A GAJANAND AGARWAL

v.

STATE OF ORISSA AND ANR.

APRIL 12, 2007

B [DR. ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.]

Code of Criminal Procedure, 1993:

s.438—While dealing with bail application in case of alleged dowry
C *death, order must show proper application of mind by the Judge—Passing an order of acquittal by commenting on the evidence is impermissible—It should only indicate whether there was a* **Prima facie** *case in view of settled principles about nature of crime and manner of commission of offence—Bail.*

D *s.438—Bail—Grant of—Determining factor—Discussed.*

Prosecution case was that daughter of appellant-complainant was married to respondent No.2-accused. Within 5 months of marriage, she was found dead. The case was registered against respondent no.2 and his family members u/ss. 498A, 304 B, 302, 406 r.w. s.34 IPC and s.4 of the Dowry
E **Prohibition Act, 1961. Respondent No.2 was arrested and other accused persons were found to be absconding.**

The accused persons filed bail applications number of times before Sessions Judge and under s.438 Cr.P.C. before High Court which were rejected.

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The Investigating Officer submitted the charge-sheet before the SDJM indicating that *Prima facie* case has been made out against the accused persons. These accused persons again filed bail applications which was rejected.

G **High Court granted bail to parents-in-law. Thereafter bail was also granted to respondent no.2 by High Court. The same was challenged before this Court. This Court set aside the order on several grounds. The High Court reconsidered the matter and by impugned orders accepted the prayer for bail.**

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In appeals to this court, appellants contended that basic ground on which the earlier orders granting the bail were set aside, were that the earlier orders rejecting prayer were not taken into consideration; that the orders were practically non-reasoned; that the High Court has not only tried to justify the grant of bail on the earlier occasion, but also has practically recorded order of acquittal to the accused respondent no.1 in each case and that while dealing with the bail application, view on merits is not to be expressed and it was only necessary to indicate reasons for grant of bail and not detailed analysis of the evidence on record, with regard to the nature of the offence and the evidentiary value of the materials on record. A B

Allowing the appeal, the Court C

HELD: 1. The cursory perusal of 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. [Para 11] [75-G; 76-A] D

2. 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. [Para 12 and 13] [76-B-D] E F

Ram Govind Upadhyay v. *Sudarshan Singh and Ors.* [2002] 3 SCC 598; *Puran etc.* v. *Rambilas and Anr. etc.* [2001] 6 SCC 338; *Kalyan Chandra Sarkar* v. *Rajesh Ranjan alias Pappu & Anr.*, JT [2004] 3 SC 442; *Chaman Lal* v. *State of U.P. and Anr.*, JT [2004] 6 SC 540; *Kamaljit Singh* v. *State of Punjab and Anr.*, [2005] 7 SCC 326; *Omar Usman Chamadia* v. *Abdul and Anr.* JT [2004] 2 SC 176 and *V.D. Chaudhary* v. *State of Uttar Pradesh and Anr.*, (2005) 7 SCALE 68, relied on. G H

A **3. The High Court has given findings which could have been given at the trial. In fact, some of the conclusions are contradictory. The High Court has noted that the *post mortem* report coupled with chemical examination report *Prima facie* reveals that the death was neither homicidal nor suicidal. The same single judge had earlier concluded about the blood stains on the pillow that the death might have been homicidal. [Para 15] [76-F-G; 77-A-B]**

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4. The reasoning given by the High Court that only the family members earlier did not lodge reports and, therefore, *Prima facie* throws doubt about alleged torture, is another conclusion which was not required to be given while dealing with the bail application. The High Court was factually wrong in C **saying that the persons of the locality had not alleged regarding torture meted out on account of dowry. Even otherwise merely because the family members of the deceased spoke about the alleged dowry demand and not others that cannot be certainly a ground to conclude that same throws doubt on the alleged torture. [Para 16] [77-C]**

D **5. The High Court has virtually written an order of acquittal by commenting on the evidentiary value of evidence on record. This is impermissible. Only broad features of the case are to be noted. Elaborate analysis of the evidence is to be avoided. [Para 18] [77-E]**

Imran Ali **v.** *Habibullah and Anr.*, **SLP (Crl.) 3986 of (2006) disposed** E **by S.C. on 19th March, 2007, referred to.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 543 of 2007.

