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ATUL TRIPATHI

v.

STATE OF UP. & ANR.

(Criminal Appeal No.1516 of 2014)

B

JULY 22, 2014

**[M. Y. EQBAL AND KURIAN JOSEPH, JJ.]**

*Code of Criminal Procedure, 1973:*

C *s. 389 first Proviso – Bail – At post-conviction stage – Procedure for – Opportunity to Public Prosecutor for showing cause in writing against such release – Need for – Held: Where the conviction is in respect of a serious offence having punishment with death or life imprisonment or imprisonment for a term not less than ten years, it is mandatory for the*  
D *appellate court to give an opportunity to Public Prosecutor, for showing cause in writing against such release – Service of copy of appeal and application for bail, on the Public Prosecutor, will not satisfy the requirement of first proviso to s. 389. – Bail.*

E *ss. 389 and 439 – Bail – At pre-conviction and post-conviction stages – Procedure for – Distinction – Discussed.*

F **The question for consideration in the present cases were whether at the post conviction stage, the appellate court, while considering the release of the convict on bail, should give an opportunity to the public prosecutor for showing cause in writing against such release where the conviction is on an offence punishable with death or imprisonment for life or for a term not less than ten years as envisaged in first Proviso to s. 389 Cr.P.C.**

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**Allowing the appeals, the Court**

H **HELD: 1. There is a marked difference between the procedure for consideration of bail under Section 439 Cr.P.C., which is pre-conviction stage and Section 389 Cr.P.C., which is post-conviction stage. In case of Section**

439 Cr.P.C., the Code provides that only notice to the public prosecutor unless impractical, be given before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Sessions or where the punishment for the offence is imprisonment for life; whereas in the case of post-conviction bail under Section 389, where the conviction in respect of a serious offence having punishment with death or life imprisonment or imprisonment for a term not less than ten years, it is mandatory that the appellate court gives an opportunity to the public prosecutor for showing cause in writing against such release. [Para 14] [1197-G-H; 1198-A-B]

2. Service of a copy of the appeal and application for bail on the public prosecutor by the appellant will not satisfy the requirement of first proviso to Section 389. The appellate court may even without hearing the public prosecutor, decline to grant bail. However, in case the appellate court is inclined to consider the release of the convict on bail, the public prosecutor shall be granted an opportunity to show cause in writing as to why the appellant be not released on bail. Such a stringent provision is introduced only to ensure that the court is apprised of all the relevant factors so that the court may consider whether it is an appropriate case for release having regard to the manner in which the crime is committed, gravity of the offence, age, criminal antecedents of the convict, impact on public confidence in the justice delivery system, etc. Despite such an opportunity being granted to the public prosecutor, in case no cause is shown in writing, the appellate court shall record that the State has not filed any objection in writing. This procedure is intended to ensure transparency, to ensure that there is no allegation of

**A collusion and to ensure that the court is properly assisted by the State with true and correct facts with regard to the relevant considerations for grant of bail in respect of serious offences, at the post conviction stage. [Para 15][1198-C-G]**

**B 3. The appellate court, if inclined to consider the release of a convict sentenced to punishment for death or imprisonment for life or for a period of ten years or more, shall first give an opportunity to the public prosecutor to show cause in writing against such release. On such opportunity being given, the State is required to file its objections, if any, in writing. In case the public prosecutor does not file the objections in writing, the appellate court shall, in its order, specify that no objection had been filed despite the opportunity granted by the court. The court shall judiciously consider all the relevant factors whether specified in the objections or not, like gravity of offence, nature of the crime, age, criminal antecedents of the convict, impact on public confidence in court, etc. before passing an order for release. [Para 16][1198-G-H; 1199-A-C]**

**F 4. In the present cases, no such opportunity was granted to the State as contemplated under the first proviso of Section 389 Cr.PC. Therefore, the impugned orders to the extent of release of the private respondents on bail are set aside. The High Court shall consider the matters afresh. [Para 17][1199-D-E]**

**CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1516 of 2014.**

**G From the Judgment and Order dated 29.08.2012 in CRLA No. 3239/2012 passed by the High Court of Judicature at Allahabad.**

