

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Bail Appl. No.736/2008**

% **Date of Decision: 13.01.2009**

Meenu Dewan Petitioner

Through Mr.K.K.Sud, Sr.Advocate with
Mr.Jayant K.Sud, Advocate.

Versus

State Respondent

Through Mr.Amit Sharma, APP for the State
along with SI Devinder Singh,
P.S.Rajender Nagar.
Mr.S.P.Minocha and Mr.Manish
Aggarwal, Advocates for the
complainant.

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR

- | | | |
|----|---|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

*

1. This order shall dispose of bail application of the petitioner in FIR No.259/2003 Police Station Rajinder Nagar under Section 302/364A/120B/201 of IPC. The petitioner has contended that she is a woman who is in judicial custody for almost 4½ years and she has been implicated falsely. She hails from a good family.

2. It is asserted that she has clean antecedents and is not involved in any other criminal case and her family comprises of her minor daughter who is suffering immensely on account of her separation from the petitioner. The husband of the petitioner is also a co-accused who is although on bail is having strained relationship with the petitioner and the well being of minor is not taken care of by him and the husband is living separately.

3. It is also contended that she had been granted interim bail for a period of 2 months and she has not exploited the liberty granted to him. The assertion is also made by the petitioner that her daughter is suffering from separation and the presence of the petitioner is necessary for her normal development as a human being.

4. The petitioner had filed another bail application being Bail Appl. No.688/2005 which was withdrawn with liberty to file a fresh application at a later stage as the prosecution had cited 87 witnesses and none of the witnesses had been examined till that time.

5. It is pleaded on behalf of petitioner that a chargesheet was filed on 6th December, 2003 and charges were framed by order dated 2nd March, 2005 and case is progressing at a snail pace despite the directions passed by this Court on 12th June, 2006.

6. On 12th July, 2006 in the Bail Appl.No.541/2006 while disposing it, it was held that the petitioner and her counsel shall cooperate with the investigation and on her doing so the trial Court shall expedite the hearing and shall endeavor to complete the evidence within nine months. The petitioner was also given liberty to move the bail application again and with those observations the bail application was dismissed where after the present bail application has been filed.

7. It is asserted on behalf of petitioner that despite the order dated 12th July, 2006 only 24 witnesses out of 87 total witnesses has been examined till the date of filing of the application on 7th April, 2008 and it will take a long time to complete the evidence.

8. The other contention of the petitioner is that the entire case of the prosecution is based on disclosure statement of co-accused and the

disclosure statement of petitioner is inadmissible in evidence being hit by Section 27.

9. The learned counsel for the petitioner has mainly emphasized that on account of non completion of recording of evidence despite the order dated 12th July, 2006, the petitioner has been denied the expeditious trial and the delay in trial has resulted in breach of Article 21 of the Constitution of India and in the circumstances she is entitled for bail. The reliance has been placed by the learned counsel for the petitioner on 1990(1) Crimes 232, Ashok Soloman v. State; AIR 1979 SC 1360, Hussain Khatoon & Ors v.Home Secretary, State of Bihar; AIR 1979 SC 1518, Nimeon Sanoma v.Home Secretary, Govt. of Meghalaya & Ors; AIR 1981 SC 939, Kadra Pehadiya & Ors v.State of Bihar; II (1992) CCR 1750, Shanta Kumar v.State; (2000) 9 SCC 398, Satya Brat Gain v.State of Bihar; 1993(1) CC Cases 254, Nafe Singh v.State; II (1993) CCR 929, Salakhan Singh & Anr v.State of M.P and II (1992) CCR 2770, Shaikh Ashraf Abdul Kadar v. Asstt.Collector of Custom & Anr.

10. The learned counsel has also relied on 1986 Cr.L.J 365, Shakuntala Devi v.State of U.P; 1998 II AD (HC) (Bom) 1, Ram Das

Dnyandeo Chandanahive v. State of Maharashtra; 78 (1999) DLT 388, Sushila Dahas v. State and I (1998) CCR 169, Simantini Samntaray v. State of Orissa to contend that a woman is entitled for bail under proviso to Section 437 of Criminal Procedure Code which is a beneficial provision for woman.

