

(1980) 07 BOM CK 0003

In the Bombay High Court

Case No : Criminal Revision Application No. 492 of 1980

Kamal K. Chadha

APPELLANT

Vs

B.S. Subhedar and another

RESPONDENT

Date of Decision : 28-07-1980

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437, 437(1), 437S, 439(1), 439(2)
Evidence Act, 1872 — Section 31

Citation : (1981) CriLJ 1799

Hon'ble Judges : Rele, J

Bench : Single Bench

Judgement

1. This Revision Application raises an important question in regard to the powers of the Court to cancel bail under S. 439(2) of the Cr.P.C., 1973.

2. Shri Samant, on behalf of the respondents at first stated that after the Rule is served in this matter upon the respondents, he would argue the matter fully; but later on he gave up this submission and stated that he would accept the Rule and argue the matter fully and final order on the Revision Application should be passed.

3. The prosecution case is that on 17-7-1980 a truck bearing No. ASZ-6377 was intercepted by the Officers of the Directorate of Revenue Intelligence (hereinafter referred to as "D.R.I.") in collaboration with the Officer of the Land Custom Station, Patropole, on the Indo-Bangla Desh border, and it was found to contain 59 cases of snake skins valued at Rs. 44.40 lakhs along with 263 cases of fruit. The said 59 cases were declared by one Laxman Kumar Mishra of Calcutta to contain sweetlime. The 59 cases as also the 263 cases of fruit and the said truck were seized under the Customs Act, 1962. The said Laxman Kumar Mishra and his brother Bijoy Kumar Mishra were arrested. Interrogation of Laxman Kumar Mishra and Bijoy Kumar Mishra revealed that the petitioner Kamal Kishore Chadha had visited Calcutta towards the end of March 1980 or in the beginning of April 1980 and he had contacted them at Calcutta and planned out the

operation of smuggling out of snake skins to Bangla Desh and from Bangla Desh to London. It further transpired that the petitioner had again visited Calcutta on 22-1-1980 to finalise the arrangements for smuggling out the snake skins.

4. On 17-7-1980, the Deputy Director of Revenue Intelligence, Zonal Unit, Calcutta, intimated the Deputy Director of Revenue Intelligence, Bombay, on telephone the above matter. On 18-7-1980 follow up action was taken at Bombay and among the place that were searched by the Officers of the D.R.I. were the residential premises of one Mangal Chand Bhandari at Talamkiwadi, Tardeo, Bombay. At the time of search Mangal Chand Bhandari was not at his residence. In the search, 27 snake skins were found and they were taken charge of by the Officers of the D.R.I., Bombay, The prosecution has further alleged that Mangal Chand Bhandari had travelled with the petitioner Kamal Kishore Chadha by air from Bombay to Calcutta on 15-3-1980. The premises of Messrs. Rohit Enterprises, a concern of the Chand family, was also search on 18-7-1980 and some telephone bills showing trunk-calls made from Bombay to Bijoy Kumar Mishra at Calcutta in February and March, 1980 were recovered.

5. On 19-7-1980, the petitioner was arrested at Bombay. The prosecution has alleged that there exists a widespread conspiracy having ramification at Bombay, Calcutta, Dacca, Bangla Desh, London and other places in Europe to smuggle out of India snake skins and the petitioner is the king-pin behind this conspiracy and had master-minded this conspiracy. The export of snake skins is totally prohibited under the Wild Life (Protection) Act, 1962, and the said prohibition is deemed to be a prohibition u/s II of the Customs Act, 1962, read with S. 3 of the Import and Export (Control) Act, 1947.

6. The petitioner was produced before the learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Bombay, and the prosecution prayed for remand of the petitioner. The learned Magistrate, however, remanded the petitioner to judicial custody up to 20-7-1980. On 20-7-1980, the petitioner-accused made an application to the learned Magistrate that he should be released on bail. This application was opposed by the Department of Revenue Intelligence and among the grounds that were taken by the Department were the complicity of the petitioner on the offence of smuggling out snake skins, that the petitioner has master-minded the smuggling activity and he was the king-pin behind the smuggling of the snake skins and it was also alleged that the telephone bills and the investigation so far done revealed a connection between the petitioner-accused and the said Mangal Chand Bhandari and that Mangal Chand Bhandari was yet to be traced and that, therefore, the petitioner-accused should not be released on bail as that would hamper the investigation of the case. The learned Magistrate, however, took into consideration the fact that beyond the word of Bijoy Kumar Mishra (he has been referred to as Vijay Kumar Mishra) there is no other evidence so far collected against the petitioner-accused. The learned Magistrate after considering the submissions made before him on both the sides passed an order directing the petitioner-accused to be released on

bail in the sum of Rupees 2,00,000 with one surety or cash deposit of Rs. 1,00,000/- on condition that the accused shall not leave Bombay without the permission of the Court and that he shall attend the D.R.I. Officer every day between 11-00 a.m. and 5.00 p.m. The learned Magistrate also recorded that the passport of the accused was already impounded.

