
(2007) 02 AHC CK 0110
In the Allahabad High Court

Dinesh Singh

APPELLANT

Vs

State of U.P. and Pramod Singh
Pramod Singh Vs State
of U.P.

RESPONDENT

Date of Decision : 21-02-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 437, 439, 482
Penal Code, 1860 (IPC) — Section 302, 34, 407, 482

Citation : (2007) 02 AHC CK 0110

Hon'ble Judges : Vinod Prasad, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

Vinod Prasad, J.—This bail cancellation application has been filed by Dinesh Singh Informant of Crime No. 299 of 1999, under Sections 302 I.P.C., P.S. Civil Lines, District Etawah seeking cancellation of bail granted to accused Pramod Singh son of Bhagwan Singh in the aforesaid crime number by this Court on 24.6.2003 in Criminal Miscellaneous Bail Application No. 9126 of 2003, Pramod Singh v. State annexure No. 6 to this Bail Cancellation Application. Before advertng to the merits of this cancellation application a brief narration of allegations against the accused is mentioned below.

2. Abhay Singh Bhadoria @ Munna (Deceased) had gone to meet Shlvraj Singh Sengar accompanied by his brother Dinesh Singh (informant), Mukesh Singh, Virendra Kumar Chowdary by his Tata Sumo U.P. 75 B 4489 on 15.7.1999 at 9.00 A.M. When he (Abhay Singh Bhadoria @ Munna (deceased) reached near the Government tap installed near the house of Shivraj Singh Sengar aforesaid, then all of a sudden, from the western lane the named accused persons of his village namely Omveer Singh, Shiv Veer Singh, Rokki (all armed with rifle) and Promod Singh, respondent accused, armed with country made pistol appeared at the scene and at the instigation of Shiv Veer Singh all of them opened fire at the deceased Abhay Singh Bhadori @ Munna who sustained injuries and died on the

spot. This incident was witnessed by informant and his other associates. The accused thereafter made their escape good. The F.I.R. of this incident was scribed by the informant and was lodged at P.S. Civil Lines, Etawah at 9.20 A.M. i.e. 20 minutes after the alleged incident, after covering a distance of 1 KM , which was registered as crime No. 299 of 1999, u/s 302 I.P.C. The police after due investigation submitted a charge sheet in Court against all the named accused persons. It transpires that subsequently the matter was transferred to C.B.C.I.D. Which also after investigation u/s 173(8) Cr.P.C. endorsed the said charge sheet submitted by the police vide annexure No. 2 to this Bail Cancellation Application. It also seems that some criminal miscellaneous proceedings u/s 482 and 407 I.P.C. were also taken in this Court by the accused persons but they were not successful In their such attempt. However, for the purposes of the present bail cancellation application it is to be noted that Pramod Singh accused, whose bail is sought to be cancelled, gave a notice in this (Court for his release on bail vide Criminal Miscellaneous Bail Application No. 9126 of 2003 on 25.8.2001 after the same was refused by both the courts below. The said bail application was however field In the Registry of this Court on 23.6.2003, after a gap of one year and ten months during summer vacations. This bail application on behalf of said Pramod singh accused was allowed by Hon''ble Omkareshwar Bhatt, J. on 24.6.2003 by passing the following order:

Two supplementary affidavits field today are taken on record.

Heard learned Counsel for the applicant and learned A. G.A. for the State.

In the F.I.R. the applicant along with three others is alleged to have fired at the deceased. The applicant is said to be armed with country made pistol. During investigation it has come that two persons fired at the deceased by rifle, one of them was bearing a red turban and one was without any turban.

On the facts and circumstances of the case emerging from perusal of the record it is a fit case for grant of bail.

The applicant Pramod Singh involved in Case Crime No. 299 of 1999, under Sections 302/34 I.P.C. and 27 Arms Act, Police Station Civil Lines District Etawah be released on bail on his executing a personal bond and furnishing two sureties each in the like amount to the satisfaction of the Chief Judicial Magistrate, Etawah.

3. As soon as the applicant Dinesh Singh, informant, came to know of the said bail granting order he filed this bail cancellation application on 11.7.2003 which came up before Hon''ble Imtiyaz Murtza, 1 on 14.7.2003 on which date his Lordship was pleased to order that this bail cancellation application be placed before Hon''ble Omkareshwar Bhatt, J. on the following day. On the next day that is 15.7.2003 Hon''ble Omkareshwar Bhatt, J. was please to pass following orders on this ball cancellation application:

Issue notice to opposite party No. 2 for filing counter affidavit within three

weeks. Learned A.G.A. may also do so during the aforesaid period. One week's further time is allowed to the applicant for filing rejoinder affidavit.

