

## **Ramesh And Ors. vs State Of U.P. on 1 December, 2010**

**Author: Rajiv Sharma**

**Bench: Rajiv Sharma**

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH This is third application for bail on behalf of the appellant Vishram who alongwith seven others was tried by the court of IVth Additional Sessions Judge, Hardoi in S.T.No.493 of 1997 (Crime No.140/1994) : State Vs. Ramesh @ Munnu and others and each of them was convicted and sentenced to undergo rigorous imprisonment for one year under Section 148 I.P.C., to undergo rigorous imprisonment for life under Section 302/149 I.P.C., to undergo rigorous imprisonment for 10 years under Section 307/149 I.P.C. and to undergo rigorous imprisonment for one year under Section 323/149 I.P.C. All the sentences were made to run concurrently.

The first application for bail was moved by the appellant alongwith memo of appeal and was rejected on merit on 21.12.1999. Thereafter, second application for bail was moved which was also rejected on merit on 21.5.2003. This third application for bail was moved on 26.4.2005 and is pending since then for disposal.

We have heard the learned counsel for the applicant as well as learned A.G.A. and perused the record of the case.

The learned counsel for the applicant, assailing the veracity of the prosecution case and evidence adduced by the prosecution during the trial, in substance contended that applicant has been falsely implicated in the case on account of enmity; and prosecution witnesses are not independent and reliable and similarly situated Co- accused have been admitted to bail by the Division Bench of this Court on 20.7.2010 hence on the ground of parity appellant too deserves bail and his long incarceration in jail is per- se illegal as being violative of Article 21 of the Constitution of India. That the applicant is not in a position to temper with the prosecution evidence and there is no danger of accused absconding or fleeing if released on bail; and as such he should also be enlarged on bail pending the appeal.

The bail is however opposed by learned A.G.A. by contending in support of the prosecution version that it is a case of heinous offence, wherein two persons were murdered and an attempt was made to commit murder of three persons who also received injuries in the incident. He further contended that it is third application for bail and previous two bail applications were rejected on merit and the grounds now taken by him are not available to him and the applicant has suppressed material facts and does not deserve bail.

We have carefully considered the respective submissions made by the parties. Before passing order on the merit of the bail application , we would like to express our views on the legal question whether on the sole ground of parity, the applicant is entitled for bail The matter of granting bail on

the ground of parity has been considered in several decisions by this Court. The Full Bench in *Sunder Lal Vs. State* 1983 Cr. L.J. 736 did not accept this proposition, which will be evident from the following observations in para 15 which is as under;-

"The learned Single Judge since has referred the whole case for decision by the Full Bench, we called upon the learned Counsel for the applicant to argue the case on merits. The learned Counsel only pointed out that by reasons of fact that other co-accused has been admitted to bail the applicant should also be granted bail. This argument alone would not be sufficient for admitting the applicant to bail who is involved in a triple murder case...."

The Hon'ble M. Katju, J., as His Lordship then was, declined to grant bail on the ground of parity and referred the matter to larger Bench in *Chander @ Chandra Vs. State of U.P.* 1997 (34) ACC 311. The matter came up for consideration before a Division Bench. While deciding the said reference in *Chander @ Chandra Vs. State of U.P.* (1998 U.P. Cr.R. 263) the Division Bench held as under;-

" a Judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains reasons, if the same has been passed in flagrant violation of well settled principle and ignores to take into consideration the relevant facts essential for granting bail."

It is further held by the Division Bench in *Chander @ Chandra Vs. State of U.P.* (1998 U.P. Cr.R. 263) that if bail has been granted in flagrant violation of well settled principles, the order granting bail would not be in accordance with law. Such order can never form the basis for a claim founded on parity.

In this connection it will be useful to notice the observations made by the Hon'ble Apex Court, where the claim was made on the ground that a similar order had been passed by a statutory authority in favour of another person. In *Chandigarh Administration Vs. Jagjit Singh* AIR 1995 SC 705, it was held in para-8 of the reports as follows:

"..... if the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal and unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order."

"..... The illegal/unwarranted action must be corrected, if it can be done according to law-indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law-but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition.

"..... Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law."

Again Hon'ble Apex Court in Secretary Jaipur Development Authority V. Daulatmal Jain, 1997(1) SCC 35, observed in para-24 as follows:

"Article 14 proceeds on the premises that a citizen had legal and valid right enforceable at law and persons having similar right and persons similarly circumstanced, cannot be denied of the benefit thereof. Such persons cannot be discriminated to deny the same benefit. The rational relationship and legal back up are the foundations to invoke the doctrine of equality in case of persons similarly situated. If some persons derived benefit by illegality and had escaped from the clutches of law, similar persons cannot plead nor the Court can countenance that benefit had from infraction of law and must be allowed to be retained. Can one illegality be compounded by permitting similar illegal or illegitimate or ultra vires acts? Answer is obviously, no."

