* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on : 19th September 2024***

Pronounced on: 4th November, 2024

\+ **CRL.REV.P.1139/2023, CRL.M.A.29229/2023, CRL.M.A.31170/2023 & CRL.M.A.5247/2024**

STATE (NCT OF DELHI) .....Petitioner

Through: Mr. Sanjay Jain, Senior Advocate with Mr. Aman Usman, APP Mr. Laksh Khanna, APP, Mr. Akhand Pratap Singh, SPP, Mr. Nishank Tripathi, Ms. Samridhi, Advocates with Mr. Krishna M. Chandell along with ACP Virender Kadyan, EOW and Insp. Pradeep Rai, EOW.

Mr. Siddharth Aggrwal, Sr. Advocate with Mr. Arjun Dewan and Mr. Harsh Yadav, Advocates for complainant.

versus

HARPREET SINGH KHALSA & ORS. .....Respondents

Through: Mr. Vikas Pahwa, Sr. Advocate with Mr. Ajay Mahia, Ms. Nancy Shamim and Mr. Garvil Singh, Advocate for R-2 and R-3.

Mr. Mohit Mathur, Senior Advocate with Mr. Rajiv Mohan,

Mr. Sumit Mishra, Mr Nishant Madan, Mr. Swapnil Krishna Tripathi, Ms. Nitika Pancholi, Advocates for R-4.

CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

CRL.M.A. 2699/2024 (*seeking surrender of respondent No. 4 to judicial custody*)

1. This application has been filed under Section 390 read with Section 482 of the Code of Criminal Procedure, 1973 ('**Cr.P.C.**') on behalf of the petitioner, seeking the surrender to judicial custody of accused/ respondent No.4 Sudershan Singh Wazir, pursuant to stay of the discharge order by this Court, on 21st October 2023.

2. The accused were implicated in FIR 557 /2021, P.S. Moti Nagar, investigated by the Economic Offences Wing ('**EOW**').

3. *Vide* order dated 26th October 2023, passed by the ADJ, West District, Tis Hazari Courts, accused Balbir Singh, Rajinder Chaudhary and Sudershan Singh Wazir stood discharged from all the offences; accused Harmeet Singh was charged for offences under Section 302 of the Indian Penal Code, 1860 ('**IPC**'); and accused Harpreet Singh Khalsa was charged for offences under Section 201 IPC and Section 174A IPC, but was discharged from the offence under Section 302 read with Section 120-B IPC.

4. *Vide* order dated 21st October 2023, at the first instance when the petition was heard by this Court, notice was issued to the respondents

returnable on 13th December 2023; operation of the impugned order was stayed till the next date of hearing.

5. By this application, the petitioner (*State*) effectively submitted that, because of the *ex-parte* interim directions passed by the Court on the first date of hearing, the position relegated back to as it was, before the passing of the impugned judgment by the Trial Court. While Harpreet Singh Khalsa, Rajender Chaudhary and Balbir Singh were still in judicial custody, the accused/ respondent No. 4 Sudershan Singh Wazir, had been released on the night of 20th October 2023. Accordingly, directions are sought for surrender of respondent No.4.

Factual Background

6. The FIR was registered relating to the murder of one Trilochan Singh Wazir at Moti Nagar, Delhi on 3rd September 2021. The body was recovered after 5 days, at the behest of the brother of the deceased, one Bhupender Singh.

7. The CCTV footage from the camera installed outside the Moti Nagar house, showed presence of Harmeet Singh, Harpreet Singh Khalsa, Rajinder Chaudhary and Balbir Singh at the place of incident, on the intervening night of 3rd and 4th September 2021.

8. As per the case of the prosecution, the murder was carried out at the instance of one Sudershan Singh Wazir. The deceased and accused, all hailed from Jammu. Deceased was a well-known figure in Jammu, a former member of the Legislative Council of Jammu and Kashmir and the Chairman of *J&K Gurudwara Prabhandak Committee*.

9. The evidence collected showed that the place of the murder was rented by Harpreet Singh Khalsa, and aside from the CCTV footage and

CDR records, eyewitnesses also proved the presence of the accused at the time and place of the incident.

10. It was contended by the State, that despite this, the ASJ, in an extraordinary deviation from settled law, proceeded to discharge the accused, conducting almost a mini trial, and minutely examining the probative value of the evidence.

Submissions by Mr. Sanjay Jain, Senior Advocate on behalf of the State

11. It was submitted that as per Section 390 Cr.P.C., when an appeal is presented under Section 378 Cr.P.C., the High Court may issue a warrant, directing that the accused be arrested and be brought before it, and the Court may commit him to prison until disposal of appeal or admit him to bail.