11. The application for bail to the petitioner is opposed on the ground that after 12th July, 2006 the case was fixed for evidence on 31 occasions out of which adjournment was sought by the petitioner and on her behalf on 10 dates and on 2 dates presiding officer was on leave and on one date the Public Prosecutor was on leave. It is contended that considering the evidence already recorded there is sufficient evidence against the petitioner.

12. In Ashok Soloman (Supra) relied on by the petitioner where the prosecution was for the offence under Section 20, 21 & 29 of Narcotics Drugs & Psychotropic Substances Act, the accused was released on bail as it was held that there was no further justification in incarcerating the accused by denying him bail as he had already been in custody for more than 2 years and the trial of the accused had made no headway and there was no material to show as to how much time the conclusion

of the trial was likely to take. In the case of Shanta Kumar (Supra) the accused was facing trial for an offence under Section 302 of IPC and not a single witness had been examined for two years after framing of charges and on that ground the bail was granted to the accused considering that the State had been oblivious to its obligation. In Satya Brat Gain (Supra) the accused was an undertrial prisoner for five years and there had not been any substantial progress nor there was any likelihood of the progress in future and considering the dilatory progress of the proceedings against the accused, incarceration of the accused for further period was not permitted and the accused was released on bail. In the case of Nafe Singh (Supra) relied on by the petitioner, the offences alleged were under Section 302, 201 & 506 in which prosecution had listed 15 to 20 witnesses and though the incident took place in May, 1989 only four witnesses were examined and it was not known as to how much time was to be taken to examine the rest of the witnesses. The accused had been in jail for more than three years. In the circumstances it was held that the trial should have been over within a reasonable period of time and if the trial was protracted the liberty of the undertrial could not be curtailed for an unreasonable period of time and, therefore, bail was granted. In Salakhan Singh (Supra) a Single Judge of the Madhya Pradesh High Court had granted bail, as despite the Court's direction to conclude the

trial within four months from the date of receipt of the copy of the order, the trial Judge had not even commenced the trial and it was thought appropriate to grant the bail and the accused was released on bail. In a case under the NDPS Act despite Section 37, the accused was granted bail as the prosecuting agency had been adopting delaying tactics and had not produced the witnesses and had prolonged the trial in the case of Sheikh Ashraf Adbul Kadar (Supra).

13. Considering the proviso to Section 437(1) it was held that the word “may” in first proviso should be read as “shall” and “must” and consequently the accused woman who was 72 years of age and as the matter was to be tried and evidence to be collected, on compassionate grounds accused was granted bail in the case of Smt.Shakuntala Devi (Supra) by a Single Judge of Allahabad High Court. In Ramdas Dnyandeo (Supra) despite a prima facie case regarding involvement of the accused who was a woman, however, having regard to proviso to Section 437 of the Criminal Procedure Code the accused woman was granted bail.

14. The proviso to Section 437(1) of the Criminal Procedure Code has been extrapolated even to Section 438 of the Criminal Procedure Code

in case of anticipatory bail. In *Sushila Dahas* (Supra) the accused was a widow and despite implication of the accused in a statement under Section 161 of the Criminal Procedure Code, she was granted anticipatory bail. Similarly, a Single Judge of Orissa High Court in case of *Simantini Samantaray* (Supra), granted anticipatory bail in case of non bailable offenses under Section 498A, 304B and 34 of Indian Penal Code. The accused in the said case was a young girl of 20 years and it was held that she is to be treated with compassion and mercy keeping in view spirit of proviso to Section 437(1) Code of Criminal Procedure and anticipatory bail was granted to her.

15. The decision relied on behalf of the petitioner are apparently distinguishable. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. In *P.S.Rao Vs State*, JT 2002 (3) SC 1, the Supreme Court had held as under:

". There is always a peril in treating the words of judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusion in two cases.