In para 17 in the case of Chander @ Chandra Vs. State of U.P. (1998 U.P. Cr.R. 263), it was held that:-

"The grant of bail is not a mechanical act and principle of consistency cannot be extended to repeating a wrong order. If the order granting bail to an identically placed co-accused has been passed in flagrant violation of well settled principle, it will be open to the Judge to reject the bail application of the applicant before him as no Judge is obliged to pass orders against his conscience merely to maintain consistency."

In Special Leave Petition No. 4059 of 2000: Rakesh Kumar Pandey Vs. Munni Singh @ Mata Bux Singh and another, decided on 12.3.2001, the Hon'ble Apex Court strongly denounced the order of the High Court granting bail to the co-accused on the ground of parity in a heinous offence and while cancelling the bail granted by the High Court it observed that:-

"The High Court on being moved, has considered the application for bail and without bearing in mind the relevant materials on record as well as the gravity of offence released the accused-respondents on bail, since the co-accused, who had been ascribed similar role, had been granted bail earlier."

The Apex Court in the aforesaid case has further observed:-

"Suffice it to say that for a serious charge where three murders have been committed in broad day light, the High Court has not applied its mind to the relevant materials, and merely because some of the co-accused, whom similar role has been ascribed, have been released on bail earlier, have granted bail to the present accused respondents. It is true that State normally should have moved this Court against the order in question, but at the same time the power of this Court cannot be fettered merely because the State has not moved, particularly in a case like this, where our conscience is totally shocked to see the manner in which the High Court has exercised

its power for release on bail of the accused respondents. We are not expressing any opinion on the merits of the matter as it may prejudice the accused in trial. But we have no doubt in our mind that the impugned order passed by the High Court suffers from gross illegality and is an order on total non-application of mind and the judgement of this Court referred to earlier analysing the provisions of sub-section (2) of section 439 cannot be of any use as we are not exercising power under sub-section (2) of section 439 Cr.P.C."

In the case of Salim Vs. State of U.P. 2003 ALL. L. J. 625, this Court has held that parity can not be the sole ground for bail.

Again in the case of Zubair Vs. State of U.P. 2005(52) ACC 205, this Court observed that there is no absolute hidebound rule that bail must necessarily be granted to the co-accused, where another co-accused has been granted bail.

In view of the aforesaid discussion, we are of the considered opinion that parity can not be the sole ground for granting bail.

It has also been submitted by the learned counsel for the appellant that the appellant is languishing in jail since long and hence on the basis of long detention period in jail, he is entitled to be released on bail because due to delay in disposal of the appeal, his fundamental rights of speedy disposal envisaged under Article 21 of the Constitution of India is being violated.

In so far as the long pendency of this appeal is concerned, we were conscious and mindful that after admission of appeal, the paper book was prepared long back and appeal is pending for final hearing since long. Therefore, we requested the learned counsel for the appellant to argue the appeal finally on merit on which learned counsel stated that he has been engaged to argue bail application only and thus he argued bail application only and not the appeal on merit.

In these circumstances, when appellant is not prepared to argue the appeal on merit, he cannot complain otherwise that his appeal is pending since long and his right of speedy disposal of appeal is being violated. No one can take advantage of his own wrong or his own inaction. In these circumstances the fact that appeal is still pending is no ground to admit the appellant to bail when he is not prepared to argue the appeal on merit.

Further in our opinion on the basis of the long incarceration in jail also, an accused cannot be admitted to bail in heinous offence like murder and dacoity etc. In the present case, the appellant had also been convicted under Section 302 I.P.C. and has been sentenced to undergo imprisonment for life. Imprisonment for life means imprisonment for the whole remaining life. In this context, reference may also be made to the case of Pramod Kumar Saxena Vs. Union of India and others : 2008 (63) ACC 115 in which Hon'ble Apex Court has held that mere long period of incarceration in jail would not be per se illegally. If the accused has committed offence, he has to remain behind bar. Such detention in jail even as under trial prisoners would not be violative of Article 21 of the Constitution of India and is permissible under the Code of Criminal Procedure.

The principle applicable to grant of bail at the pre-trial stage are different from the release of the appellant on bail during pending of appeal. At the pre-trial stage there is a presumption of innocence in favour of an accused till it is established that he is guilty.

After trial, Section 389 of the Code of Criminal Procedure deals with the release of the appellant on bail and suspension of sentence pending appeal. It states as under :-

"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.

\* \* \* (2) The power conferred by this section on a 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.

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

(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, 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.

(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."

Bare reading of the above provision makes it clear that during the pendency of appeal, an appellate court is empowered to suspend sentence on the appellant by releasing him on bail. Such action, however, can be taken only after affording opportunity to the Public Prosecutor in case of offence punishable with death or imprisonment for life or imprisonment for ten years or more and after recording reasons in writing. 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.

In Case of., State of Haryana v. Hasmat (2004) 6 SCC 175 Hon'ble ,Apex Court stated: (SCC p. 176, para 6) :-

"6. Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the applicant 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. 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." (emphasis supplied).

