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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **CRL.A. 157/2013**

BABLOO CHAUHAN @ DABLOO ..... Appellant
Through: None.

versus

STATE GOVT. OF NCT OF DELHI ..... Respondent
Through: Ms.Kusum Dhalla, APP for State.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

O R D E R
% 30.11.2017

Dr. S. Muralidhar,J.:

1. The present appeal was allowed by a detailed judgment dated 15th September 2016. However, by a separate order of that date, the Court highlighted three issues that arose in a larger context, and sought inputs from Prof. (Dr.) G.S. Bajpai, Professor of Criminology & Criminal Justice and Registrar, National Law University, Delhi by appointing him as *amicus curiae*. Prof. Bajpai has submitted a detailed report.

Fines and default sentences

2. The first issue concerns 'the substantive law and procedure relating to the default in payment of fine.' The Court's attention is drawn to the decision of the Supreme Court in ***Palaniappa Gounder v. State of Tamil Nadu (1977)***

2 SCC 634, where the Supreme Court has observed that "the sentence of fine must not be unduly excessive". It was further observed:

> "Though there is power to combine a sentence of death or life imprisonment with a sentence of fine that power is to be sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose."

3. The Court's attention is also drawn to the decision in ***Shahejadkhan Mahebubkhan Pathan v. State of Gujarat (2013) 1 SCC 570*** where the Supreme Court reiterated the earlier decision in ***Shantilal v. State of M.P. (2007) 11 SCC 243*** which analysed in detail the scheme of the provisions in Sections 63 to 70 IPC. The Supreme Court in ***Shahejadkhan Mahebubkhan Pathan*** (*supra*) observed:

> "It is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstance, we are of the view that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine should not be harsh or excessive. We also reiterate that where a

> substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases."

4. The Court is of the view that the above decisions make the legal position regarding fines and default sentences fairly clear.

Suspension of sentence

5. The second issue concerns the existing law on suspension of sentence under Section 389 CrPC. In this context, Prof. Bajpai has in his report referred to the large number of judgments of the Supreme Court and in particular the decisions in ***Kashmira Singh v. State of Punjab (1977) 4 SCC 291*** and ***Sunil Kr. Sinha v. State of Bihar (2009) 16 SCC 370***.

6. In ***Kashmira Singh*** (*supra*) the Appellant had sought bail during the pendency of his appeal in the Supreme Court. While granting him that relief, the Supreme Court observed:

> "Now, the practice in this Court as also in many of the High Courts has been not to release on bail a person who has been sentenced to life imprisonment for an offence under section 302 of the Indian penal Code. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where

> the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to unjustified? Would it be just at all for the Court to tell a person: "We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?" What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

7. Although in ***Sunil Kumar Sinha*** (*supra*), the Court in a short order observed that "merely because the High Court is unable to hear the case in the near future would be no ground, by itself, for releasing the accused", that was in the context of the fact that in that case the accused had "not even been in custody for three years." Therefore, the broad principles highlighted in ***Kashmira Singh*** (*supra*) hold good even in the context of suspension of sentence.

8. Prof. Bajpai has in his report highlighted the following distinctions in the sub-sections of Section 389 CrPC which may be usefully reproduced:

> "(A) **Difference between Section 389(1) and (3)**
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> Within Section 389, sub-sections (1) and (2) govern the situation when bail is sought before the appellate court upon the filing of the appeal, thereby preventing the situation where he is incarcerated and subsequently found not guilty. Whereas sub-section (3) is the power of the convicting court itself to grant the accused bail, thereby enabling him to challenge the findings before a higher court. Major differences in the operation of the sub-sections are as follows:
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> 1. Section 389 (1) applies to an appeal already pending whereas Sub-section (3) becomes operational upon the convicted party expressing his/her intention to challenge the findings of the convicting/trial court before the trial court itself.
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> 2. Sub-section (1) talks of "suspension" first and then "release on bail" or "own bond"; however, Sub-section (3) talks of "release on bail" first with "suspension" being an "automatic" effect.
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> 3. Sub-section (1) does not prescribe that the accused must be on bail. However, Sub-section (3) can be invoked only if the accused is on bail on the day of judgment.
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> 4. Sub-section (1) gives option to release the convict on "bail" or "his own bond". However, the trial Court in terms of Sub-section (3) does not have power to release the convict on "his own bond". The trial Court can also release the accused on his own bond if the accused is poor etc.
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> 5. In Sub-section (1) suspension is the cause and bail is effect. Under Sub-section (3) bail is cause and suspension is effect.
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> (B) **Salient Features of Section 389 (3)**

