REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 937 OF 2009
(Arising out of SLP (Crl.) No. 3209 of 2008)

Mohammed Ishaq .....Appellant

Versus

S. Kazam Pasha & Anr. .....Respondents

With

WRIT PETITION (CRL.) No. 13 OF 2008

JUDGMENT

Dr. Mukundakam Sharma, J.

SLP (Crl.) No. 3209/2008

1. Delay condoned.

2. Leave granted.

3. This appeal arises out of the judgment and order dated 29.01.2007 passed by the High Court of Andhra Pradesh at Hyderabad whereby the learned Single Judge partly allowed the appeal filed by the respondent herein by setting aside his conviction for the offence under Sections 148, 392 and

452 of the Indian Penal Code (for short 'IPC') and convicted him under Sections 147 and 451 IPC.

4. Factual matrix of the case is as follows:

Mohd. Ishaq – PW-1 (the appellant herein) is a resident of House No. 23-2-10, Khaja-Ka-Chilla, Moghalpura, Hyderabad which is a sarfakhas property. His father, Mohd. Maqbool was working as watchman of Khaja-Ka-Chilla. He resided in the said house as per the agreement with sarfakhas. After his death, his son (PW-1) continued to live in the said house with his family members. PW-7 and Anjuna Fathima are the sisters of PW-1. PW-2 and PW-9 are daughters of PW-7. PW-8 is daughter of his another sister. PW-10 is the younger sister of PW-8. PW-13 is wife of PW-1. They were all residing together in the above-mentioned house. The said house comprises of six rooms, out of which three rooms fell to the share of PW-1, two rooms fell to the share of his sister – Ahmedi Begum (PW-7) and one room fell to the share of his another sister – Anjum Fatima. One Latif Khader Saheb had established Latifaia Arabic College by the side of house of the appellant herein. Respondent herein (A-1) is the son-in-law of said Latif Khader Saheb. Respondent (A-1) was working as Librarian in the said college. A-2 to A-5 are employees of the said college whereas A-6 and A-7 are friends of respondent (A-1).

5. It has been stated that A-1 to A-7 demanded that the appellant would vacate the above-mentioned house. They tried to evict the appellant forcibly from the house but locality of the people intervened and made their efforts futile. However, on 10.06.1990 at 7.00 AM, Ayesha Khan (PW-2) while taking water from a tap which was near the gate of Khaja-Ka-Chilla saw A-1 to A-7 entering the premises. She went and informed her mother Ahmedi Begum (PW-7). The appellant (PW-1) and PW-7 closed the doors of the house so as to prevent the entry of A-1 to A-7 and their associates. However, A-1 to 7 broke open the doors of the house and gained entry into the house. When they attempted to lift the household articles, the appellant and his sister's husband Mohd. Qasim went through another door of the house to the police station to inform the highhanded acts of the accused. When PWs 7, 9, 10 and 13 prevented A-1 and his associates from removing the household articles, they were beaten up by the accused. By the time appellant returned from the police station, A-1 and his associates loaded household articles in a lorry bearing No. ABT 6596 and emptied the house. The efforts made by PW-1 to prevent A-1 to A-7 and their associates from removing the household articles did not yield any fruitful result. He along with the injured woman folk i.e. PWs 7,9,10 and 13 went to the police station and

presented a report. One M.A. Hafiz Khan (PW-17), Inspector of Police, Mogalpura Police Station received the report and registered a case bearing Crime No. 69 of 1990 under Sections 147, 452 and 392 of IPC and sent the injured i.e. PWs 7,9,10 and 13 to the hospital. He inspected the scene and found no house articles in the house bearing No. 23-2-10, Khaja-Ka-Chilla, Mogalpura. Dr. Swarna Lata Singh (PW-5) medically examined Ahmedi Begum (PW-7), Asma Begum (PW-9), Wjeed Shareef (PW-10) and Naseem Begum (PW-13) and issued wound certificates in respect of them.

6. PW-1, (the appellant herein) having come to know that his articles were hidden at house No. 18-7-312/1/C/25, Talabkatta, Amannagar filed a petition under Section 94 of Criminal Procedure Code (for short the 'Cr.P.C.') in the Court of Chief Metropolitan Magistrate-cum-First Addl. Magistrate, Hyderabad for issuance of search warrant. The learned Chief Metropolitan Magistrate issued the search warrant whereupon C. Ravindra Nath (PW-14), Inspector of Police, CCS Hyderabad searched the house adjacent to the house bearing No. 18-7-312/1/C/25, Talabkatta, Amannagar and seized the household articles belonging to the appellant party which were produced before the court. The learned Chief Metropolitan Magistrate released the articles to PW-1 for interim custody

pending disposal of the case. T. Bhojraj Yadav (PW-15), Inspector of Police, CCS Hyderabad took up investigation from PW-17. He examined PW-1 to PW-13 and recorded their statements under Section 161 Cr.P.C.

