

(2001) 03 BOM CK 0093

In the Bombay High Court

Case No : Criminal Application No. 1878 of 2000

Hanuman Nehare

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 05-03-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437, 437(1), 439
Penal Code, 1860 (IPC) — Section 302, 307, 34

Citation : (2001) 5 BomCR 879 : (2001) 3 MhLj 465

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

Bench : Single Bench

Advocate : V.N. Morande, for the Appellant; D.B. Yengal, Assistant Public Prosecutor for respondent No. 1 and Bharat Vora, for the Respondent

Final Decision : Allowed

Judgement

R.K. Batta, J.—The applicant, who is the son of the deceased, seeks cancellation of bail granted by the Judicial Magistrate First Class, Kelapur to respondent Nos. 2 and 3, vide order dated 20th October, 2000.

2. The respondent Nos. 2 and 3 were arrested in connection with an attempt to murder u/s 307 I.P.C. on 19-10-2000, in respect of an offence which had taken place on 17-10-2000. The bail application was filed on 20-10-2000 and on the same day, respondent Nos. 2 and 3 were ordered to be enlarged on bail even though A.P.P. was not available in the Court. The victim died on 20-10-2000 at about 3.00 P.M. and in view of the same section 302 I.P.C. would be attracted. The charge-sheet u/s 302 I.P.C. has already been filed.

3. Learned Advocate for the applicant has urged before me that the Magistrate acted very hastily in granting bail in serious matter without even waiting for the say of the A.P.P. or hearing A.P.P. The exercise of power by the Magistrate, in the circumstances, accordingly, the learned Advocate for the applicant is arbitrarily in the light of the dying declaration of the deceased prima facie offence u/s 307 read with section 34 of the I.P.C. and now 302 read with section 34 I.P.C. is

made out. After relying upon the judgment of this Court in B.S. Rawat, Assistant Collector of Customs, R and I (P), Bombay Vs. Andre Christopher Mydlarz and others, , it was urged that it is not obligatory on the Court to release the accused only on the count that she is a woman and that word "may" appearing in the provision does not mean "shall" and "must" and that all other considerations have to be weighed. He, therefore, contends that the bail granted to respondent Nos. 2 and 3 be cancelled.

4. The learned Advocate for respondent Nos. 2 and 3 urged before me that on the basis of material on record, offence u/s 302 is not disclosed and that in view of the proviso to section 437(i), the Magistrate has jurisdiction to enlarge the respondents who are women on bail. It is also urged that the applicant has approached the Court with great delay and in the circumstances, the bail granted to the respondent Nos. 2 and 3 be not cancelled. Reliance has been placed on the judgments of the Apex Court in Bhagirathsinh Judeja Vs. State of Gujarat, and The State (Delhi Administration) Vs. Sanjay Gandhi, .

5. Learned A.P.P. after relying upon the dying declaration of the deceased urged that prima facie offence u/s 302 I.P.C. is made out and the Magistrate acted illegally by granting bail in a serious matter without even hearing the A.P.P. He pointed out that the Magistrate has no power to grant bail in respect of the offences which fall within the bar of section 437 I.P.C. He also relied upon the judgment of Rajendra Nath Srivastava Vs. State of U.P. and Others, in this respect. Learned A.P.P. also pointed out that any person can apply for cancellation of bail and in this connection reliance was placed on R. Rathinam v. State by DSP, reported in 2000 Cri 178. Imamuddin Vs. Ayub Khan and Others, , it was urged that the bail has been granted in an arbitrary and capricious manner. Learned A.P.P. also pointed out that there are threats to witnesses and applicant. In this respect, complaints have already been made by the complainant to the police. He, therefore, contends that the bail granted to the respondent Nos. 2 and 3 is required to be cancelled.

