

# Kanhaiya Alias Kural vs State Of U.P. on 12 July, 2019

**Equivalent citations: AIRONLINE 2019 ALL 1271**

**Bench: Karuna Nand Bajpayee, Rajeev Misra**

HIGH COURT OF JUDICATURE AT ALLAHABAD

?Court No. - 64

Case :- CRIMINAL APPEAL No. - 2161 of 2015

Appellant :- Kanhaiya Alias Kural

Respondent :- State Of U.P.

Counsel for Appellant :- Mohammad Khalid-I,Ajay Kumar Pandey,Lal Vijay Singh,Noor Mohamm

Counsel for Respondent :- Govt.Advocate

Hon'ble Karuna Nand Bajpayee,J.

Hon'ble Rajeev Misra,J.

Ref: Criminal Misc. Third Bail Application No.6 of 2018 Heard Mr. Lal Vijay Singh, the learned counsel for the applicant-appellant and the learned A.G.A. on the third bail application moved on behalf of accused-appellant Kanhaiya Alias Kural.

S.T. No. 268 of 2012 (State Vs. Lalit Kumar and Seven Others), arising out of Case Crime No. 820 of 2011, under Section 364 A IPC, P.S. Kotwali Hapur Nagar, District Ghaziabad, S.T. No. 363 of 2014 (State Vs. Qayum), arising out of Case Crime No. 820 of 2011, under Section 364 A IPC, P.S. Kotwali Hapur Nagar, District Ghaziabad, S.T. No. 291 of 2012 (State Vs. Lalit Kumar and seven Others), arising out of Case Crime No. 1190 of 2011, under Sections 147, 148 307/149 IPC, P.S. Kavi Nagar, District Ghaziabad, S.T. No. 292 of 2012 (State Vs. Lalit Kumar), arising out of Section 25 of the Arms Act, P.S. Kavi Nagar, District Ghaziabad, S.T. No. 293 of 2012 (State Vs. Pappu) arising out of Case Crime No. 1192 of 2011, under Section 25 of the Arms Act, P.S. Kavi Nagar, District, Ghaziabad, S.T. No. 294 of 2012 (State Vs. Raj Kumar) arising out of Case Crime No. 1193 of 2011, under Section 25 of the Arms Act, P.S. Kavi Nagar, District Ghaziabad, S.T. No. 295 of 2012 (State Vs. Kanhaiya),

arising out of Case Crime No. 1194 of 2011, under Section 25 of the Arms Act, P.S. Kavi Nagar, District Ghaziabad, S.T. No. 296 of 2012 (State Vs. Iqbal) under section 25 of the Arms Act arising out of Case Crime No. 1195 of 2011, P.S. Kavi Nagar, District Ghaziabad and S.T. No. 297 of 2012 (State Vs. Shiv Ram) under Section 25 of the Arms Act, arising out of Case Crime No. 1196 of 2011, P.S. Kavi Nagar, District Ghaziabad were decided together by the Additional Sessions Judge, Court No. 7, Ghaziabad vide judgement and order dated 7.5.2015.

By means of the judgment and order dated 7.5.2015, the Court below convicted the accused Lalit Kumar, Pappu, Raj Kumar, Kanhaiya, Iqbal and Shiv Ram alias Bijju have been convicted under section 364 A I.P.C. and consequently sentenced to life imprisonment along with fine of Rs. 10,000/- each. They have also been convicted under section 147 IPC for which they have been awarded two years imprisonment followed by conviction under section 148 IPC for which they have been sentenced for three years imprisonment as well as conviction under section 307/149 IPC for which they have been sentenced for 10 years rigorous imprisonment along with fine of Rs. 20,000/-. All the accused-appellants have also been convicted under section 25 of the Arms Act and consequently sentenced to three years rigorous imprisonment along with fine of Rs. 10,000/-. Upon failure to deposit the amount of fine, the accused-appellants were to further undergo imprisonment of three years.

Feeling aggrieved by the judgement and order dated 7.5.2015, two of the accused namely, Kanhaiya alias Kural and Raj Kumar, have filed the above mentioned Criminal Appeal. Along with the memo of criminal appeal, the accused appellant also filed a bail application which was registered as Criminal Misc. Bail Application No. 190107 of 2015. The first bail application of the accused appellants came to be dismissed for want of prosecution vide order dated 22.7.2015, passed by Their Lordships Hon'ble Mr. Justice A.P. Sahi and Hon'ble Mr. Justice Pramod Kumar Srivastava. For ready reference, the order dated 22.7.2015 is reproduced herein under:-

"Sri Dharam Veer Singh holding brief of Sri Mohd. Khalid-I, learned counsel for the applicant-appellant, prays for an adjournment.