In the meantime it is provided that opposite party No. 2, Pramod Singh, if not already released, be not released in pursuance of the order dated 24.6.2003.

List on 19.8.2003.

4. From the perusal of the above order dated 15.7.2003 it is perceptibly clear that his Lordship was of the view that if the accused Pramod Singh has not been released in pursuance of the order dated 24.6.2003 then he should not be released In pursuance thereof. This bail cancellation application thereafter was listed on many dates before his Lordship and the arguments were also started but the same could not be concluded. Mean while Hon"ble Omkareshwar Bhatt J. demitted the office and this bail cancellation application was listed before Hon"ble C.P. Mishra J. and was dismissed in default on 4.10.2004 for non-prosecution by his lordship, to which a restoration application was field on 30.8.2005 and the said order was recalled on 5.9.2006 by me. Subsequently arguments were heard and the order was reserved on 7.9.2006. However, at the time of dictation of the order it transpired that one Criminal Miscellaneous Application No. 2337 of 1999, u/s 482 Cr.P.C, was tagged along with this bail cancellation application and the same was still undisposed off hence the order could not be pronounced and the cancellation application was directed to be listed again on 19.2.2007 as an unlisted case on which date the arguments were heard and were continued on 20.2.2007 and now by this order this application is being disposed off.

5. Learned Counsel for the Informant in this bail cancellation application raised many submissions. He contended that in this case the notice of the bail application of the respondents accused was given on 25.8.2001 to the learned A.G.A. but the same was kept pending and it was only after a gap of one year and ten months that the bail application was field in the Registry of this Court on 23.3.2003 without giving any further notice to the learned A.G.A. in accordance with Chapter XVIII and Rule 18(3)(a)(b) of the High Court Rules 1952, herein after referred to as the Rules. Learned Counsel contended that the applicant should have given two days further notice to the Government Advocate before moving bail application in this Court as is provided under that Rule. Learned Counsel further contended that the bail has been granted by Hon"ble Onkareshwar Bhatt, J. on wrong facts. He submitted that it was never the prosecution case that any of the accused was wearing red turban. He further contended that the bail order of the accused respondent is a non -speaking order and has been passed without considering the merits of the matter and the allegations leveled against the respondent accused. He submitted that It was the day light murder and the F.I.R. was lodged promptly within 20 minutes of the incident and respondent accused was armed with a country made pistol with specific role of firing at the deceased. He submitted that the respondent accused was not alleged to be armed with a rifle and therefore white granting bail to the

respondent accused who was armed with a country made pistol Hon"ble Judge has not considered his case at all. Learned Counsel further submitted that facts as alleged by the prosecution were not taken into consideration at all and prior to the day on which bail was allowed to the respondent accused the bail of co accused Omveer already stood rejected by this Court. He also contended that respondent accused has absconded for one and a half year and two other co-accused persons of the crime namely Shiv Veer Singh and Rocky were still at large and they have not been apprehended as yet. Learned Counsel thereafter contended that no doubt there is no fetter on the powers of this Court to grant bail to an accused of non-bailable offence but the said power has to be exercised which circumspection within the ambit of law laid down by the Supreme Court. He contended that granting of bail is not an arbitrary exercise of power but is a judicial discretion to be exercised within the scope of Section 439 Cr.P.C. as has been explained and enumerated by the Apex Court learned Counsel contended that so far as Criminal Miscellaneous Application, being Criminal Miscellaneous Application Number 2337 of 1999. Arjun Singh Bhadoria and Ors. v. State of U.P. and Ors. u/s 482 Cr.P.C., attached with this bail cancellation application is concerned the said application has nothing to do with the present Bail Cancellation Application and it should be ordered to be untagged from the record of this cancellation application. Learned Counsel contended that since the order of granting bail to the accused respondent has been passed on wrong facts against the Rules of the Court without proper opportunity to the Public Prosecutor (AGA) therefore, the bail of the accused respondent should be cancelled. He pointed out that in the Impugned bail granting order. It is mentioned that out of two persons who fired at the deceased by rifle one of them was wearing a red turban and other was without any turban was never the allegation of the prosecution nor any prosecution witness has said the said fact and more over this was no ground to grant bail to the accused respondent Learned Counsel in the last contended that on the facts of the case it was a day light incident with prompt F.I.R. and eyewitness account and the postmortem report being consistent with the prosecution version, therefore, there was no justification to grant bail to the accused respondent without considering his case on the merits of the matter against the Rules of the Court without proper opportunity to the public prosecutor (AGA) and therefore it should be canceled.

