

\* IN THE HIGH COURT OF DELHI AT NEW DELHI  
+ Crl. Misc.(Bail) No.730/2008  
in  
Crl.A.No.456/2008  
% Date of Decision : 29<sup>th</sup> of September, 2008

# SURAJ JIT CHAUDHRI .....Appellant  
! Through: Mr.D.C.Mathur,Sr.Adv.with  
Ms.Manisha Bhandari &  
Mr. Onkar Srivastava, Advs.

versus  
\$ CBI .....Respondent  
^ Through: Mr. R.M.Tewari, Adv. for CBI  
Mr. Arun Jaitley, Sr. Adv.  
with Mr. Hari Shankar, Adv.  
for the complainant.

\* CORAM:  
HON'BLE MR.JUSTICE B.N. CHATURVEDI  
HON'BLE MR.JUSTICE P.K. BHASIN

1. Whether the Reporters of local papers  
may be allowed to see the judgment? —
2. To be referred to the Reporter or not? —
3. Whether the judgment should be  
reported in the Digest? YES

: **B.N.CHATURVEDI, J.**

1. Instant application, under Section 389 Cr.P.C.  
made by the appellant, seeks suspension of sentence  
inflicted on him vide impugned order of sentence dated  
3.5.2008 under Sections 302 IPC and 3/4 of the

Explosive Substances Act, 1908.

2. Facts relevant for disposal of the application, as gathered from the record, disclose that the appellant, a Lt. Colonel in the Indian Army, was married to one Smt.Rani Chaudhary on 31st of March, 1971. Their marital ties suffered a set back when in May, 1976 Smt.Rani Chaudhary left the appellant's company and started living separately with her parents. She filed a divorce petition under Section 13(1)(1.a) of the Hindu Marriage Act on 1<sup>st</sup> of September, 1979 in the Court of District Judge, Delhi, wherein an ex parte decree of divorce was granted in her favour on 6<sup>th</sup> of December, 1979. The appellant filed an appeal before this Court on 5<sup>th</sup> of March, 1980 for setting aside the ex parte decree. At the same time, he also filed a petition on 7<sup>th</sup> of March, 1980 before the Court concerned of learned Additional District Judge, Delhi for setting aside the ex parte decree. The application for setting aside ex parte decree was eventually dismissed on 6<sup>th</sup> of January, 1981 by the Court concerned of learned Additional District Judge, Delhi. The appeal for setting aside ex

parte decree, filed on 5<sup>th</sup> March, 1980, was dismissed by this Court on 17<sup>th</sup> of March, 1981. The appellant, in the meantime, filed another appeal against the order dated 6.1.1981 of the learned Additional District Judge, whereby his application dated 17.3.1980 for setting aside ex parte decree was dismissed. Allowing the appeal so filed, the ex parte decree dated 6.12.1979 was set aside by this Court on 14<sup>th</sup> of September, 1981. Aggrieved by the order, Smt.Rani Chaudhary went in appeal before the Supreme Court on 12<sup>th</sup> of October, 1981. The Supreme Court, allowing the appeal, set aside the order dated 14.9.1981 and restored the ex parte decree of divorce passed in favour of Smt.Rani Chaudhary. A review petition filed by the appellant on 25<sup>th</sup> of September, 1982 before the Supreme Court resulted in dismissal thereof on 9<sup>th</sup> of December, 1982.

3. Smt.Rani Chaudhary, while her litigation with the appellant was still on, came into contact with Kishan Sikand, deceased in October, 1979. Their acquaintance, in a course of time, developed into

friendship. Smt. Rani Chaudhary decided to get married to Kishan Sikand, deceased on a decree of divorce being finally granted in her favour. Smt.Rani Chaudhary towards the end of October, 1980 shifted to the house of Kishan Sikand, deceased, at 98, Sunder Nagar and kept on staying with him there till his death on 2<sup>nd</sup> October, 1982. The appellant did not like Smt.Rani Chaudhary staying with Kishan Sikand, deceased, in his house. He could also not digest the prospect of Kishan Sikand, deceased, and Smt.Rani Chaudhary getting married to each other at any later point of time. He wanted the deceased to make Smt.Rani Chaudhary move out of his house, which, of course, never happened.