**With**

**H CRL Appeal no.1517-18 of 2014 @ SLP (Crl) No. 262-263 of 2013.**

Ashok Panigrahi, R. N. Tripathi, Santosh Kumar, Ms. Ashmi Mohan and Ms. Tuleka Mukherjee (For M/s Anuradha & Associates), Advs., for the Appellant. A

R.K. Das, Pramod Swarup, Sr. Advs. Sibho Sankar Misra, Pareena Swarup, Ameet Singh, Ms. Alka Sinha, Anuvrat Sharma and Tuleka Mukherjee (For M/s Anuradha & Associates), Advs., for the Respondents. B

The Judgment of the Court was delivered by

**KURIAN, J.** 1. Leave granted.

2. At the post conviction stage, whether the appellate court, while considering the release of the convict on bail, should give an opportunity to the public prosecutor for showing cause in writing against such release where the conviction is on an offence punishable with death or imprisonment for life or for a term not less than ten years, is the issue falling for consideration in these appeals. C D

3. All the private respondents have been convicted by the Court of Additional Sessions Judge, Azamgarh under Sections 147, 148, 149 read with Sections 302, 120B of the Indian Penal Code (45 of 1860) (hereinafter referred to as 'IPC') and Section 7 of Criminal Law (Amendment) Act, 2013 and they have been awarded sentence of imprisonment for life with fine. Altogether seven accused have been convicted; however bail is granted only to four. E

4. The main contention of the appellant is that the procedure contemplated under Section 389 proviso has not been complied with while releasing them on bail and, hence, the order passed by the High Court is liable to be set aside. For the purpose of ready reference, we shall extract the impugned order dated 29.08.2012 passed by the High Court, which reads as follows: F G

"Heard Sri Rajeev Mishra, learned counsel for the appellant as also Sri A.N. Mulla, learned AGA for the State. We have also heard Sri Viresh Mishra, learned H

A Senior Counsel assisted by Sri Rahul Mishra, Advocate appearing on behalf of the informant.

This appeal shall be heard.

B Call for lower court record of Sessions Trials No.435 of 2006, 436 of 2006 and 437 of 2006 from the court of Additional Sessions Judge, Court No.2, Azamgarh, which must be made available in a maximum period of four weeks.

C As regards the prayer for bail, the submission is that the present appellant Shyam Narain Pandey along with the other convict Laxmi Narain Pandey were alleged in the FIR as also in the evidence that they were sitting in a vehicle and were remonstrating from there, the shots whereupon were fired by three others.

D Regard being had to be submissions, let appellant Shyam Narain Pandey be released on bail, during pendency of appeal, on furnishing a bond of Rs.20,000/- with two sureties of the like amount each to the satisfaction of the learned Additional Sessions Judge, Court No.2, Azamgarh in connection with the Sessions Trial No.435 of-2006, 436 of 2006 and 437 of 2006.

E As regard sentence of fine imposed upon the above noted appellant, realization thereof shall remain stayed.

F Order Date: 29.8.2012

Sd/- Dharnidhar Jha, J.

Sd/- Ashok Pal Singh, J.”

G 5. Subsequently, in order dated 05.09.2012, it was clarified that Laxmi Narayan Pandey is also to be covered by the said order. In the case of Umesh Kumar Pandey and Ramesh Kumar Pandey, following is the order:

H “This appeal shall be heard along with criminal appeal no.3239 of 2012 in which we also send for the record of learned trial court.

Heard Sri Satish Trivedi, learned Senior Counsel appearing for the appellants and Sri Rahul Sharma, learned counsel appearing for the informant as also learned AGA for the State.

As regards the prayer for bail, the submission is that the case of Laxmi Narain Pandey – appellant No.1 was same and similar to that of co-convict Shyam Narain Pandey. As regards the remaining two appellants, namely, Umesh Kumar Pandey and Ramesh Kumar Pandey, the submission is that except that they had also alighted with other accused persons from the Bolero vehicle, there were no further allegation against them.

Regard being had to the submission and evidence, which is discussed in the impugned judgment, we direct the release of the appellants namely, Umesh Kumar Pandey and Ramesh Kumar Pandey on bail, during pendency of appeal, on furnishing a bond of Rs.20,000/- each with two sureties of the like amount each to the satisfaction of the learned Additional Sessions Judge, Court No.2, Azamgarh in connection with the Sessions Trials No,435 of 2006, 436 of 2006 and 437 of 2006.