From the Judgment and Order dated 08.11.2006 of the High Court of F Orissa, Cuttack in BLAPL Case No. 4575 of 2006.

WITH

Criminal Appeal No. 544 of 2007.

G Uday U. Lalit, Sanjay Sen, Rana S. Biswas, Manish P.S. Choudhan, Vishal Anand, Ruchika Rathi and Sarla Chandra for the Appellants.

K.T.S. Tulsi, Suresh C. Gupta, J.K. Mahapatra, Sidharth Srivastava, Kuber Boddh and Sunil Kumar Jain for the Respondents.

H The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. Leave granted. A

1. This is a second journey of the appellant to this Court. Earlier the appellant had questioned grant of bail to the respondent no.2 in each case by learned Single Judge of the Orissa High Court. This Court held the impugned orders to be indefensible by the judgment dated 18.9.2006 in *Gajanand Agarwal* v. *State of Orissa and Ors.*, AIR (2006) SC 3248 and the B orders were nullified. The High Court again considered the bail applications and passed the impugned order in each case reiterating its view that the respondent no.2 in each case was entitled to grant of bail.

2. Background facts in a nutshell are as follows: C

Bimal (respondent No.2 in appeal relating to SLP (Crl.) No.49 of 2007) was married to the daughter of the appellant-accused i.e. Manisha (hereinafter referred to as 'deceased'). The marriage between the deceased and the said accused took place on 9.5.2005. Within five months of marriage, the deceased was found dead on 1.10.2005. The appellant lodged FIR at the Jharsuguda D police station and on that basis a case was registered and investigation was undertaken. The offences indicated were punishable under Sections 498A, 304B, 302, 406 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') and Section 4 of the Dowry Prohibition Act, 1961, (in short 'the Act') Respondent no.2 was arrested on 3.10.2005. Rest of the accused persons E were found to be absconding and police having failed to arrest them in spite of issuance of non-bailable warrants of arrest. An application in terms of Sections 82 and 83 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') was filed. On 16.12.2005 father-in-law of the deceased Kailash Khetan and mother-in-law Kanta Khetan filed application in terms of Section 438 Cr.P.C. before the High Court which was rejected. Process under Section 82 of the F Cr.P.C. was issued by the learned ADJM on 19.12.2005. On 16.1.2006 respondent no.2 filed application for bail which was rejected on the ground that investigation was still in progress. Liberty was granted to the accused to move the Sessions Judge for bail after completion of investigation and submission of final form. On 24.1.2006 application in terms of Section 438 was filed by Sunil Kumar G (respondent no.2 in the connected appeal) and Sujata Khetan. The same was rejected by order dated 24.1.2006. An application under Section 438 Cr.P.C. was filed by Kailash and Kanta. The same was again rejected by the High Court. On 27.1.2006 the Trial Court issued orders in terms of Section 83 Cr.P.C. to attach the moveable properties of the accused. On 30.1.2006 the H investigating officer submitted the charge-sheet/final report before the learned

