

Supreme Court of India
High Court Of Judicature For ... vs The State Of Rajasthan on 29 September, 2021
Author: Aniruddha Bose
Bench: Aniruddha Bose

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1113 OF 2021
(ARISING OUT OF PETITION FOR SPECIAL LEAVE TO
APPEAL (CRIMINAL) NO.5618 OF 2021)

HIGH COURT OF JUDICATURE
FOR RAJASTHAN

APPELLANT(S)

VERSUS

THE STATE OF RAJASTHAN & ANR.

RESPONDENT(S)

WITH

CRIMINAL APPEAL NO. 1114 OF 2021
(ARISING OUT OF PETITION FOR SPECIAL LEAVE TO
APPEAL (CRIMINAL) NO.3949 of 2021)

JUDGMENT

ANIRUDDHA BOSE, J.

Leave Granted

2. These two petitions for Special Leave to Appeal, now Signature Not Verified appeals on grant of leave, have been listed as connected Digitally signed by DEEPAK SINGH matters and heard by us as such. A learned Single Judge of the Date: 2021.09.30 13:21:07 IST Reason:

Rajasthan High Court in an order passed on 31st March, 2020, from which SLP (Crl.) No. 5618 of 2021 originated, had directed the Registrar (Judicial) of the High Court to not to list bails, appeals, applications for suspension of sentence in appeals and revisions in the category of extreme urgent matters. We shall henceforth refer to that application (S.B. Criminal Miscellaneous Second Bail Application No. 17767 of 2019) filed in the High Court as the first bail application. The same learned Judge, in the other order, passed on 17th May 2021 giving rise to SLP (Crl.) No. 3949 of 2021, had directed the police authorities not to make arrest of persons in cases where the accused is charged under an offence carrying maximum sentence of three years and the offence is triable by a First Class Magistrate. In this order also, direction had been given to the High Court administration not to list bail applications under Section 438 of the Code of Criminal Procedure, 1973 (the 1973 Code)

in offences where maximum sentence extends upto three years and the offence which is triable by a First Class Magistrate. When these orders were passed, the Covid-19 pandemic was raging across this country. This order was passed in an application for anticipatory bail, registered as S.B. Criminal Miscellaneous Bail Application No. 3125 of 2021 (the second bail application). We, however, find that the bail plea of the applicant was ultimately rejected by the High Court on 20th May, 2020 in the first bail application. The second bail application, which was for anticipatory bail, was also rejected by the High Court on 2nd August, 2021.

3. By an interim order passed by this Court on 25th May, 2021 in appeal brought by the High Court of Judicature for Rajasthan, Bench at Jaipur there was interim stay of the directions issued in Paragraphs 9, 10 and 11 of the impugned order dated 17th May, 2021. The directions contained in paragraphs 15 and 16 in the order passed on 31st March, 2020 was also stayed by an interim order passed by this Court on 3rd April, 2020. The order passed by the High Court in the first bail application was to last till withdrawal of the order of complete lockdown by the Government of India. The order in the second bail application was to last till 17th July, 2021.

4. The applicant in the first bail application was one Shahrukh, who went unrepresented on the day the order was passed. This order contained, inter-alia, the following directions:-

13. Release of an accused or convict at the cost of breaching the order of lockdown and at the cost of risking lives of many cannot be considered to fall within the category of "extreme urgent matter." It is also relevant to note that Rajasthan High Court has Holi, Dashera, Diwali and Winter vacations ranging from few days to few weeks during which period also Bail applications and applications for suspension of sentence are not taken up by the Court.

14. It is pertinent to mention that a report was sought from DG Prisons who has reported that there is no overcrowding in Prisons, there is regular medical check up of inmates and all new inmates are subject to medical check up and wherever space is available are kept separately before putting them with the inmates.

15. In view of the discussions made herein above, this Court is of the considered view that at the time when there is complete lockdown the bail applications, Appeals under SC/ST Act, applications for suspension of sentence can not be considered to be of extreme urgency.

16. Registrar Judicial is directed not to list Bails, appeals applications for suspension of sentence in Appeals and Revisions in the category of "extreme urgent matters".

