

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
INDIRA BANERJEE; J., V. RAMASUBRAMANIAN; J.**

JULY 12, 2022

CRIMINAL APPEAL NO. 938 OF 2022 (Arising out of SLP (Crl.) No. 4982 of 2022)

INDRESH KUMAR versus THE STATE OF UTTAR PRADESH & ANR.

Code of Criminal Procedure, 1973; Sections 439, 161 - Bail - Statements under Section 161 of Cr.P.C. may not be admissible in evidence, but are relevant in considering the prima facie case against an accused in an application for grant of bail in case of grave offence.

Summary: Appeal against HC order that granted bail to POCSO Accused who allegedly raped and murdered his 11 year old daughter - Allowed - Ex facie, the allegations are grave, the punishment is severe and it cannot be said that there are no materials on record at all - Order set aside.

(Arising out of impugned final judgment and order dated 15-12-2021 in CRMBA No. 2125/2021 passed by the High Court of Judicature at Allahabad)

For Petitioner(s) Mr. Manan Kumar Mishra, Sr. Adv. Mr. Durga Dutt, AOR Ms. Anjul Dwivedi, Adv. Mr. Vaibhav Shukla, Adv.

For Respondent(s) Mr. Ankit Goel, AOR Mr. Salman Khurshid, Sr. Adv. Ms. Tehsheema Z. Hussain, Adv. Mr. Aman Khullar, Adv. Ms. Lubna Naaz, AOR

J U D G M E N T

INDIRA BANERJEE J.

Leave granted.

This appeal is against an order dated 15th December, 2021 passed by the High Court of Allahabad granting bail to the respondent-accused who was arrested in connection with Crime Case No. 08 of 2019 under Sections 302, 201, 376 read with 120B of the Indian Penal Code and under Sections 5 and 6 of the Protection of Children from Sexual Offences Act (POCSO) for alleged rape and murder of an eleven year old child being the daughter of the appellant.

The High Court held:

“Considering the overall facts and circumstances, the nature of allegations, the gravity of offence, the severity of the punishment, the evidence appearing against the accused, submission of learned counsel for the parties, considering the law laid down in the case of Data Ram Vs. State of U.P. and others, 2018 (3), SCC, 2 and also the fact that aforesaid co-accused has been admitted to the concession of bail by this Court, but without expressing any opinion on merits, this Court finds it to be a fit case for bail.

Accordingly, the bail application stands allowed.

Let the applicant Mintu @ Jitendra involved in the aforesaid crime be released on bail on executing a personal bond and furnishing two sureties each in the like amount to the satisfaction of the court concerned with the following conditions:

- i) The applicant shall not tamper with the prosecution evidence.*

- ii) The applicant shall not threaten or harass the prosecution witnesses.*
- iii) The applicant shall appear on the date fixed by the trial court;*
- iv) The applicant shall not commit an offence similar to the offence of which the applicant is accused, or suspected of the commission;*
- v) The applicant 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 such person from disclosing facts to the Court or to any police officer or tamper with the evidence."*

The offence alleged against the respondent-accused of rape and cold-blooded murder of an eleven year old child is heinous and dastardly. The conduct of killing a child to avoid getting caught of the offence, *inter alia*, of rape and then burial of the child as also her stained clothes and other articles under the soil to cause disappearance of evidence and evade apprehension for the offence of murder is indicative of a tendency to evade the process of law. It is possible that the respondent-accused might flee to evade the process of law.

The High Court has ignored the materials on record including incriminating statements of witnesses under Section 164/161 of the Code of Criminal Procedure. Statements under Section 161 of Cr.P.C. may not be admissible in evidence, but are relevant in considering the prima facie case against an accused in an application for grant of bail in case of grave offence.

The High Court has granted the respondent-accused bail, without considering the heinous nature of the allegations against him, the gravity of the offence alleged and severity of the punishment in the event of ultimate conviction, only because a coaccused had also been granted bail by the High Court.

The impugned order of the High Court incorrectly states that bail is granted considering all facts and circumstances, nature of the allegations, gravity of the offence, severity of the punishment, the evidence appearing against the accused and the law laid down in **Dataram Singh vs. State of U.P. & Ors.** reported in **(2018) 3 SCC 22**. This has not been done. The impugned order evinces non-application of mind.

In **Dataram Singh vs. State of U.P.** (supra), this Court held :

"2. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case".

After referring to the observation in **Emperor v. Hutchinson**, reported in **AIR 1931 All. 356**, where the Court held that grant of bail is the rule and refusal is the exception, this Court added:

"6. However, we should not be understood to mean that bail should be granted in every case. The grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately. Also, conditions for the grant of bail ought not to be so strict as to be incapable of compliance, thereby making the grant of bail illusory".

The observations and directions in Dataram Singh (supra) were in the context of arrest and long custodial detention in a crime case under Section 138 of the Negotiable Instruments Act, 1881 for issuing cheques and then stopping payment of the cheque. Bail application had been rejected, first by the Trial Court and then by the High Court even after about five months of detention of the accused in custody.

As argued on behalf of the Appellant, the High Court has, apparently ignored the criminal antecedents of the respondent-accused. The Appellant states that the respondent-accused has been implicated in the following cases:-

- i. Case Crime No. 0181/2015 u/s 147, 148, 149, 325, 323, 504 and 304 IPC at P.S. Amritpur, District: Farrukhabad.
- ii. Case Crime No. 059/2020 under Section 3(1) of the UP Gangster Act, P.S. Amritpur, District: Farrukhabad
- iii. Case Crime No. 69 of 2018 under Sections 279, 337 IC, P.S. Amritpur, District: Farrukhabad
- iv. Case Crime No. 063 of 2018 under Section 3(1) of the UP Gangster Act, P.S. Amritpur, District: Farrukhabad
- v. Case Crime No. 392/2008 under Sections 323, 304 of IPC, P.S. Amritpur, District: Farrukhabad
- vi. Case Crime No. 0144/2016 under Section 147, 506 of IPC, P.S. Amritpur, District: Farrukhabad

In **Neeraj Yadav vs. State of U.P.** reported in **(2016) 15 SCC 422**, this Court referred to a catena of judgments and held:

“15. This being the position of law, it is clear as cloudless sky that the High Court has totally ignored the criminal antecedents of the accused. What has weighed with the High Court is the doctrine of parity. A history-sheeter involved in the nature of crimes which we have reproduced hereinabove, are not minor offences so that he is not to be retained in custody, but the crimes are of heinous nature and such crimes, by no stretch of imagination, can be regarded as jejune. Such cases do create a thunder and lightning having the effect potentiality of torrential rain in an analytical mind. The law expects the judiciary to be alert while admitting these kind of accused persons to be at large and, therefore, the emphasis is on exercise of discretion judiciously and not in a whimsical manner”.

If the High Court had seriously considered the gravity of the offence, there would have been some indication of what was the apparently extenuating circumstance, which entitled the respondent-accused to bail. *Ex facie*, the allegations are grave, the punishment is severe and it cannot be said that there are no materials on record at all.

The appeal is, accordingly, allowed. The impugned order granting bail is set aside. It is however made clear that any observation made in this order will not affect the merits of the trial.