7. After completing the investigation, M.Madhav Reddy (PW-16), Inspector of Police, filed the charge sheet before the XXI Metropolitan Magistrate, Hyderabad. The Metropolitan Magistrate took the charge sheet on file and committed the case to the Metropolitan Sessions Division, Hyderabad. The Metropolitan Sessions Judge, Hyderabad took up the case and assigned the same to the Additional Metropolitan Sessions Judge, Hyderabad who framed charges under Sections 148, 452/149, 324/149 and 397/149 IPC in respect of all the accused persons i.e. A-1 to A-7. The accused pleaded not guilty and claimed to be tried. To bring home the guilt of the accused for the offences as aforesaid, the prosecution examined 17 witnesses and proved 26 documents and exhibit 28 material objects.

8. The trial court, on appreciation of the evidence brought on record and on hearing the prosecution and the accused, found A-1 guilty for the offences under Sections 148, 452 and 392 IPC and convicted and sentenced him to suffer rigorous imprisonment for six months and pay a fine of Rs. 500/- in default, to suffer simple imprisonment for two months

for the offence under Section 148 IPC; rigorous imprisonment for two years and a fine of Rs. 500/- in default to suffer simple imprisonment for two months for the offence under Section 452 IPC; rigorous imprisonment for five years and a fine of Rs. 5,000/- in default to suffer simple imprisonment for six months for the offence under Section 392 IPC. All the sentences were directed to run concurrently. However, the trial court found A-2 to A-7 not guilty for the offences punishable under Sections 148, 452, 392 read with Section 149 IPC and acquitted them accordingly.

9. Aggrieved by the said judgment and order of the trial court, A-1 preferred an appeal in the Andhra Pradesh High Court contending that since six of the named accused i.e. A-2 to A-7 were acquitted, it was not proper and legal to convict him on the same set of evidence. The High Court partly allowed the appeal filed by A-1 and set aside the conviction of A-1 for the offences under Sections 148, 392 and 452 IPC and acquitted him of the same. However, the High Court convicted A-1 for the offences under Sections 147 and 451 IPC and sentenced him to suffer rigorous imprisonment for a period of six months and pay a fine of Rs. 1000/- in default to suffer simple imprisonment for three months for the offence under Section 147 IPC and rigorous imprisonment for a period of

six months and pay a fine of Rs. 1000/- in default to suffer simple imprisonment for three months for the offence under Section 451 IPC.

10. Aggrieved by the said decision of the High Court, the PW-1 (Mohd. Ishaq) though not a party before the High Court, has preferred the present SLP as the State of Andhra Pradesh chose not to file an appeal against the judgment and order of the High Court.

11. The short question for consideration before us is whether the High Court was justified in acquitting the respondent from the offences punishable under Sections 148, 452 and 392 of IPC.

12. A scrutiny of the evidence on record shows that it has come out in evidence of PW-7 and PW-9 that A-1 beat PW-9 with a knife on her left forearm and PW-9 sustained a bleeding injury and the said part of evidence is supported by the wound certificate of PW-9. Further, with regards to the gathering outside the house of PW-1 is concerned, the evidence of PW-11 and 12 corroborates the evidence of PW-7, PW-9, PW-10 and PW-13. That being the position, there cannot be any doubt of the fact that it was an unlawful assembly, which was armed with deadly weapons, within the meaning of Section 141 and 148 IPC and the said unlawful assembly was acting at the instance of A-1.

13. It has been contended by the respondent that PW-1 was not in possession of the house and in a separate civil proceeding (OS 3369/90) PW-1 has admitted that he was dispossessed by one Abdul Rawoof Khan on 20.05.1990. However, the plaint was subsequently amended as per the order of civil court and the date of 20.06.1990 has been mentioned at the place of 20.05.1990. In this regard, the testimonies of PW-2, PW-7, PW-9, PW-10 and PW-13 clearly establish that PW-1 was in possession of the said house on the date of offence and all his belongings were forcibly taken away in the lorry at the instance of A-1.

