ALI AHMAD

v.

THE STATE OF BIHAR & ANR.

(Criminal Appeal No. 1374 of 2021)

NOVEMBER 12, 2021

[K. M. JOSEPH AND PAMIDIGHANTAM SRI NARASIMHA, JJ.]

Code of Criminal Procedure, 1973: s.389 – Suspension of sentence pending the appeal; release of accused on bail – Second respondent-accused was convicted by trial court under s.302 IPC and sentenced to life imprisonment – Pending appeal, High Court allowed application filed under s.389 – Appeal by complainant – Held: With the introduction of the first proviso to s.389, the law giver has stipulated a particular procedure to be followed in a matter of releasing a person who stands convicted of serious offences as are indicated thereunde – Every law is intended to be followed – In the impugned orders, the mandate of the first proviso has not been followed – Grant of bail post conviction clearly stands on a different footing from grant of bail to an under-trial prisoner under s.439 – The argument for the second respondent that resort could be made to the second proviso in s.389 is misplaced – What the second proviso speaks about is that when a person is released on bail under s.389, it is open to the public prosecutor to seek cancellation of bail – Cancellation of bail apparently is intended to deal with cases of transgression of conditions based on the conduct of the appellant(applicant for bail) after the grant of bail essentially – The mandate of the first proviso must be observed in its own right – Therefore, in these cases, the impugned orders do not conform to the requirement of the law – High Court to take up the applications filed by the second respondent and to follow the procedure laid down in the s.389.

Atul Tripathi v. *State of Uttar Pradesh and Others* **(2014) 9 SCC 177 : [2014] 14 SCR 1188 – relied on.**

Kashmira Singh v. *State of Punjab* **AIR 1977 SC 2147 : [1978] 1 SCR 385 – referred to.**

Case law reference

[2014] 14 SCR 1188	**referred to**	**Para 5**
[1978] 1 SCR 385	**referred to**	**Para 5**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.1374 of 2021.

From the Judgment and Order dated 08.01.2020 of the High Court of Judicature at Patna in Criminal Appeal (DB) No.599 of 2019.

With

Criminal Appeal Nos.1375 and 1376 of 2021.

M. Shoeb Alam, Ms. Fauzia Shakil, Gautam Jha, Pankaj Kumar, Ms. Sweta Jha, Advs. for the Appellant.

Manish Kumar, Ms. Anisha Mathur, Samir Ali Khan, Gaurav Agrawal, Advs. for the Respondents.

The Order of the Court was passed by

O R D E R

K. M. JOSEPH, J.

(1) Leave granted.

(2) In both these appeals, the appellant is the complainant. He takes exception to the order passed by the High Court which purports to be under Section 389 of the Code of Criminal Procedure, 1973 (Cr.P.C.)

(3) By the impugned order, the second respondent in both the appeals have been released on bail. The second respondent in both these appeals stood trial for offences including Section 302 Indian Penal Code, 1860 (IPC). They stand convicted by the trial Court and sentenced to life. It is challenging the said conviction that the criminal appeals came to be filed in the year 2019, before the High Court of Judicature at Patna. It is in the applications filed under Section 389 Cr.P.C. that the impugned orders have been passed.

(4) We have heard Shri M. Shoeb Alam, learned counsel for the appellant and Shri Gaurav Agrawal, learned counsel appearing on behalf of the second respondent in both the cases and Shri Manish Kumar, learned counsel for the State.

(5) Learned counsel for the appellant would draw our attention to Section 389 Cr.P.C. He would point out that it is the mandate of the first proviso that an opportunity must be afforded to the public prosecutor in case an application is moved to state his objections in writing. In this regard, he drew our attention to the judgment of this Court in Atul Tripathiv. State of Uttar Pradesh and Others (2014) 9 SCC 177 wherein this Court has laid down inter alia as follows:

> 14. Service of a copy of the appeal and application for bail on the Public Prosecutor by the appellant will not satisfy the requirement of the first proviso to Section 389(1) CrPC. 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.
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> 15. To sum up the legal position:
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> 15.1. 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.
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> 15.2. On such opportunity being given, the State is required to file its objections, if any, in writing.

> 15.3. 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.
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> 15.4. 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."

He would point out that while it may be true that the orders show that public prosecutor was heard, the procedure contemplated in the first proviso and as referred to by this Court in the aforesaid decision has not been followed.

He further drew our attention to the fact that an application under Section 439 Cr.P.C. stands on a different footing from an application for suspension of sentence post conviction in a case which involves section 302 IPC which is the offence with which we are concerned in these cases. In other words, he drew our attention to the principle which has been enunciated by this Court in the judgment reported in Kashmira Singh v. State of Punjab AIR 1977 SC 2147. He would point out that this principle has been followed in later judgments as well. He would point out that the order does not disclose any reasoning as to justify grant of bail in a case where the trial Court has after consideration of the evidence convicted the second respondent in both the cases of the offences under Section 302 included.