This matter has been taken up in the revised call. We are not inclined to grant any adjournment. No arguments have been advanced on behalf of the applicant-appellant.

Dismissed for want of prosecution. "

Thereafter, the accused appellant No. 1 Kanhaiya alias Kural filed Criminal Misc. IIInd Bail Application No. 176307 of 2016. During the pendency of aforesaid IIInd bail application, the accused appellant No.2 Raj Kumar filed Criminal Misc. Second Bail Application No. 363723 of 2016. These second bail applications came to be rejected vide order dated 31.1.2018, passed by their Lordships Hon'ble Mr. Justice A.P. Sahi and one of us Hon'ble Mr. Justice Rajeew Misra. The order dated 31.1.2018 is on the record, as the same has been pasted on the order sheet of the criminal appeal. For ready reference the order dated 31.1.2018 is quoted herien below:

"Ref:- Criminal Misc. IInd Bail Application No. 363723 of 2016.

Ref:- Criminal Misc. IInd Bail Application No. 176307 of 2016.

Heard Sri Satish Trivedi learned Senior Counsel assisted by Sri S.K. Garg, Sri Gaurav Singh, Sri Ajay Kumar Pandey and Sri Alok Kumar Singh on behalf of all the applicants in these bail applications.

These bail applications have been moved on behalf of the appellants and it is evident that the first bail application in the case of Kanhaiya Kumar, Raj Kumar, Lalit Kumar and Shiv Ram alias Vijju had been rejected for want of prosecution vide order dated 22.07.2015. The second bail application in Criminal Appeal No. 2126 of 2015 is not on record.

The arguments were advanced but at this stage learned counsel for the appellants prayed that they may be permitted to not press the bail application at this stage on behalf of the appellants and file their fresh bail applications after some time. The bail application stands rejected with the aforesaid liberty. "

Subsequently, the appellants in Criminal Appeal No. 2127 of 2015 filed Criminal Misc. IInd Bail Application No. 04 of 2018 and Criminal Misc. II Bail Application No. 1 of 2018 in Criminal Appeal No. 2162 of 2015. Both the aforesaid bail applications came to be rejected by means of a detailed order dated 25.5.2018, passed by their Lordships Hon'ble Mr. Justice A.P. Sahi and one of us Hon'ble Mr. Justice Rajeev Misra. For ready reference, the order dated 25.5.2018 is quoted herein below:-

"Ref: Criminal Misc. Second Bail Application No. 04 of 2018.

Heard Mr. Ramesh Kumar Pandey, learned counsel for the applicants-appellants in Criminal Appeal No. 2127 of 2015 (Pappu and another Vs. State of U.P.) and Criminal Appeal No. 2162 of 2015 (Lalit Kumar and another Vs. State of U.P.) and the learned A.G.A. for the State.

The above mentioned criminal appeals i.e. Criminal Appeal No. 2127 of 2015 (Pappu and another Vs. State of U.P.), Criminal Appeal No. 2162 of 2015 (Lalit Kumar and another Vs. State of U.P.) and Criminal Appeal No. 2161 of 2015 (Kanhaiya alias Kural and another Vs. State of U.P.) have been filed against the common judgement dated 7.5.2015, whereby the accused-appellants Lalit Kumar, Pappu, Raj Kumar, Kanhaiya, Iqbal and Shiv Ram alias Bijju have been convicted under section 364 A I.P.C. and consequently sentenced to life imprisonment along with fine of Rs. 10,000/- each. They have also been convicted under section 147 IPC for which they have been awarded two years imprisonment followed by conviction under section 148 IPC for which they have been sentenced for three years imprisonment as well as conviction under section 307/149 IPC for which they have been sentenced for 10

years rigorous imprisonment along with fine of Rs. 20,000/-. All the accused-appellants have also been convicted under section 25 of the Arms Act and consequently sentenced to three years rigorous imprisonment along with fine of Rs. 10,000/-. Upon failure to deposit the amount of fine, the accused-appellants were to further undergo imprisonment of three years.

These Criminal Appeals have a chequered history in so far as the filing of the bail applications in these appeals are concerned.

Criminal Appeal No. 2127 of 2015 (Pappu and another Vs. State of U.P.) was filed on 25.5.2015 on behalf of the accused-appellants Pappu and Iqbal. Along with the memo of the Criminal Appeal, Criminal Misc. Bail Application No. 187541 of 2015 dated 25.5.2015 was also filed. During the pendency of the aforesaid bail application, Criminal Misc. Second Bail Application No. 3 of 2018, dated 28.1.2018 was filed. Both of the above mentioned Criminal Misc. Bail Applications came to be decided, vide order dated 31.1.2018. The order dated 31.1.2018 is reproduced herein below:-

"Ref:- Criminal Misc. Bail Application No. 187541 of 2015.