6. Section 437 Cri.P.C. provides that person accused of, or suspected of, the commission of any non-bailable offence shall not be released on bail by the Magistrate, if there appears reasonable ground for believing that he has been guilty for offence punishable with death or imprisonment for life. The scope and ambit of expression "punishable with death or imprisonment for life" occurring in section 437(i) came up for consideration before a learned Single Judge of this Court in Santosh Bhaurao Raut Vs. State of Maharashtra, . It was a case of gang rape and it was submitted on behalf of the accused that since one of the punishments prescribed for the said offence is ten years, though a person may be sentenced to life, yet the bar u/s 437 I.P.C. did not operate in so far jurisdiction of Magistrate to grant bail is concerned. This argument was not accepted by the learned Single Judge and it is necessary to reproduce para 3 of the said judgment, which reads as under:--

"Counsel for the applicant submits that the Sessions Court was in error in holding

that the applicant was disentitled to bail merely because one of the punishments prescribed for the offence of rape, is life imprisonment. It is argued that though the applicant is accused of gang rape, the punishment prescribed is 10 years R.I. though it is possible that in a given case the offender may be sentenced to life imprisonment. However, for the purposes of entitlement to bail it is not the maximum punishment that is relevant. The offender who is accused of a non-bailable offence is not deprived of the entitlement to bail merely because the offence is punishable with life imprisonment. Such a disability is occasioned where the offence allegedly committed by the offender is punishable only with death or imprisonment for life. To put it differently, section 437(1)(i) of the Cr.P.C. cannot be applied to the case of a person who can be punished with a sentence of imprisonment less than imprisonment for life. The Indian Penal Code prescribes a minimum sentence of 10 years R.I. for one accused of the offence of gang rape. This is the punishment to be taken into consideration for the purposes of deciding on the applicability or otherwise of section 437(1)(i) of the Cr.P.C. In other words it is not the maximum sentence imposable for gang rape which determines the applicability or otherwise of section 437(1)(i). It is not possible to agree with this submission. Section 437(1)(i) says that a person accused of or suspected of the commission of an offence punishable with death or imprisonment for life, shall not be released on bail if there appears reasonable ground for believing that he has committed such an offence. Therefore, even if the law prescribes death or imprisonment for life as the maximum impossible sentence, section 437(1)(i) is attracted and the offender deprived of the right to get bail. This of course is on it being made to appear that there are reasonable grounds for believing that he has committed an offence for which the prescribed punishment is death or imprisonment for life."

Therefore, in respect of offence for which the maximum sentence prescribed is life imprisonment, but alternatively lesser sentence is provided, for instance ten years, the bar of section 437 would operate and such persons cannot be released on bail by the Magistrate as the Magistrate has no jurisdiction to grant bail to such persons u/s 437(1) Cr.P.C. In attempt to murder, if hurt is caused, the offence is punishable with imprisonment for life or imprisonment which may extend up to 10 years.

7. In *Akhil Anand Arya v. K.V. Satyamurthy and another*, 1987 (1) B.C.R. 473 : 1987 M.L.J. 138, it has been held by learned Single Judge of this Court that Magistrate has no jurisdiction to grant bail where person accused of an offence punishable with death or imprisonment for life unless it is found that there are no reasonable grounds to believe that he has been guilty of such an offence. The offences reported therein were under sections 143, 144, 146, 147, 148, 149 and 307 I.P.C. and the aforesaid observations were made in the light of the said offences.

8. The cases of persons under the age of 16 or a woman or sick or infirm person shall, of course be not covered by this bar as the proviso empowers the

Magistrate to grant bail even in cases where offences punishable with the death or life imprisonment or alternatively lesser punishment say ten years in so far as woman, persons under the age of 16, sick or infirm are concerned. However, for releasing such persons on bail in exercise of power u/s 437, the Magistrate is required to give reasons. Nevertheless, the mere fact that the accused is a woman, by itself, may not be sufficient to exercise jurisdiction to grant bail. A learned Single Judge of this Court in *B.S. Rawat, Assistant Collector of Customs v. Andre Christopher Mydlarz and others* (supra), has laid down that the word "may" appearing in the provision does not mean "shall" and "must" and as such it is not obligatory on Court to release the accused only on count that she is woman and all other considerations are to be weighed while exercising the jurisdiction to grant bail to a woman.