12. Senior Counsel, therefore stated that applicability of Section 390 Cr.P.C. in revisional jurisdiction, arises from section 401(1) Cr.P.C. where the Court can exercise same power under revision.

13. The said provisions are extracted hereunder for ease of reference:

S. 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*."
>
> (emphasis supplied)

S. 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…*"
>
> (emphasis supplied)

14. Reliance was placed on decision of the Constitutional Bench of the Supreme Court in ***State of U.P. v. Poosu*** (1976) 3 SCC 1, where the Supreme Court, in paragraph 10, while dealing with Section 427 Cr.P.C. (*as it stood prior to the amendment and was pari-materia to Section 390 Cr.P.C.*), stated as under:

> "*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*."
>
> (emphasis supplied)

15. The said judgment in ***Poosu*** (*supra*) was followed by the Supreme Court in ***State of Maharashtra v. Mahesh Kariman Tirki*** (2022) 10 SCC 207, where discharge and acquittal have been kept at the same pedestal and held to be governed by Section 390 Cr.P.C. The right to apply for bail, would therefore stand extinguished, once the High Court has passed a stay on the operation of the impugned order, it was contended.

16. Mr. Sanjay Jain, Senior Counsel for the State, submitted that even though the subsequent orders of the Court after 21st October 2023 did not specifically state that interim orders will not continue, it will be presumed that they shall continue till such time, as indicated, since the effect of the interim order was to stay the operation of the impugned judgment.

Besides that, there was no effective date on which the matter was taken up for hearing therefore any non-mention of the stay was inconsequential. Subsequently, on 5th July 2024, the Court mentioned that the interim orders were to be continued.

Submissions by Mr. Mohit Mathur, Senior Advocate on behalf of the Respondent No. 4

17. Senior Counsel for the respondent No.4, placed the following submissions to counter the State's plea:

i. When the impugned order of 20th October 2023 was passed, discharging the accused, a Special Public Prosecutor was present. The revision petition filed by the State was mentioned before this Court at 4.40 P.M., and then had to be listed on 21st October 2023. The Special PP ought to have informed the High Court on 21st October 2023, regarding the acceptance of the bail bonds by the Trial Court. It was just a ministerial formality.

ii. *Status quo ante* is not permissible in criminal law.

iii. An incorrect observation has been made in order dated 21st October 2023, passed by this Court. Regarding para 8, 9, and 10, where submissions have been made regarding CDRs where all accused persons have been seen shown to be in touch with each other. Neither was accused No. 4 a part of the CDRs nor was he shown in the CCTV footage, as submitted by the Counsel for the State before this Court.

iv. Stay of the operation of the impugned order would have a prospective effect. All actions which have already been taken, pursuant to the impugned order cannot be reversed. The status stood altered, which cannot be undone. Application under Section 390

Cr.P.C. was moved much later, in January 2024, while the stay order had already been passed and bail had been granted to respondent No.4, in October 2023.

v. Section 390 is effective to ensure that accused is present during the appeal. The accused No. 4 has given the undertaking to be present before the Court.

vi. Attention was drawn to section 401 (2) Cr.P.C, as per which, no order should be passed in a revision petition without hearing the accused.

vii. Discharge under section 227 Cr.P.C is on the basis of non-sufficiency of material, while acquittal meant that there was a benefit of doubt which can be given to the accused. Discharge therefore stood at a higher pedestal than acquittal.

viii. The order releasing respondent No.4 on bail by the Trial Court has not been challenged by the State.

ix. Reliance was placed, also, on the Supreme Court's decision in ***Poosu*** (*supra*) particularly on paras 6, 7, and 13, where the Supreme Court has effectively stated that the provision is for securing the attendance of the accused by issuing bailable warrants or NBWs and rests entirely on the discretion of the Court. This discretion ought to be exercised sparingly in exceptional cases, particularly where the acquittal order is perverse or clearly erroneous and results in a gross miscarriage of justice.

x. Reliance was placed on the decision of the Full Bench of the High Court of Punjab and Haryana in ***State of Punjab v. Bachittar Singh*** 1971 SCC OnLine P&H 302, in particular, paragraph(s) 3, 5, 6, 7, 9, 10, 12, 13, 16 and 17 of the said judgment, where the Court held

that, the true rule should be that accused/ respondents in State appeals against acquittal, are normally eligible to be released on bail during pendency of these appeals, unless, for grave and exceptional reasons, the Court directs their detention and custody.