Heard Sri Alok Kumar Singh on behalf of the applicant who submits that he has moved a second bail application in this case.

What we find from the record is that this first bail application itself has not been disposed of. Sri Alok Kumar Singh therefore proceeded to argue this first bail application and has made the same submission as in Criminal Appeal No. 2161 of 2015 praying that the bail application be permitted to be not pressed at this stage.

The prayer is allowed, the bail application stands rejected with liberty to move fresh bail application.

In the event any second bail application has already been filed prior to passing of this order, the same shall also stand rejected on the same terms as it was not maintainable during the pendency of this application."

Subsequent to the order dated 31.1.2018, the present second bail application dated 20.3.2018 has been filed by the accused-appellants Pappu and Iqbal praying for release on bail during the pendency of the above mentioned criminal appeal.

Criminal Appeal No. 2162 of 2015, Lalit Kumar and another Vs. State of U.P. was filed on 26.05.2015. Alongwith the Memo of Criminal Appeal, Criminal Misc. Bail Application. No. 190182 of 2015 dated 26.05.2015 was filed. During the pendency of the aforesaid bail application, Criminal Misc. Second Bail Application No. 1 of 2018, dated 28.1.2018 was filed. Both of the above mentioned Criminal Misc. Bail Applications came to be decided, vide order dated 31.1.2018.

Learned counsel for the applicant-appellants in support of the bail application submitted that the accused-appellants are in Jail since 22.10.2011. He therefore submits that on date the applicants-appellants have been in custody for more than 6 years and 6 months. Therefore, looking into the period of incarceration undergone by the accused appellants, they be released on bail. He next submits that the kidnappee, i.e., Pasharv Jain was kidnapped on 18.10.2011 at about 7.30 AM when the Chaukidar namely Anand was taking him to the school. However, the Chaukidar, who was adduced as P.W.-4, has failed to recognize any of the accused persons. Therefore, on the aforesaid factual premise, it is urged that the court below has illegally convicted the accused-appellants and as such, the accused-appellants are liable to be enlarged on bail. Elaborating his submissions, learned counsel for the applicants/appellants submits that the kidnappee was recovered on 22.10.2011 in the presence of his father, namely Amit Jain. However, he also could not identify any of the accused persons. Thus, it is urged that the conviction awarded to the accused appellants is based upon hypothesis and not on the basis of proved facts. As such it is urged that the accused-appellants are entitled to be enlarged on bail. Extending his arguments, learned counsel for the accused-appellants submits that the accused appellants have not been named in the F.I.R. He further submits that the motive behind the alleged kidnappee is said to be the demand of ransom to the tune of Rs.2 crore but nothing passed on as ransom.

In the police encounter, which took place on 22.10.2011, the kidnappee was recovered but there is no loss of life. The encounter is alleged to have taken place at 3.30 AM in the dead of night. However, as there was no source of light, the testimony of the police personnel who are alleged to have taken part in the encounter, could not be relied upon as they could not have recognized the accused-appellants in darkness. He further submits that three police persons namely Station House Officer Avanish Gautam, Head Constable Akshya Sharma and Constable Vikas Kumar, have sustained fire arm injuries in the encounter which took place on 22.10.2011 but the author of the said fire arm injuries could not be identified by any of the injured police personnel who deposed before the court below as P.W. 7, P.W. 9 and P.W. 8 respectively. Doubting the police encounter, learned counsel for the applicants-appellants vehemently urged that all the three police personnel, who have sustained fire arm injuries, have been shot on the left hand side of their body which again makes the alleged police encounter dated 22.10.2011 to be doubtful. There is no recovery of empty cartridges relatable to the fire arm alleged to be in the possession of the accused-appellants. On the cumulative strength of the aforesaid submissions, learned counsel for the applicants-appellants strenuously urged before us that the accused-appellants are liable to be enlarged on bail as prima facie the conviction awarded by the court below to the accused-appellants is liable to be set aside by this Court.

Learned A.G.A. on the other hand has opposed the prayer for bail of the accused-appellants.