A SDJM indicating that a *Prima facie* case has been made against the respondent No.2, Kailashnath (father-in-law), Kanta Devi (mother-in-law), Sunil (brother-in-law) the respondent no.2 in the connected appeal under Sections 498A, 304B, 302, 406 read with Section 34 IPC and Section 4 of the Act. The prosecution made a further prayer to permit investigation in terms of Section B 173(8) Cr.P.C. since some of the accused persons were still absconding and were not arrested. After surrendering, Kanta Khetan and Sujata Devi filed application for bail. The same was rejected by learned SDJM. The applications filed by Kailashnath and Sunil were also subsequently rejected. On 13.2.2006, respondent no.2 filed fresh bail application before the Sessions Court, which was rejected. The learned Additional Sessions Judge took note of factual C position which according to him was relevant for the purpose of rejecting the bail application. It was noted that strong case under Sections 302/304B IPC is made out. Sujata Devi filed bail petition before the High Court after rejection of bail application by the Sessions Judge. The High Court by order dated 6.3.2006 granted bail to her. Interestingly, it was noted that the order was not D to be treated as a precedent so far as other accused persons are concerned. It is to be noted that on 22.3.2006 Kanta Devi moved the High Court for bail. The High Court granted the bail imposing conditions similar to those which were stipulated in case of Sujata Devi. Accused Sunil Kumar moved the High Court for regular bail. By order dated 7.4.2006 the prayer was rejected but liberty was granted to renew his prayer for bail after the case was committed E to the Court of Sessions. On 21.4.2006 the High Court granted bail to Kailashnath on the ground that he was aged and sick. Here again, the High Court passed an order to the effect that same was not to be treated as a precedent so far as other accused persons are concerned. On 3.5.2006 accused Sunil Kumar moved the Sessions Court for bail on the ground that his father F requires further treatment at Apollo Hospital and there was no male member to accompany him. The learned Sessions Judge rejected the prayer of bail by order dated 3.5.2006 suspecting genuineness of the documents filed. It was noted that report was dated 30.6.2006 i.e. date put on the advisory report, while the application was made earlier. Because of this suspicious document, G the application for bail was rejected.

3. The date for framing of charges was fixed on 6.6.2006. Accused Bimal filed bail application before the High Court. By order dated 22.6.2006 bail was granted. The same was the subject matter of challenge in the earlier matter. This Court set aside the order on several grounds as noted in the order.

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4. The High Court has reconsidered the matter after the earlier orders

were set aside and by the impugned orders the prayer for bail has been accepted. A

5. In support of the appeals, learned counsel for the appellant submitted that basic ground on which the earlier orders granting of bail were set aside were (a) since earlier orders rejecting prayer have not taken into consideration (b) in case of accused Sunil lack of genuineness of documents as noted by B the Additional Sessions Judge were not considered (c) the orders were practically non-reasoned. The High Court has not only tried to justify the grant of bail on the earlier occasion, but also has practically recorded order of acquittal to the accused respondent no.2 in each case. While dealing with the bail application, final view is not to be expressed. It was only necessary C to indicate reasons for grant of bail and not detailed analysis of the evidence on record, with regard to the nature of the offence and the evidentiary value of the materials on record.

6. The High Court lost sight of the fact that it was not dealing with any appeal on merits. It was considering bail application. Even otherwise several D irrelevant aspects have been taken into consideration and this Court's view regarding use of non-genuine documents by respondent Sunil have been lightly brushed aside. Curiously, the High Court has treated the documents which were treated non-genuine by this Court to be minor circumstances. It is also pointed out that factually certain conclusions recorded are contrary E to the evidence on record. Merely because the relatives of the deceased spoke out about the dowry demand that cannot be a ground to come to the conclusion that the allegations relating to dowry demand are *Prima facie* untenable and "*Prima facie* throws doubt about the alleged torture". Learned Single Judge has also put great emphasis on the alleged non mention of any person other than family members regarding alleged torture. It is pointed out F that the same is also factually incorrect. Merely because the doctor who conducted the post mortem examination has not been examined by the investigating agency and statement has not been recorded under Section 161 of the Cr.P.C., that cannot be a ground to grant bail to the accused persons. It has been held by the learned Single Judge that the accused persons were G permanent residents and there was no question of their absconding or there being problem in ensuring their presence. It is submitted that at least accused Sunil had absconded for a long time, more than once his application in terms of Section 438 Cr.P.C. was rejected by the High Court. He was absconding and, therefore, action of attachment property in terms of Sections 82 and 83 H of the Cr.P.C. were taken. It is stated that charges have not been framed as

A yet because proceedings have been stayed by the High Court at the instance of the respondents-accused persons.