7. As against the said order, the D.R.I. preferred Miscellaneous Criminal Application in the Court of Session for Greater Bombay for cancellation of bail under S. 439(2) of the Cr.P.C. 1973, (hereinafter referred to as "the new Code"). The learned Sessions Judge, however, felt that the learned Metropolitan Magistrate displayed "total lack of application of mind". He, therefore, passed an order as follows :

"(i) The respondent No. 1 is ordered to be arrested and committed to judicial custody.

(ii) This order shall remain operative for a period of one fortnight.

(iii) The respondent No. 1 shall produced before the Chief Metropolitan Magistrate on 24-7-1980 and 31-7-1980 to abide by the orders which the Chief Metropolitan Magistrate may deem fit to pass".

The learned Sessions Judge was prompted to pass this order on the ground that the investigation papers, which were placed before him, go to show that the petitioner-accused was "the master-mind who planned the underground conspiracy of a serious magnitude spread over a wide range to this whole subcontinent from Bombay to Bangla Desh and from Bangla Desh to London and it was he who directed the operations". The learned Session Judge proceeded to observe :

"The planned conspiracy, if successful, would be fraught with such grave consequences so as the throw the whole national economy out of gear."

8. It must straightway be stated that though this Revision Application was opposed by Shri Samant with some vehemence, yet advisedly he did not refer to this observation of the learned Sessions Judge to support the order for cancellation of bail. This observation is the outcome of the working of the mind of the learned Sessions Judge alone as it is not even contended by the prosecution itself that the seizure of snake skins worth Rs. 44.40 lakhs would be fraught with such grave consequences so as to throw the whole national economy out of gear and this observation, therefore, is wholly unsupported and unwarranted. Before I proceed to consider the arguments advanced on behalf of both the sides, it would be necessary to consider the order that was passed by the learned Sessions Judge. The second part of the order provides that the order shall remain operative for a period of a fortnight. As to what was to happen thereafter, the order is silent. It does not say whether, the judicial custody should be continued, nor does it state that the petitioner-accused would be entitled to be released on bail thereafter and, if so, on what terms and conditions. On this

aspect of the matter, the order is silent. The third part of the order merely states that the respondent should be produced before the chief Metropolitan Magistrate on 24-7-1980 and 31-7-1980 to abide by the orders which the Chief Metropolitan Magistrate may deem fit to pass. Now, the order passed by the learned Sessions Judge was to be in operation for two weeks. The two weeks, if calculated from the date of the order would expire on 6th August, 1980. What order the learned Sessions Judge expected the learned Magistrate to pass on 24-7-1980, i.e., the very next day of the order cancelling the bail was passed by him, has not been clarified. So also, what order the learned Magistrate was expected to pass on 31-7-1980 in spite of the order of the learned Sessions Judge being operative till 6th August, 1980, has not been stated by the learned Sessions Judge. What was the reason for passing such a curious order, which required the learned Magistrate to pass orders on these two dates, viz., 24-7-1980 and 31-7-1980, has remained to be clarified. Passing orders of this nature, which is prone to create confusion and complications, should have been avoided.

