

(1994) 05 BOM CK 0003

In the Bombay High Court

Case No : Criminal Application No. 1321 of 1994

Girish Ghanshyam Dube

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 10-05-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439, 482

Citation : (1994) 4 BomCR 376

Hon'ble Judges : Vishnu Sahai, J

Bench : Single Bench

Advocate : Mahesh Jethmalani, instructed by L.P. Kanal, for the Appellant;
Ranjana Desai, APP, for the Respondent

Judgement

Vishnu Sahai, J.—This is an application under sections 439 and 482 Cr.P.C. on behalf of one Girish Ghanshyam Dube for quashing the order dated 3-5-1994 passed by the learned Additional Sessions Judge, in Sessions Case No. 409 of 1993 cancelling the applicant's bail for offences under sections 395/398/342/327/171 I.P.C. read with section 34 I.P.C. and sections 3 and 25 of the Arms Act. Another prayer to in this application is that this Court be pleased to release the applicant on bail. A short recital of the relevant facts is necessary for the disposal of this application.

2. It appears that initially the applicant was being run down for offences punishable under the Terrorists and Disruptive Activities Act, popularly known as "TADA" and hereinafter referred to as "TADA". The designated Court having jurisdiction to try the TADA case refused bail to the applicant and on 18.7.1991 the Apex Court was pleased to grant bail to the applicant; the bail order being hemmed by certain stringent conditions. On 5-11-1991 the matter again came up before the designated Court which held that as offences under the TADA were not made out the case against the applicant should proceed in the regular Court. Consequently the Judge of the designated Court remanded the matter to the Court of the Metropolitan Magistrate.

3. It would be relevant to point out that the designated Court at the time of sending the matter to the regular Court had given directions to the applicant to apply a fresh for bail before it after the charge sheet was filed. Consequently, the committing Magistrate after fresh surety was executed on 29-3-93, granted bail to the applicant on the conditions fixed by the Apex Court. On 8-4-93, the learned Magistrate committed the case to the Court of Sessions, Gr.. Bombay.

4. On 25th March, 1994, the trial of the applicant commenced before the Additional Sessions Judge, I am informed by Mrs. Desai, learned Counsel for the respondent that up to now 23 witnesses have been examined and the trial is in progress. On 9-4-94, in the trial Court, prosecution filed an application for cancellation of applicant's bail supported by an affidavit of the Investigating Officer. In the aforesaid application, it was alleged that on 31-3-94, the applicant along with his father had approached the Investigating Officer saying that they wanted an acquittal by whatever means possible and for that end they were prepared to spend any amount of money. On 4th and 6th April, 1994, witnesses relevant to the applicant namely, witnesses numbers 9, 11 and 12 were examined. The aforesaid witness did not identify the applicant. An application for declaring them hostile was moved by the prosecution before the trial Judge but he rejected it.

5. To the application for cancellation of bail a reply is said to have been furnished by applicant, but there was no rebuttal from his father in any form of the fact that he also had approached the investigating officer, on 31-3-1994. On 15-4-1994 the learned Additional Sessions Judge allowed the application for cancellation of bail, in terms, that instead of entirely cancelling the bail, he directed that the operation of the bail order shall remain suspended for a period of 15 days.

6. The order dated 15-4-1994 was challenged in this Court through Criminal Application No. 1064 of 1994 on two grounds, namely;

(a) As the bail had been granted by the Apex Court it was the Apex Court alone which had jurisdiction to cancel the bail and consequently the order dated 15-4-1994 was without jurisdiction and legally unsustainable ; and

(b) On the facts it was not a fit case for suspending the operation of bail order and the order suspending the bail of the applicant for 15 days was oppressive, inequitable and unwarranted in the interests of justice.

7. On 20-4-1994, brother Rane, J., was pleased to confirm the order dated 15-4-1994 and was pleased to observe in his order that the order dated 15-4-1994 will come into operation from 21-4-1994.

8. It is not disputed by both sides that 21-4-1994 was not only the date from which the order passed by brother Rane, J., was to be operative but it was also the date fixed before the learned Additional Sessions Judge. On that date the applicant did not turn up in Court. The learned Counsel for the applicant

informed the Court that the applicant would come by 1 p.m. but even after 1 p.m. he did not turn up. When the applicant did not come in the Court by 1 p.m. the prosecution made an application for issuing of a non-bailable warrant for his arrest and the aforesaid application was allowed. It may be stated that 22-4-1994 was also a date fixed in the trial Court but even on that date the applicant did not come to the Court till 4.25 p.m.