7. Learned counsel for the State submitted that the High Court not only acted on erroneous premises but completely overlooked the fact that undisputedly accused Bimal and deceased went to the bed together, the latter B died under suspicious circumstances. Charge sheet has been filed therefore, the grant of bail is not proper. Reliance was placed on a decision of this Court in *Gajanand Agarwal's* case (supra) more particularly what is stated in para 19.

C 8. In response, learned counsel for the respondent no. 2- accused submitted that the accused persons are unnecessarily being hounded by the complainant. Though the High Court need not have gone beyond giving reasons and should not have recorded findings which are matters of trial, that cannot be a ground to deny bail to the accused (Respondent no.2 in each case). The unnecessary findings may be set aside. But the order granting bail D should not be interfered with as that was perfectly legitimate. The Court may have exceeded what was required to be done while dealing with the bail application. But that is no ground to cancel the bail. On reading of the inquest report, the post-mortem report and FSL report one thing is clear that the death was natural and was certainly not homicidal as is being presented by the E prosecution and the complainant. On the earlier occasion the High Court had not considered the effect of the FSL report. The report clearly rules out homicidal angle and, therefore, the presence of blood in the mouth cannot be attributed to any homicidal action. Because of the informant's interference the investigation has not been done in a fair manner, and the whole family of the F husband's family has been roped in. The damage already done to their reputation and dignity cannot be adequately compensated even if in trial the accused persons are acquitted. In view of the strong possibility of death being natural, the High Court has rightly granted bail. It is not a case as if accused Sunil was absconding. He was running from pillar to post to prove his innocence for grant of bail. The mere fact that there has been some G mistake in the date of the certificate, that cannot be considered to be vital. It appears to be a genuine and bona fide mistake. The reports clearly establish that the death was natural. Since the complainant has acted with motives to unleash personal vendetta that should not be permitted.

H 9. At this juncture, it would be appropriate to take note of a decision of this Court in *Omar Usman Chamadia* v. *Abdul and Anr.*, JT (2004) 2 SC

176. In para 10, it was observed as follows: A

"However, before concluding, we must advert to another aspect of this case which has caused some concern to us. In the recent past, we had several occasions to notice that the High Courts by recording the concessions shown by the counsel in the criminal proceedings refrain from assigning any reason even in orders by which it reverses B the orders of the lower courts. In our opinion, this is not proper if such orders are appealable, be it on the ground of concession shown by learned counsel appearing for the parties or on the ground that assigning of elaborate reasons might prejudice the future trial before the lower courts. The High Court should not, unless for very good C reasons desist from indicating the grounds on which their orders are based because when the matters are brought up in appeal, the court of appeal has every reason to know the basis on which the impugned order has been made. It may be that while concurring with the lower court's order, it may not be necessary for the said appellate court to assign reasons but that is not so while reversing such orders of the D lower courts. It may be convenient for the said court to pass orders without indicating the grounds or basis but it certainly is not convenient for the court of appeal while considering the correctness of such impugned orders. *The reasons need not be very detailed or elaborate, lest it may cause prejudice to the case of the parties, but* E *must be sufficiently indicative of the process of reasoning leading to the passing of the impugned order.* The need for delivering a reasoned order is a requirement of law which has to be complied with in all appealable orders. This Court in a somewhat similar situation has deprecated the practice of non-speaking orders in the case of *State* F *of Punjab and Ors.* v. *Jagdev Singh Talwandi,* AIR (1984)SC 444".

(underlined for emphasis)

10. These aspects were recently highlighted in *V.D. Chaudhary* v. *State of Uttar Pradesh and Anr.,* [2005] 7 SCALE 68.

G

11. 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, H 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.