9. Shri Jethmalani, learned counsel appearing on behalf of the petitioner accused, has contended that the learned Sessions Judge has failed to appreciate that the offence in the present case, though a non-bailable offence, is an offence not punishable with death or life imprisonment and, therefore, in respect of these types of offences bail is a rule. Shri Jethmalani has argued that the learned Sessions Judge has failed to appreciate the dichotomy created in regard to non-bailable offence in S. 437(1) of the new Code. Shri Jethmalani has submitted that being a non-bailable offence of a lesser kind, the general rule as laid down in the case of *Gurcharan Singh and Others Vs. State (Delhi Administration)*, would be attracted and that, therefore, the learned Sessions Judge was in error in cancelling the bail. Shri Jethmalani has further argued, on the strength of the authority in *Gurcharan Singh's* case, that the learned Sessions Judge has failed to draw a distinction between rejection of bail and cancellation of bail. The learned Sessions Judge has failed to appreciate the policy under the new Code that bail order is an interlocutory order hit by the provisions of S. 397(2) of the new Code and whether or not the Code has imposed jurisdictional limitation on the Sessions Court, the Sessions Court should have exercised its power of cancellation of bail u/s 439(2) of the new code with circumspection. He should not have lightly exercised that power. Shri Jethmalani has further contended that the learned Sessions Judge has confused between rejection of bail and cancellation of bail and learned Sessions Judge has not properly appreciated the principles of law in regard to the cancellation of bail laid down by the Supreme Court in the case of *State through the State (Delhi Administration) Vs. Sanjay Gandhi*, . Shri Jethmalani has also referred to the decision of the Madras High Court in the case of *The Public Prosecutor Vs. George Williams alias Victor*, , and he has submitted that the prosecution has failed to show any of the five grounds mentioned by their Lordships of the Madras High Court for cancellation of bail. He has submitted that though the case before the Madras High Court was u/s 497(5) of the Cr.P.C., 1898, (hereinafter referred to as "the old Code", yet the principles

as laid down by the Madras High Court, viz., the five cases in which the bail could be cancelled, would be equally applicable to the present case and that, therefore, there is no ground available to the prosecution for cancellation of bail. Shri Jethmalani submitted that the learned Sessions Judge had committed an error of law in cancelling the bail.

10. Shri Jethmalani made a grievance in the course of the arguments that authorities were cited before the learned Sessions Judge both by himself as well as by Shri Samant on behalf of the prosecution, and Shri Samant supports Shri Jethmalani, and that in the order that has been passed by the learned Sessions Judge not a single authority has been referred to.

11. On merits Shri Jethmalani has argued that the petitioner-accused was arrested on 19-7-1980. He was produced before the learned Additional Chief Metropolitan Magistrate on the same day and he was released on bail on the next day, i.e., 20-7-1980. According to Shri Jethmalani the petitioner-accused has observed all the conditions of bail. Therefore, there was no reason for the learned Sessions Judge to have cancelled the bail order which could have been done on the ground that any condition has been contravened. Shri Jethmalani has further argued that the statements of Bijoy Kumar Mishra and his brother Laxman Kumar Mishra are after all statements of accomplices. Though their statements are evidence u/s 108 of the Customs Act, 1962, nevertheless, the probative value of such evidence is still to be gathered from S. 31 of the Evidence Act and the salient feature of law that this evidence should not be acted upon as a matter of prudence without sufficient corroboration would, in this case also, hold good and except for the statements of the two Mishras recorded u/s 108 of the Customs Act, 1962 there is no other evidence against the petitioner and that being so it should not hold back the Court in releasing the accused on bail. Shri Jethmalani has submitted that at this very preliminary stage of the proceedings it is not necessary for him to dilate any more on this aspect of the matter. Shri Jethmalani has also contended that the reason why the petitioner is required to be kept in custody, according to the prosecution, is that an alleged accomplice is yet to be arrested. This according to Shri Jethmalani, is not a valid and a salient ground for cancellation of bail which was once granted. According to Shri Jethmalani, the principles of cancellation of bail are well settled and in the present case no ground was available to the prosecution for cancellation of bail. Shri Jethmalani has contended that the petitioner was required to attend the office of the D.R.I. from 11.00 a.m. to 5.00 p.m. The petitioner was released on bail on 20-7-1980; on 21st July, 1980 he attended the Esplanade Court from 11.00 a.m. to 5.00 p.m. on 22nd July 1980, he attended the office of the D.R.I. from 11.00 a.m. to 5.00 p.m. on 23rd July, 1980, this matter was before the learned Sessions Judge, Bombay, and the petitioner was present in the Court of the learned Sessions Judge, Bombay, and that, therefore, this conduct of the petitioner shows that the petitioner has complied with all the conditions of bail and that, therefore, there was no ground made out by the prosecution for the learned Sessions Judge to cancel the bail. Shri Jethmalani has lastly contended