xi. Reliance was also placed on ***Mulraj v. Murti Raghunathji Maharaj*** 1967 SCC OnLine SC 260, where the Supreme Court stated that while an injunction is usually passed against a party, a stay order is addressed to a court and if the court does not have knowledge of said stay order, it cannot deprive the court of the jurisdiction to proceed in its execution.

xii. On the scope of an interim order passed without the presence of a party, the decision of the Supreme Court in ***Allahabad High Court Bar Assn. v. State of U.P.*** (2024) 6 SCC 267, was adverted to, in particular para 13, 14 and 15 of said judgment where the Supreme Court states that an *ex-parte* order is effectively an *ad interim* order and once an opportunity of being heard to the respondent is given, *ad interim* orders can, accordingly, be modified since they are for a limited duration.

xiii. It was contended that stay of the operation meant, that the impugned order would not be operative from the date of passing such a stay order, but that did not mean that the order of discharge had been wiped out of existence. In this regard, reliance was placed on the decision of the Supreme Court in ***Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn.*** (1992) 3 SCC 1, where the Court held in paragraph 10 that the stay of the operation of an order does not mean that the impugned order has been wiped out from existence.

Rejoinder Submissions by Mr. Sanjay Jain, Senior Advocate on behalf of the State

18. Countering Mr. Mathur's submissions, Mr. Sanjay Jain, appearing for the State, *inter alia* submitted as under:

i. The order dated 21st October 2023, staying the operation of the impugned discharge order, was passed in consonance with the judgment of the Constitution Bench in ***Poosu*** (*supra*), after a *prima facie* evaluation of facts, pending the adjudication of the revision.

ii. Respondent No. 4 cannot be treated differently from other respondents, who did not avail the benefit of being released.

iii. It was not the State's submission that the impugned order on discharge would be wiped out or become *non-est*, pursuant to the stay order passed on 21st October, 2023. To the contrary, the discharge order subsists, the operation being stayed and eventually will be tested on merits.

iv. Respondent No. 4's submission that it was not in the knowledge of the State that their bail bonds have been submitted and accepted was misconceived. Post the discharge, bail bonds were to be filed to the satisfaction of the Jail Superintendent, which being a separate authority, there was no way for the prosecution to know that bails have been filed.

v. This Court was conscious of requirements of Section 401 Cr.P.C., of not passing any adverse final order without hearing the accused, and, therefore, an interim order had been passed on 21st October, 2023 and issuing notice to the respondents.

vi. If this Court would not have passed the stay of the operation of the discharge order, the same would have resulted in a miscarriage of justice affecting the rights of the victim/victim's family, which need to be balanced with the claim for liberty by the accused.

vii. Respondent No. 4 has never challenged the stay order passed by this Court, and in any case, being interim nature, it would be subject to final adjudication of the revision petition.

viii. Application under Section 390 Cr.P.C. was necessitated only because it was learnt that, in the interregnum, between passing the order on discharge and order staying operation thereof, respondent No. 4 was able to get out of jail.

ix. An application under Section 390 Cr.P.C. can be filed at any stage during pendency of main proceedings and it could not be filed along with the revision petition since the fact of respondent No. 4 being released was not known to the State.

x. ***Poosu*** (*supra*) was passed on first principles of law, independent of Section 390 Cr.P.C., and it was noted that the courts had inherent power, pending the appeal against acquittal, to secure attendance of the accused by issuance of bailable or non-bailable warrants.

xi. ***Poosu*** (*supra*) cannot be confined to the limited objective of securing presence of the accused before the Court, but is premised on a higher obligation of justice delivery, and for accused to be restored to judicial custody.

xii. The principle of *status quo ante* would be inevitably applicable, and respondent No. 4 should first surrender and then set the process of law in motion to seek relief, if so desired.

Submissions by Mr. Siddharth Aggarwal, Senior Advocate on behalf of the Complainant

19. Senior Counsel for the complainant, contended *inter alia,* as under:

i. Section 390 Cr.P.C. could not be diluted by any other provision on the statute book, considering it was a power given to the Appellate Court hearing appeals against acquittals, to arrest the accused, if need be.

ii. The use of the word "may", in Section 390 Cr.P.C. naturally ascribes a discretion in the Court to issue such warrants for arrest. This cannot be equated with ensuring, the presence of the accused during the pendency of the appeal before the Court.