In case Akhilesh Kumar Sinha v. State of Bihar(2000) 6 SCC 461, Vijay Kumar v. Narendra(2002) 9 SCC 364, Ramji Prasad v. Rattan Kumar Jaiswa(2002) 9 SCC 366,, State of Haryana v. Hasmat(2004) 6 SCC 175, Kishori Lai v. Rupa(2004) 7 SCC 638and State of Maharashtra v. Madhukar Wamanrao Smarth(2008) 5 SCC, it has been observed by Hon'ble Apex Court, that once a person has been convicted, normally, an appellate court will proceed on the basis that such person is guilty. It is no doubt true that even thereafter, it is open to the appellate court to suspend the sentence in a given case by recording reasons. But it is well settled, as observed in Vijay Kumar(supra) that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 IPC, the Court should consider all the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, the desirability of releasing the accused on bail after he has been convicted for committing serious offence of murder, etc. It has also been observed in some of the cases that normal practice in such cases is not to suspend the sentence and it is only in exceptional cases that the benefit of suspension of sentence can be granted.

In Case of Sidhartha Vashisht Alias Manu Sharma Versus State (Nct Of Delhi) (2008) 5 SCC 230 Hon'ble Supreme Court held as under :

"The mere fact that during the period of trial, the accused was on bail and there was no misuse of liberty, does not per se warrant suspension of execution of sentence and grant of bail. What is really necessary is to consider whether reasons exist to suspend execution of the sentence and grant of bail."

In view of the above, it cannot be said that the detention of applicant in jail pending appeal is in any way violative to the provision of Article 21 of the Constitution of India.

It is not in dispute that it is third application for bail The first application for bail was rejected on merit on 21 Dec 1999 and 2nd application for bail was rejected on merit on 21 May 2003. Certain arguments on merit has also been raised and made in this third application for bail, but in view of law laid down by Division Bench of this Court in case of Satya Pal Vs. State of U.P. 1998(37) ACC

287 and observation made by Hon'ble Apex Court in Kalyan Chandra Sarkar etc, Vs. Rajesh Ranjan @ Pappu Yadav 2005 (51) ACC 727, subsequent Bail application on the same Grounds which were available at the time of dismissal of previous bail application is not maintainable. Further this third bail application was moved on 26 April 2005 was pending even on 20 July 2010 when other co-accused were granted bail but this application was not pressed at that time.

It further reveals from the record that present applicant along with Co -accused Rama Kant got the forged bail order of this Court, on the basis of which Rama Kant succeeded to get him released and is still absconding. Thus conduct of applicant pending appeal has not been fair, and such person can not be admitted to bail, in this serious offence of double murder.

The offence for which appellant has been convicted are of serious nature. The considerations which normally weigh with the court in granting bail in non-bailable offence have been explained by Hon'ble Apex Court in State v. Capt. Jagjit Singh, AIR 1962 SC 253 and Gurcharan Singh v. State (Delhi Admn.), AIR 1978 SC 179 and basically they are - the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case. Recently Hon'ble Apex Court in Gobarbhai Naranbhai Singala Versus State Of Gujarat & Ors. & Jayeshbhai @ Panchabhai Muljibhai Satodiya Versus Jayrajsinh Temubha Jadeja & Anr. (Appeal (crl.) 198 of 2008 (Arising out of SLP(CRL) No. 6646 of 2005) With Criminal Appeal No. 199 of 2008 (Arising out of SLP(CRL) No. 4283 of 2006) - Decided on 29-1-2008 observed as under :-

"This Court in Amarmani Tripathi's case has held that while considering the application for bail, what is required to be looked is, (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of accused absconding or fleeing if released on bail; (v) character, behavior, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail"

Thus in view of above principle laid down by Hon'ble Supreme Court, while considering prayer for bail, what was required to be taken into account was the above factors, but these factors were not taken into account while considering bail of co-accused on 20-07-2010 and bail was granted solely on the basis of long incarceration. Thus it cannot be said to be in consonance with the principles laid down by Hon'ble Supreme Court. Hon'ble Supreme Court in case of Chenna Boyanna Krishna Yadav Versus State Of Maharashtra & Anr (2007) 1 SCC 242 has held that when the gravity of the offence alleged is severe, long period of incarceration or the fact that the trial is not likely to be concluded in the near future either by itself or conjointly may not entitle the accused to be enlarged on bail.

The appeal is pending for final hearing, therefore observations on merits, one way or the other are likely to prejudice one or the other party to the appeal.

Hence, we are not entering into the correctness or otherwise of the merit of the evidence on record, however, it cannot be overlooked that as on today, the applicant has been found guilty and convicted by a competent criminal court. Initial presumption of innocence in favour of the accused, therefore, is no more available to the applicant. The trial Court has also given cogent reasons for accepting the prosecution case and believing prosecution witnesses In view of what has been stated above, we are of the opinion that the applicant does not deserve bail on the ground of parity, long incarceration in jail or any other grounds. Bail is therefore refused and application for bail is rejected accordingly.

List this appeal for final hearing on merit in the next cause list.

1.12.2010.

Shukla.