17. All such matters and the present applications be listed after the withdrawal of order of complete lockdown by the Government of India.

5. The applicant in the second bail application was one Than Singh, accused of offences under Sections 457 and 354 of the Indian Penal Code read with Section 67 of the Information Technology

Act, 2000. Observations made and directions issued in this order were:-

5. A query was put to learned Additional Advocate General as to whether the police, which is involved in other more important task of enforcing the lock-down, be directed not to arrest an accused charged with offence punishable with a term, which may extend upto 3 years till situation normalizes and for the time being, till 17th July, 2021, to which the learned Additional Advocate General replied in affirmative.
6. Further, this Court is also of the opinion that the arrest of persons in cases where imprisonment extends upto 3 years and are triable by First Class Magistrate under present circumstances will prove to be counter-productive. If a person, who is arrested and produced before the Magistrate and thereafter, sent to Jail is an asymptomatic carrier of Covid-19, the inmates may be put at risk.
7. Taking note of the above and also in view of larger public interest, this Court is of the view that the police may be restrained for the time being from making arrest of the accused persons, who are charged with offence where maximum sentence is upto three years, till 17th July, 2021. Thus, listing of bail applications under Section 438 Cr.P.C. both before Sessions Court as well as High Court will be avoided.
8. Learned Additional Advocate General has requested the Court to pass appropriate order so that Director General of Police (for short DGP) may be informed to comply with the same.
9. In light of the discussions made hereinabove and considering the suggestions, I deem it proper to direct the DGP to issue instructions to all the Officers concerned in the State of Rajasthan not to make arrest of persons in cases where accused is charged under an offence where maximum sentence extends upto three years and the offence is triable by First Class Magistrate. The order would remain in operation till 17th July, 2021.
10. A copy of this order be sent to the Registrar General for issuance of necessary directions. The Registrar (Judicial), Jaipur Bench, Jaipur & the Registrar (Judicial), Principal Seat, Jodhpur, are directed not to list bail applications under Section 438 Cr.P.C. in offences where maximum sentence extends upto three years and the offence is triable by First Class Magistrate till reopening of Courts after Summer Vacation.
6. Since both the applications before the High Court stand rejected now, under ordinary circumstances we would have had dismissed these appeals having been rendered infructuous. So far as service is concerned, the same was not complete as against respondent no.2 (the applicant before the High Court) in SLP (Crl.) No.5618 of 2021. But considering the fact that his application stood ultimately rejected and in this judgment we are considering the legality of the order containing certain directions upon the High Court administration, we chose to consider the appeal on merit. Otherwise also, the impugned orders have outlived their duration specified by the learned Single Judge. Substantial relaxations have also been made by the authorities on restrictions in the Covid-19

protocol. But we decided to address legality of the orders under appeal for two reasons. First, the impugned orders did not concern themselves with the applicants for bail, but general directions were issued on the Registry of the High Court and the police authorities. Secondly, the respective orders in substance impacted operation of legislative provisions giving right to an accused to apply for bail, suspension of sentence and other aggrieved parties to institute appeals under the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989. The in rem character of these orders raise question of jurisdiction of the learned Judge in passing such orders. The ultimate rejection orders of the two bail applications also do not contain any reference to the orders which are under appeal before us. The appellant before us is the High Court of Rajasthan in both these cases.

7. The Rajasthan High Court had issued a notification bearing NO. PA/RG/Misc/2020 dated 24.03.2020 at the onset of the COVID-19 pandemic. Clause 1 (xiii) of the notification as quoted in the order dated 31st March, 2020, reads:-

It is made clear that on consideration of written mentioning and written submissions, if any, the relief as prayed for in urgent matters will be considered and/or the matter shall be suitably adjourned without passing any adverse orders.