iii. Exercise of Section 390 Cr.P.C. as per para 10 of ***Poosu*** (*supra*) is premised on "sufficient ground" for interfering and issuing process to the respondent. In para 13 and 14 of ***Poosu*** (*supra*), Court has to consider, whether in the circumstances of the case, the attendance of the accused can be best secured by issuance of a bailable warrant or a non-bailable warrant, which aspect, rests entirely upon the discretion of the Court. The Court would take into account various factors such as, nature and seriousness of the offence, character of the evidence, circumstances peculiar to the accused, possibility of absconding, larger interest of public and State. Further, the Court would consider the time taken when the proceedings were pending, the period which is likely to elapse, before the appeal comes up for

final hearing. Such powers ought to be invoked and exercised when the order of acquittal was perverse or clearly erroneous and results in gross miscarriage of justice.

iv. He adverted to a decision of a Division Bench of the High Court of Rajasthan in, ***State of Rajasthan v. Mubeen*** 2006 SCC OnLine Raj 842, which also involved an application under Section 390 of Cr.P.C., filed after four months of the leave to appeal against acquittal was filed under Section 378 IPC, to commit the accused to prison. The Court on the basis of ***Poosu*** (*supra*), examined if there were sufficient grounds, and directed them to be committed to prison pending the disposal of the appeal. The said judgment was upheld by the Supreme Court, and the SLP against the same was dismissed by the decision in, ***Amin Khan v. State of Rajasthan*** (2009) 3 SCC 776.

v. As regards ***Bachittar Singh*** (*supra*) cited by counsel for respondent No. 4, it was stated that the decision was in a criminal appeal, where, in para 16 it was stated, that the normal rule would be to release on bail, the accused, in State appeals against acquittals, unless for grave and exceptional reasons, the Court directs the detention and custody.

vi. Attention was further drawn to the order of dismissal of bail dated 15th July 2023 passed by the ASJ which, in para 61, stated that the respondent No. 4 was an influential person and can threaten witnesses as well, and there was a reasonable apprehension in this regard. It was contended that unlike an acquittal where the trial is already over, if the discharge is reversed, the witnesses who are available, would still have to be examined and they remained

vulnerable to being influenced by a discharged accused. Therefore, the power under Section 390 Cr.P.C. is critical in this context. It was further stated, that the entire material in an acquittal situation of the Trial Court is on record, whereas since discharge is at the initial stage itself, the assessment is impeded.

Submissions by Mr. Vikas Pahwa, Senior Advocate on the behalf of respondent Nos.2 and 3.

20. As regards respondent Nos.2 and 3, being in custody, and having not been released post the discharge and before the stay order was passed by this Court, it was contended by Senior Counsel for respondent Nos. 2 and 3, *inter alia*, as under:

i. Any decision in the application under Section 390 Cr.P.C. would potentially affect the respondent Nos.2 and 3 as well, since it will colour the status of their arrest.

ii. The interim stay was given in exercise of powers under Section 482 Cr.P.C., on the basis of which, the respondent Nos.2 and 3 are in custody, whereas arrest can only happen pursuant to a remand order by a Magistrate, the right being protected under Article 22(2) of the Constitution of India.

iii. Respondent Nos.2 and 3, along with respondent No. 4 were released by an order passed on the same day of 20th October 2023 by the ASJ and the directions, that they were to be released forthwith, with orders being given *dasti* to the prosecution. This includes knowledge of the State of the release orders passed by the ASJ.

iv. Section 437A Cr.P.C. was brought on the statute book in 2009, prescribing execution of bail bonds with sureties of accused to appear before the Appellate Court during disposal of the appeals. He drew attention to Law Commission Report Nos. 154 and 268, to contend that Section 437A was inserted in the Cr.P.C. since Section 390 Cr.P.C. had proven unsuccessful in securing the presence of the acquitted accused before the Appellate Court, in appeals against acquittal and pleas for enhancement of sentence.

v. Section 390 Cr.P.C. itself was predicated on the accused having been released since it mandates an issue of warrant for arrest and, therefore, by virtue of an interim order, a *status quo ante* cannot be achieved.

Analysis

21. This judgment is limited to the disposal of the application filed under Section 390 Cr.P.C. read with Section 482 Cr.P.C., on behalf of the petitioner/ State. Through the present application, the State seeks directions to respondent No.4 (*Sudershan Singh Wazir*), to surrender to judicial custody, in light of the stay order granted by this Court on 21st October 2023, on the operation of the order of discharge dated 20th October 2023 passed by the ASJ, Tis Hazari Court.