14. Another contention which has been advanced by the respondent that PW-1 was not present at the scene of offence. However, even if we aside the testimony of PW-1 in this regard, the testimonies of PW-2, PW-7, PW-9, PW-10 and PW-13 which have been corroborated by the evidence of PW-11 and 12 clearly establish that a mob of 60-70 person with a common object of using criminal force and to take away and remove the house-hold belongings of PW-1 from the said house entered the house of PW-1. The said evidence further establishes that the gathering of mob outside the house of PW-1 was an unlawful assembly, which was armed with deadly weapons. The same would clearly fall within the ambit of Section 141 and 148 IPC.

15. It has been further established beyond reasonable doubt that A-1 along with some others entered into the house of PW-1 and committed robbery. So, the case of A-1 would clearly fall within the ambit of Section 392 IPC.

16. It is further proved beyond reasonable doubt that A-1 has committed house trespass by putting PW-1 and other inmates of the house in fear to hurt and thus, committed an offence under Section 452 IPC.

17. Accordingly, A-1 is liable to be convicted under Sections 148, 392 and 452 IPC, which we hereby do and order. Consequently we restore the order of sentence passed by the trial court. The accused shall surrender immediately to serve out the remaining part of the sentence and the police is directed to take him into custody if he does not surrender within a period of fifteen days from today. Appeal is allowed accordingly.

Writ Petition (Cri.) 13/2008

18. This writ petition has been preferred under Article 32 of the Constitution by the petitioner (Mohammed Ishaq) who is the appellant in above-mentioned SLP (Cri.) 3209/2008. This writ originates from the same set

of factual matrix as discussed in the aforesaid appeal except some additional facts which we propose to discuss herein below.

19. The petitioner has sought to invoke writ of certiorari to quash the order of Government of Andhra Pradesh dated 24.04.2007 and writ of mandamus directing the Union of India and the State of Andhra Pradesh to take steps for the implementation of order of sentence passed by the Andhra Pradesh High Court against A-1. Since the order of commutation is based on consideration of irrelevant materials and non-consideration of relevant materials the same is liable to be set aside.

20. Mr. Amarendra Sharan, Additional Solicitor General, has strenuously contended that the petition is not maintainable as the PW-1 cannot directly come to the Supreme Court. He has vehemently argued that at the time of granting remission, all relevant materials including medical report of A-1 have been taken into account by the government. Accordingly, the writ petition deserves to be dismissed.

21. On the preliminary issue of maintainability of present writ petition, it is well settled position of law that simply because a remedy exists in the form of Article 226 of the Constitution for filing a writ in the concerned High Court, it does not prevent or place any bar on an aggrieved person

to directly approach the Supreme Court under Article 32 of the Constitution. It is true that the court has imposed a self-restraint in its own wisdom on the exercise of jurisdiction under Article 32 where the party invoking the jurisdiction has an effective, adequate alternative remedy in the form of Article 226 of the Constitution. However, this rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion rather than a rule of law. At any rate it does not oust the jurisdiction of this Court to exercise its writ jurisdiction under Article 32 of the Constitution. We therefore, reject the preliminary objection raised and proceed to examine the contentions raised in the Writ Petition on merits.

22. It would be useful to mention here that after the judgment and order dated 29.01.2007 of the High Court, the A-1 surrendered before the court of 1st Additional Metropolitan Sessions Judge at Hydrabad on 16.04.2007. However, the Government of Andhra Pradesh commuted six month rigorous imprisonment given to A-1 into fine of Rs. 5000 and released A-1 immediately after one week of his surrender on 24.04.2007. It is the case of the petitioner that he came to know about the said development only when some local newspaper reported the same on 06.12.2007 and 07.12.2007.

23. Coming to the factual position of the case with regard to the commutation, we have noticed that various materials were taken into consideration when the request for commutation of six month RI into fine was made by the A-1. A-1 submitted his representation to the Government through Director General & Inspector General of Prison & Correctional Services, Hyderabad stating that he is a qualified Islamic Scholar preaching religious and communal harmony all over the country and has been suffering from multiple medical ailments. The said DG forwarded the representation to the State Government for necessary action. The State Government then called for reports from the Commissioner of Police, Hyderabad; the Collector, Hyderabad and the Regional Inspector of Probation, Hyderabad. Since the reports of these three above-mentioned functionaries formed the basis of impugned order, it is relevant to take note of some interesting features of these documents.

