

Court No. - 15

Case :- CRIMINAL APPEAL No. - 1267 of 2020

Appellant :- Israr Khan

Respondent :- State Of U.P. And Anr.

Counsel for Appellant :- Manoj Kumar Singh, Brij Mohan Sahai

Counsel for Respondent :- G.A., Ashish Raman Mishra, Sandeep Singh

Hon'ble Shamim Ahmed, J.

1. Heard Sri Brij Mohan Sahai, learned Senior Counsel, assisted by Sri Sri Ashish Kumar Dubey, Advocate, for the appellant; Sri Ashish Raman Mishra, learned counsel for the opposite party no.2 as well as Sri Ashok Srivastava, learned A.G.A. for the State and perused the entire record.

2. This Criminal Appeal under Section 14-A (2) of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act has been preferred against the impugned order dated 10.12.2020 passed by learned Special Judge(S.C./S.T. Act)/Addl. Sessions Judge, Bahraich, in Bail Application No. 1827/12A/2020, Case Crime No. 170 of 2020, under Sections 364, 302, 201, 34 I.P.C. and Section 3(2)(v) of S.C./S.T. Act, Police Station Matera, District Bahraich, whereby the bail-application of the appellant has been rejected.

3. Sri B.M. Sahai, learned counsel for the appellant submits that the first-information-report dated 29.10.2020 had been lodged against unknown persons under Section 363 of I.P.C., stating that on the said date, i.e. on 29.10.2020, at about 7 a.m. the informant's son Ved Prakash Chaudhary, aged about 12 years, who was studying in Class-V, had gone to coaching, but he did not return home. Thereafter, the complainant searched the son,

but he could not find his whereabouts and thereafter he lodged a missing report before the Police.

4. It is further argued by the learned counsel for the appellant Sri B.K. Sahai that after lodging of the first-information-report dead-body of the missing son of the complainant Ved Prakash Chaudhary was recovered. Thereafter the inquest-proceedings on his dead-body were conducted on 20.10.2020 on 8.05 hrs. The dead-body of the son of the complainant was found in a yellow bag on the instance of one informer, who is father of the first informant and who was also grandfather of the deceased, and at the time of inquest-proceedings one injury was found on the head of the deceased. Thereafter, the postmortem of the deceased was conducted on 31.10.2020 at 12:35 p.m. and as per the postmortem report the injuries are: one lacerated wound on the right side of temporal region; incised wound on left side of temporal region and crush injuries were present on the forehead; contused swelling on the right side of the face and abrasion mark was present in front of neck. As per postmortem report and the opinion of the Doctor, the cause of death is Asphyxia due to ante-mortem injury and the time of death is shown as one day prior. Thereafter the appellant was arrested on 1.11.2020. After recording the statement of the prosecution witnesses, the Investigating Officer filed the chargesheet against five persons, including the present appellant.

5. Learned counsel for the appellant further submits that the appellant has been falsely implicated in the present case due to ulterior motive, whereas in fact he was not present on the spot. The first-information-report has been lodged against unknown persons. It has further been submitted that the name of the present appellant surfaced on the confessional statement of the main accused, namely Kaleem, and on the statement of the

uncle of the deceased namely Mata Prasad and Pradeep, who were also the interested witnesses of the case. They have only stated that they have seen the appellant accompanying the deceased, but have not made statement that at the time of the alleged incident the appellant was present with the deceased or the appellant had committed the murder. It is also case of the learned counsel for the appellant that there is no independent witness, who had made the statement that the appellant had committed the alleged murder.

6. It was further submitted that no incriminating article has been recovered from possession or pointing of the appellant. Only one danda was shown to be recovered by the Police only with the intention to give gravity to the alleged offence, but that danda does not belong to the appellant. All the accused persons are said to have used danda and it is also the case of the prosecution that all the named accused persons were shown holding danda in their hand, but the allegation against the appellant is not specified. It is further submitted that the alleged recovery of cycle of the deceased is against the provision of Section 100 Cr.P.C. It was not made under Section 27 of the Evidence Act. There is no statement recorded with regard to the recovery of the alleged cycle, which was owned by the deceased. It is also argued that as per the prosecution case, motive has been assigned to the co-accused Kaleem. It is further submitted that the books of the deceased, one danda and one Salwar pooled with blood stained has recovered on the pointing out of the co-accused, namely, Rabiya.

7. Several other submissions have also been brought forth before this Court regarding illegality and infirmity of the prosecution case and has also been highlighted before this Court that the appellant is in detention since 1.11.2020 and he has

already undergone a substantial period of detention. In support of his contention, learned counsel for the applicant has placed reliance of Hon'ble Apex Court judgment in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

8. Learned counsel for the applicant has also placed reliance of Hon'ble Apex Court judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463**, and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."

9. Sri B.M. Sahai, learned counsel for the appellant submits that the ratio of the above cited judgments is also applicable in the case of the present appellant and, thus, the case of the appellant be considered by this Court sympathetically and the present appeal be allowed and the judgment and order, impugned herein,

be reversed and set aside and the appellant be released on bail.

10. It has also been submitted by the learned counsel for the appellant that the co-accused, namely Tahira, Aaysha, Rabiya Begam and Hasan Mohammad, who were also assigned almost identical role as that of the present appellant, have already been granted bail by Coordinate Benches of this Court vide orders dated 2.2.2022, 4.3.2022, 27.7.2022 and 4.8.2022 passed in Criminal Appeal Nos. 22 of 2021, 50 of 2021, 1263 of 2020 and 846 of 2021. The case of the present appellant is not on the worst footing than that of the aforesaid co-accused, who have been granted bail by Coordinate Benches of this Court and the case of the appellant is totally distinguishable from the case of the co-accused Kaleem. It has also been submitted that the appellant has no previous previous criminal antecedent. This fact has been stated in para No. 35 of the affidavit filed in support of the bail-application.