4. It is the prosecution case that sometime after 7.30 p.m. on 25.9.1982, the appellant, with an intent to eliminate Kishan Sikand, deceased, personally carried a parcel containing a hand grenade and placed the same at the second landing of the stairs leading to first floor of 98, Sunder Nagar where the deceased lived with Smt.Rani Chaudhary. The explosive device

in the parcel was based on a pressure release, designed to explode on opening of the parcel. The parcel in question was noticed by the deceased as well as Smt.Rani Chaudhary and their friend Shri Suresh Gopal, PW-3, and his wife at about 9/9.30 p.m. of the same evening when they were coming down stairs from the first floor to go out for a dinner. Noticing the parcel, the deceased picked it up as it was addressed to him and placed the same in a nearby window sill enclosed by iron mesh and went out for dinner. On return, the deceased, as also Rani Chaudhary, forgot to collect the parcel and thus the same remained lying in the window sill itself. It was only on 2<sup>nd</sup> of October, 1982 in the evening that PW Vijay Ram, servant of a person occupying the front portion of the first floor of the house as a tenant, who, noticing the parcel lying in the window sill picked it up and finding that the same was addressed to the deceased delivered it to him in his bedroom. The deceased placed the parcel for a while in the side rack of his dining-cum-drawing room before opening the same around 5.45 p.m. when an

explosion occurred which resulted into his death.

5. The appellant was eventually arrested on 31<sup>st</sup> of July, 1983. On his house/office search, certain recoveries, as mentioned at pages 11-13 of the impugned judgment, were made. Pursuant to disclosure by the appellant, the typing establishment wherefrom he allegedly got the address of the deceased typed on a slip of paper pasted on the parcel was located and the particular typewriter that was used for typing the deceased's address was, on being pointed out by him, seized. The expert concerned at CFSL, on comparison of specimens and questioned typed address, referred to him, opined the questioned English typescript and the specimens from the seized typewriter being from the one and the same very typewriter.

6. Plea for suspension of sentence and release of appellant on bail pending appeal, raised by Shri D.C.Mathur, Senior Advocate, appearing for the appellant, emanates from his criticism of the impugned judgment of conviction on various counts.

To begin with, Shri Mathur contended that the findings recorded by the learned trial court in regard to various circumstances as firmly established are based on conjecture and surmises rather than on evidence. Referring to internal page 105 of the impugned judgment, it was contended that by simply noticing the marking on the hand grenade that had exploded and caused death of Kishan Sikand, the learned trial court was not justified in holding that it was a hand grenade manufactured at a Pakistan Ordnance Factory. Shri Mathur argued on the strength of statement of PW-45 Maj.R.R.Gupta and DW-3 Lt. Gen. R.M. Vohra (Retd.) that the appellant during War with Pakistan in 1971 had to be evacuated from the battlefield in a wounded condition and, thus, there was no occasion for him to have had acquired the hand grenade in question from the battlefield. He further contended that there is no evidence that out of the hand grenades of Pakistan origin seized during the War and later issued to different Units of the Indian Army, any number of such hand grenades

were made available to the particular Unit of the Army where the appellant happened to be posted at the relevant time. It was contended that the finding by the learned trial court that the hand grenade in question could have been procured by the appellant is thus clearly unfounded. Questioning the credibility of Mohd.Shafi, PW-7, Shri Mathur argued that Mohd.Shafi, PW-7, claims to have had seen the appellant coming out of the gate of deceased's house and moving away towards Sunder Nagar Market and that he had immediately thereafter gone upstairs to hand over the key of the car to the deceased, but did not notice any parcel lying at the second landing of the staircase leading to the first floor. He pointed out that according to Suresh Gopal, PW-3, and Smt.Rani Chaudhary, PW-1 they came across with the parcel placed at second landing of the stairs only at about 9/9.30 p.m. when they alongwith the deceased were coming down stairs to go out for a dinner. Shri Mathur contended that the statement of Mohd.Shafi, PW-7, was recorded by the CBI only after 9 ½ months



of the incident on 16<sup>th</sup> of July, 1983, which clearly shows that instead of being a truthful witness, he is simply a procured one and, thus, no part of his testimony could have been accepted to connect the appellant with the crimes. To support his contention in this regard, Shri Mathur, cited a decision of the Supreme Court in “Kali Ram Vs. State of Himachal Pradesh”, AIR 1973 SC 2773(para 15).

7. Against the finding by the learned trial court that the appellant had a motive to commit the murder of Kishan Sikand, Shri Mathur, referring to a letter dated 3.3.1982 written by the appellant to Rani Chaudhary, PW-1 contended that, as a matter of fact, much before the Supreme Court finally allowed the appeal of Smt. Rani Chaudhary on 24.8.1982, taking a cue from whatever transpired in the course of hearing on the matter, the appellant had resigned to his fate and was left with no rancour towards her or the deceased. It was further contended that the incident having taken place much after the appellant had finally written to Ms.Rani Chaudhary, PW-1 on 3<sup>rd</sup> of

March, 1982 extending his good wishes to her, his alleged spiteful disposition in the past could not be held as proximate motive to commit the crimes. Learned counsel felt that the learned trial court while concluding that the appellant had the motive to commit the crimes unwittingly lost sight of and completely ignored the said letter dated 3.3.1982 of the appellant. It was lastly argued that all through the trial period, which lasted for about 24 years, the appellant continued to be on bail with no complaint of misusing the liberty and that the appellant being an old man, aged about 72 years, deserves to be released on bail pending appeal.