9. As mentioned earlier on 22-4-1994 at about 4.25 p.m. the applicant came to Court and was then taken into custody. As the non-bailable warrant had become redundant the same was cancelled. On the same day, the learned Additional Sessions Judge issued a notice to the applicant to show cause as to why his bail be not cancelled because he had failed to be present in the Court on the dates fixed i.e. on 21.4.1994 and 22.4.1994. The learned Additional Sessions Judge also issued notice to the sureties as to why the bail amount be not forfeited.

10. On 28.4.1994 the Public Prosecutor made an application for cancellation of bail wherein he spelt out that the applicant had abused the bail in terms of the decision of the Apex Court in the case of State (Delhi Administration) Vs. Sanjay Gandhi, . The grounds which were spelt out in that application were that inspite of the knowledge that the applicant had to be present in the Court on the 21st and 22nd, April 1994 he absented himself completely on the former date and on the latter date only came to the Court at 4.25 p.m. It was also mentioned therein that on 27.4.94 one witness P.W. 21 had been examined but he had turned hostile. In that application it was further alleged that two witnesses whose evidence was relevant to the applicant, namely, Sunil Sharma and Virendra, who were witnesses pertaining to recovery of ornaments at the applicant's instance, were yet to be examined. It was also stated in the aforesaid application that some witnesses who were examined to prove conspiracy demolished it in a very subtle manner, namely that although they identified the applicant they did not identify co-accused persons. Some more grounds also have been mentioned in the aforesaid application.

11. On 28.4.1994 the applicant furnished his reply explaining his absence on 21.4.1994 and till 4.25 p.m. on 22.4.1994. The reply which was supported by a medical certificate was that the applicant had diarrhoea and fever on 20-4-1994 and 21-4-1994 and hence he could not attend the Court. No reason for the coming to the Court till 4.25p.m. on 22.4.1994 has been spelled out in that reply. It is significant to note that the aforesaid medical certificate is dated 26.4.1994. I may also mention here that when the applicant came to the Court on 22-4-1994 at 4.25 p.m. he did not furnish either the aforesaid explanation or the aforesaid medical certificate.

12. It may also be mentioned that in the three applications which were moved on behalf of the applicant in the Court on 22.4.94, namely, Exhibit 81,82 and 83, there is no mention of this explanation. By order dated 3.5.1994, the impugned order, the learned Additional Sessions Judge cancelled the bail of the applicant. Some of the circumstances which weighed with him in cancelling the bail were:

- a) The applicant should have surrendered on 20-4-1994 because on that date the order dated 15-4-1994 had been confirmed by the High Court and the interim order earlier passed by it, had been vacated;
- b) There was no explanation for the applicant for absenting himself on 21-4-1994 and till 4.25 p.m. on 22.4.1994;
- c) On 22.4.1994 a show cause notice was issued to the applicant as to why his bail be not cancelled and the matter was adjourned till 27.4.1994 to give the authorities time to execute non-bailable warrant. On 27th April, 1994 the applicant did not file his reply to the show cause notice. It was only when he was reminded on 28.4.94 that he had to show cause as to why his bail should not be cancelled, that he furnished his reply on 28.4.94;
- d) There is no mention of ill-health of the applicant in any of the three applications made on his behalf viz. Exhibits 81,82 and 83; and
- e) Since the evening of 20.4.94 accused No. 4, (applicant herein) was making preparations to abscond but since the non-bailable warrant was issued police was successful in ensuring that he could not get out of Bombay.

Apart from these reasons some other grounds for cancelling the applicant's bail have also been mentioned in the aforesaid order.

13. I have heard Mr. Mahesh Jethmalani, learned Counsel for the applicant and Mrs. Ranjana Desai learned Additional Public Prosecutor for the respondent, at a considerable length. I have also carefully perused the averments contained in the petition and the various annexures appended to it. Mr. Jethmalani, made a two fold submission before me, that being :-

(1) In as much as the Apex Court had granted bail to the applicant it was not within the jurisdiction of the learned Trial Judge to have cancelled it in exercise of his powers u/s 439(2) Cr.P.C. for the aforesaid provision is only applicable in respect of those persons who have been released on bail under chapter XXXIII of Cr.P.C. 1973. Mr. Jethmalani's contention is that the applicant was not granted bail by the Apex Court under the aforesaid Chapter but, by virtue of the powers vested in it by Article 136 of the Constitution of India. Consequently, he submits that the impugned order dated 3.5.94 is a nullity in law, and (ii) In the alternative, it was contended that if the entire circumstances relevant to the instant case are to be taken into consideration, the impugned order is too harsh, oppressive, unwarranted in the interests of justice and hence, should be quashed.