8. In the order passed on 31st March, 2020, the learned Single Judge opined that in the category of urgent matters, even 2nd, 3rd and 4th Bail Applications were being filed as the advocates/litigants were aware that no adverse order would be passed. The reason for issuing the direction which we have quoted above is that at that stage, the pandemic was having devastating effect on large parts of this country. Guidelines had been issued under the provision of Section 6 (2)(i) of the Disaster Management Act, 2005 on 24th March, 2020 for maintaining social distancing to prevent its spread. These guidelines continued and subsequently have been varied from time to time. The extension or variation of the guidelines are not of much significance for deciding the questions involved in these appeals.

9. The learned Single Judge dealing with the bail application of Shahrukh was primarily concerned with difficulties in effecting service of the notices in connection with the cases which were being listed as matters of extreme urgency. There was another factor which weighed with the learned Single Judge for issuing such directions. It appears that when the applications were moved, lawyers were abstaining from professional work on account of call given by the Bar Council of Rajasthan and because of this reason complainants would have been deprived of their right to engage a lawyer to oppose bail applications or applications for suspension of sentence. The reasoning was summarized in paragraphs 10 and 11 of the impugned order.

10. In the order passed in S. B. Criminal Miscellaneous Bail Application No. 3125 of 2021, the reasoning thereof would appear from paragraphs 5 and 6. We have quoted these paragraphs earlier in this judgment. The factors considered by the learned Single Judge, ex-facie, were of administrative concern. Mr. Vijay Hansaria, learned Senior Advocate appearing for the High Court has based his submissions on two main planks. His main argument is that decisions for listing of matters by fixing the roster rest with the Chief Justice of a High Court and such administrative

power cannot be appropriated by any Bench. The authorities on which reliance has been placed by him in support of this argument are (1) *State of Rajasthan v. Prakash Chand & Ors.* [(1998) 1 SCC 1], (2) *High Court of Judicature for Rajasthan v. Ramesh Chand Paliwal & Another* [(1998) 3 SCC 72] and (3) *Campaign for Judicial Accountability and Reforms v. Union of India & Anr.* [(2018) 1 SCC 196]. He has also relied on decisions of this Court in case of *Asok Pande v. Supreme Court of India* [(2018) 5 SCC 341] and *Shanti Bhushan v. Supreme Court of India & Anr.* [(2018) 8 SCC 396] in support of the same proposition of law. The other ground of grievance of the High Court administration, the appellant before us, is that the impugned orders were passed without giving any opportunity of hearing to the High Court administration.

11. In their reply affidavit to the appeal arising from the Order passed on 17th May, 2021, the State, represented by Dr. Manish Singhvi, learned Senior Advocate has taken a stand that the issue of congestion in correctional homes has been addressed to by this Court in an order passed on 7th May, 2021 in *Suo Motu Writ Petition (C) No. 1 of 2020*. Strict implementation of directions relating to arrests as contained in the case of *Arnesh Kumar v. State of Bihar and Anr.* [(2014) 8 SCC 273] has been mandated in this order. The said order of this Court in *Suo Motu Writ Petition (C) No. 1 of 2020* contains observations and directions to the following effect:-

10. Second, the rapid proliferation of the virus amongst the inmates of congested prisons is a matter of serious concern. The High-Powered Committees constituted by the State Governments/Union Territories shall consider release of prisoners by adopting the guidelines (such as inter alia, SOP laid down by NALSA) followed by them last year, at the earliest. Such of those states which have not constituted High Powered Committees last year are directed to do so immediately. Commissioner of Police Delhi shall also be a member of the High-Powered Committee, Delhi.

11. Third, due to the immediate concern of the raging pandemic, this court has to address the issue of de-congestion. We find merit in the submission of Mr. Colin Gonsalves, learned Senior Counsel appearing on behalf of the applicant, that the High-Powered Committee, in addition to considering fresh release, should forthwith release all the inmates who had been released earlier pursuant to our order 23.03.2020, by imposing appropriate conditions. Such an exercise is mandated in order to save valuable time.

12. Fourth, further we direct that, those inmates who were granted parole, pursuant to our earlier orders, should be again granted a parole for a period of 90 days in order to tide over the pandemic.