9. The principles relating to cancellation of bail are now well settled. If the bail is granted illegally or by a Court having no jurisdiction or the grant of bail shows arbitrariness in granting the same, such bail can be cancelled. Learned A.P.P. and Advocate for the applicant has relied upon a judgment of Rajasthan High Court in *Imamuddin v. Ayub Khan and others* (supra), wherein it is laid down that when bail has been granted to accused in a non-bailable offence punishable with death or imprisonment for life in a manner which smacks of arbitrariness, capriciousness or perversity, on the part of the Court of Sessions granting such bail, the High Court has not merely the discretion but a duty laid on it u/s 439(2) Cr.P.C. to cancel the bail and order the accused to be re-arrested.

10. Of course, as laid down by the Apex Court in *Bhagirathsingh Judeja v. State of Gujarat* (supra) very cogent and overwhelming circumstances are necessary seeking cancellation of the bail.

11. In the light of the above, I would like to examine whether the bail granted to respondent Nos. 2 and 3 by the Judicial Magistrate is required to be cancelled or not. The offence, in question, is reported to have taken place on 17-10-2000 and dying declaration of the victim was recorded by the police on 18-10-2000 at 5.30 P.M. The learned A.P.P. stated that the Executive Magistrate had been summoned to record the dying declaration, but he expresses his inability to come as a result of which dying declaration was recorded by the police. In the dying declaration, the victim had stated that Sonabai came running to her house. She had plastic bottle in her hand. She poured kerosene on her person. Her daughter Shantabai came along with her, she set her on fire by burning match stick, after Shantabai poured kerosene. The respondent Nos. 2 and 3 were arrested on 19-10-2000 at 4.00 p.m. and the bail application in question was filed by them on 20-10-2000. On 20-10-2000, the police had also filed an application for Magisterial Custody of the respondent Nos. 2 and 3. Learned A.P.P. could not justify this action of the police since according to him the police should have sought police custody remand. Be that as it may, on the bail application, the Magistrate asked A.P.P. to give say. However, it appears that the A.P.P. was not available in the Court and without waiting the say of the A.P.P. as also giving an opportunity to the

prosecution the Magistrate in a very hastily manner granted bail to the applicants on the same day when the victim was already in the hospital and in fact she expired at about 3.00 p.m. on 20-10-2000. It is no doubt true that the respondent Nos. 2 and 3 are ladies but that fact alone does not entitle them to get bail since all other circumstances including nature and seriousness of the offence and other considerations have to be looked into. The Magistrate did not even wait for the say of the AP.P. in order to hear the AP.P. in a matter where the applicants had been arrested for attempt to murder u/s 307 read with section 34 I.P.C. Besides this, it appears that there are threats to witnesses in respect of which a complaint has been made to the police. In the aforesaid circumstances, I have absolutely no hesitation to come to the conclusion that the Magistrate had acted in an arbitrary and capricious manner while dealing with the matter and hurriedly granted bail to the respondent Nos. 2 and 3.

12. Accordingly, I am of the opinion that the bail granted to the respondent Nos. 2 and 3 is required to be cancelled. The bail granted to respondent Nos. 2 and 3, Sonabai wd/o Puliya Chauhan and Shantabai Manglu Rathod, respectively, by the Magistrate on 20-10-2000, is accordingly cancelled and I direct the police to immediately re-arrest respondent Nos. 2 and 3. In case the respondents move for bail to the Sessions Court having jurisdiction, the Sessions Court shall decide the same on the merits of the matter without being in any manner influenced by the order of cancellation of bail passed by the Court. However, such bail application shall be entertained after the arrest of respondent Nos. 2 and 3.

13. The application is allowed in aforesaid terms. Steno copies of the operative portion of the order be given to the parties and learned AP.P.