on merits that the prosecution has objected to the petitioner accused being released on bail on the ground that Mangal Chand Bhandari has not been traced and that if the petitioner is released on bail, the petitioner would divulge to him what statement the petitioner has made u/s 108 of the Customs Act, 1962, to the D.R.I. authorities and this would hamper the investigation. On this aspect of the matter Shri Jethmalani has argued that the search of Mangal Chand Bhandari's place took place on 18th July, 1980, Mangal Chand Bhandari was not traced on 18th July, 1980 and since that time Mangal Chand Bhandari is not traceable. On the other hand, on the 19th July, 1980, i.e., one day after the search, the petitioner was traced, was available and was arrested. Can it, therefore, be said that Mangal Chand Bhandari absconded because of the petitioner ? Can it, therefore, be said that the petitioner-accused has the knowledge as to where Bhandari is ? To attribute knowledge to the petitioner and the alleged tampering of witnesses by the petitioner-accused, under the facts and circumstances of this case, is grossly erroneous. The petitioner-accused was released on bail in the watch contraband case, but no allegation has been made that in the Delhi watch contraband case the petitioner has tampered with the evidence. Had the petitioner done so, even to a minutest extent, the D.R.I. authorities would not have hesitated to make an application for cancellation of bail; but no such application has been made. What is the ground, therefore, for the prosecution to say that their investigation would be hampered if the petitioner-accused is directed to be released on bail ? Having posed this question, Shri Jethmalani proceeded to answer the question by stating the prosecution has not alleged any ground and has no such ground. Shri Jethmalani has then argued that if the statement of Bijoy Kumar Mishra as disclosed in the application for cancellation of bail and in the remand application before the learned Magistrate is looked into, it would be noticed that B. K. Mishra had implicated Bhandari in the commission of the offence and he had implicated the petitioner-accused remotely and in this view of the matter there is no reason why the petitioner's liberty should any more be curtailed. The statements which are contained in the remand application, in the reply application opposing bail and in the application for cancellation of bail, looked at in their proper perspective, would show that the prosecution has not shown by any preponderance of probability that the petitioner-accused is likely to tamper with the witnesses or hamper investigation.

12. Shri Samant, learned counsel appearing on behalf of the D.R.I., has argued that the petitioner-accused is a previous convict. He was convicted by a British Court for smuggling Hashish and this fact should also be taken into consideration in considering whether the petitioner was a fit person to be enlarged on bail. Shri Samant has then argued that in or about June 1979, the petitioner was involved in the commission of an offence of smuggling wrist watches at New Delhi, and the petitioner-accused was arrested in connection with that case at Bombay and he has since then been enlarged on bail. Shri Samant has then argued that while on bail in that case, the petitioner-accused has committed the second offence of

smuggling out of India snake skins and that, therefore, the petitioner-accused has forfeited his right to be released on bail. Shri Samant has then argued that the statements of the two accused persons, viz., Bijoy Kumar Mishra and Laxman Kumar Mishra amply involve the accused in the commission of the offence smuggling and their statements are evidence under the provisions of S. 108 of the Customs Act, 1962; and being evidence in this case, this Court will not at this stage of proceedings appreciate evidence but merely consider whether there is evidence or not and there being evidence in this case at least of the two accomplices, the petitioner-accused should not be released on bail. Shri Samant has next argued that although orders granting bail are interlocutory orders within the meaning of S. 397(2) of the new Code and are, therefore, not revisable, nonetheless independent jurisdiction has been given to the Court of Session and to the High Court for cancellation of bail and that this giving of independent jurisdiction itself shows that in a given case, the Sessions Court will cancel bail. According to Shri Samant, the giving of independent jurisdiction to the Sessions Court itself shows that although the Sessions Court is not sitting in revision over the orders passed by the Magistrate it could apply its mind independently and could come to its own conclusion whether the accused person should any longer remain free or whether his bail should be cancelled. Shri Samant has then argued that if the Sessions Court comes to a conclusion that the bail ought not to have been granted, the Sessions Court would be justified in cancelling the bail, as the principle that once bail is always a bail unless supervening circumstances intervene, is principle which is not applicable to the facts and circumstances of the present case. In the present case, according to the prosecution, a co-accused is yet to be traced and if the petitioner-accused is released on bail, there is every likelihood that the petitioner-accused would sound the co-accused and thereby hamper investigation. Shri Samant has relied upon the decision of the Gujarat High Court rendered in the case of *The State of Gujarat Vs. Hirasing Kesarising Solanki*, and the two decisions of the Punjab and Haryana High Court rendered in the case of *Onkar Chand Vs. The State of Punjab*, and *Jagjit Singh Vs. The State of Punjab*, and he has contended that if bail is granted on erroneous ground, the Sessions Court has ample power to cancel bail and if the Sessions Court comes to a conclusion that bail has been granted on erroneous grounds by a Magistrate, the Sessions Court would be justified in cancelling the bail and this Court would not interfere in revision. Shri Samant has sought to distinguish the judgment of the Supreme Court in the case of *State (Delhi Administration) Vs. Sanjay Gandhi*, and according to Shri Samant in *Sanjay Gandhi*'s case the stage at which bail application was sought to be cancelled was after the charge was framed and the trial had progressed, while in the present case the bail is cancelled at the investigation stage and according to Shri Samant, the two stages, which are apparent in S. 437(1), viz., the stage at which the investigation is pending and the stage after the charge is framed, have to be taken into consideration and he has submitted that since the accomplice Mangal Chand Bhandari is yet to be traced the petitioner-accused should be remanded to jail custody at least for about two weeks. Shree Samant has argued that the prosecution is well aware