As regard sentence of fine imposed upon the above noted appellant, realization thereof shall remain stayed till further orders.

Order Date: 05.09.2012"

6. Section 389 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.PC') reads as follows:

**"S.389. Suspension of sentence pending the appeal; release of appellant on bail.—**(1) Pending 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 he is in confinement, that he be released on bail, or on his own bond.

A [Provided that the Appellate Court shall, before releasing  
on bail or on his own bond a convicted person who is  
convicted of an offence punishable with death or  
imprisonment for life or imprisonment for a term of not  
less than ten years, shall give opportunity to the Public  
Prosecutor for showing cause in writing against such  
release:

B *Provided further* that in cases where a convicted person  
is released on bail it shall be open to the Public  
Prosecutor to file an application for the cancellation of  
the bail.]

C (2) The power conferred by this section on an Appellate  
Court may be exercised also by the High Court in the  
case of an appeal by a convicted person to a Court  
subordinate thereto.

D (3) Where the convicted person satisfies the Court by  
which he is convicted that he intends to present an appeal,  
the Court shall,—

E (i) where such person, being on bail, is sentenced to  
imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been  
convicted is a bailable one, and he is on bail,

F order that the convicted person be released on bail,  
unless there are special reasons for refusing bail, for such  
period as will afford sufficient time to present the appeal  
and obtain the orders of the Appellate Court under sub-  
section (1), and the sentence of imprisonment shall, so  
long as he is so released on bail, be deemed to be  
suspended.

G (4) When the appellant is ultimately sentenced to  
imprisonment for a term or to imprisonment for life, the  
time during which he is so released shall be excluded in  
computing the term for which he is so sentenced.”

H (Emphasis supplied)

7. Since the argument is on the faulty procedure adopted by the High Court on 24.03.2004, this Court directed the respondents to state on affidavit:

"... as to whether the first proviso to Section 389 Cr.P.C. for giving an opportunity to the Public Prosecutor for showing cause in writing against the proposed release of the convicted person on bail was complied with before the impugned bail order was passed by the High Court."

8. The State has filed an affidavit on 24.04.2014. Paragraph 5 of the affidavit reads as follows:

"That in this regard, it is respectfully submitted, that as per information received, no opportunity for showing cause in writing was provided to the State counsel though the State counsel appeared on the said date."

(Emphasis supplied)

9. On behalf of the second respondent, an affidavit has been filed on 12.04.2014 wherein it is stated at paragraphs 2 and 3 as follows:

"2. ... In this context it may be stated that respondent no. 2 to 4 for challenging the judgment and order of conviction recorded by the trial court gave notice of the appeal to the State Counsel on 31.08.2012. The notice consisted of the memo of appeal and the application for bail. Thereupon appeal alongwith bail application were filed. Giving of earlier notice to the State Counsel was in compliance with the requirement of law as provided in Section 389 Cr.P.C. to enable the State to have its say in writing on the prayer for bail.

3. That the appeal (Criminal Appeal No. 3404/2012) alongwith bail application were listed on 05.09.2014. The counsel representing State as well as of the complainant, petitioner here-in, entered appearance and objected to the respondent's prayer for bail. Upon hearing the counsel

A of respondent no. 2 to 4, State and the complainant,  
Hon'ble High Court passed the impugned order(s). ...”

(Emphasis supplied)

B 10. Learned counsel for the private respondents  
contends that the appellants had given copies of the appeal  
and the bail application to the public prosecutor and since the  
public prosecutor having been heard on the day when the  
appeal came up for admission, there is compliance of the first  
proviso under Section 389 Cr.PC. The public prosecutor having  
C appeared in the matter and opposed the application for bail,  
the statutory requirement of opportunity to show cause has been  
satisfied.

D 11. The provisos to Section 389 were introduced mainly  
pursuant to the 154<sup>th</sup> Report of the Law Commission of India  
submitted in 1996. The amendments were introduced by Act  
25 of 2005 and they have come into effect from 23.06.2006.  
The Law Commission recommended for addition of two  
provisos. The recommendation reads as follows:

E “47. Two provisos to sub-section (1) of section 389 of  
the Code be added to the effect that the Appellate Court  
would give notice to the prosecution before releasing a  
convicted person on bail, if he was convicted of an offence  
punishable with death, imprisonment for life or  
imprisonment for a term of not less than ten years and  
F also to enable the prosecution to move an application  
for cancellation of such bail granted by the Appellate  
Court.”