22. Even though the submissions made by the parties traversed various aspects of criminal jurisprudence, the application itself is on a basic premise that once this Court had stayed the operation of the discharge order, the status of respondent No. 4 relegated back to as it was, before the order of discharge was passed, and all the respondents/ accused, therefore, will be at par. The benefit of securing release, pursuant to the

discharge order could not subsist for respondent No. 4, the other accused being still in custody. Therefore, respondent No. 4 ought to surrender.

23. There are two broad aspects of analysis: ***firstly***, the impact of the operation of the impugned order of discharge and whether it ensures a *status quo ante* with all its consequences, in that the discharge order would remain suspended and the accused would be in the same condition as they were, before the impugned order was passed; ***secondly***, the mandate of Section 390 Cr.P.C. to be exercised by the Court, as is being requested by the State.

24. Though Section 390 Cr.P.C. relates to arrest of accused in an appeal from acquittal, the exercise of that power is extended to the High Court in exercise of its revisional jurisdiction under Section 401 Cr.P.C. What therefore, is to be assessed is, whether this Court must exercise powers under Section 390 Cr.P.C., in this revision petition, pending before this Court, against the discharge order.

25. At this stage, the Court is faced with: ***firstly***, a stay granted *vide* order of this Court dated 21st October 2023, on the operation of the discharge order; and ***secondly***, plea of the State that respondent No. 4, who took the benefit of the discharge order and was released from judicial custody, be arrested, pending the disposal of the revision petition.

26. Axiomatically, the Court is seized of the revision petition and therefore, still has to adjudicate upon the legality of the discharge order. The discharge order is therefore, not *non est*, as was sought to be contended, as part of submissions.

27. Any consequence which would arise out of the discharge order, has been paused by the stay order granted by this Court, which though granted on 21st October 2023 till the next date of hearing, has continued through successive orders.

28. There was no occasion for the State to know that the respondent No. 4 had been released, since if it were so, they would have moved a Section 390 Cr.P.C. application immediately at that stage. The question, therefore, would be, whether powers under Section 390 Cr.P.C. were suffused in grant of the stay of the impugned discharge order or was the Court bereft of the power to ensure that the accused are not released, till the Court is able to hear the matter more substantially.

29. Essentially, what needs to be determined is, whether release of respondent no. 4, having fructified in the interregnum, between the passing of discharge order by ASJ and directions of stay by this Court, cannot be interfered with by this Court.

30. On first principles, this itself would seem as an absurd proposition. The powers of a Constitutional Court cannot be denuded, basis a practical/ ministerial step having occurred, which as per respondent No. 4, is to be preserved. In the opinion of this Court, there can never be a situation where the Court in its discretion, would not take steps to rectify this situation and would not correct it, to ensure that, in effect, its orders are both judicially and practically implemented.

31. To contend, as has been, by the counsel for respondents, that *status quo ante* cannot be achieved, would effectively mean that this Court is completely disabled from taking any steps and is expected to stand as a mute witness to a fortuitous sequence of events.

32. The statutes, having been carefully drafted, embody provisions in order to address all such eventualities. One such provision, relevant in this situation, is Section 390 Cr.P.C. In the opinion of the Court, therefore:

i. ***Firstly***, its applicability in revisional jurisdiction is already crystalized by Section 401 (1) Cr.P.C.

ii. ***Secondly***, there is no provision which denudes the power of Court or prohibits it from securing custody of the accused while adjudicating a challenge to discharge. This cannot be so, naturally, since a successful challenge to discharge of an accused would require that the accused be placed back in custody and the trial would recommence.

iii. ***Thirdly***, Section 390 Cr.P.C. is in a separate silo, empowering the Court to ensure the custody of an accused while deciding an appeal against acquittal or in its revisional jurisdiction. It is a discretion given to the Court, for securing custody of accused, who has been acquitted or, as in this case, discharged. This discretion is to be exercised in accordance with law.

iv. ***Fourthly***, in consequence, the exercise of power under Section 390 Cr.P.C. results in reviving his status as an accused and that of the proceedings against him. This has been clearly articulated by the Supreme Court in ***Poosu*** (*supra*), which dealt with the rationale of Section 427 Cr.P.C. (which was the 1897 precursor to Section 390 Cr.P.C). In para 10, of the judgment in ***Poosu*** (*supra*), the Court states as under:

> "*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*."
>
> (emphasis supplied)

v. ***Fifthly***, discretion to be exercised under Section 390 Cr.P.C., has to be based on sufficient grounds, and is to be exercised judicially by the Court after taking into consideration, various factors such as nature and seriousness of offence, character of evidence, circumstances peculiar to accused, possibility of his absconding, larger interest of the public and State. In this regard, para 13 of the judgment in ***Poosu*** (*supra*), has been extracted hereunder:

> "*13. Thus there can be no doubt that this Court while granting special leave to appeal against an order of acquittal on a capital charge is competent by virtue of Article 142 read with Article 136, to exercise the same powers which the High Court has under Section 427. Whether in the circumstances of the case, the attendance of the accused respondent can be best secured by issuing a bailable warrant or non-bailable warrant, is a matter which rests entirely in the discretion of the Court. Although, the discretion is exercised judicially, it is not possible to computerise and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the Court would take into account the various factors such as,*
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> > *"the nature and seriousness of the offence, the character of the evidence, circumstances peculiar to the accused, possibility of his absconding, larger interest of the public and State" (see State v. Capt.*

Jagjit Singh [AIR 1962 SC 253 : (1962) 3 SCR 622 : (1962) 1 Cri LJ 215]).

In addition, the Court may also take into consideration the period during which the proceedings against the accused were pending in the courts below and the period which is likely to elapse before the appeal comes up for final hearing in this Court. In the context, it must be remembered that this overriding discretionary jurisdiction under Article 136 is invoked sparingly, in exceptional cases, where the order of acquittal recorded by the High Court is perverse or clearly erroneous and results in a gross miscarriage of justice."

(emphasis supplied)

vi. ***Sixthly***, the Appellate Court in exercise of its powers under Section 390 Cr.P.C., may suspend the order of acquittal/ discharge, as has been noted by the Supreme Court in ***Mahesh Kariman Tirki*** (*supra*).

33. Whether an application under Section 390 Cr.P.C. is maintainable, having been filed, subsequent to the revision petition, and not together with it, invited contrary assertions from the State and complainant on one side and the accused/ respondents on the other. Without venturing to dissect the provision, attention has been drawn to a decision of a Division Bench of the High Court of Rajasthan in ***Mubeen*** (*supra*) which involved an application under Section 390 Cr.P.C. filed 4 months after the leave to appeal against the acquittal. ***Poosu*** (*supra*) was applied, sufficient grounds were found, and the accused were directed to be committed to prison. Subsequently, an SLP filed, against the said decision, to Supreme Court, was dismissed *vide* the judgement of the Supreme Court in ***Amin Khan*** (*supra*).

34. The decision of the Rajasthan High Court in ***Mubeen*** (*supra*), having been affirmed by the Supreme Court, is an indication that an exercise of Section 390 Cr.P.C. power could have been done at any stage.

35. It is quite clear that by staying the operation of the impugned order, the Court intended to ensure that consequential action under the discharge order is not taken. This is in context of the urgent mentioning by the State, immediately after the impugned order was passed and the urgent hearing before the Court.

36. The application under Section 390 Cr.P.C., in the present case, was filed on 24th January 2024. In the peculiar circumstances of this case, when the State was admittedly, not aware, that before the revision was listed before this Court, respondent No. 4 had already been given bail, the State could not be precluded from filing the Section 390 Cr.P.C. application subsequently. ***Firstly***, the provision itself does not provide any limitation to such a plea being made; ***secondly***, the essence of Section 390 Cr.P.C. power is the exercise of discretion by the High Court to commit an accused back to prison. In this regard, the observations of Supreme Court in ***Poosu*** (*supra*) are relevant, which noted that even before the enactment of Cr.P.C. in 1882, the High Court as a matter of judicial practice, had the power to secure attendance of the accused. In this regard, Para 7 of the judgment in ***Poosu*** (*supra*) is extracted hereunder:

> "*7. It may be noted that this provision was for the first time enacted in the Code of 1882. But even before its enactment, the High Court as a matter of judicial practice, had the power, pending the appeal against an order of acquittal, to secure the attendance of the accused respondent by bailable*

or non-bailable warrants. As pointed out by Panigrahi, C.J. in State v. Badapall Adi [ILR 1955 Cut 589]

"what was formerly the judicial practice received statutory recognition in the year 1882 when this provision in Section 427 of the Criminal Procedure Code, was introduced".

In Empress of India v. Mangu [ILR (1879) 2 All 340] (which was decided several years before the addition of this provision in the Code), a Full Bench of Allahabad High Court held, that the High Court has the power to cause the arrest and detention of the accused in prison, pending an appeal against an order of acquittal. To the same effect was the decision of the Calcutta High Court in Queen v. Gobin Tewari [ILR (1876) 1 Cal 281] . Again in Queen-Empress v. Gobardhan [ILR (1887) 9 All 528] Sir John Edge, Chief Justice without laying down any inflexible rule, emphasised that it is not desirable that, pending the appeal against acquittal in a capital case, the prisoner should remain at large while his fate is being discussed by the High Court. The ratio of this decision was followed by a Division Bench of Orissa High Court in State v. Badapalli Adi [ILR 1955 Cut 589] ."