that the offence with which the petitioner-accused is charged is not, though non-bailable, an offence punishable with death or imprisonment for life and that, therefore, the prosecution does not desire that the petitioner should be kept in jail as in the case where a person is charged with having committed an offence punishable with life imprisonment or with death, but what the prosecution at this stage desires is that the petitioner should be remanded to jail custody for two weeks in order that the investigation into the tracing of the absconding accused person is not hampered. Shri Samant has lastly contended that looking into the previous conduct of the petitioner-accused and his complicity in the smuggling of the wrist watches case at Delhi, the prosecution has reasonable apprehension in their mind that the petitioner-accused, if released on bail, will tamper with the witnesses and would hamper investigation and that, therefore, the petitioner-accused should not be released on bail.

13. On merits Shri Samant has argued that the petitioner-accused's brother by name Shashikumar Chandha was traced at the residence of Mangal Chand Bhandari in or about June 1979 and this shows that Mangal Chand Bhandari is a close associate of the petitioner and his brother Shashikumar Chandha. He has also referred to the finding of 27 snake skins in the house of Mangal Chand Bhandari and he has argued that this also shows that the petitioner-accused and Mangal Chand Bhandari are close associates and the complicity of Mangal Chand Bhandari in the commission of the offence of smuggling snake skins cannot be ruled out. He has then referred to Mangal Chand's presence at Calcutta in the company of the petitioner-accused in or about March and April 1980 and this also shows the petitioner's close association with Mangal Chand Bhandari and for all these reasons the order cancelling bail should (not) be set aside.

14. Shri Jethmalani has rejoined and he has argued that S. 437 of the new Code applies even at the investigation stage and, therefore, the offence, though non-bailable, being one of the lesser kind, bail is the Rule and refusal to grant bail would be an exception to this general rule. He has submitted that the past conduct alleged by the prosecution is in regard to the Hashish case where the petitioner-accused was convicted by a British Court; but that conviction was about seven years ago in or about the year 1973; from 1973 to 1979, when the petitioner was allegedly involved in the smuggling or wrist watches case at Delhi, nothing has been shown against the petitioner. Therefore, conduct, which is far too remote and which relates to a matter which happened about seven years ago, cannot avail the prosecution for objecting to the petitioner-accused being released on bail. In regard to the smuggling of watches and watch-straps at Delhi, Shri Jethmalani has relied upon an application made on 2-7-1980 to the learned Chief Metropolitan Magistrate, Esplanade, Bombay, made by the Officers of D.R.I. That application was made for extension of bail of the respondents, respondent No. 1 being the petitioner-accused herein. The petitioner-accused was released on bail in the sum of Rs. 50,000/-. The application was for continuation of the bail period in the case of the seizure of contraband watches at Delhi. In that application it is stated -

"The complaint in connection with seizure of contraband goods effected at Palam Airport Delhi on 29/30th January, 1979 as mentioned above is likely to be filed in the Court of Delhi against respondents Nos. 1 and 2 mentioned herein along with others. However, respondents Nos. 1 and 2 have not been arrested by Customs at Delhi as their arrest for the seizure at Delhi was also effected in Bombay. The department does not wish to file any complaint against them for the seizure at Bombay. In the circumstances, to enable the Delhi Customs to make necessary arrangement to file a complaint at Delhi against these respondents or pending the filing to effect their arrest, the bail period of these two respondents be extended."