1. The convict shall not be released on bail "as of right" but he will have to satisfy that he is "eligible" to be released on bail;

2. Only the convicting Court is empowered to confer bail under sub-section (3)

3. The trial court is well within its powers to refuse bail for "special reasons", thereby making the power discretionary,

4. The order by the court must necessarily be of a substantive conviction,

5. Sentence of imprisonment must not exceed three years,

6. The intention of presenting an appeal before the appellate Court must be made clear."

9. As rightly pointed out by Prof. Bajpai, there is a distinction between bail and the suspension of a sentence. He further observes that "an order passed under Section 389 does not in any way affect the status of the conviction." This, however, requires to be further qualified in view of the decisions of the Supreme Court in the context of the power to suspend the conviction itself. This issue came up for consideration in ***Navjot Singh Sidhu v. State of Punjab (2007) 2 SCC 574*** where the Appellant before the Court was seeking such relief to avoid being disqualified from contesting for the election to the Lok Sabha. In that context, the Supreme Court reviewed the legal position and observed as under:

"3. Before proceeding further it may be seen whether there is any provision which may enable the Court to suspend the order of conviction as normally what is suspended is the execution of the sentence. Sub-section (1) of Section 389 says that pending any appeal by a convicted person, the appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or

order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond. This Sub-section confers power not only to suspend the execution of sentence and to grant bail but also to suspend the operation of the order appealed against which means the order of conviction. This question has been examined in considerable detail by a Three Judge Bench of this Court in *Rama Narang v. Ramesh Narang & Ors. (1995) 2 SCC 513* and Ahmadi, C.J., speaking for the Court, held as under (para 19 of the reports) :-

> "19. That takes us to the question whether the scope of Section 389 (1) of the Code extends to conferring power on the Appellate Court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some disqualification of the type mentioned in Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and, therefore, we see no reason to place a narrow interpretation on Section 389(1) of the Code not to extend it to an order of conviction, although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389(1) of the Code. We are, therefore, of the opinion that the Division Bench of the High Court of Bombay was not right in holding that the Delhi High Court could not have exercised jurisdiction under Section 482 of the Code if it was confronted with a situation of there being no other provision in the Code for staying the operation of the order of conviction. In a fit case if the High Court feels satisfied that the order of conviction needs to be suspended or stayed so that the convicted person does not suffer from a certain disqualification provided for in any other statute, it may

exercise the power because otherwise the damage done cannot be undone; the disqualification incurred by Section 267 of the Companies Act and given effect to cannot be undone at a subsequent date if the conviction is set aside by the Appellate Court. But while granting a stay or suspension of the order of conviction the Court must examine the pros and cons and if it feels satisfied that a case is made out for grant of such an order, it may do so and in so doing it may, if it considers it appropriate, impose such conditions as are considered appropriate to protect the interest of the shareholders and the business of the company."

The aforesaid view has recently been reiterated and followed by another Three Judge Bench in *Ravi Kant S. Patil v. Sarvabhouma S. Bagali JT 2006 (1) SC 578*. After referring to the decisions on the issue, viz., *State of Tamil Nadu v. A. Jaganathan (1996) 5 SCC 329, K.C. Sareen v. C.B.I., Chandigarh (2001) 6 SCC 584, B.R. Kapur v. State of T.N. & Anr. (2001) 7 SCC 231 and State of Maharashtra v. Gajanan & Anr. (2003) 12 SCC 432*, this Court concluded (para 12.5 of the report) :

"All these decisions, while recognizing the power to stay conviction, have cautioned and clarified that such power should be exercised only in exceptional circumstances where failure to stay the conviction, would lead to injustice and irreversible consequences."

The Court also observed :-

"11. It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non-operative."

> The legal position is, therefore, clear that an appellate Court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate Court to the consequences that may arise if the conviction is not stayed. Unless the attention of the Court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case."