14. Taking up Mr. Jethmalani's first contention I find that technically speaking the bail on which the applicant was, when the impugned order dated 3-5-94, was passed, was not the bail granted to him by the Apex Court. I have pointed out earlier that the learned Magistrate after taking a fresh surety bond executed on 29-3-93, had granted bail to the applicant and on 3-5-94, the applicant was on bail in furtherance of that order.

15. Leaving technicalities apart, even otherwise, Mr. Jethmalani's submission is devoid of substance. The Apex Court has repeatedly emphasised that the two material considerations in the matter of cancellation of bail are :

a) Whether the accused would be readily available for his trial, in other words whether there was any likelihood of his fleeing from justice ; and

b) Whether he is likely to abuse the discretion in his favour by tampering with evidence. See Bhagirathsinh Judeja Vs. State of Gujarat, , and paragraph 29 of AIR 1978 S.C. 179 Gurharan Singh and others v. State of Delhi Administration. If the answer to any of the aforesaid consideration is in the affirmative then as the Apex Court put it, "it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial". See AIR 1978 S.C 691 The State, through the Delhi Administration v. Sanjay Gandhi.

16. If Mr. Jethmalani's contention is to be accepted then even in cases where during the course of trial tampering of witnesses is going on or circumstances show a imminent likelihood of the accused absconding, the trial judge would be helpless and sit as a mute spectator and only as and when the Apex Court cancels bail the continuance of a fair trial would be ensured. By that time it may already be too late. In my opinion, this certainly the law would not permit and that definitely must not have been the intention of the Apex Court when it granted bail to the applicant. I asked Mr. Jethmalani to show me any authority in support of his contention and he frankly and fairly conceded there was none. For the aforesaid reason I reject the first contention of Mr. Jethmalani.

17. But having held, that in cases of the aforesaid type there is a power with the trial Judge to cancel bail granted by the Apex Court to the accused, I would like to make it clear that the trial Judge should only exercise this power very sparingly, after greatest circumspection and only in those cases where the danger of tampering of witnesses and accused absconding, is real and imminent.

18. I now propose taking up Mr. Jethmalani's second contention namely that if the entire circumstances relevant to the instant case are to be taken into consideration, then the order cancelling bail of the applicant is a too harsh and oppressive order, unwarranted in the interests of justice. Before I adjudicate on the aforesaid contention I would like to point out as to what is the nature of the burden on the prosecution to make out a case for cancellation of bail.. This has been spelled out by the Apex Court in the decision reported in State (Delhi Administration) Vs. Sanjay Gandhi, . In paragraph 14. Their Lordship have observed thus:

"The prosecution, therefore, can establish its case in an application for cancellation of bail by showing on a preponderance of probabilities that the accused has attempted to tamper or has tampered with its witnesses. Proving by the test of balance of probabilities that the accused has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice is all that is necessary for the prosecution to do in order to succeed in an

application for cancellation of bail."

19. In the backdrop of the law laid down by the Apex Court I propose examining whether the impugned order dated 3.5.1994 cancelling the applicant's bail was correctly arrived at and is warranted in the interests of justice.

The learned trial Judge has given some reasons for cancelling the applicant's bail to which I have already referred earlier. The grounds of cancellation of bail have also been mentioned in the application for cancellation of bail, dated 28.4.92. I have mentioned them in paragraph 10 of this judgment.

20. It is not disputed by counsel for the parties that the two witnesses who remain to be examined, namely Sunil Sharma and Virendra are witnesses relating to recovery of ornaments, at the pointing out of the applicant.

Mrs. Desai, learned Counsel for the respondent, pointed out that 6.6.1994 is the date fixed in the trial Court for the evidence of these two witnesses and in case the impugned order dated 3.5.1994 cancelling the bail of the applicant is set aside the prosecution apprehends that these witnesses may also be tampered with.

21. Mrs. Desai also pointed out that on 21.4.1994 which was the date fixed in the trial Court the applicant absented himself. On 22.4.1994 which was also a date fixed in the trial Court the applicant only turned up in the Court at 4.25 p.m. and did not furnish any explanation as to why he had not come to the Court on 21.4.94 and on 22.4.94 came to the Court as late as 4.25 p.m. Mrs. Desai's further submission is that in the three applications, namely, Exhibits 81, 82 and 83 moved on behalf of the applicant on 22.4.94 there is not even a whisper of the illness of the applicant. She also submitted that the medical certificate was belatedly issued on 26.4.1994 and still more belatedly filed on 28.4.1994. She says that looking to all these circumstances the order dated 3.5.1994 has been correctly arrived at by the learned trial judge and should be upheld by this Court.