On the strength of this, Shri Jethmalani has contended that the respondents therein are not arrested in respect of contraband goods at Delhi and the Bombay Customs do not wish to proceed against the respondents as stated by them. In this view of the matter, the alleged involvement of the petitioner-accused in the matter of contraband goods seized at Delhi cannot avail the D.R.I. authorities for objecting to grant of bail. He has then referred to the three decisions cited by Shri Samant, viz., of Gujarat High Court in *The State of Gujarat Vs. Hirasing Kesarising Solanki*, of the Punjab and Haryana High Court in *Ramlagan Singh and Others Vs. State of Bihar*, and *Mohammad Shafi Vs. Humaira Khatoon and Another*, and has contended that all those cases were decided prior to the decision of the Supreme Court rendered in *State (Delhi Administration) Vs. Sanjay Gandhi*, and that, therefore, the ratio of those decision is no longer good law. Shri Jethmalani had finally contended that if the order of the learned Sessions Judge is looked into, it will be noticed that the argument advanced before the learned Sessions Judge that because Bhandari is absconding and is not traceable, the bail of the petitioner-accused should be cancelled has not found favour with the learned Sessions Judge. Had it been so, the learned Sessions Judge would surely have stated so in his judgment. The fact that no mention of this argument has been made in the judgment shows that it has not found favour with the learned Sessions Judge.

15. Section 437 of the new Code empowers the Magistrate to release a person accused of a non-bailable offence and produced before the Magistrate to release him on bail; but an accused person is not to be so released if there appear to be reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. Section 437 of the new Code creates a dichotomy in regard to the non-bailable offences and deals with two stages of a case, viz., prior to the filing of the charge-sheet and after the filing of the charge-sheet, as is apparent from sub-section (2), which states -

"If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be"

The sub-section (6) provides for releasing the accused on bail in cases triable by a Magistrate where trial is not concluded within a period of 60 days from the first date fixed for taking evidence in the case, unless for reasons to be recorded in

writing the Magistrate otherwise directs. Section 438 confers an extraordinary power upon the Court to grant bail even before arrest, what is called anticipatory bail; and S. 439(1) confers power upon the High Court or the Court of Session to enlarge a person accused of any offence on bail. It does not create any dichotomy in regard to non-bailable offence, as has been done in S. 437 of the new Code. Therefore, the power of the Court of Session is an unlimited power and even in cases where the person is accused of a non-bailable offence punishable with death or imprisonment for life, the High Court or the Court of Session has the power to release even such a person on bail. Sub-section (2) of S. 439 empowers the High Court or the Court of Session to direct that any person who has been released on bail under Chapter XXXIII be arrested and commit him to custody.

16. There are no words in S. 439(2) of the new Code which limit or curtail the powers of the High Court or the Court of Session to cancel bail. S. 439(2) also does not give any guideline as to when bail could be cancelled. The Supreme Court has considered the provisions of Section 439(2) in the case of Gurcharan Singh and Others Vs. State (Delhi Administration), In that case on Sunder, who was said to be a notorious dacoit, was murdered and the Police Officers ranging from the Deputy Inspector General of Police down to some police constables were alleged to have been involved in the commission of murder of Sunder while he was in police custody. The appellants were released on bail and after the charge-sheet was filed, the State moved the High Court u/s 439(2) of the new Code for cancellation of bail and the bail bonds furnished by the appellants were cancelled. The appellants moved the Supreme Court against that order. After considering the provisions of S. 437 of the new Code and the provisions in regard to the non-bailable offence punishable with death or imprisonment for life, the Supreme Court proceeded to consider the non-bailable offences in other cases and it was observed at page 135 (of Cri LJ) : (at p. 185 of AIR) :-

"In other non-bailable cases the court will exercise its judicial discretion in favour of granting bail subject to sub-section (3) of S. 437, Cr.P.C., if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the court which may defeat proper investigation and a fair trial, the court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life."

In regard to the power of the High Court and the Court of Session as provided in S. 439(1), the Supreme Court observed at page 135 (of Cri LJ) : (at p. 186 of AIR) :-

"Section 439(1), Cr.P.C. of the new Code on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike u/s 437(1) there is no ban imposed u/s 439(1), Cr.P.C. against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, how-ever, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only

after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of S. 437(1) and S. 439(1), Cr.P.C. of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witness; the history of the case as well as of its investigation and other relevant grounds which, in view of so many variable factors, cannot be exhaustively set out."

