

(1998) 11 OHC CK 0037

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 808 of 1998

Lingaraj Khandayat Ray

APPELLANT

Vs

Bibhu alias Braja Kishore alias Bibhuti Bhusan Swain and
Another

RESPONDENT

Date of Decision : 05-11-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439(2)
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (1999) 1 OLR 115

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Advocate : D. Das, U.K. Mohanty, M.K. Badu and H.K. Mallik, for the Appellant;
None for Opp. party No. 1 and Addl. Standing Counsel for Opp. party No. 2, for
the Respondent

Judgement

P.K. Tripathy, J.—Informant in G.R.Case No. 330 of 1997 of the Court of the S.D.J.M., Jagatsinghpur arising out of Jagatsinghpur P.S.Case No. 128 of 1997 registered u/s 302/34, I.P.C., has filed this application u/s 439(2) of the Criminal Procedure Code, 1973 (in short, "the Code") praying for cancellation of the bail granted in favour of opposite party No. 1 Bibhu alias Braja Kishore alias Bibhuti Bhusan Swain.

2. Notice was served on the opposite party No. 1 personally, on 2.5.1998 with a direction to file show-cause by 17.6.1998. By the date of service of the notice, opp. party No. 1 was in jail custody in accordance with the order passed by the S.D.M. in Crl. Misc. Case No. 66/98 u/s 110 of the Code. However, it appears from the said case record that as per the order of the learned Addl. Sessions Judge, Jagatsinghpur in Criminal Revision No. 18/98, opposite party No. 1 was released from the jail custody on 14.5.1998. Therefore, in spite of service of notice, opposite party No. 1 neither appeared nor filed any show-cause.

3. Petitioner has prayed to pass an order u/s 439(2) of the Code on two grounds

viz; (1) though *aprima facie* case is overwhelmingly present against the petitioner for commission of the murder of the deceased, yet learned Addl. Sessions Judge, vide his order dated 17.2.1998 in CrI. Misc. Case No. 57/98 u/s 439 of the Code, allowed the opposite party No. 1 to go on bail on misappreciation of evidence in record and by recording erroneous findings; and (2) after being released on bail, the opposite party No. 1 along with some unknown persons threatened the petitioner and his family members of dire consequences if the case would not be compromised and if the petitioner with his family would not leave the village.

4. It appears from the LCR and the case diary that Siba Prasad Khandayat Ray is the deceased. His elder brother i.e. the petitioner is the informant in this case. It appears from the FIR and the statement of witnesses that relating to collection of DADA CHANDA by opposite party No. 1 and his group from the businessmen of "Purunagad" market, on 3.6.1997 afternoon there was some quarrel when the deceased being the Secretary of the Market Committee lodged a protest before opposite party No. 1 and that the opp. party No. 1 threatened to kill the deceased. This matter was reported before the police and also the market was closed for a day in protest against the Goondaism. On 5.6.1997 while the deceased was dealing with a customer in their cloth shop, as alleged, opp. party No. 1 with the co-accused Chagu Sahu and Nanu entered into that shop and opp. party No. 1 and the co-accused inflicted several "Bhujali blows to the deceased. According to the informant, who is an eye witness to the occurrence, opp. party No. 1 dealt "Bhujali" blows to the neck of the deceased. It reveals from the post mortem report that two incised wounds were on the right side neck one below the other. According to the post mortem report one such incised injury was of the size of 4" x 3" x 2" situated obliquely on the upper part of the right side neck and had cut the skin, muscles, spinal cord and third cervical vertebra. The second injury in that region was an incised injury of the size of 4" x 2V2" x 2" situated transversely on the lower part of right side neck cutting the skin, muscles and vessels. There was another incised injury on the right side vertex and there were two other incised injuries; on the left leg and the other was on the left forearm. The doctor who conducted the post mortem examination opined that all the injuries were ante- mortem in nature and the death was due to haemorrhage and shock produced from the aforesaid injuries. As noted above, the injuries on the neck according to the FIR as well as the statement of the informant was caused by the opp. party No. 1.

5. On perusal of the statement of several witnesses examined during the course of investigation, it appears that some witnesses have stated about the opposite party No. 1 and the co-accused entering into the shop and some other witnesses have stated the said accused persons coming out from the shop of the deceased with blood-stained Bhujalis and running away from the market. Similarly, witnesses have made statements regarding the occurrence dated 3.6.1997 and also regarding the conspiracy hatched by the opp. party No. 1 before committing the aforesaid crime. According to the petitioner, Sashi Dei, a charge-sheeted

witness, was the lady customer, in whose presence the opp. party No. 1 and the co- accused entered inside the shop and on seeing them she came out of the shop out of the fear, but she witnessed the occurrence. She was examined by the police on 6.6.1997 and in her statement u/s 161 of the Code she stated about the three culprits entering into the shop and dealing Bhujali blows. In that statement she disclosed name of only one accused i.e. accused Nanu. Her statement u/s 164 of the Code was recorded by the Magistrate on 24.9.1997. In that statement, she stated about the occurrence in the same manner and named the culprits.