10. The legal position on the exercise of the powers by the High Court under Section 389 of the CrPC being fairly clear, it is sufficient for this Court to reiterate it.

Remedies for wrongful incarceration

11. The third issue concerns the possible legal remedies for victims of wrongful incarceration and malicious prosecution in India. The report of Prof. Bajpai refers to the practice in the United States of America (USA) and the United Kingdom (UK). He points out that that there are 32 states in the USA including District of Columbia (DC) which have enacted laws that provide monetary and non-monetary compensation to people wrongfully incarcerated. There are specific schemes in the UK and New Zealand in this regard.

12. As far as India is concerned, there is no exclusive legislation on the topic. The decisions in ***Khatri v. State of Bihar (1981) 1 SCC 627***; ***Veena Sethi v. State of Bihar AIR 1983 SC 339; Rudul Sah v. State of Bihar AIR 1983 SC 1086***; ***Bhim Singh v. State of Jammu and Kashmir (1985) 4 SCC 677*** and ***Sant Bir v. State of Bihar AIR 1982 SC 1470***, are instances where

the Supreme Court has held that compensation can be awarded by constitutional courts for violation of fundamental right under Article 21 of the Constitution of India. These have included instances of compensation being awarded to those wrongly incarcerated as well. But these are episodic and are not easily available to all similarly situated persons.

13. There is at present in our country no statutory or legal scheme for compensating those who are wrongfully incarcerated. The instances of those being acquitted by the High Court or the Supreme Court after many years of imprisonment are not infrequent. They are left to their devices without any hope of reintegration into society or rehabilitation since the best years of their life have been spent behind bars, invisible behind the high prison walls. The possibility of invoking civil remedies can by no stretch of imagination be considered efficacious, affordable or timely. Further, this has to invariably await the final outcome of the case which may take an unconscionably long time.

14. Section 436-A CrPC (introduced with effect from 23rd June 2006) permits release on personal bond of under trial prisoners who have completed up to one half of the maximum period of imprisonment for that offence. Its object is laudable but its effective implementation is still a challenge. In any event, it is not an answer to the hardship undergone by an innocent person who is declared as such after spending more than a decade in jail.

15. As far as compensating the victims of crime is concerned, Sections 357 and 357 A to C of the Cr PC provide for compensation to the victim of

crime. The effective implementation of these provisions hinges upon the concerted efforts of legal services authorities and governments. As far as compensating 'persons groundlessly arrested', Section 358 Cr PC offers some token relief. This provision however fails to acknowledge the multiple ways in which not only the prisoner, who may ultimately be declared to be innocent, but the family of the prisoner faces deprivation and hardship. Particularly poignant is the plight of the spouse, children and aged parents of the prisoner who are unable to find legal redress for their losses. The Delhi High Court has on more than one occasion stepped in to order provision of shelter, educational and health needs of the children whose parents, either or both, are in jail serving sentence.

16. There is an urgent need, therefore, for a legal (preferably legislative) framework for providing relief and rehabilitation to victims of wrongful prosecution and incarceration. Whether this should be an omnibus legislation or scheme that caters to both the needs of the victim of the crime, as well those wrongfully incarcerated, including the family and dependants of the prisoner, or these have to be dealt with in separate legislations or schemes is a matter for discussion, deliberation and consultation with a cross-section of interest groups. Specific to the question of compensating those wrongfully incarcerated, the questions as regards the situations and conditions upon which such relief would be available, in what form and at what stage are also matters requiring deliberation. This is a task best left in the first instance to the body tasked with advising the government on the legislative measures needed to fill the obvious gap.

17. The Court, accordingly, requests the Law Commission of India to undertake a comprehensive examination of the issue highlighted in paras 11 to 16 of this order and make its recommendation thereon to the Government of India.

18. A copy of the order dated 15th September, 2016 and today's order, together with the report of Prof. Bajpai, be placed before the Chairman of the Law Commission of India.

19. The Court records its appreciation of the excellent assistance provided to it by Prof G. S. Bajpai. A copy of this order be delivered to him.

20. No further directions are called for.

S. MURALIDHAR, J.

I.S. MEHTA, J.

NOVEMBER 30, 2017
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