
(1996) 05 OHC CK 0026

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 3542 of 1995

Gandu Mallia

APPELLANT

Vs

Kanhu alias Mahendra Mallia and Another

RESPONDENT

Date of Decision : 17-05-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439

Citation : (1996) 82 CLT 471 : (1996) 2 OLR 26

Hon'ble Judges : R.K. Dash, J

Bench : Single Bench

Advocate : Devashis Panda, for the Appellant; Prabir Palit, S. Palit, L. Jena, P.K. Majhee and J. Katikia (O.P. No. 1) and A.G.A. (O.P. 2), for the Respondent

Judgement

R.K. Dash, J.—This is informant's petition u/s 439(2) Cr PC seeking to cancel the bail granted to the opp. party No. 1 by the learned Second Additional Sessions Judge, Bhubaneswar.

2. Opp. party No. 1 and four others stand charged under Sections 148, 302 and 506 read with Section 149, IPC.

The prosecution-case, shortly stated is that, on 8/9-10-1992 night at about 12.30 a.m. Tulu Mallia (hereinafter referred to as "the deceased"), elder brother of the informant had come out of his house to make urine. In the meanwhile opp. party No. 1 and his associates suddenly emerged being armed with revolver, sword and bhujali and of them opp. party No. 1 fired from his revolver as a result the deceased received injury on his chest and dropped down there. He was immediately removed to Capital hospital where the doctor on emergency duty recorded his dying declaration. An FIR was lodged in the Capital Police Station whereupon a case u/s 307, IPC was initially registered and subsequently upon the death of the deceased the case was converted to one u/s 302, IPC. After usual investigation charge-sheet was laid against all the persons involved in the incident showing opp. party No. 1 as absconder since he could not be apprehended v. the police. Steps were taken by the learned SDJM for his arrest

and finally the case was split up against him. Latter on as the order of the learned Additional Sessions Judge reveals, he surrendered before the Court below whereupon the split up case was committed to the Court of Session. An application for bail was moved before the learned Second Additional Sessions Judge who on consideration of the materials rejected the prayer, but four days thereafter the very same prayer was renewed on the ground that he being an asthma patient immediate medical treatment was necessary. Additional Public Prosecutor seriously opposed the prayer contending that the opp. party No. 1, a man of rowdy nature has no respect for law and if he is admitted to bail, the witnesses may not dare to give evidence against him. Upon hearing the learned Additional Sessions Judge allowed the prayer mainly on the ground of illness. The relevant observation in that context is reproduced hereunder :

".....As submitted by the learned counsel for the defence, it is true that now a days because of overcrowding of U. T. Ps. in the jail, the jail authorities are not in a position to provide adequate facilities and amenities to all the U. T. Ps. to fully protect them from cold in winter season. A patient of bronchial asthma undoubtedly requires special care and facility to fully protect him from cold, otherwise he is very likely to be affected by that disease....."

3. Challenging the legality of the order in question, learned counsel for the informant contended that once bail was rejected on the ground that there was prima facie materials against opp. party No. 1, learned Addl. Sessions Judge should not have allowed the very same prayer four days thereafter on flimsy ground. He submitted that though grant or refusal of bail by the Court is discretionary and unfettered by restriction of any kind, yet such discretion is to be exercised judicially and on well-established principles. In the present case, he submitted, the learned Court below exercised discretion illegally and must arbitrarily overlooking the nature and gravity of the offence and the materials available on record. On the other hand, learned counsel for opp. party No. 1 strenuously urged that once bail has been granted, the same should not be lightly interfered with since cancellation of bail amounts to curtailment of liberty.

4. I am reminded of certain latin maxims, "Conscientia Legalise Lega Fundature" which connotes that legal conscience must be founded upon law. The next is conscientia Legi Nunquen contravenit which connotes that legal conscience never contravenes law; and the third maxim is Consientisus Legis Legi Pendent which connotes that conscience of a Judge in Law Court depends upon law." It is, therefore, to be seen whether the learned additional Sessions Judge, Bhubaneswar while admitting opp. party No. 1, accused of gruesome murder to bail, acted according to legal conscience founded upon law. it admits of no doubt that Court arrogates to itself enormous discretionary power on the question of grant or refusal of bail, but then while deciding the said question, it should take into consideration the gravity of the offence, nature of evidence and other attending circumstances. It cannot arbitrarily and whimsically exercise discretion in favour of the accused and admit him to bail and if it does so, in that case. High

Court or Sessions Judge, as the case may be, will be well within its jurisdiction to cancel the same in exercise of power u/s 439(2) Cr PC. In this context it would be useful to refer to a decision of the apex Court in the case of State Vs. Jaspal Singh Gill, . In that case their Lordships while cancelling bail granted by the High Court observed thus:

".....the Court before granting bail in cases involving non-bailable offences particularly where the trial has not yet commenced should take into consideration various matters such as the nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State and similar other considerations." In another case, Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, , their Lordships took note of the gravity of the offence, nature of evidence and the likelihood of the accused tampering with the evidence and consequently cancelled the bail. The relevant observation of their Lordships in that regard is extracted hereunder: ".....No doubt liberty of a citizen must be zealously safeguarded by Court, nonetheless when a person is accused of a serious offence like murder and his successive bail applications are rejected on merit there, being prima facie material, the prosecution is entitled to place correct facts before the Court. Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution. Learned Judge was unduly influenced by the concept of liberty, disregarding the facts of the case."