6. Learned Addl, Sessions Judge, as it appears from impugned order, doubted the veracity of Sashi Dei on the ground that while not naming the opp. party No. 1 in her statement u/s 161 of the Code, named him in her statement u/s 164 of the Code though no T.I. parade was held. Learned Addl. Sessions Judge, regarded her statement as a developed version. He also recorded that "other than Sashi there is no other direct evidence available against the petitioner." Learned Addl. Sessions Judge also stated that "Law is well settled that if prima facie a case is established, one should not be detained in custody as way of punishment and it is to be seen whether the attendance of the petitioner can be secured at the time of trial or there is any scope to tamper with the evidence of prosecution." He held that in view of submission of charge sheet, there is no possibility of tampering of evidence and the petitioner having a fixed place of stay, there is less chance of absconding. Learned Addl. Sessions Judge also noted that it was stated on behalf of the petitioner (present opp. party No. 1) that his family members were leading a miserable life because of the detention of the petitioner inside the custody for six months and his father was in death bed. However, he has not indicated if any document was filed in support of that contention. He also considered the ground of illness of the petitioner as an UTP inside the jail i.e. acid peptic disease and though it required for a specialised treatment by a Cardiologist which facility is not available in the Sub-jail at Jagatsinghpur and ultimately he held that "since it is necessary for the treatment of the petitioner which is not available inside the jail at Jagatsinghpur and special investigations are urgently required in order to save the life of the petitioner and that there is no alternative except releasing the accused on bail and as such the Criminal Misc. Case is allowed." (underlined to supply emphasis). Accordingly, the opposite party No. 1 was allowed to go on bail on furnishing bail bond with a condition not to leave the jurisdiction of the Addl. Sessions Judge.

7. During the course of hearing learned counsel appearing for the petitioner vehemently criticised correctness and merit of the aforesaid findings and order. Learned Counsel for the petitioner argued that the opp. party No. 1, who has a criminal record of several cases pending against him, if allowed to go on bail after committing a heinous crime like murder in a cruel and gruesome manner in broad day light in a busy market place notwithstanding existence of overwhelming, direct and circumstantial evidence to pin up the case against him (opp. party No. 1) petitioner can do nothing save and except seeking the

indulgence of this Court to cancel the aforesaid bail order.

8. Learned Addl. Standing Counsel for the State candidly conceded to the criticism levelled against the merit of the impugned order as well as to the prayer made by the petitioner.

9. It reveals from the L.C.R. as well as the forwarding letter dated 1.10.1997 that after the occurrence, opp. party No. 1 absconded for a period of about four months and ultimately he was caught with much efforts. It also reveals from the said forwarding letter that by then opp. party No. 1 was involved in three other cases for various offences like 341/506/323/324 etc. of the Indian Penal Code.

10. In the case of Chhaila Pradhan v. Bansidhar Pradhan, 62 (1986) CUT 699 a Division Bench of this Court held that :

"As observed by the Supreme Court in the State v. Captain Jajjit Singh, Gourcharan Singh's case {supra} and Gudikanti Narasimhulu and Ors. v. Public Prosecutor, dealing with the principles governing the grant of bail, before granting bail involving non-bailable offences, particularly where the trial has not yet commenced the Court 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 the evidence of the witnesses being tampered with, the larger interest of the public or State or similar other considerations. This view has been taken by the Supreme Court in the State through Deputy Commissioner's case (supra)."

In the case of Sk. Imam v. State of Orissa and another (1998) XV OCR 215 this Court has held that :

"Law is well settled that while considering a bail application a Court is required to assess the facts and circumstances to find out if a prima facie case is made out, nature and gravity of the offence, manner in which the crime was allegedly committed, antecedents of the accused i.e. to say if he has a criminal record or whether there is chance of repeating the offence or committing more crime, securing attendance of the accused at the time of trial, chances of abusing the liberty and hampering proper investigation or fair trial and such other matters of the like nature."

It appears from the impugned order that learned Addl. Sessions Judge has not at all followed the well settled principles of law relating to grant of bail and by quoting and applying the principles he allowed opposite party No. 1 to go on bail.

11. Bail is not to be refused as a measure of punishment, is a cardinal principle and the settled position of law. But that proposition of law has to be properly understood. That proposition means that if otherwise the accused is entitled to bail or if there is no legal and valid evidence to detained the accused in the custody, in such cases bail should not be refused. That proposition of law does not mean nor it implies that refusal of bail in any case amounts to detention in

custody as a measure of punishment. As it appears, learned Addl. Sessions Judge has not followed that principle in proper manner.

