2025 INSC 281

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.536-537 OF 2025

Sudershan Singh Wazir ... **Appellant**

versus

State (NCT of Delhi) & Ors. ... **Respondents**

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. The appellant was arraigned as an accused in connection with a First Information Report (for short, 'the FIR') for the offences punishable under Sections 302, 201 and 34 of the Indian Penal Code, 1860 (for short, 'the IPC'). He was not named in the FIR and was formally arraigned as an accused in the 3rd Supplementary Chargesheet under Section 302, 201, 34, 120B IPC read with 25, 27 of the Arms Act. The learned Additional Sessions Judge passed an order dated 20th October 2023 discharging the present appellant in connection with all the offences subject to furnishing a personal bond in the sum of Rs.25,000/- with one surety of like amount to the satisfaction of the Jail Superintendent. Pursuant to the said order of discharge, the appellant was released from custody on the same day after he furnished the bond.

2. A revision application was filed by the first respondent-NCT of Delhi, challenging the order of discharge before the High Court of Delhi. A prayer was made in the revision application for stay of the order of discharge. By the first impugned order dated 21st October 2023, while issuing a notice in the revision application, the learned Single Judge of the High Court stayed the discharge order. It was an *ex-parte* order of stay, which was extended from time to time. An application was filed under Section 390, read with Section 482 of the CrPC, by the first respondent in the revision application seeking a direction against the appellant to surrender to judicial custody on the ground that the discharge order has already been stayed. By the second impugned order dated 4th November 2024, the learned Single Judge of the High Court held that on account of the stay granted by the High Court, the appellant cannot avail the benefit of the discharge order. Therefore, the High Court observed that if the custody of the appellant is not secured, the order of stay granted by the first impugned order will become ineffective. Therefore, by the second impugned order, the appellant was directed to surrender before the Trial Court and was granted liberty to apply for bail thereafter. While issuing notice on 11th November 2024, this Court stayed the second impugned order. However, this Court clarified that the High Court was free to proceed with the hearing of the revision application.

SUBMISSIONS

3. Shri Siddharth Luthra, the learned senior counsel appearing for the appellant, submitted that the High Court

ought not to have stayed the order of discharge. The consequence of the stay order is that the trial will proceed against the appellant, though he has been discharged. He submitted that unless the order of discharge is set aside, the trial cannot proceed. He submitted that the appellant has been discharged for the cogent reasons recorded and that the order cannot be nullified by granting a stay. He submitted that the grant of stay to the discharge order would virtually amount to allowing the revision application without examining the merits or demerits of the discharge order. He submitted that the appellant has complied with the directions issued by the Sessions Court of furnishing bail in accordance with Section 437A of the CrPC. Therefore, the presence of the appellant is secured, if at all, he is required to face trial.

4. Shri Satya Darshi Sanjay, the learned Additional Solicitor General (ASG) appearing for the first respondent-NCT of Delhi, strenuously urged that though a strong *prima facie* case was made out to proceed on the basis of the charge sheet filed against the appellant, the learned Sessions Judge has passed an order of discharge. He pointed out that it is a very serious case of murder of a former Member of the Legislative Council of Jammu and Kashmir and the Chairman of Jammu and Kashmir Gurudwara Prabandhak Committee. He submitted that apart from the CCTV footage, there is evidence of CDR and eye-witnesses. He submitted that the order of discharge is perverse. He submitted that the learned Judge of the High Court had recorded a prima facie finding in the first impugned order that the learned Sessions Judge had overlooked material

evidence. Inviting our attention to Sections 397 and 401 of the CrPC, the learned ASG submitted that the High Court has the power to stay or suspend the operation of the impugned order. In fact, as per sub-section (1) of Section 401 of the CrPC, the High Court while dealing with a revision application, is empowered to exercise all the powers of the Court of Appeal under Sections 386, 389, 390 and 391 of the CrPC. Therefore, after admitting the revision application for hearing, the High Court had power under Section 390 of the CrPC to direct that the appellant should be committed to prison. He urged that considering the *prima facie* finding recorded in the first impugned order, the High Court had every justification to order the appellant to be taken into custody.