In Ragiq Vs State, 1980 SCC (Crl) 946 it was observed as under:

“The ratio of one case cannot be mechanically applied to another case without having regard to the fact situation and circumstances obtaining in two cases.”

16. The learned prosecutor has relied on 144(2007) DLT 41, Amit Rathi v. State; (2004) 7 SCC 528, Kalyan Chandra Sarkar v. Rajesh Ranjan; (2007) CrL.Law Journal 304, Rajesh Ranjan @ Pappu Yadav v. CBI; 1993 CrL.L.J 2621 (All) Mohammad Main v. State of U.P; 1992 CrL.L.J.3634, Chandraweati v. State of U.P; (2001) 4 SCC 280, Prahlad Singh Bhatia v. NCT Delhi to contend that the petitioner accused having undergone certain period of incarceration by itself would not entitle her to be enlarged on bail and that the trial is not likely to be concluded in the near future itself or coupled with the period of incarceration would not be sufficient for enlarging the petitioner on bail when the gravity of offence alleged is severe.

17. The learned counsel for the State has also contended that merely because the petitioner was enlarged on interim bail twice, it will not ipso facto entitle her for regular bail. Regarding the last seen evidence it is contended that the employees had seen her. The three employees were asked to go away on the date of incident before the normal hours despite their services being not terminated. It is contended that the evidence of the service provider also establishes that the deceased was with the petitioner. The learned counsel has also contended that the movement of the deceased and the petitioner coincided with the record of the cell phones.

18. The learned counsel for the respondent has also emphasized on the nature and gravity of offence. It is contended that the dead body of the deceased was burnt and the car was abandoned at Faridabad. After strangulation, the deceased body was taken in the car of the deceased and petrol and diesel was procured for burning the body. It is also contended that from the evidence already led it is apparent that the finger prints of the co-accused matched with the prints which were lifted. Pursuant to the disclosure by the accused, the place was pointed out where the dead body was burnt and bushes around the place were also found to be burnt and some of the articles of the deceased were also found at that place. Regarding petitioner it is contended that she

also pointed out watch and shoes of the deceased and the credit cards of the deceased were recovered from the petitioner. The learned counsel for the respondent also pointed out that the petitioner had even stolen the credit cards of her father which were later on paid by her father. Regarding the delay in trial it is contended that the charges were framed on 2nd March, 2005 and before framing of charges four adjournments were sought. It is further contended that the trial was directed to be completed within nine months subject to the petitioner and her counsel cooperating with the counsels. According to him on 10 dates the matter was adjourned at the instance of the accused. Regarding reliance of petitioner's counsel under Article 21 of the Constitution it is contended that the speedy trial as claimed by the petitioner does not mean that the trial has to be concluded within a particular period. According to the learned counsel merely because the trial has not been concluded within the time granted by this Court subject to the cooperation by the petitioner and her counsel, does not create a right in favor of petitioner. It is contended that while considering whether the petitioner should be enlarged on bail or not the facts and circumstances of the case also has to be considered.

19. According to the learned Additional Public Prosecutor even the mobile of the deceased was used for a ransom call which was given at

the residence of the deceased and the locality from where the call was made was Noida. Sh.Amit Saxena who made the call is a co-accused and mobile of the deceased was recovered from him.

20. The learned counsel for the respondent has also pointed out that the four bail applications have already been dismissed and 10 witnesses have turned hostile. Regarding the witnesses turning hostile, it is contended that though the petitioner was in custody, however, one witness Raj Kapoor supported the prosecution case initially. Later on when he appeared for cross-examination he turned hostile. It has also been pointed out that a witness Babu Khan appeared for his examination-in-chief, however, the same could not be recorded and subsequently when he appeared he had turned hostile. The plea regarding the condition of the minor daughter of the petitioner was taken into consideration and the interim bail which was granted to her had not been extended on the ground of mental condition of the petitioner's daughter. Regarding non cooperation by the petitioner and her counsel, it is contended that PW.10 Sh.Raj Kapoor was examined on 11th October, 2006 and he was not cross examined on the ground of non-availability of the senior counsel and on 26th February, 2007 he had turned hostile.