(emphasis supplied)

37. Counsel for respondent No. 4 further contended that, respondent No. 4's attendance can be secured before the Court and arrest may not be necessitated.

38. As per ***Poosu*** (*supra*), the Court would, therefore, have to find sufficient grounds for issuing a warrant and committing the accused to prison. Relevant factors, such as period of incarceration, the extent of the investigation, the nature of the crime, the role of the accused, the possibility of tampering would come into play.

39. In this regard attention has been drawn to nature and seriousness of offence and possibility of tampering of evidence, particularly when the

trial of the case, just might have to recommence. Reliance in this regard, was placed on order dated 15th July 2023, passed by the ASJ, dismissing respondent No. 4's bail application.

40. Even though it was argued by counsel for respondent No. 4, that referring to a bail order, which preceded order of discharge, may not be the correct approach, this Court disagrees. If analysis has been presented by the Trial Court, which underscores the importance of custody in a case, the Court is well within its right to consider it.

41. In any event, aside from the bail order, it is noted that the prosecution case is that Mr. Trilochan Singh Wazir, R/o Gandhi Nagar Jammu, and a former MLC (Jammu), was found dead in a flat in Delhi. His body was discovered on 9th September 2021, when a foul stench was emanating from the flat. Investigation revealed involvement of the accused persons, including respondent No. 4, and a conspiracy to murder the deceased. The accused was stated to be an influential person and was an MLC in the State Assembly, and a member of *Gurudwara Prabhandak Committee* and there was a concern that he could tamper with evidence and influence the witnesses as well, basis allegations that witnesses had been threatened.

42. Even though the analysis by the order dismissing bail is not final or binding, needless to state, respondent No. 4 is not precluded from seeking bail before the Trial Court, which would be considered in accordance with law, on its own merits.

43. However, his release pursuant to discharge order, operation of which is stayed, needs to be reversed as a first step. Otherwise having stayed the discharge orders, it would revive status of respondents as

accused, and at least in interim, they would have to be restored to judicial custody. This would apply to all the respondents.

44. Contention of respondent No. 4, that stay does not operate upon him since he was released, would mean that discharge order is final, binding, and effective, and the stay order of this Court, is not.

45. The other contention of counsel for respondent No. 4, that State would have been aware of the bail granted to him, but chose not to present that fact before this Court on 21st October 2023, is neither here nor there. It is inconceivable that, if the State knew that respondent No. 4 had been discharged on the previous night, they would have not brought it to attention of this Court. Having fought tooth and nail, on the issue of surrender through Section 390 Cr.P.C. application, this Court cannot give benefit of this to respondent No. 4.

46. Besides, as rightly contended by the Senior Counsel for the State, pursuant to discharge, release is to the satisfaction of Jail Superintendent and there is no way to know that release has been granted. Besides, the stay granted on 21st October 2023 has itself not been challenged by respondents and in any event, is only interim in nature, subject to final adjudication of the revision.

47. Reliance by counsel for respondent No. 4 on the decisions in ***Shree Chamundi Mopeds Ltd.*** (*supra*), ***Allahabad High Court Bar Assn.*** (*supra*), ***Mulraj*** (*supra*), ***Hammad Ahmed v. Abdul Majeed*** (2019) 14 SCC 1, ***Kishore Kumar Khaitan v. Praveen Kumar Singh*** (2006) 3 SCC 312, ***Commissioner of Central Excise v. Anuj Vohra*** 2003 SCC OnLine Del 1299, may not have direct relevance in this matter.

48. The decision of the High Court of Bombay in ***Rajaram v. State of Maharashtra*** 2019 SCC OnLine Bom 146 and the High Court of Gujarat in ***Munirbhai Fejalbhai Malek v. State of Gujarat*** 2015 SCC OnLine Guj 553, reiterate the settled position of law, that, upon issuance of warrants under Section 390, the accused may either be remanded to prison or admitted to bail.

49. The decision of the High Court of Bombay in ***State of Maharashtra v. Bapu Pandu Mali*** 2009 SCC OnLine Bom 1327, may not come to the aid of respondent No. 4 at this stage, as the decision elucidates the procedure to be followed, post the issuance of a remand order/ order granting bail, in proceedings under Section 390 Cr.P.C.