5. Shri Arjun Deewan, the learned counsel appearing for the fifth respondent (a son of the deceased), has also made detailed submissions. He relied upon a decision of the Constitution Bench in the case of ***State of Uttar Pradesh v. Poosu & Ors***[1]**.** He relied upon paragraph No.10 of the decision, which reads thus:

> **"10.** This is the rationale of Section 427. As soon as the High Court on perusing a petition of appeal against an order of acquittal, considers that there is sufficient ground for interfering and issuing process to the respondent, his status as an accused person and the proceedings against him, revive. The question of judging his guilt or innocence in respect of the charge against him, once more becomes *sub judice*.**"**

[1] (1976) 3 SCC 1

6. He submitted that once a revision application against the order of discharge is admitted, the status of the appellant as an accused is revived and therefore, the trial must proceed against him and he has to be taken into custody. He relied upon a decision of this Court in the case of ***Amin Khan v. State of Rajasthan & Ors***[2] and submitted that the power under Section 390 of the CrPC has been correctly exercised by passing the second impugned order. He also relied upon a decision of this Court in the case of ***State of Maharashtra v. Mahesh Kariman Tirki & Ors***[3]**.** He submitted that a higher Court can always stay the order of discharge.

7. The learned senior counsel appearing for the appellant, in response to the submissions of the respondents, relied upon the 154th Report of the Law Commission of India, by which a recommendation was made to incorporate Section 437A in the CrPC. He also relied upon a decision of this Court in the case of ***Parvinder Singh Khurana v. Directorate of Enforcement***[4]**.**

CONSIDERATION OF SUBMISSIONS

REVISIONAL JURISDICTION OF THE HIGH COURT

8. Firstly, we will examine the power of the High Court of revision. It is governed by Sections 397 and 401 of the CrPC. The corresponding provisions in the Bhartiya Nagarik Suraksha Sanhita, 2023 (for short, 'the BNSS') are Sections

[2] (2009) 3 SCC 776
[3] (2022) 10 SCC 207
[4] 2024 SCC OnLine SC 1765 : 2024 INSC 546

438 and 442 respectively. Sections 397 and 401 of the CrPC read thus:

> **"397. Calling for records to exercise powers of revision.—**(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself; to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, **and may, when calling, for such record, direct that the execution of any sentence or order be suspended,** and if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record.
>
> Explanation.—All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398.
>
> (2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.
>
> (3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.
>
> .. ..
>
> **401. High Court's powers of revision.—** (1) **In the case of any proceeding the**

record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307, and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of Justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.**"**

(emphasis added)

Hence, while exercising the revisional jurisdiction under Section 401, the High Court has all the powers of the Appellate Court under Sections 386, 389, 390 and 391 of the CrPC. The corresponding provisions under the BNSS are Sections 427, 430, 431 and 432 respectively. In view of what is provided under Section 397(1), the High Court has the power to suspend the operation of the order impugned in the revision application. The question is whether the power to grant a stay can be exercised for staying an order of discharge.

9. Section 386 provides for the procedure for the hearing of appeals. Section 389 of the CrPC, on its plain reading, is applicable when the order impugned is an order of conviction. It deals with suspension of sentence pending an appeal against conviction. Section 390 of the CrPC is the provision which deals with an appeal against acquittal. Section 391 of the CrPC deals with the power of the Appellate Court to take further evidence. Section 390 reads thus:

> **"390. Arrest of accused in appeal from acquittal.—**When an appeal is presented under section 378, the High Court may issue a warrant directing that the accused be arrested and brought before it or any Subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail."

When an appeal against the order of acquittal is filed, the High Court has the power to order the arrest of the accused and his production before it or any subordinate court. After the accused is produced, there is a discretion in the Court to either commit him to prison or admit him to bail. As Section 390 has

been made expressly applicable to Section 401, the power under Section 390 can be exercised in a revision against an order of discharge.