6. Sri V.P. Srivastava, learned Sr. counsel for the respondent accused on the other hand contended that this bail cancellation application should be dismissed as merit less as grant of bail is one thing and cancellation thereof is quite different. Sri Srivastava contended that since the accused respondent has not tampered with the witnesses nor has absconded therefore, the bail which has been granted to the accused respondent should not be canceled. He further submitted that cancellation of bail has to be judged from a different angle altogether and it is not a ground to cancel the bail of an accused merely because the bail granting order is against the facts of the case or that it was passed during vacations and also because the Rules of the Court were not observed

while granting bail learned Counsel has relied upon various judgments of the Supreme Court reported in Vikramjit Singh Vs. State of Madhya Pradesh, Harjeet Singh @ Seeta Vs. State of Punjab and Another, Bhagirathsinh Judeja Vs. State of Gujarat, Subhendu Mishra Vs. Subrat Kumar Mishra and Another, : Subhendu Mishra v. Subrat Kumar Mishra (XXXII) 1995 ACC 12 : Nityanand Rai Vs. State of Bihar and Another, Nityananad Rai v. State of Bihar and Anr.

7. I have heard learned Counsel for the both the sides at a great length and have gone through the record of Criminal Miscellaneous Bail Application No. 9126 of 2003 Pramod Singh v. State of U.P. as well as this bail cancellation application. The record of Criminal Miscellaneous Bail Application No. 9126 of 2003 indicates that the notice of the bail application was given to learned A.G.A. on 25.8.2001 but the bail application was filed in the Registry of this Court on 23rd June 2003 after a gap of one year and ten months, without following Chapter XVIII Rule 18(1)(b) of the Rules of the court. Further it is also clear that it was nowhere the prosecution case that any of the accused was wearing a turban. It is further clear that along with the said bail application no statement of any witness was filed which could indicate that any of the accused was wearing turban, subsequently a first supplementary affidavit was filed after giving it's notice to AGA on 11.12.2002 annexing various statements of witnesses. A perusal of those statements of witnesses namely, Anshuman Singh, Gyanendra Singh, Ramashankar Singh, Mahesh Chandra Mishra, Naresh Sharma, Subhash Dubey, it is clear that none of the aforesaid witnesses has said anything regarding wearing of any turban by any accused. Subsequently thereafter a second supplementary affidavit was filed in the aforesaid bail application of which the notice was given on 16.6.2003. Under the Rules of the Court the Government Advocate is allowed ten days time to obtain instructions if any affidavit is filed in any bail application to controvert the averments made in those affidavits. Thus the said second supplementary affidavit would have been matured on 26.6.2003 or thereafter and could have been filed in court only after the said period but it could not have been filed before that date and certainly not on 24.6.2003 when the bail was granted to the accused respondent. In this second supplementary affidavit the statement of Sudhir Kumar Pathak, Rameshwar Dayal have been appended (these persons were not witnesses of the prosecution but were produced by the accused) wherein they have said that out of the culprits two of them were seen by them and out of those two one was wearing a red turban but they could not identify them. It seems that on the basis of this second supplementary affidavit, which was not even mature on the day on which the bail was granted to the accused respondent (24.6.2003) that the bail application of the accused respondent was allowed by this Court. When all these facts were brought to the notice of Hon'ble Onkareshwar Bhatt, J. through this bail cancellation application on 15.7.2003 then his Lordship was pleased to stay the release of the accused vide his bail granting order dated 24.6.2003, if he was not already released, but by that time the accused was already released hence the order of staying his release on 15.7.2003 did not have any effect. Before Hon'ble

Onkareshwar Bhatt, J. counter and rejoinder affidavits had been exchanged and the arguments started on 19.9.2003 but the same remained inconclusive. In view of above facts I am of the view that the bail was granted to the accused respondent without proper opportunity of hearing to the State Counsel to seek instruction on the second supplementary affidavit filed by the accused person against the Rules of the court and hence no proper opportunity of hearing was afforded to the AGA which opportunity was a must in view of Proviso to Section 439(1) Cr.P.C. which is referred to below:

439. Special powers of High Court or Court of Session Regarding bail-

(1) A High Court or Court of Sessions may direct

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Sessions or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

In the proviso of this section word "notice" does not mean only giving copy of bail application and affidavits to the Public prosecutor. The word "Notice" in the proviso to Section 439 Cr.P.C. has been used in a generic sense which includes proper opportunity of hearing as well. Notice without proper opportunity of hearing will make the provision of Section 439 Cr.P.C. otiose. Giving of notice under the proviso quoted above is not an empty formality but it had got a salutary purpose and that is that no bail should be granted in offences triable by court of session's or in offences punishable with life Imprisonment unless the public prosecutor is afforded full opportunity of hearing. This was not done in the present case at all.