13. Fifth, the fight against the pandemic is greatly benefitted by transparent administration. In this regard, our attention was drawn to example of Delhi, wherein the prison occupancy is updated in websites. Such measures are required to be considered by other States and should be adopted as good practice. Moreover, all the decisions of High-Powered Committees need to be published on respective State Legal Service Authorities/State Governments/High Courts websites in order to enable effective dissemination of information.

14. Overcrowding of prisons is a phenomenon, plaguing several countries including India. Some prisoners might not be willing to be released in view of their social background and the fear of becoming victims of the deadly virus. In such extraordinary cases, the authorities are directed to be considerate to the concerns of the inmates. The authorities are directed to ensure that proper medical facilities are provided to all prisoners who are imprisoned. The spread of Covid-19 virus should be controlled in the prisons by regular testing being done of the prisoners but also the jail staff and immediate treatment should be made available to the inmates and the staff. It is necessary to maintain levels of daily hygiene and sanitation required to be improved. Suitable precautions shall be taken to prevent the transmission of the deadly virus amongst the inmates of prisons. Appropriate steps shall be taken for transportation of the released inmates of the prisons, if necessary, in view of the curfews and lockdown in some States.

12. The position of the Honble Chief Justice for allocation of business to the individual judges stand well established in the light of the decisions in the cases of Prakash Chand (supra), Campaign For Judicial Accountability and Reforms (supra), Asok Pande (supra) and Shanti Bhushan (supra). Barring the first judgment, the rest of these authorities outline the administrative power of the Chief Justice of this Court under Article 145 of the Constitution of India. But the pre-eminent position of the Chief Justice of a High Court in fixing the roster is no different. This issue has been highlighted in the case of Prakash Chand (Supra). A Coordinate Bench of this court in the case of Ramesh Chand Paliwal (Supra) underscores the administrative power of the Chief Justice of a High Court under Article 229 of the Constitution of India in dealing with the subordinate staff.

13. In our view, orders under appeal passed on 31st March, 2020 and 17th May, 2021 encroached upon the administrative power of the Chief Justice of the High Court of Rajasthan in the matter of allocation of business to Honble Judges of that Court. It was also improper for the learned Single Judge to come to a general finding that when there is complete lockdown the bail applications, appeal under SC/ST Act and applications for suspension of sentence in appeals and revisions could not be considered to be matters of extreme urgency. Such sweeping orders in our adversarial adjudicatory system would be contrary to law as many persons would be impacted by such orders without having any knowledge of the proceeding. The orders were passed in relation to criminal matters and would have had adverse effect on those suffering or anticipating pre-trial detention or convicts awaiting of their appeals. There could be individual cases of extreme urgency for undertrial prisoners or convicts also to apply for bail, upon suspension of sentence for the latter category of litigants. In the impugned orders, the learned Single Judge was in error in picking up the four categories of litigations and arrive at a finding that these categories of cases could not be considered to be of extreme urgency. It was also not within his jurisdiction to direct the Registrar (Judicial) not to list bail, appeals and applications for suspension of sentence in Appeals and Revisions in the category of extreme urgent matters. In passing such order, the learned Single Judge had assumed administrative jurisdiction of the Chief Justice to allocate business to individual Judges of the Court. Also, by issuing such sweeping directions, decision has been taken which should have been left to be decided by the respective Benches for determining as to whether the specific cases fell in the category of extreme urgent matters warranting listing, even during the pandemic.

14. Apart from this jurisdictional issue, on which we find the learned Single Judge went beyond his allocated judicial business, a blanket order prohibiting listing of bail application or applications for suspension of sentence in appeals also infringe upon the right of personal liberty of incarcerated persons. Such right has been taken away by judicial order, without compliance of procedure established by law, which in our constitutional jurisprudence, is akin to the due process dictum. Right to apply for bail is an individual right implicit in Articles 14, 19 and 21 of the Constitution. The right of an accused, an undertrial prisoner or a convicted person awaiting appeal courts verdict to seek bail on suspension of sentence is recognized in Sections 439, 438 and 389 of the 1973 Code. Similarly, the factors guiding appeal provision is contained in the 1989 Act. If there is a blanket ban on listing of these applications, even for offences with lesser degree of punishment, that would effectively block access for seekers of liberty to apply for bail and in substance suspend the Fundamental Rights of individuals in or apprehending detention. Such an order also has the effect of temporarily eclipsing statutory provisions.

