. Section 389 of the Code stipulates that pending hearing of 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 the Appellant is in confinement, he be released on bailer on his own bond.

8. Mr. Ray, learned Counsel for the Appellants, in the light of the decision in the case of Kashmira Singh (*supra*) vehemently urged that the practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Court and in the Supreme 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 is, therefore, absolutely essential that the practice which the Court has been following in the past must be reconsidered and as long as the 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.

A Full Bench of the Patna High Court in the case of Anurag Baitha Vs. State of Bihar, , relying upon the decision of the Apex Court in the case of Kashmir Singh (*supra*) observed as follows:

A strong note of caution, however, must be loudly sounded and the exceptions to the general rule be clearly laid down. Even in Kashmira Singh's case (AIR 1987 SC 2147.) their Lordships laid down a rule order in unless there were cogent grounds for acting otherwise. What indeed would be these cogent ground. Plainly enough, no exhaustive definition there is either possible or desirable.

However, it would be to say that what has been held above is on the context of the ordinary run of the mill cases is capital crimes. There is no gainsaying the fact that the Viably all crimes which are visited by capital punishment are brutal and the most seriously frowned upon by the law. Nevertheless, even herein there is a difference of great degree where capital crime may further be horrendously brutal in its nature and shocking to the conscience of the Court and society in general. In such a case, there is a societal interest involved. Convicts therein would not and, in my opinion, be ordinarily entitled to such concession of bail once they have been held guilty by the trial Court of such grievous crime. Not only would it be dangerous to enlarge them on bail, but it would also hurt the heart and sentiments of the society and the victims of such crime in. particular, that convicted criminals of such crimes should still be enjoying their liberty pending the bearing of their appeals because of the Court's inability to dispose them of in reasonable time. Herein, therefore, the only alternative is that the substantive appeals of this nature for peculiarly heinous crimes, where the grant, of bail is inappropriate, should be listed out of turn and disposed of within the timeframe of one year or as nearly thereto as would be within the bounds of

possibility.

9. Keeping in view, the judicial dictum quoted above, we feel that while deciding a question, as to whether the accused appellant who has been convicted and sentenced to life imprisonment, can be enlarged on bail or not, varies from case to case and it would not be just and proper to allow all the bail applications simply on the ground that hearing of the appeal would take a long stretch of time.

Mr. Ray, learned Senior Advocate, has further argued that the High Court should exercise its judicial discretion to enlarge a person on bail if it prima facie appears that there are errors apparent on the face of the judgment. In case of Babu Singh and Others Vs. State of U.P., , the Apex Court held as follows:

What, then, is "judicial discretion" in this bail context. In the elegant words of Benjamin Cardozo:

The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains.

Thus, an appeal to the Judge's discretion is an appeal to his judicial conscience. The discretion must be exercised not in opposition, but in accordance to the established principle of law.

10. Now coming to the present horrendous crime, it appears from the F.I.R. and other documents available that the occurrence resulting in the death of a person and causing severe injuries to others occasioned due to a tussle between two groups of business men, trying to grab the contract work for himself and obstruct others from filing tender papers quoting their offer. This is an attempt to throttle healthy competition by using muscle and money power. The business man wants to monopolies a particular contract, not permitting others to compete with him even by filing tenders. Here is a case, where not only sharp cutting weapons, but also fire arms were used to prevent filing of the tender. The deceased sustained as many as 15 injuries and on post-mortem, the doctor found 7 internal injuries. According to the doctor (P.W. 15) all the injuries were ante-mortem and homicidal in nature. The names of the assailants are clearly mentioned in the F.I.R. There are four eye-witnesses being P. Ws. 2, 8, 9 and 11 out of whom P.W. 2 is the informant and injured. The evidence further reveals that the Appellant-accused persons were engaged by Appellant No. 7.

11. Mr. Ray, learned Senior Counsel, drawing our attention to the fact that out of the Appellants, Appellant Nos. 1, 2, 6 and 8 were released on bail when the trial was in progress and tried to persuade us to scrutinize the evidence adduced in

the case. He also brought to our notice certain observations made by the trial Court regarding acceptability of the ocular evidence. In fact, the trial Court in the latter part of the judgment relying upon the ratio of some of the decisions of this Court as well as the Apex Court has scrutinized the evidence and arrived at a conclusion and held the Appellants guilty; In that view of the matter, at this stage, in the absence of the lower Court records and other materials, it would not be very most justifiable to accept the contention of Mr. Ray and delve into the exercise of vividly analyzing the evidence in isolation to other materials. Such an attempt will amount to prejudging the case.

12. After making a prima facie assessment of the evidence on record for the purpose of dealing with the petition for bail, we feel that Appellant No. 1-Konark Pattnaik, whose name does not find place in the F.I.R. and who is said to be a student of Engineering and has to undergo an orthopedic operation, should be enlarged on bail. Similarly, Appellant No. 6-Birendra Kumar Misra and Appellant No. 8-Sri Rama Dash, whose names do not find place in the F.I.R. and no specific overt acts have been alleged against them by the informant, at the first instance. are also entitled to be enlarged on bail for the time being.

So far as Appellant No. 7 Sri Arun Kumar Agarwal alias Tilu Agarwal is concerned, though there is no evidence to show that he had taken part in the real tussle, we are prima facie of the opinion that he being the king-pin of the entire episode and a person who had engaged other accused persons (assailants), should not be enlarged on bail after being convicted for the offences. Similarly the other accused persons whose names find place in the F.I.R. and against whom there is specific allegation of overt acts, should not be enlarged on bail and the application for bail so far as Appellants No. 2, 3, 4, 5 and 7 is concerned, stands rejected.

13. We accordingly, direct that Appellant-petitioner Nos. 1, 6 and 8 (Konark Pattnaik, Birendra Kumar Misra and Sri Rama Dash respectively) be enlarged on bail of Rs. 20,000/- with two sureties each for the like amount to the satisfaction of the learned Addl. Sessions Judge, Jharsuguda in S.T. Case No. 35/1 6 of 2000, subject to the further condition that;

(i) the said Appellants shall report to the local police station on 14th and 30th of each month.

(ii) shall not travel beyond the jurisdiction of Orissa without obtaining prior permission of this Court, and

(iii) shall not be involved in any other criminal activities in the meanwhile.

It is made clear that in the event of breach of any of the conditions, the prosecution will be at liberty to move this Court for cancellation of bail granted herein.

However, in line with what has been held by the Apex Court in Kashmira Singh's case (supra), it is directed that the Criminal Appeal should be heard as

expeditiously as possible and if the Petitioners-appellants prepare and submit the paper books within three months, the Appeal be listed for hearing before a available Criminal Bench soon thereafter.

Misc. Case is accordingly disposed of.