G 12. However, in the Bill, a further modification was  
suggested to the effect that the public prosecutor be given an  
opportunity to show cause in writing against the release and,  
thus, the provisos have found place under Section 389(1)  
Cr.PC.

H 13. Section 389 comes under Chapter XXIX of Cr.PC  
dealing with appeals. Section 439 Cr.PC coming under  
Chapter XXXIII Cr.PC provides for special powers to High

Court or Court of Sessions regarding bail for an accused. Section 439(1) also has a proviso. Section 439 reads as follows:

**"S.439. Special powers of High Court or Court of Session regarding bail.—(1) A High Court or Court of Session may direct—**

- (a) that any person accused of an offence and in custody, be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;
- (b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

(Emphasis supplied)

14. It may be seen that there is a marked difference between the procedure for consideration of bail under Section 439, which is pre conviction stage and Section 389 Cr.PC, which is post conviction stage. In case of Section 439, the Code provides that only notice to the public prosecutor unless impractical be given before granting bail to a person who is accused of an offence which is triable exclusively by the Court

A of Sessions or where the punishment for the offence is imprisonment for life; whereas in the case of post conviction bail under Section 389 Cr.PC, where the conviction in respect of a serious offence having punishment with death or life imprisonment or imprisonment for a term not less than ten years, it is mandatory that the appellate court gives an opportunity to the public prosecutor for showing cause in writing against such release.

15. Service of a copy of the appeal and application for bail on the public prosecutor by the appellant will not satisfy the requirement of first proviso to Section 389 Cr.PC. The appellate court may even without hearing the public prosecutor, decline to grant bail. However, in case the appellate court is inclined to consider the release of the convict on bail, the public prosecutor shall be granted an opportunity to show cause in writing as to why the appellant be not released on bail. Such a stringent provision is introduced only to ensure that the court is apprised of all the relevant factors so that the court may consider whether it is an appropriate case for release having regard to the manner in which the crime is committed, gravity of the offence, age, criminal antecedents of the convict, impact on public confidence in the justice delivery system, etc. Despite such an opportunity being granted to the public prosecutor, in case no cause is shown in writing, the appellate court shall record that the State has not filed any objection in writing. This procedure is intended to ensure transparency, to ensure that there is no allegation of collusion and to ensure that the court is properly assisted by the State with true and correct facts with regard to the relevant considerations for grant of bail in respect of serious offences, at the post conviction stage.

16. To sum up the legal position,

- a. The appellate court, if inclined to consider the release of a convict sentenced to punishment for death or imprisonment for life or for a period of ten years or more, shall first give an opportunity to the

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public prosecutor to show cause in writing against such release. A

b. On such opportunity being given, the State is required to file its objections, if any, in writing.

c. In case the public prosecutor does not file the objections in writing, the appellate court shall, in its order, specify that no objection had been filed despite the opportunity granted by the court. B

d. The court shall judiciously consider all the relevant factors whether specified in the objections or not, like gravity of offence, nature of the crime, age, criminal antecedents of the convict, impact on public confidence in court, etc. before passing an order for release. C

17. Admittedly, no such opportunity was granted to the State as contemplated under the first proviso of Section 389 Cr.PC in these appeals. Therefore, the impugned orders to the extent of release of the private respondents on bail are set aside. The High Court shall consider the matters afresh. Needless to say that Shyam Narayan Pandey—respondent no.2 in Criminal Appeal No. 1516 of 2014 @ S.L.P. (Criminal) No.261 of 2013 and Laxmi Narayan Pandey-respondent no.2, Umesh Kumar Pandey-respondent no.3 and Ramesh Kumar Pandey-respondent no.4 in Criminal Appeal Nos. 1517-18 of 2014 @ S.L.P. (Criminal) Nos. 262-263 of 2013 shall surrender before the trial court within three weeks and, if not, they shall be taken into custody. Thereafter, the High Court shall consider afresh their applications for bail, after following the procedure as per proviso to Section 389 (1) Cr.PC as explained above, expeditiously. D  
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18. The appeals are allowed as above.