(6) Per contra, Shri Gaurav Agrawal, learned counsel appearing on behalf of the second respondent, would point out that the public prosecutor has a right to invoke the second proviso in Section 389 which he has not done. It is not as if he questions the locus of the appellant to impugn the order but he would submit that on the facts, no case is made out for interference. He further points out that pursuant to the impugned orders, the second respondent in both the cases, have been out on bail for nearly two years. The appellant joins issue with the second respondent on the last contention which is that the second respondents have been out on bail by pointing out that the appellant has followed up the matter as expeditiously as he could. Letter was circulated by the second respondent. The case was thereafter adjourned and the case could be taken up only today and it is not the fault of the appellant. It is further

pointed out that the appellant cannot be blamed and this is a case where the impugned orders do not show any reasoning besides being afflicted with legal flaw which has been referred to viz., not following the procedure provided for in the first proviso.

(7) We have also heard the learned counsel for the State as already noted.

(8) It is indeed true that with the introduction of the first proviso to section 389 the law giver has stipulated a particular procedure to be followed in a matter of releasing a person who stands convicted of serious offences as are indicated thereunder. Every law is intended to be followed. The fact that it is intended to be followed has been taken note of by this Court in judgment reported in Atul Tripathi (supra). It is despite this that, in the impugned orders, it appears that the mandate of the first proviso has not been followed. Grant of bail post conviction clearly stands on a different footing from grant of bail to an undertrial prisoner under Section 439. The argument of the learned counsel for the second respondent that resort could be made to the second proviso in Section 389 is misplaced. What the second proviso speaks about is that when a person is released on bail under Section 389, it is open to the public prosecutor to seek cancellation of bail. Cancellation of bail apparently is intended to deal with cases of transgression of conditions based on the conduct of the appellant(applicant for bail) after the grant of bail essentially. The mandate of the first proviso must be observed in its own right.

(9) We are therefore of the view that in these cases, the impugned orders do not conform to the requirement of the law. We must observe that the High Court must be requested to consider the applications filed by the second respondents again. However, we notice that the second respondent in both the cases have been out on bail based on the impugned orders for quite some time. We, however, cannot be totally oblivious of the fact that criminal appeals are not taken up with the expedition with which they are to be taken up having regard to the docket explosion with which the Courts are plagued. We must be mindful of the submission that a careful consideration of these aspects is required when applications for suspension / bail are considered based on the merits of each individual case.

(10) We are inclined, therefore, to allow the appeals and request the High Court to take up the applications filed by the second respondent and to follow the procedure laid down in the Section 389. The appeals

A are allowed. The impugned orders are set aside. The High Court will take up the applications bearing in mind the mandate of Section 389 including the first proviso. Further, we would direct that the second respondent in both the cases need not surrender during the consideration of the applications. However, their fate will depend on the consideration B of the applications. We also make it clear that we have not expressed on the merits of the matter. Having regard to the orders passed, we request the High Court to take up the applications and dispose of the same within a period of six weeks from the date a copy of this order is produced before it.

CRIMINAL APPEAL NO. 1376 OF 2021

C (Arising out of SLP (Crl.) No.2665 of 2021 (II-A)

(11) Leave granted.

(12) The appellant stands convicted under Section 302 included of the IPC. He filed an application under Section 389. The impugned order reads as follows:

D "List this appeal under the same heading after disposal of Special Leave Petition (Criminal) Diary No(s).9485 of 2020, in which the Hon'ble Supreme Court has directed for issuance of notice to the respondents against the order dated 08.01.2020 passed in Cr.Appeal (DB) No. 599 of 2019 by this Court, whereby the prayer E for bail of co-convict Brij Mohan Pandey was allowed."

(13) Today we have disposed of the case which has been mentioned therein. Further, we need to indicate that the High Court ought not to have kept the matter pending based on the fact that an SLP has been filed in regard to the application filed for suspension by a co-convict. F The application for suspension of sentence and bail of the appellant ought to have been considered on its individual merit.

(14) However, having regard also to fact that we have already disposed of other cases, we see no reason as to why application filed by the appellant under Section 389 for suspension of sentence and bail should G not be considered in its own right. Accordingly, we dispose of the appeal by requesting the High Court to consider the application filed by the appellant at the earliest and preferably, within a period of six weeks from the date of the production of the copy of this judgment.

Devika Gujral Appeals allowed.