8. Opposing the application, Shri R.M.Tewari, Advocate, appearing for the CBI, relying on a decision of the Supreme Court, in “Gomti Vs. Thakurdas & Others”, (2007) 11 SCC 160, contended that the fact that the appellant was on bail during the trial and that he did not misuse the liberty is not of much significance on conclusion of trial once he has been adjudged guilty of the offences and convicted therefor.

He argued that looking at the nature of accusation made against the appellant and the manner in which he committed the murder as also the nature and quality of evidence connecting him with the crime/s, there is no good reason for suspension of sentence and his release on bail during the pendency of the appeal.

9. Countering the argument raised on behalf of the appellant against the creditworthiness of testimony of Mohd.Shafi, PW-7, Shri Tewari submitted that even though he, while going upstairs, does not claim to have had noticed any parcel placed in the stairs, omission on his part in this respect could not justify a doubt being raised about his presence outside the deceased's premises on the relevant date and time. It was contended that the witness had come to the house of the deceased on his services being requisitioned to repair his car and being a casual visitor, he could not be expected to take note of each and everything lying there, including the parcel placed in the stairs. Shri Tewari, apart from the testimony of Mohd.Shafi, PW-7, also made a reference to the evidence to the effect that

the address of the deceased pasted on the parcel containing the hand grenade was got typed by none other than the appellant himself from a commercial college of typing which was identified pursuant to a disclosure by him in that regard. He pointed out that the specimens from the typewriter, as identified by the appellant, used in typing the deceased's address pasted on the parcel, were, on comparison with the questioned typescript by the expert concerned at CFSL, found to be from the same very typewriter which was seized by the IO from the commercial college. It was accordingly argued that it is not only the statement of Mohd.Shafi, PW-7, but also the evidence that the address of the deceased on the parcel was got typed by the appellant himself, clearly corroborates the statement of Mohd.Shafi, PW-7. The fact that parcel bore typed address of the deceased was questioned by Shri D.C.Mathur, learned counsel for the appellant by referring to the statement under Section 161 Cr.P.C. of Ms.Rani Chaudhary, PW-1 recorded by the local police wherein she had told that

the address on the parcel was a hand written one. Shri Tewari however, pointed out that in her statement under Section 161 Cr.P.C. recorded by the CBI after taking over investigation from the local police, Ms.Rani Chaudhary has refuted that she ever made any statement to the local police that the address on the parcel was a handwritten one. Shri Mathur, relying on a decision of the Supreme Court in "K.Chandrasekhar Vs. State of Kerala & Others", 1998 SCC (Cri) 1291(para 24), contended that the investigation of the case was transferred from local police to CBI only to carry out further investigation and in that situation it was not open to CBI to resort to reinvestigation by recording yet another statement under section 161 Cr.P.C. of PW-1, Ms.Rani Chaudhary afresh contradicting the one already recorded by the local police.

10. Shri Arun Jaitley, Senior Advocate, appearing for the complainant, who joined the CBI counsel in opposing the application, supplemented by contending that unlike in the matter of bail, in the course of his

trial, where the appellant enjoyed the benefit of presumption of innocence, the same ceases to be available to him on his conviction and his continuance on bail throughout the trial with no adverse report of misusing the liberty, pales into insignificance being of no relevant consideration in the context of the plea for suspension of execution of sentence and release on bail pending disposal of appeal. A decision of Supreme Court in “Sidharth Vashisht @ Manu Sharma Vs. The State(NCT of Delhi)”, 2008 (7) Scale 321, was relied upon by Shri Jaitley to supply support to this contention. Shri Jaitley contended that the circumstantial evidence proving complicity of the appellant in commission of the crimes broadly consists of motive on the part of the appellant, possibility of the hand grenade that exploded to cause death of Kishan Sikand being available to him for procurement, the recoveries effected in the course of his house/office search, seizure of the typewriter, pursuant to a disclosure in that respect by him, that was used to type the deceased's address pasted on the parcel and

the testimony of Mohd.Shafi, PW-7. Shri Jaitley pointed out that the letter dated 3.3.1982, as reproduced at page 144 of the impugned judgment, from the appellant to Ms.Rani Chaudhary, PW-1, instead of showing that he had reconciled to the expected course of events that were likely to follow after hearing on appeal filed by Ms.Rani Chaudhary was rather in the nature of an outpouring of a frustrated mind and veiled ireful manifestation of his disturbed emotions. He added that inspite of divorce decree being granted in favour of Ms.Rani Chaudhary, PW-1, the appellant continued to be obsessed with her, which is evident from the fact that even after the appeal filed by Ms.Rani Chaudhary was allowed and ex parte decree passed in her favour by the Matrimonial Court restored, the appellant did not accept the same inasmuch as he filed a review petition before the Supreme Court on 25<sup>th</sup> September, 1982 against its order dated 24.8.1982 restoring the ex parte decree which was, of course, eventually dismissed on 9<sup>th</sup> of December, 1982. It was contended that the review