22. Mr. Jethmalani, learned Counsel for the applicant contended that none of the grounds in the application for cancellation warranted the passing of the impugned order and the aforesaid order is based on very flimsy reasons and consequently should be quashed by this Court. He drew my attention to the decision of the Apex Court reported in State (Delhi Administration) Vs. Sanjay Gandhi, . He placed reliance on the observations made by the Apex Court in paragraph 13 to the effect that "cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial." He also submitted that in the same decision the Apex Court has observed that simply the circumstance that a witness has turned hostile should not be construed to mean that this has happened as a result of the tampering on the part of the accused. I am in respectful agreement with the aforesaid observations of the Apex Court.

23. Mr. Jethmalani's contention is that simply because no convincing explanation on behalf of the applicant was forthcoming for his absence in the Court on 21.4.94 and till 4.25 p.m. on 22-4-94, his bail should not have been cancelled by the trial Judge. It is wrong to say that this was the only factor which weighed with learned trial Judge in cancelling the applicant's bail. The facts mentioned earlier show that there was a preponderance of probability that if the impugned order was not passed and bail of the applicant cancelled then the evidence of Sunil Sharma and Virendra, who as observed earlier, are witnesses relevant to the recovery of ornaments at the instance of the applicant may have been tampered with. This must have also influenced the mind of the trial Judge.

24. The crucial question to be answered is that taking into consideration all the relevant factors, should in the instant case, the bail of the applicant be cancelled.

In the matter of cancellation of bail the approach of the Court should not be to detain the accused by way of punishment.

An order cancelling the bail of an accused should only be passed in exceptional circumstances, some of them being : where there is a reasonable likelihood of the accused absconding or where there is an apprehension that there might be tampering of evidence if the accused was allowed to remain on bail whereby hindering the continuance of a fair trial. To say this does not mean, that in no other circumstances bail cannot be cancelled. Whether in a given case bail should be cancelled or not would depend on the facts and circumstances peculiar to that case and no hard and fast rule having universal application can be laid down. (See AIR 1978 S.C. P. 179, AIR 1978 S.C. P. 691 and Bhagirathsinh Judeja Vs. State of Gujarat,). In the instant case on the solitary circumstance that the accused absented himself from the Court on 21-4-94 and turned up in the Court as late as 4.25 p.m. on 22.4.94 it cannot be inferred that there was likelihood of his absconding. To establish such a plea, there should be more clinching material than that on which the prosecution relies in the instant case. On two days absence from the Court I am not prepared to infer that there was likelihood of the accused absconding. Consequently on this ground the impugned order cannot be sustained. So far as the apprehension of the prosecution that in case the impugned order is set aside and the accused is granted bail there is likelihood of tampering of witnesses Sunil Sharma and Virendra who are yet to be examined, is concerned, I find that is well founded. In my view to safe guard this apprehension cancellation of applicant's bail is not necessary. Admittedly the aforesaid two witnesses are to be examined in the trial Court on 6.6.94.

25. In my opinion the ends of justice would be squarely and equitably met if the order dated 3.5.1994 passed by the learned Additional Sessions Judge in Sessions Case No. 409 of 1993 cancelling the bail of the applicant is modified in terms that if the evidence of Sunil Sharma and Virendra is recorded on 6.6.1994, the order would automatically lapse and the applicant would be deemed to continue on the same bail, provided he furnishes fresh sureties. If the deposition of either of these two witnesses is not over by 6.6.1994 then the learned trial

Judge would keep on recording their evidence from day to day, without any break and the order dated 3.5.94, shall continue to remain operative till the date the recording of the aforesaid statements is complete. It is being made amply clear that if there is any delay, negligence or lapse on the part of the prosecution in not examining those witnesses on 6.6.1994, then the order dated 3.5.1994 would be deemed to have come to an end on 6.6.94 and the applicant shall be released forthwith on the same bail but on fresh sureties. It is further being classified that in case there is an adjournment from the side of the applicant then the impugned order dated 3.5.94 would remain operative till the date the evidence of Sunil Sharma and Virendra is recorded.

With these directions and observations this application stands finally disposed off.

26. Office shall immediately send a copy of this order to the learned trial Judge, who will appreciate the gravity of the matter and will have the depositions of Sunil Sharma and Virendra recorded on 6.6.94.

27. Before parting with the order I would like to express my gratitude to Mr. Mahesh Jethmalani and Mrs. Ranjana Sawant Desai for the extremely able, fair and objective manner in which they have argued this matter. Their submissions have been of tremendous assistance to me in deciding it.