Learned A.G.A. has invited the attention of the Court to the judgement passed by the court below. On the basis of the findings recorded therein, he submits that there is no such material on the record on the basis of which, the police encounter, which took place on 22.10.2011 could be doubted. It was in the aforesaid encounter that the kidnappee namely, Parshav Jain was recovered. The bag containing the amount of ransom which was handed over by the father of the kidnappee to the accused-appellants was also recovered and handed over to the father of the kidnappee. Six of the accused-appellants were arrested from the place of the police encounter along with fire

arms and live cartridges. There is no explanation with regard to the aforesaid circumstance in the statement of the accused-appellants recorded under section 313 Cr.P.C. In the aforesaid police encounter, three police personnel namely Station House Officer Avanish Kumar, Head Constable Akshya Sharma and Constable Vikas Kumar have sustained fire arm injuries. They have also deposed before the court below as P.W. 7, P.W. 9 and P.W. 8 respectively. He submits that the credibility of an injured witness is far far superior and the same cannot be ignored lightly. According to the learned A.G.A., once the defence denies the cause of injuries then the burden shifts upon the defence to explain how the injuries were caused. Admittedly, no such explanation has come forward from the side of the accused-appellants. The recovery of a white Scorpio in which the kidnaped was kept in hiding position, the recovery of the bag which contained the ransom, the firing by the accused-appellants upon the police party, the injuries sustained by the police personnel, the arrest of the accused-appellants from the spot followed by the recovery of fire arms are part of the same transaction and therefore, are relevant under section 6 of the Indian Evidence Act. He, therefore, submits that the bail applications filed by the respective applicants-appellants are liable to be rejected.

Having considered the rival submissions made by the learned counsel for the applicants-appellants and the learned A.G.A. as also the recovery of the kidnaped and other incriminating articles, this Court is of the view that the applicants-appellants do not make out a case for bail. Accordingly, the bail application of the applicants-appellants is hereby rejected. "

After the order dated 25.5.2018, referred to above, was passed, the accused-appellant Kanhaiya Alias Kural has filed the third bail application.

Mr. Lal Vijay Singh, Assisted by Mr. S.K. Garg, Advocate, has vehemently urged before us that the applicants are in custody since long and looking at the period of incarceration undergone by accused appellant, this Court may sympathetically consider his bail application. It was then contended that the father of the appellant No.1 has died on 13.10.2011. The mother of appellant No.1 is an old lady and is almost blind. As there is no other person in the family to look after her on these equitable grounds, the bail application of the appellant No.1 be considered sympathetically.

On the merits of the bail application, we find from the pleadings raised in paragraphs 5,6,7,8,9,10,11 and 12 wrongly mentioned as paragraph 11 of the affidavit filed in support of the third bail application that, same grounds have been urged in support of the bail application, which have already been considered by this Court vide order dated 25.5.2018 while considering Criminal Misc. II Bail Application No. 04 of 2018 in Criminal Appeal No. 2127 of 2015 and Criminal Misc. II Bail Application No. 1 of 2018 in Criminal Appeal No. 2162 of 2015 filed by the co-accused. Counsel for the accused-appellant has also been fair enough not to dispute the fact that the factual or evidentiary merits of the case have already been dealt with by this Court at sufficient length and nothing much can be additionally submitted in that regard. Counsel has in fact tried to invoke only the humanitarian facets of the Court which according to him may be exercised in favour of the accused-appellant keeping in perspective his period

of detention.

As is so obvious in the circumstances of the case that so far as the merits of the case is concerned, nothing substantial can be found in favour of the accused. The crime committed by the accused emanated from the rapacious greed for dishonest money and in order to quench the same an innocent helpless child of tender age was kidnapped in a daredevil manner while he was going to attend his school. Huge ransom amount of two crores was demanded in lieu of releasing the kidnapped boy and though later on in the police action which ensued, the kidnappee was successfully redeemed from the custody of kidnappers but in this process a number of police personnel received firearm injuries as a result of the firing resorted to against them by the accused party. Six of the accused persons were successfully apprehended on the spot from where the kidnapped child was recovered which conclusively affirmed their complicity in this egregious crime. It goes without saying that in matters of such audacious crimes the depravity of the accused is writ large on the face of record and unmerited pleas of mercy cannot be successfully invoked. The gravity of the crime and the depravity involved in the same has vicious social ramifications and generates a sense of extreme insecurity in public at large. In such nature of crimes and with such incriminating evidence available as is there in the present case, the period of detention cannot be said to be so long drawn out which by itself may be deemed to be sufficient to enlarge the accused on bail.

In view of the above, no new and good ground has been made out to allow the third bail application of the accused appellant or which may dissuade us from taking the same view as has already been taken vide order dated 25.5.2018. The third bail application being devoid of merits, must meet its nemesis. It is, accordingly, rejected.

Order Date :- 12.7.2019 Arshad