21. In Amit Rathi (Supra) relied on by the respondent, the bail was sought on the ground that the accused had been in custody ever since the date of his arrest and out of 172 prosecution witnesses only 86 witnesses had been examined and it would be unlikely that the trial would be concluded in near future and the sole witness regarding supply of revolver and cartridges had been examined. However, the Court held that his testimony is to be evaluated in conjunction with any other evidence and release of the accused on bail in the midst of trial when more than half of prosecution witnesses were yet to be examined, was held to be detrimental to a fair trial and the bail application was rejected. The Apex Court had set aside the bail granted by a High Court on the ground of period of incarceration already undergone and unlikelihood of trial concluding in the near future in Kalyan Chandra Sarkar (Supra). It was held that the mere fact that the accused has undergone certain period of incarceration by itself would not entitle the accused to be enlarged on bail nor the fact that the trial is not likely to be concluded in near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the accused on bail when the gravity of the offence alleged is severe. In Rajesh Ranjan Yadav (Supra) the Apex Court had reiterated that grant of bail depends on facts and circumstances of each case and no absolute rule can be culled that the bail must be granted on account of long period of

imprisonment. Considering the ramification of Article 21 the Apex Court had held that it is of great importance because it enshrines the fundamental right of individual liberty but at the same time a balance has to be struck between the right to individual liberty and the interest of society. The Supreme Court had further held that no right can be absolute and reasonable restriction can be placed on them. The Supreme Court had held as under:-

“10. In our opinion none of the aforesaid decisions can be said to have laid down any absolute and unconditional rule about when bail should be granted by the Court and when it should not. It all depends on the facts and circumstances of each case and it cannot be said there is any absolute rule that because a long period of imprisonment has expired bail must necessarily be granted.

11. The condition laid down under Section 437(1)(i) is since qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to be enlarged on bail, nor the fact that the trial is not likely to be concluded, in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail.”

22. A Single Judge of Allahabad High Court in Mohammad Mian (Supra) had also held that there is no statutory provision under which an accused can claim his release on bail for there being inordinate delay in his trial before the Sessions Judge and it would not be prudent to lay down that in every case the accused should be enlarged on bail if there has been a long and inordinate delay in his trial.

23. The learned counsel for the respondent has also contended that the alleged entitlement to bail being a woman under proviso to Section 437(1) is not mandatory and has relied on Chandrawati (Supra). It was held that overriding considerations in granting bail which are common both in Section 437(1) and 439(1) of Criminal Procedure Code are the nature and gravity of the circumstances in which the offence has been committed, position and status of the accused with reference to the victim and the witnesses and likelihood of the accused fleeing from justice and tampering with witnesses etc. It was held that the bail is at the most a matter of procedural privilege and not an accrued right until it is granted. Consequently, it was held that the accused would not be entitled to bail merely being a woman on account of proviso to Section 437(4) of the Criminal Procedure Code. It was further held that the cause of public justice also has to be zealously guarded compared to the rights of a criminal defendant. Interest of society and also cause of

public justice has also to be kept in mind while granting or refusing bail. Consequently, if offence is of such a nature which affects the vital interest of the society and has adverse effect on the social and family life, in such matters the issue is to be considered with reference to them and one of the consideration which has to be weighed for granting or refusing bail is a nature of the offence and its heinousness.