petition so filed was still pending when the incident resulting into the death of Kishan Sikand took place. The motive on the part of appellant was, thus, according to Shri Jaitley, writ large and the learned trial court was fully justified in finding existence of such a motive on his part in commission of the crime. It was further argued that even if the evidence on procurement of the hand grenade in question by the appellant is taken to fall short of firmly establishing the same, the possibility of its availability to the appellant could not be lost sight of. It was further submitted that it is equally important to note that an Indian detonator was found attached to the hand grenade and being in the Army the appellant had an access to procure it from there. Shri Jaitley, accordingly, contended that the incriminating circumstances, as proved by evidence on record, supply adequate justification for the appellant being held guilty of murder of Kishan Sikand.

11. The learned trial court enumerates the incriminating circumstances at pages 98 to 137 of the



impugned judgment while holding the same as firmly established. It has summed up the facts established by evidence on record at pages 137 to 141 thereof. Shri Mathur, appearing for the appellant, has, of course, raised a number of points to assail the impugned conviction but given the limitation on making observations touching the merits of the case with reference to the evidence on record while dealing with an application under Section 389 Cr.P.C., it is premature to embark upon an exercise associated with reevaluation of the evidence on record. Needless to say, the points of arguments raised by learned senior counsel for the appellant cannot be appropriately addressed to without a resort to re-appraisal of the evidence on record. The fact of the matter is that with his conviction by the learned court below, the appellant continues to be guilty of committing the murder so long as his such conviction is not set aside in appeal. Thus, for the present, he cannot press into service the plea of being an innocent person. Without being expressive on merits of rival contentions, prima

facie, it does not appear to be a case of conviction falling in the category of ones based on no evidence.

12. In a number of cases, including “Akhilesh Kumar Sinha Vs. State of Bihar”, (2000) 6 SCC 461, “Vijay Kumar Vs. Narendra” 45 & Ors., (2002) 9 SCC 364 : JT 2004 Supp (1) SC 60, “Ramji Prasad Vs. Rattan Kumar Jaiswal & Anr.,” (2002) 9 SCC 366 : JT 2002 (7) SC 477, “State of Haryana Vs. Hasmat”, (2004) 6 SCC 175 : JT 2004 (6) SC 6, “Kishori Lal Vs. Rupa & Ors.,” (2004) 7 SCC 638 : JT 2004 (8) SC 317 and “State of Maharashtra Vs. Madhukar Wamanrao Smarth”, (2008) 4 SCALE 412 :JT 2008 (4) SC 461, the Supreme Court has observed that once a person is convicted, normally, an appellate court would proceed on the basis that such person is guilty though in appropriate cases, it still remains open to the appellate court to suspend the sentence by recording reasons. As ruled in Vijay Kumar (supra) in considering bail plea in a case involving a serious offence like murder, the court is required to take into account 'all relevant factors like the nature of accusation made against the

accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, the desirability of releasing the accused on bail after he has been convicted for committing serious offence of murder', etc. It was held in *Sidharth Vashisht @ Manu Sharma(supra)* that mere fact that during trial period the accused was on bail and that there was no misuse of liberty, does not per se warrant suspension of execution of sentence and grant of bail. It is the existence of reasons supplying justification to suspend execution of sentence and grant of bail which really guide the course of exercise of power under Section 389 Cr.P.C.

13. In the present case, as observed earlier, the arguments advanced by learned counsel for the appellant being of a nature, the validity whereof cannot be tested without adverting to evidence on record, including re-appraisal thereof, which we refrain from doing at this juncture for obvious reason of prejudice that may likely occur to one or the other side, given the nature of accusation, manner of

commission of the crime and gravity of the offence, we find it difficult to accede to the prayer made in the application. Here, in this case, the appeal was filed recently in May, 2008 and the same stands admitted for hearing. Being in custody, the appellant can expect his appeal being taken up for hearing within a reasonable time. It is not a case where the appellant is incarcerated for a considerably long period awaiting hearing on his appeal. In the given facts and circumstances, we find no adequate reasons to direct suspension of execution of sentence and release of appellant on bail at this stage. The application is, therefore, dismissed.

(B.N.CHATURVEDI)  
JUDGE

September 29, 2008  
RS/

(P.K.BHASIN)  
JUDGE