50. The decision of the Supreme Court in ***Bihari Prasad Singh v. State of Bihar*** (2000) 10 SCC 346, may not directly apply to the present controversy, considering it was passed in a case where the Appellate Court refused to entertain the petition on the grounds that the accused person had not surrendered. However, in the present case, the revision petition has been admitted and is pending before this Court. A stay of operation of the impugned order, would necessarily mean that, as a consequence, impugned order would have to cease, pause, or reverse, depending on the circumstances.

51. Reliance by counsel for respondent No. 4, on ***Bachittar Singh*** (*supra*) may not be relevant since the decision was in a criminal appeal filed by the State against acquittal, where the normal practice is not to place accused in custody during pendency of appeal, unless there are grave and exceptional reasons.

52. Here, by order dated 21st October 2023 of this Court, it is evident that the Court was cognizant that the Trial Court had overlooked evidence and had undertaken a huge exercise of going through a mini trial and assessing probative and evidentiary value of the evidence, which ought not to have been done while framing charges.

53. The State relied on the following precedents to further the proposition, that a mini trial cannot be conducted at the stage of framing of charges:

i. ***Saranya v. Bharathi*** (2021) 8 SCC 583
ii. ***Bhawna Bai v. Ghanshyam*** (2020) 2 SCC 217
iii. ***State of Rajasthan v. Ashok Kumar Kashyap*** (2021) 11 SCC 191
iv. ***State (NCT of Delhi) v. Shiv Charan Bansal*** (2020) 2 SCC 290
v. ***Soma Chakravarty v. State*** (2007) 5 SCC 403
vi. ***Akbar Hussain v. State of J&K*** (2018) 16 SCC 85
vii. ***Ujjwal Gupta v. State (NCT of Delhi)*** 2022 SCC OnLine Del 4451

54. The discharge itself, is therefore under the judicial scanner of this Court, and stage of filtering evidence has not been reached. Present situation, therefore, is not akin to an acquittal, where in an appeal, where two views are possible, the view taken by the Trial Court should not be disturbed. Pursuant to the same, respondent No. 4's reliance on the decision of the Supreme Court in ***Chandrappa v. State of Karnataka*** (2007) 4 SCC 415, may not be warranted.

55. By order dated 21st October 2023, this Court has brought into question the very exercise by the ASJ in assessing the evidence pre-trial, particularly in case of a heinous murder.

56. The Court has appreciated the submissions made by Mr. Vikas Pahwa, Senior Advocate, on behalf of respondent nos. 2 and 3, which have been of assistance to this Court in overall assessment. However, this order is only adjudicating application under Section 390 Cr.P.C. filed on behalf of petitioner-State *qua* respondent No. 4 and does not extend to pleas of respondent nos. 2 and 3.

57. Some of the additional pleas advanced by Mr. Pahwa, relating to Section 437A Cr.P.C., do not appeal to this Court. Section 437A Cr.P.C. is meant to ensure that, till the time appeal/ challenge is filed, the accused are put to terms through bail bonds and sureties in order to secure their attendance before the Appellate Court. However, once the appeals are filed, the powers of the Appellate Court get triggered in that either the Appellate Court decides to ensure the presence of the accused by having them submit bail bonds and sureties, or otherwise exercise the powers under Section 390 Cr.P.C.

Conclusion

58. It is underscored, that release of the respondent No. 4, was a direct consequence of the impugned discharge order by the Trial Court. The operation of the Trial Court order, being stayed by this Court, the release itself becomes invalid.

59. Respondent No. 4 is, therefore, obliged to be taken into custody and cannot avail the benefit of a discharge order, the operation of which, has been stayed by this Court. Not securing the custody of respondent No. 4, would amount to the stay order granted by this Court, being ineffective, of no consequence, and bereft of any teeth. This, the Court, cannot countenance. Thus, considering the stay order dated 21st October

2023 passed by this Court, respondent No. 4 continuing to avail the benefits of the impugned discharge order, would be illegal, invalid, and infirm.

60. In light of the above discussion, this application under Section 390 Cr.P.C., filed by the State, is allowed; respondent No.4 is directed to surrender before the Trial Court, which shall take steps to secure his judicial custody.

61. As stated above, this does not preclude respondent No.4 to exercise his rights for bail before the Trial Court which shall be assessed in accordance with law.

62. Accordingly, the application stands disposed of.

CRL.REV.P. 1139/2023 CRL.M.A. 29229/2023 CRL.M.A. 31170/2023 CRL.M.A. 5247/2024

1. List on 18th November, 2024, the date already fixed.

2. Judgment be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

NOVEMBER 04, 2024/SM/*kp*