5. When the petition for bail in the present case was moved on the first occasion, illness of the opp. party No. 1 was not taken as an additional ground for his release. Only after the Court rejected the prayer, second petition was filed stating therein that he being an asthma patient should be admitted to bail or else the disease may prove fatal. On a scrutiny of the record I find that on 1-12-1995 the second petition for bail was accompanied with a medical certificate and on the passing of the impugned order, the said certificate was returned back without there being any specific order by the Court. I fail to understand how counsel for the opp. party No. 1 was allowed to freely handle the record and take back the document. (Endorsement of the counsel acknowledging the receipt of the medical certificate finds mention in the list of document) As to the legality of the impugned order, learned Addl. Sessions Judge was of the impression that asthma is a serious disease and facilities are not available in the jail to protect a prisoner attacked with such disease from cold during winter. Such observation by him is based on no material. To my mind he in a most whimsical manner and having closed his eyes to the well-settled principles of law ordered for the release of opp. party No. 1. True it is, sickness of an Under Trial Prisoner sometimes weighs with the Court while deciding the question of bail, but it is not every sickness or

infirmity that entitles him to be enlarged on bail. The nature and seriousness of the sickness, the availability of necessary treatment and reasonable amenities provided in jail are to be taken into consideration along with other circumstances before granting bail on the ground of illness. If asthma is considered to be a serious disease for admitting a person, accused of serious crime to bail, we may not blame the people commenting that there is no justice in the world and law always supports the accused and not the victim of crime.

6. In course of argument, petitioner's counsel strenuously contended that opp. party No. 1 has tampered with the evidence inasmuch as the witnesses so far examined did not support the prosecution and more particularly the doctor who recorded the dying declaration was gained over and therefore, ends of justice demands that bail granted to the opp. party No. 1 should be cancelled. On a scrutiny of the lower Court record I find that PWs 1 to 3, the witnesses to inquest and certain seizures did not support the prosecution for which they were declared hostile. PW 5, doctor of the Capital Hospital who recorded the dying declaration of the deceased although was not declared hostile, but when questioned by the Court gave certain answers affecting the prosecution case. In this context. I am constrained to make certain observation about the manner of conducting the case by the learned Additional Sessions Judge. Record reveals that PW 5 was cross-examined at length by the defence and there was absolutely no ambiguity in his evidence which needed clarification by the Court. No doubt, it is the duty of a Judge to discover the truth and for that purpose he may ask any question in any form at any time to any witness about any fact relevant or irrelevant, but he must do so without unduly trespassing upon the functions of the Public Prosecutor and the defence counsel, without any hint of partisanship and without appearing to frighten or bully witnesses and if he does so parties may begin to think, quite wrongly it may be, that the Judge is not holding the scales of justice quite eventually.

In this context, I may be reminded of what Lord Denning in his book "What Next in the Law", under Caption "The Judges themselves" at page 330 said-

"There remains most touchy question of all. May not the Judges themselves sometimes abuse or misuse their power ? It is their duty to administer and apply the law of the land. If they should divert it or depart from it and do so knowingly they themselves would be guilty of a misuse of powers. So we come up against Juvenal's question "Sed quis custodiet ipsos custodes" ? (But who is to guard the guards themselves ?)"

.....Every Judge on his appointment "discards all politics and all prejudices. You need have no fear. The Judges of England have always in the past and always will be vigilant guarding over freedoms. Some must be trusted. Let it be the Judges."

7. The prosecution case, as stated earlier is that it was the opp. party No. 1 who committed murder of the deceased and there is eye-witness account to support the same. So keeping in view the nature and gravity of the offence and the

evidence collected during investigation, I am of the opinion that it is a fit case where bail granted to the opp. party No. 1 should be cancelled. Consequently petitioner's prayer is allowed and the bail is cancelled. Necessary steps be taken by the trial Court for immediate apprehension of the opp. party No. 1. I may further observe that in fitness of things this case should be tried by the First Additional Sessions" Judge, Bhubaneswar. Accordingly, S. T. Case No. 18/ 345 of 1995 and 21/380 of 1995 are transferred to the Court of the First Additional Sessions Judge. Bhubaneswar for disposal in accordance with law. Any observation made in this order will however, not influence the trial Court.