12. 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.

13. Any order dehors of such reasons suffers from non-application of mind as was noted by this Court, in *Ram Govind Upadhyay* v. *Sudarshan Singh and Ors.*, [2002] 3 SCC 598; *Puran etc.* v. *Rambilas and Anr. etc.*, [2001] 6 SCC 338 and in *Kalyan Chandra Sarkar* v. *Rajesh Ranjan alias Pappu Yadav & Anr.*, JT (2004) 3 SC 442.

14. The above position was highlighted by this Court in *Chaman Lal* v. *State of U.P. and Anr.*, JT (2004) 6 SC 540, and in *Kamaljit Singh* v. *State of Punjab and Anr.*, [2005] 7 SCC 326.

15. As has been rightly contended by learned counsel for the appellant, the High Court has given findings which could have been given at the trial. In fact, some of the conclusions are contradictory. In para 9 of the judgment the High Court has noted as follows:

"Be that as it may, the post-mortem report is a *Prima facie* piece of material the evidentiary value can be considered at the time of trial."

But indicating "peculiar features of the case", the High Court has observed that "the post-mortem report coupled with chemical examination report *Prima facie* reveals that the death of Manisha was neither homicidal nor suicidal". Interestingly, earlier the same learned Judge concluded as follows about the blood stains on the pillow by order dated 24.1.2006 in Crl.MC No.25 of 2006:

"xx xx xx xx

I have heard learned counsel for the parties at length and have perused the materials available in the Case Diary. The post-mortem report reveals that blood mixed with fluid was detected from both the nostrils and mouth of the deceased. It is also submitted by the learned counsel for the State that a pillow cover stained with blood has also been recovered by police. All these facts *Prima facie* reveal that the death in question might have been homicidal." A B

16.The reasoning given by the High Court that only the family members earlier did not lodge reports and, therefore, *Prima facie* throws doubt about alleged torture, is another conclusion which was not required to be given while dealing with the bail application. The High Court was factually wrong in saying that the persons of the locality had not alleged regarding torture meted out on account of dowry. Even otherwise merely because the family members of the deceased spoke about the alleged dowry demand and not others that cannot be certainly a ground to conclude that same throws doubt on the alleged torture. C D

17. The High Court was also not correct in saying that there was no likelihood of the accused persons absconding in view of what has been pointed out by learned counsel for the appellant about his not surrendering requiring issuance notice in terms of Sections 82 and 83 of the Act.

18. The High Court has virtually written an order of acquittal by commenting on the evidentiary value of evidence on record. This is impermissible. Only broad features of the case are to be noted. Elaborate analysis of the evidence is to be avoided. E

19. In *Imran Ali* v. *Habibullah and Anr.*, SLP (Crl.) 3986 of (2006) disposed of on 19th March, 2007 it has been held as follows: F

"It is no doubt true that the High Court felt persuaded to grant bail to the respondents in the pending appeal before it. The High Court however, went on to record a very detailed reasoned order virtually holding that the prosecution case has no merit. Such observations either for or against the prosecution, made in orders disposing of bail applications may prejudicially affect the interests of the parties because in case a trial is pending before the Sessions Court, the trial Judge may consider itself bound by the observations made in such an order. In any event, such observations are bound to influence its mind. It is no doubt true that in appropriate cases G G

A particularly in serious matters, the High Court may record reasons, but the High Court while recording reasons must take care to safeguard against prejudicing the case of the parties. The recording of reasons, wherever necessary, is only to indicate the considerations that may have weighed with the Court in passing the order and the Court must do so in a manner that may not prejudice the case of the parties. The
B trend recently noticed, to virtually write a judgment while disposing of an application for grant of bail must be discouraged."

20. Looked from any angle the impugned orders of the High Court are indefensible and are set aside. The appeals are allowed.

C D.G. Appeals allowed.