ORDER OF DISCHARGE

10. Before we go to the power of the revisional Court to stay the order of discharge, it is necessary to consider the effect of discharge. In a trial before a Court of Sessions, the power to discharge is conferred on the Court by Section 227 of the CrPC. In the case of a trial of a warrant case, there is a similar power to grant a discharge under Section 245 of the CrPC. We are concerned with Section 227, which deals with discharge and Section 228, which deals with the framing of charge, which read thus:

> **"227. Discharge.—**If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, **the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing**.
>
> **228. Framing of charge.—**(1) If, after such consideration and hearing as aforesaid, **the Judge is of opinion that there is ground for presuming that the accused has committed an offence** which—
>
> (a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, [or any other Judicial Magistrate of the first class and

> direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate] shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;
>
> (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.
>
> (2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.**"**
>
> (emphasis added)

11. Under Section 226 of the CrPC, after the order of commitment, when the accused appears or is brought before the Court of Sessions, the prosecutor has to open his case by describing the charge levelled against the accused by stating what evidence is proposed to prove the guilt of the accused. At that stage, the Sessions Court has to consider the record of the case. The record of the case will be the charge sheets. The Sessions Court is under an obligation to hear the submissions of the accused and the prosecution as provided in Section 227 of the CrPC. After hearing the parties, if the Sessions Court is of the opinion that there is a ground for presuming that the accused has committed an offence, it may proceed to frame a charge in writing against the accused. The charge can be framed only after the Court comes to a conclusion that there is

a ground for presuming that the accused has committed an offence.

12. After considering the material on the charge sheet and the submissions of parties, if the Court concludes that there is no sufficient ground for proceeding against the accused, the Court must discharge the accused for the reasons recorded. Thus, an order of discharge is passed when there is no sufficient material to proceed against the accused. When a discharge order is passed, the person discharged ceases to be an accused. The position of a discharged accused is on a higher pedestal than that of an accused who is acquitted after a full trial. The reason is that a charge can be framed, and an accused can be tried only when there is sufficient material in the charge sheet to proceed against him. An order of discharge is passed when the charge sheet does not contain sufficient material to proceed against the accused. Therefore, he is discharged at the threshold. After an accused is discharged under Section 227 of the CrPC, he is set at liberty as he ceases to be an accused.

POWER TO STAY THE ORDER OF DISCHARGE

13. An order staying the order of discharge is a very drastic order which has the effect of curtailing or taking away the liberty granted to the accused by the discharge order. As a result of the order staying the order of discharge, the order of discharge ceases to operate, and the Sessions Court can proceed to frame charges against the accused and try him further. Thus, the stay of the discharge order has a grave

consequence of depriving an accused of the liberty granted under the discharge order. The grant of stay to the order of discharge amounts to the grant of final relief, as the trial can proceed against him. An interim order can be granted pending disposal of the main case only if the interim order is in the aid of final relief sought in the main case. If the discharge order is ultimately set aside by grant of final relief in the revision, the accused has to face the trial. Therefore, the order staying the order of discharge by way of interim relief cannot be said to be in the aid of final relief.

14. It is only in rare and exceptional cases where the order of discharge is *ex-facie* perverse that the revisional Court can take the extreme step of staying that order. However, such an order should be passed only after giving an opportunity of being heard to the accused. Moreover, while granting the stay, the Court must mould the relief so that the trial does not proceed against the discharged accused. If the trial against a discharged accused proceeds, even before the revision application against an order of discharge is decided, the final outcome of the revision will become *fait accompli.*

15. In the case of ***Parvinder Singh Khurana***[4], this court dealt with the power of the Court to stay the order granting bail pending final disposal of the proceedings filed for cancellation of bail. In paragraphs 11 to 13 of the said decision, this Court held thus:

> **"11.** While issuing notice on an application for cancellation of bail, without passing a drastic order of stay, if the facts so warrant,

the High Court can, by way of an interim order, impose additional bail conditions on the accused, which will ensure that the accused does not flee. **However, an order granting a stay to the operation of the order granting bail during the pendency of the application for cancellation of bail should be passed in very rare cases.** The reason is that when an undertrial is ordered to be released on bail, his liberty is restored, which cannot be easily taken away for the asking. The undertrial is not a convict. An interim relief can be granted in the aid of the final relief, which could be finally granted in proceedings. After cancellation of bail, the accused has to be taken into custody. Hence, it cannot be said that if the stay is not granted, the final order of cancellation of bail, if passed, cannot be implemented. If the accused is released on bail before the application for stay is heard, the application/proceedings filed for cancellation of bail do not become infructuous. The interim relief of the stay of the order granting bail is not necessarily in the aid of final relief.