15. In the case of *Nikesh Tara Chand Shah v. Union of India & Anr.* [(2018) 11 SCC 1], a Coordinate Bench of this Court traced the history and highlighted importance of bail provisions in criminal jurisprudence, starting from Clause 39 of Magna Carta to the case of *Gurbaksh Singh Sibbia v. State of Punjab* [(1980) 2 SCC 565]. It was, inter-alia, observed in this judgment:-

In *Gurbaksh Singh Sibbia v. State of Punjab* [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465], the purpose of granting bail is set out with great felicity as follows: (SCC pp. 586-88, paras 27-30) 27. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in *Nagendra Nath Chakravarti, In re* [*Nagendra Nath Chakravarti, In re*, 1923 SCC OnLine Cal 318 : AIR 1924 Cal 476 : 1924 Cri LJ 732], AIR pp. 479-80 that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the Meerut Conspiracy cases observations are to be found regarding the right to bail which deserve a special mention. In *K.N. Joglekar v. Emperor* [*K.N. Joglekar v. Emperor*, 1931 SCC OnLine All 60 : AIR 1931 All 504 : 1932 Cri LJ 94] it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the Court that there was no hard-and-fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In *Emperor v. H.L. Hutchinson* [*Emperor v. H.L.*

Hutchinson, 1931 SCC OnLine All 14 : AIR 1931 All 356 : 1931 Cri LJ 1271] , AIR p. 358 it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various Sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

28. Coming nearer home, it was observed by Krishna Iyer, J., in *Gudikanti Narasimhulu v. State* [*Gudikanti Narasimhulu v. State*, (1978) 1 SCC 240 : 1978 SCC (Cri) 115] that: (SCC p. 242, para 1) 1. the issue [of bail] is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Article 21 are the life of that human right.

29. In *Gurcharan Singh v. State (UT of Delhi)* [*Gurcharan Singh v. State (UT of Delhi)*, (1978) 1 SCC 118 : 1978 SCC (Cri) 41] it was observed by Goswami, J., who spoke for the Court, that: (SCC p. 129, para 29) 29. There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.

30. In AMERICAN JURISPRUDENCE (2nd, Vol. 8, p. 806, para 39), it is stated:

Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would effect that end. It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail

16. There was a hint of suggestion from learned Additional Advocate General before the High Court for passing appropriate order so that the Director General of Police may be informed to comply with the same. But we can accept neither the rationale nor the substantive parts of these directives. The power to make arrest of persons lies with the investigating agencies and the 1973 Code as well as other statutory instruments have laid down the procedural structure in which such power may be exercised. Moreover, in the case of *Arnesh Kumar* (supra), this Court has laid down certain methodology to be followed by the law enforcing agencies while making arrest.

17. We do not think in view of the comprehensive guidelines contained in the case of Arnesh Kumar (supra) and Suo Motu Writ Petition (C) No. 1 of 2020 (supra), there was any necessity for the learned Single Judge to issue general directives to which the subject of arrest of the applicants was remotely involved. In the orders under appeal, the actual fate of the plea of the applicants for bail was not addressed to.

18. We have already observed that since both the bail applications were eventually rejected, we had considered the course of disposing of these appeals as having become infructuous. But we chose to labour on testing the correctness and propriety of these orders as these contained general directions going far beyond the lis forming subjectmatter of the two proceedings. The directions issued had the potential for breaching the constitutional and legal rights of individuals who could be or are arraigned in criminal action and also put fetters on power of investigating agencies. Though the impact of the orders under appeal no more survives, we decided to express our opinion on the subjectcontroversy. With these observations, we allow the appeals. As both the applications for bail have been rejected, there is no necessity of formally setting aside the orders under appeal.

..J.

(L.NAGESWARA RAO) ..J.

(ANIRUDDHA BOSE) New Delhi Dated 29th September, 2021