24. Learned counsel for the parties argued at length regarding the compliance or non compliance of order dated 12th July, 2006 in Bail Application No.541 of 2006 whereby it was held that the petitioner and her counsel shall cooperate with the investigation and on her doing so the Trial Court shall expedite the hearing and endeavor to complete the evidence within nine months. Learned counsel for the respondent had contended that on 10 dates the matter was adjourned at the instance of petitioner/accused which is refuted by the learned counsel for the petitioner. Detailed explanations have been given by both the parties regarding various adjournments. It may not be necessary to go into each and every date on which the adjournments were sought by the petitioner/accused. It cannot be denied that on some of the dates adjournment has been sought by the petitioner. If the adjournment has been sought by the petitioner or her counsel, it may not be possible to infer that that the petitioner and her counsel had cooperated with the

investigation. In any case by order dated 12th July, 2006, this Court had directed to make an endeavor to complete the evidence within nine months. This Court had not passed an order that the evidence should be concluded in all probabilities within nine months. Learned counsel for the petitioner has also pointed out a subsequent order passed by the learned Additional Sessions Judge holding that considering various factors, it was not possible to take the case on day-to-day basis. Considering all the facts and circumstances, it cannot be inferred that since the trial has not been concluded within nine months, a right has accrued or crystallized in favor of the petitioner to be released on bail. From the perusal of the trial court record, it cannot be inferred that the learned Additional Sessions Judge did not make endeavor to complete the evidence in terms of order dated 12th July, 2006. The Apex Court in Kalyan Chand Sarkar (*supra*) had held that merely because the accused has undergone a certain period of incarceration by itself would not entitle the accused to be enlarged on bail nor the fact that the trial is not likely to be concluded in near future either by itself or coupled with the period of incarceration would entitle the accused to be enlarged on bail when the gravity of offence alleged is severe. In the circumstances, apparently it cannot be inferred that the endeavor was not made to comply with the order dated 12th July, 2006. From the perusal of the record of the trial court, it is apparent that the progress has been made

and the witnesses have been examined. It also cannot be inferred that the petitioner and her counsel fully cooperated in terms of order dated 12th July, 2006.

25. The other contention of the learned counsel for the petitioner is that the petitioner being a woman is entitled for bail under proviso to Section 437 of the Code of Civil Procedure which is a beneficial legislation for women. The judgments relied on by the petitioner do not lay down any absolute and unconditional rule that bail should be granted if the accused is a woman. Overriding consideration in granting bail are nature and gravity of circumstances in which the offense is committed, possession and status of the accused with reference to the victim and the witnesses and likelihood of the accused fleeing from justice and tempering with the witnesses etc. Consequently, it will not be appropriate to contend that the petitioner is entitled for a bail merely because she is a woman under proviso to Section 437(4) of the Criminal Procedure Code. Though the learned counsel for the respondent has highlighted the evidence which has already been led and has contended that prima facie inference can be drawn regarding complicity of the petitioner in the offense. However, learned counsel for the petitioner had stated that those factors are not relevant for the purpose of granting or refusing bail to the petitioner.

As is already held by this Court that merely because the petitioner is a woman does not entitle her for bail under proviso to Section 437 (4) but the nature and gravity offense and heinousness of the offense also has to be considered. It is also contended that the circumstances in which the offense was committed, position and status of the accused with reference to the factum and the witnesses and the accused tempering with the witnesses etc. has also to be taken into consideration. In the circumstances, it will not be correct to say that the contentions and pleas of the respondent regarding the nature and the way the crime is alleged to have been committed are not relevant. Consequently, the petitioner is not entitled for bail merely because she is a woman under proviso to Section 437(4) of Criminal Procedure Code.

26. Consequently, in the entirety of facts and circumstances and considering the nature, gravity and the heinous manner in which the offence has been alleged to be committed and other facts and circumstances, this court is not inclined to grant bail to the petitioner at this stage. The trial is pending for a considerable period and consequently the Sessions Court is directed to make every endeavor to complete the trial as expeditiously as possible and if possible to take up the matter for hearing on day-to-day basis. The application of the petitioner for bail is, therefore, dismissed with directions as stipulated

hereinabove to the trial Court. The trial Court record be also sent back forthwith.

January 13, 2009

ANIL KUMAR J.

‘Dev’