12. The Court dealing with the application for cancellation of bail can always ensure that notice is served on the accused as soon as possible and that the application is heard expeditiously. **An order granting bail can be stayed by the Court only in exceptional cases when a very strong *prima facie* case of the existence of the grounds for cancellation of bail is made out. The prima facie case must be of a very high standard. By way of illustration, we can point out a case where the bail is granted by a very cryptic order without recording any reasons or application of mind. One more illustration can be of a case where**

material is available on record to prove serious misuse of the liberty made by the accused by tampering with the evidence, such as threatening the prosecution witnesses. If the High Court or Sessions Court concludes that an exceptional case is made out for the grant of stay, the Court must record brief reasons and set out the grounds for coming to such a conclusion.

13. An *ex-parte* stay of the order granting bail, as a standard rule, should not be granted. The power to grant an *ex-parte* interim stay of an order granting bail has to be exercised in very rare and exceptional cases where the situation demands the passing of such an order. While considering the prayer for granting an *ex-parte* stay, the concerned Court must apply its mind and decide whether the case is very exceptional, warranting the exercise of drastic power to grant an *ex-parte* stay of the order granting bail. Liberty granted to an accused under the order granting bail cannot be lightly and casually interfered with by mechanically granting an *ex-parte* order of stay of the bail order. Moreover, the Court must record specific reasons why it concluded that it was a very rare and exceptional case where a very drastic order of *ex-parte* interim stay was warranted. Moreover, since the issue involved is of the accused's right to liberty guaranteed by Article 21 of the Constitution, if an *ex-parte* stay is granted, by issuing a short notice to the accused, the Court must immediately hear him on the continuation of the stay.**"**

(emphasis added)

16. We may note here that the order of discharge stands on a higher pedestal than the order granting bail. By grant of bail, the status of the accused does not cease to be that of an accused, but when the order of discharge is passed, he ceases to be an accused. The power of the Court to stay the order granting bail can be exercised only in rare and exceptional cases. As a discharged accused stands on a still higher pedestal than an accused released on bail, the law laid down in the case of ***Parvinder Singh Khurana***[4] will apply more strictly and rigorously while dealing with the application for grant of stay of the order of discharge.

17. In the case of ***State of Maharashtra v. Mahesh Kariman Tirki & Ors***[3], a bench of the Bombay High Court, while finally hearing an appeal against an order of conviction of the accused after a full-fledged trial, passed an order of discharge only on the ground of the absence of sanction. The High Court did not advert to the merits of the conviction. Considering this peculiar order, this Court passed a drastic order of stay while issuing notice on Special Leave Petition against the order of discharge. Therefore, the said order is of no relevance to this case.

SECTION 390 OF CrPC

18. As we have held earlier, in view of Section 401(1) of the CrPC, the revisional Court can exercise power under Section 390 in a given case. As can be seen from Section 390, when an appeal is preferred against an order of acquittal, the High Court is empowered to issue a warrant directing that the

accused be arrested and brought before it or any sub-ordinate Court. The Court, before which the accused is brought, may commit him to prison pending disposal of the appeal or admit him to bail. Once an appeal against acquittal is admitted, the status of the person acquitted as an accused can be said to be restored. That is what is held in the case of ***State of Uttar Pradesh v. Poosu & Ors.***[1] The object of Section 390 of the CrPC is that if ultimately the order of acquittal is converted into the order of conviction, the accused must be available for undergoing sentence. The second object of Section 390 is that when an appeal against acquittal is finally heard, the accused's presence at the hearing can be secured. Therefore, there is a power vested in the High Court to arrest an acquitted accused and bring him before it or the Trial Court. The object is that the accused remains under the jurisdiction of the Court dealing with the appeal against acquittal. It is well settled that an order of acquittal further strengthens the presumption of innocence of an accused. Therefore, as a normal rule, where an order under Section 390 of the CrPC is passed, the accused must be admitted to bail rather than committing him to prison. It is well-settled in our jurisprudence that bail is the rule, and jail is the exception. This rule must be applied while exercising power under Section 390 of the CrPC, as the position of the acquitted accused is on a higher pedestal than an accused facing trial. When an accused faces trial, he is presumed to be innocent until he is proven guilty. In the case of an acquitted accused, as stated earlier, the presumption of innocence is further strengthened because of the order of acquittal. Only in extreme and rare cases by way of exception can an order

committing an acquitted accused to prison be passed under Section 390.