In regard to the cancellation power of the High Court and the Court of Session, the Supreme Court has observed at page 136 (of Cri LJ) : (at p. 186 of AIR) :

"The question of cancellation of bail under S. 439(2), Cr.P.C. of the new Code is certainly different from admission to bail u/s 439(1), Cr.P.C." Having observed this, the Supreme Court proceeded to consider its own decision in the case of *The State Vs. Captain Jagjit Singh*, and the Supreme Court proceeded to observe :-

"The Captain was prosecuted along with others for conspiracy and also under Sections 3 and 5 of the Indian Official Secrets Act, 1923, for passing on official secrets to a foreign agency. This Court found a basic error in the order of the High Court in treating the case as falling under S. 5 of the Official Secrets Act which is a bailable offence when the High Court ought to have proceeded on the assumption that it was u/s 3 of the Act which is a non-bailable offence. It is because of this basic error into which the High Court fell that this Court interfered with the order of bail granted by the High Court."

17. In *State (Delhi Administration) Vs. Sanjay Gandhi*, the Supreme Court has stated :-

"Rejection of bail when bail is applied for is one thing, cancellation of bail already granted is quite another. It is easier to reject a bail application in non-bailable case than to cancel a bail granted in such a case. 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 fair trial to allow the accused to retain his freedom during the trial. The fact that prosecution witnesses have turned hostile cannot by itself justify the interference that the accused has won them over the objective fact that witnesses have turned hostile must be shown to bear a casual connection with the subjective involvement therein of the respondent. Without such proof, a bail once granted cannot be cancelled on the off chance or on the supposition that witnesses have been won over by the accused It is therefore, necessary for the prosecution to show some act or conduct on the part

of the respondent from which a reasonable inference may arise that the witnesses have gone back on their statements as a result of an intervention by or on behalf of the respondent."

Then again in para 24 at page 968 (of AIR) : (at p. 960 of Cri LJ) the Supreme Court has observed in regard to Section 439(2) of the Cr.P.C. as follows :-

"Section 439(2) of the Cr.P.C. confers jurisdiction on the High Court or Court of Session to direct that any person who has been released on bail under Chapter XXXIII be arrested and committed to custody. The power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection. But the power, though of an extraordinary nature, is meant to be exercised in appropriate cases when, by a preponderance of probabilities, it is clear that the accused is interfering with the course of justice by tampering with witnesses. Refusal to exercise that wholesome power in such cases, few though they may be, will reduce it to a dead letter and will suffer the Courts to be silent spectators to the subversion of the judicial process. We might as well wind up the Courts and bolt their doors against all than permit a few to ensure that justice shall not be done."

18. Reference may be made to the decision of the Madras High Court in the case of *The Public Prosecutor Vs. George Williams alias Victor*, Though cases in which bail, which is granted, can be refused, cannot be circumscribed and will depend upon the facts and circumstances of each case, the five cases enumerated by the Madras High Court would serve as a guideline to consider the cases in which bail can be cancelled and, therefore, they are enumerated here :

(1) Where the person on bail, during the period of bail, commits the very same offence for which he is being tried or has been convicted, and thereby proves his utter unfitness, to be on bail.

(2) If he hampers the investigation as will be the case if he, when on bail, forcibly prevents the search of places under his control for the corpus delicti or other incriminating things.

(3) If he tampers with the evidence, as by intimidating the prosecution witnesses, interfering with the scene of offence in order to remove traces or proofs of the crime, etc.

(4) If he runs away to a foreign country, or goes underground, or beyond the control of his sureties.

(5) If he commits acts of violence, in revenge, against the police and the prosecution witnesses and those who have booked him or are trying to book him. In the present case, the order of bail has been challenged by the prosecution on a twofold ground : (1) Conduct prior to the alleged commission of the offence in the present case; and (2) tracing of an accomplice. There is no third ground made out. The various grounds which are stated in the remand application and in reply to the application for bail are only stated to disclose the material before the