11. Learned counsel for the applicant while placing reliance upon the judgment of Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra : 1984 Cri. L.J. 178** has argued that no one had seen the commission of crime, there is no connecting link to indicate the involvement of applicant in the commission of crime, it is a case of circumstantial evidence and the chain of evidence is totally broken, the police has also failed to complete the chain of evidence to connect the applicant in the present crime. He further submits that the applicant is not involved in the present crime, thus he should be released on bail.

12. Several other submissions in order to demonstrate the illegality and infirmity of the prosecution case have also been placed forth before the Court. The circumstances which,

according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the appellant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 01.11.2020 and he has already undergone a substantial period of detention and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

13. *Per contra*, Sri Ashish Raman Mishra, learned counsel for the opposite party No. 2 has submitted that the involvement of the appellant is there in the commission of the crime alongwith other co-accused. He also submitted that the co-accused, who have already been granted bail, their case is distinguishable from the case of the present appellant. The appellant was lastly seen in the company of the deceased. Several injuries were found on the body of the deceased, and the recovery of danda is from possession of the present appellant, thus, he submits that the involvement of the present appellant is very much clear in the commission of the crime, thus, the order passed by the Court below is justified and the present criminal appeal is liable to be rejected and the appellant is not entitled to be released on bail.

14. Sri Ashok Srivastava, learned A.G.A. has also made an agreement with the argument advanced by the learned counsel for the opposite party No. 2, who has submitted that the appellant is not entitled to get any relief.

15. After perusing the record in the light of the submissions

made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also in the absence of any convincing material to indicate the possibility of tampering with the evidence, there appears force in the arguments of the learned counsel for the appellant; and considering the fact that the appellant is said to be not present on the spot; the first-information-report has been lodged against unknown persons; name of the present appellant has surfaced on the confessional statement of the main accused, namely Kaleem, and on the statement of the uncle of the deceased namely Mata Prasad and Pradeep, who are also the interested witnesses of the case, however, they have only stated that they have seen the appellant accompanying the deceased, but have not made statement that at the time of the alleged incident the appellant was present with the deceased or the appellant had committed the murder; there also appears force in the arguments of the learned counsel for the appellant that there is no independent eye-witness, who had made the statement that the appellant had committed the alleged murder; no incriminating article has been recovered from possession or pointing of the appellant; only one danda was shown to be recovered by the Police only with the intention to give gravity to the alleged offence, but that danda does not belong to the appellant; all the accused persons are said to have used danda and the case of the prosecution that all the named accused persons were shown holding danda in their hand, but the allegation against the appellant is not specified; no one had seen the commission of crime, there is no connecting link to indicate the involvement of applicant in the commission of crime, it is a case of circumstantial evidence and the chain of evidence is totally broken, the police has also failed

to complete the chain of evidence to connect the applicant in the present crime; further, there appears force in the arguments of the learned counsel for the appellant that the alleged recovery of cycle of the deceased is against the provision of Section 100 Cr.P.C. It was not made under Section 27 of the Evidence Act; there is no statement recorded with regard to the recovery of the alleged cycle, which was owned by the deceased; motive has been assigned to the co-accused Kaleem; books of the deceased, one danda and one Salwar pooled with blood stained have been recovered on the pointing out of the co-accused, namely, Rabiya; and further co-accused, Tahira, Aaysha, Rabiya Begam and Hasan Mohammad have been enlarged on bail on the same allegations, and further considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Sharad Birdhichand Sarda (supra)**, **Kamal (supra)** and **Takht Singh (Supra)** this Court is of the view that the learned court below has failed to appreciate the material available on record. The order passed by the court below is liable to be set aside.

16. Accordingly, the appeal is **allowed**. Consequently, the impugned judgment and order dated 10.12.2020 passed by learned Special Judge(S.C./S.T. Act)/Addl. Sessions Judge, Bahraich, in Bail Application No. 1827/12A/2020, Case Crime No. 170 of 2020, under Sections 364, 302, 201, 34 I.P.C. and Section 3(2)(v) of S.C./S.T. Act, Police Station Matera, District Bahraich, is hereby set aside and reversed.

17. Let the appellant, **Israr Khan** be released on bail in the Case Crime No. 170 of 2020, under Sections 364, 302, 201, 34 I.P.C. and Section 3(2)(v) of S.C./S.T. Act, Police Station Matera, District Bahraich, with the following conditions:-

(i) The appellant shall furnish a personal bond with two sureties each of like amount to the satisfaction of the court concerned.

(ii) The appellant shall appear and strictly comply following terms of bond executed under section 437 sub section 3 of Chapter- 33 of Cr.P.C.:-

(a) The appellant shall attend in accordance with the conditions of the bond executed under this Chapter.

(b) The appellant shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) The appellant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

(iii) The appellant shall cooperate with investigation /trial.

(iv) The appellant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(v) The appellant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(vi) In case, the appellant misuses the liberty of bail during trial, in order to secure his presence, proclamation under section 82

Cr.P.C. is issued and the appellant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(vii) The appellant shall remain present, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the appellant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

18. The trial court is also directed to expedite the trial of the aforesaid case by following the provisions of Section 309 Cr.P.C., strictly without granting any unnecessary adjournments to the parties, in case there is no other legal impediment.

19. The observation made hereinabove are confined only to disposal of this bail-application and have nothing to do with the merits of the case.

(Shamim Ahmed, J.)

Order Date :- 12.10.2023

A.Nigam