19. When a revision application challenging the order of discharge is admitted for hearing, the High Court may exercise power under Section 390 by directing the person discharged to appear before the Trial Court and by directing the Trial Court to admit him to bail on appropriate terms and conditions. If such an order is passed after the admission of the revision application against the order of discharge, it is a sufficient safeguard for ensuring the presence of the discharged accused at the time of hearing of the revision application and for undergoing trial, if the order of discharge is set aside. If the discharge order is eventually set aside, such an order under Section 390 of the CrPC passed in an admitted revision application against the discharge order will be in the aid of final relief. As held earlier, while exercising power under Section 390 of the CrPC, the normal rule is that the acquitted accused should not be committed to custody, and a direction should be issued to admit him to bail. This normal rule should apply all the more to cases where the challenge is to the order of discharge, as the order of discharge is on a higher pedestal than an order of acquittal.

20. Passing an order under Section 390 directing the discharged accused to admit to bail is sufficient to procure the presence of the discharged accused at the time of hearing of the revision application and for undergoing trial if the order of discharge is set aside.

OUR VIEW ON THE FACTS OF THE CASE

21. Now, coming to the facts of the case, the first impugned order has been passed *ex-parte* while issuing notice by which the order of discharge was stayed. There is nothing placed on record to show that till the second impugned order was passed, at any time, the High Court had given an opportunity to the appellant to be heard on the prayer for stay. The second impugned order runs into as many as twenty-six pages and involves 62 paragraphs, which, in substance, holds that as the order of discharge was no longer operative, the status of the appellant as an accused has been restored, and therefore, he shall be forthwith taken into custody.

22. In our view, the *ex-parte* order of stay of the order of discharge should not have been passed by the High Court. The consequences of such an order are very drastic as alluded to hereinabove. Hence, the *ex-parte* order of stay is entirely illegal. Consequently, the second impugned order deserves to be set aside.

23. In the present case, after passing the order of discharge, the Sessions Court passed a further order on the same day by directing the release of the appellant on furnishing a personal bond of Rs.25,000/- and one surety in the like amount to the satisfaction of the concerned Jail Superintendent. Apparently, the Sessions Court exercised power under Section 437A of the CrPC, which reads thus:

> **"437A. Bail to require accused to appear before next appellate Court.—**(1) Before conclusion of the trial and before disposal

> of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months.
>
> (2) If such accused fails to appear, the bond stand forfeited and the procedure under section 446 shall apply.**"**

24. The bail bonds furnished by the appellant in terms of the order dated 20th October 2023 were for ensuring his presence when notice of the proceedings against an order of discharge is served. Thus, the validity of the bail bonds may have expired. Hence, we propose to direct the appellant to furnish bail in terms of Section 390 of the CrPC.

25. Accordingly, we pass the following order:

a. The impugned orders dated 21st October 2023 and 4th November 2024 are, hereby, quashed and set aside;

b. The High Court will decide the revision application without being influenced by any observations made in this judgment. It will be open for the first respondent-NCT of Delhi, and the fifth respondent to apply before the High Court for giving necessary priority to the disposal of the revision application;

c. We direct the appellant to appear before the Sessions Court within four weeks from today and furnish bail effective till disposal of the revision application on such terms and conditions as may be fixed by the Sessions Court. If the appellant fails to comply with the above directions, he shall be forthwith taken into custody and sent to judicial custody till the disposal of the revision application; and

d. While admitting the appellant to bail, the Sessions Court shall impose usual conditions. In addition, a condition of cooperating with the High Court for early disposal of the revision application shall be also imposed. If the High Court finds that the appellant is not cooperating with the early disposal of the revision application, it will be open for the High Court to cancel the bail after hearing the appellant.

26. The appeals are allowed on the above terms.

.....J.
(Abhay S. Oka)

.....J.
(Ujjal Bhuyan)

New Delhi;
February 28, 2025.