prosecution showing the complicity of the petitioner-accused in the commission of the offence. For example, the search at Rohit Enterprises Office in which the telephone bills were recovered, and the statements of the two accomplices Bijoy Kumar Mishra and his brother Laxman Kumar Mishra. These statements, the search, the finding of incriminating materials, all these relate to the complicity of the accused in the commission of the offence. They do not relate to the conduct of the accused in the course of investigation of the offence and in considering bail one cannot lose sight of the fact that the Court has to consider what is the gravity of the offence. The Legislature itself has permitted bail to be granted in non-bailable offence where the gravity of the offence is of a lesser kind than the offence for which death penalty or imprisonment for life has been prescribed. If the Legislature itself in its wisdom has permitted bail to be granted in non-bailable offences of this nature, the question would be whether the Court would be justified in rejecting bail. This is a question which does not directly call for an answer in the present case because this is not a case of rejection of bail. Bail was granted. The question is of cancellation of bail. As already stated, what is before this Court to exercise its extraordinary jurisdiction, which the Court has to exercise with circumspection ? The only factors or the only circumstances which this Court is called upon to consider are that Mangal Chand Bhandari is at large; Mangal Chand Bhandari is a close associate of the petitioner-accused; if the accused is released on bail, Mangal Chand Bhandari would be contacted and what the petitioner-accused stated in his examination under S. 108 of the Customs Act would be disclosed to Mangal Chand Bhandari and he would be alerted. All these aspects of the matter were present before the learned Additional Chief Metropolitan Magistrate, when he granted bail, since they were disclosed in the remand application as also in the reply which the D.R.I. Officers gave to the application for bail made by the petitioner. The learned Additional Chief Metropolitan Magistrate in his discretion granted bail to the accused and the learned Additional Chief Metropolitan Magistrate has in no uncertain terms stated in the order :-

"The present accused financed the other persons for purchasing snake skin shra, there is no other evidence so far collected against the accused."

Except this fact that Mangal Chand Bhandari is to be traced no other ground has been alleged or canvassed before me for cancellation of bail. As already stated, the entire argument proceeded on the past conduct which has already been dealt with; then the conduct after he was released on bail by the learned Magistrate, which has also been dealt with, and that Mangal Chand Bhandari is yet to be traced. It is nowhere shown that Mangal Chand Bhandari has been secreted from the prosecution by the petitioner-accused. In fact, Mangal Chand Bhandari absconded even before the petitioner-accused was arrested. The petitioner-accused was already released by the learned Magistrate on bail and was out for one day. If at all anything the petitioner-accused would do, as the prosecution apprehends the same in all probability must have already been done. The learned Sessions Judge should have approached the matter with a greater

circumspection. The learned Sessions Judge has observed that in granting bail, the learned Magistrate has acted in great haste and it appears to be premature. This observation of the learned Sessions Judge seems to have been made in all probability because a similar argument was advanced before me on behalf of the prosecution that the learned Magistrate granted bail on Sunday, a day which was a holiday. The learned Magistrate was in Court sitting as a holiday Magistrate. Sunday or holiday sitting is not an idle formality and if the learned Magistrate felt that a citizen's liberty should not be curtailed even for one day, it will be improper to allege that the Magistrate acted in haste. In fact, the petitioner-accused was produced before the learned Magistrate on 19-7-1980; the remand was granted up to 20th July, 1980 to enable the prosecution to produce certain documents and on 20th July, 1980 the accused made an application for bail. The Magistrate was duty bound to deal with that application and either to grant bail or to refuse to grant bail. But if the Magistrate either grants or refuses bail, how could it be said that he acted in haste in dealing with an application for bail ?

19. Taking an overall view of the matter. I feel that it would not be proper for this Court to curtail the liberty of the petitioner-accused any further. There are no supervening circumstances brought forth by the prosecution before this court to maintain the order cancelling the bail. There is nothing except the bare allegation that the prosecution apprehends that the petitioner accused would tamper with the evidence in that he would alert the absconding accused Mangal Chand Bhandari. As already stated above. Mangal Chand Bhandari has not absconded because of the petitioner-accused. He has absconded even prior to the petitioner-accused being arrested. In this view of the matter, I am of the opinion that it was an error on the part of the learned Sessions Judge to have cancelled the bail.

20. In the result, I pass the following order :

Rule absolute. The order passed by the learned Sessions Judge cancelling bail set aside. The petitioner-accused be released on bail in the sum of Rs. 2,00,000/- with one surety in the like amount of two sureties in equal amounts. The petitioner is at liberty to pay Rs. 2,00,000/- as cash security. After release on bail, the petitioner shall attend the D.R.I. Office from 11.00 a.m. to 5.00 p.m. daily for fifteen days. The petitioner will thereafter attend the D.R.I. Office as and when required until charge-sheet is filed. The petitioner shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from giving such information to the D.R.I. Office or to Court. The petitioner shall not leave Greater Bombay without the permission of the Court before whom the remand application is made.

The D.R.I. authorities will permit the petitioner-accused half an hour lunch time.

21. Shri Parsurampuriah has stated that the petitioner has already deposited Rupees 1,00,000 in pursuance of the previous order passed by the learned Additional Chief Metropolitan Magistrate and the petitioner holds a receipt for the same. The said amount should be treated as deposit under this order also.

22 . Application allowed.