(Under Line Emphasis mine)

8. In view of above facts it is clear that while granting bail to the accused respondent the statutory provision of Section 439 Cr.P.C. (1) as well as Rules of the court were not observed at all. Section 439 Cr.P.C. has to be read in conjunction with the Rule of the Court, which Prescribes the procedure for entertaining and disposal of bail applications in this Court. Allahabad High Court Rules (Rules of the Court 1952) are not a empty formality. The disposal of the cases in this Court has to be made in accordance with those Rules. In view of what I have stated above the bail granting order of the accused respondent was

certainly not accordance with the Rules and proviso to Section 439 Cr.P.C. Let me remind here that if the Law enjoins any thing to be done In a particular manner then either that thing should be done in that manner or not at all.

9. Coming to the second aspect of the matter, it is clear that the impugned order of granting bail does not seems to be an order on the merits of the case at all. This fact when was brought to the notice of the Judge who had granted bail, he himself passed the order of stay if the accused was not already released. However, since the Hon''ble Judge had retired the matter could not be disposed off by him. In view of the aforesaid fact it cannot be said that now this Bench is sitting over in appeal or revision or review of the order passed by his lordship Hon''ble Onkareshwar Bhatt, J. I only say this much that his lordship Hon''ble Onkareshwar Bhatt J. himself had entertained this bail cancellation application.

10. Now adverting to the contentions raised by counsel for the respondent that there is no allegation of tampering it is to be noted that the said argument is of no help to the accused because I am of the view that the bail was granted to the accused respondent without following procedure prescribed for hearing of bail matters in this Court. An order passed without following the procedure meant for passing of such order is a non-est and illegal order. It is the decision making process which makes the order valid or illegal. None of the judgments referred to above cited at by Sri V.P. Srivastava learned Senior counsel for the accused respondent has any applicability on the facts of this case. Neither those cases were decided against the Rules of the Court and the statutory provision u/s 439 Cr.P.C. Proviso nor in those cases the Judge, who has granted bail himself had passed an order staying the release of the accused in pursuance of his own order. In this view of the matter the rulings which has been cited at the bar by Sri V.P. Srivastava is of no help to him.

11. On the merits of the matter I am of the view that since it was a day light incident with specific allegations against the accused respondent with eye witness account, prompt F.I.R. and consistent medical report that there could not have been any reason to allow bail to the accused.

12. In view of the discussions made above I am of the view that this Bail Cancellation Application deserves to be allowed and the bail granting order of accused respondent dated 24.6.2003 vide Criminal Miscellaneous Bail Application No. 9126 of 2003 Pramod Singh v. State deserves to be canceled.

13. Criminal Miscellaneous Application No. 2337 of 1999, Arjun Singh Bhadoria and Ors. v. State of U.P. and Ors. u/s 482 Cr.P.C. is wrongly tagged with the file of this cancellation application which is directed to be untagged and is further directed to be listed before the appropriate bench for disposal in the next cause list as the matter relates to an offence u/s 302 IPC.

14. Concludingly, this Criminal Miscellaneous Bail Cancellation Application No. 10423 of 2003 Dinesh Singh v. State of U.P. is allowed. The impugned bail granting order of the accused respondent Pramod Singh dated 24.6.2003 in

Crime No. 299 of 1999, under Sections 302 I.P.C., P.S. Civil Lines, District Etawah is hereby cancelled. Pramod Singh accused respondent is directed to surrender forthwith. In the event of his failure to surrender within one week from today, CJM Etawah is directed to issue non-bailable warrant of arrest against him, get him arrested forthwith and lodge him in jail.

15. A copy of this order is directed to be sent to C.J.M. Etawah by tomorrow by the registry of this Court for compliance of this order and to send compliance report to this Court within a period of two weeks from today.

16. List this matter for consideration of report of C.J.M. Etawah on 5th March 2007.