24. The Commissioner of Police, Hyderabad in his report noted that A-1 was suffering from a number of ailments. He further opined that PW1 is not involved in any other case other than the present one. He further stated in his report that he is a known Islamic scholar and preaches communal harmony and has been cooperating with the police on several occasions for maintenance of peace in the city and that he does not have any

political connections and that there is no risk to law and order situation if his sentence is commuted. The Collector, Hyderabad in his report noted that A-1 has a traditional family background and he was reportedly an active participant in the peace committee meetings and other programme relating to fostering of communal harmony and peace in locality. He further stated that there was no other criminal cases pending against him and no anticipated apprehension or unrest from any quarter is likely to arise so far as the request of commutation is concerned. The District Probationary Officer, Hyderabad in his report stated that no untoward incidents are expected to take place on the release of A-1 and accordingly recommended for commutation of sentence. On the basis of these reports, the Government of Andhra Pradesh commuted the sentence of A-1 under Section 433(c) Cr.P.C.

25. It is well settled that the exercise or non-exercise of pardon power by the President or Governor, as the case may be, is not immune from judicial review. Limited judicial review is available in certain cases. This Court has succinctly discussed the issue in the case of **Epuru Sudhakar & Anr. v. Government of Andhra Pradesh & Others**, (2006) 8 SCC 161 that the consideration of religion, cast or political loyalty of a convicted

person for the purpose of commutation of his sentence are held to be prohibited grounds. It observed as follows in relevant paras:

> **"34.** The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:
>
> (*a*) that the order has been passed without application of mind;
>
> (*b*) that the order is mala fide;
>
> (*c*) that the order has been passed on extraneous or wholly irrelevant considerations;
>
> (*d*) that relevant materials have been kept out of consideration;
>
> (*e*) that the order suffers from arbitrariness.
>
> **66.** Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an executive action that mitigates or sets aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter. It can no longer be said that prerogative power is *ipso facto* immune from judicial review. An undue and unjustified exercise of this power is to be deplored. Considerations of religion, caste or political loyalty are irrelevant and fraught with discrimination. These are prohibited grounds. The Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic

> principle of fairness and certainty. Therefore, the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future."

26. There is no denial of the fact that while making request for commutation of sentence, A-1 has not made any reference to the effect that he was in fact absconding for about 4 months before his surrender. He was fugitive to law for four months. The records clearly show that the High Court gave its decision on 29.01.2007, but A-1 surrendered before the Court of Additional Metropolitan Sessions Judge only on 16.04.2007. None of the reports mentioned herein above took into consideration this vital aspect of the case that, even after imposition of sentence by the High Court, A-1 showed utter disregard to the rule of law by evading the arrest. Interestingly, A-1 is stated to have been drawing his salary during the aforesaid period when he was absconding which unmistakably shows his callous attitude towards rule of law. The executive clemency may not be extended to a law disobeying citizen who did not surrender before the trial court as mandated by the law. This vital aspect has been completely ignored by the Andhra Pradesh government who without any application of mind accepted the reports submitted by different functionaries in undue haste and finished the entire exercise within a week from the date

of request of commutation by A-1. In fact, the order of commutation is just reiteration of the identical reports submitted by different government authorities without any independent scrutiny. It has been stated that A-1 is suffering from multiple medical ailments, but neither his petition for commutation nor any report nor the order of commutation provides any details with regard to what kind of medical ailment he is suffering from. We are of the view that by simply making vague and bald statements, without having even an iota of indication with regards to the actual disease or ailment is not sufficient to justify the order of commutation. The order of commutation on the basis of these statements without ascertaining its genuineness/veracity shows that the impugned order was passed without any application of mind.

27. We may add here that the appropriate Government must not as a matter of routine, indulge in exercise of such powers at its sweet will, pleasure and whim or fancy. The powers conferred upon the appropriate Government under Section 433 Cr.P.C., must be exercised in accordance with rules and established principles i. e. reasonably and rationally, keeping in view the reasons germane and relevant for the purpose of law under which the conviction and sentence has been imposed. While exercising such power, relevant facts necessitating the commutation, and

the interest of the society and public interest must be reflected and well established. The exercise of any power vested by the statute in a public authority is to be always viewed as in trust, coupled with a duty to exercise the same in the larger public and social interest.

28. In view of the aforesaid discussion, we find that the order of the Andhra Pradesh government is untenable in law. It is also to be indicated that in view of the order passed by this Court convicting the appellant under Sections 148, 382 and 452 IPC and restoration of the order of sentence passed by the Trial Court, the impugned order passed by the State Government is also liable to be struck down on the ground of changed situation and circumstances. The writ petition is allowed to the aforesaid extent.

..……..J.
[S.B. Sinha]

.....……J.
[Dr. Mukundakam Sharma]

New Delhi,
May 6, 2009