12. Article 21 of the Constitution guarantees freedom to every citizen by providing that no person shall be deprived of his life or personal liberty according to the procedure established by law. The framers of the Constitution have thus made the mandate of law very clear that life and personal liberty which is of paramount consideration of human dignity it should not be impaired. The persons alleged with crimes or booked for offences are not covered by such guaranteed protection. Therefore, mere assurance of securing the attendance of a culprit is not always sufficient to consider his prayer for bail. For example, if a person gives his guarantee to appear in the Court after furnishing sufficient security, but repeats commission of crime one after the other should he be released on bail on the aforesaid ground ? The obvious answer is in negative. The forwarding letter of the Investigating Officer, which is available in the L.C.R., clearly states about the criminal activity and involvement of the opposite party No. 1 in other criminal case. Learned Addl. Sessions Judge did not at all consider that aspect of the reasons best known to him.

13. It is the settled principle of law that at the stage of consideration of the bail application *prima facie* view of the evidence is to be taken and detail documentation should be scrupulously avoided. In this case unfortunately and unnecessarily learned Addl. Sessions Judge tried to make out a case of contradiction in the statement of Sasi Devi obviously with a view to favourably consider the prayer for bail of the opposite party No. 1. Be that as it may, for the sake of discussion even if such a contradiction is accepted, though not existing, that was not sufficient to throw away whole of the prosecution case inasmuch as there are overwhelming and sufficient direct and circumstantial evidence available in the case diary showing the motive, complicity and commission of the crime by the opposite party No. 1 and the co-accused persons. In that connection, while considering existence of *prima facie* case, the evidence of the informant, who is an eye witness to the occurrence cannot be discarded simply because he is the brother of the deceased. On the other hand, the statement of the informant should have received more credit inasmuch as immediately after the murder of his brother the informant could not have made an attempt to screen the real offender so as to make a false case against opposite party No. 1 when there is no allegation of previous enmity between him and the opposite party No. 1. Thus, whether or not the statement of Sasi Devi is taken up for consideration, there is a strong *prima facie* case available against the opposite party No. 1 so far the other statement of the witnesses disclose. Learned Addl. Sessions Judge unfortunately, ignored such evidence available in the case diary.

14. As already noted in this order, the opposite party No. 1 absconded after the occurrence and arrested about four months after the occurrence. The forwarding letter discloses that he has a criminal record. The offence alleged against opposite party No. 1 is u/s 302, IPC for committing the murder of the deceased

in a broad day light inside a crowded bazar. The offence is punishable with death or imprisonment for life. Are these circumstances not sufficient, in accordance with the settled principle of law, to reject the prayer for bail ? Learned Addl. Sessions Judge without considering any of these aspects, misread the evidence and misled himself to allow the petitioner to go on bail.

15. Notwithstanding the fact that no evidence was adduced to substantiate the plea of illness of the father of the petitioner so as to suggest that he was in death bed, learned Addl. Sessions Judge accepted the contention of the petitioner as the Gospel Truth. Illness of a relation, should never be a ground to release an accused of murder to go on bail. At best, in rarest of the rare type of such cases, granting of interim bail may be considered, if the Court is thoroughly satisfied about the illness of a close relative and the consequences thereof. In the present case, no such cause with satisfactory evidence was available before the learned Addl, Sessions Judge.

16. Apart from that, the ground of self-illness of the petitioner also appears to be not correct inasmuch as it appears from the case record of G.R.Case No. 330 of 1997 that except on 20.12.1997 and 3.1.1998 on other dates opposite party No. 1 was regularly produced in the Court of S.D.J.M. as per the remand order and that production went on till the date of bail. For the sake of discussion even if admitting the illness to be genuine, then also that could not have been a ground to release the opp. party No. 1 on bail inasmuch as the opposite party No. 1 could have been sent for specialised treatment as an U.T.P. even if such facilities are not available in the Sub-jail at Jagatsinghpur and in that respect appropriate direction could have been passed by the Court. Therefore, the reasoning recorded by the learned Addl. Sessions Judge that because of the said illness he had no other alternative, but to allow the petitioner to go on bail so as to save his life does not appear to be a reasonable or sound reason and as it appears such a finding was recorded only to support his conclusion in support of releasing the petitioner on bail.

17. The aforesaid discussion clearly indicates that learned Addl. Sessions Judge has failed in his duty in prooperly considering the bail applications and has passed the order in favour of opposite party No. 1 illegally i.e. without due application of law and without taking into consideration the materials available in the case diary. In the case of Chhaila (supra) so also in the case of Satyabadi Parida v. State of Orissa and another, (1998) XIV OCR 415 and the case of Sk. Imam (supra) and State of Orissa Vs. Bipin Behera, , this Court have consistently taken the view that if bail is granted illegally, the same can be cancelled even in the absence of any supervening circumstances. The order of learned Addl. Sessions Judge, in granting bail to opp. party No. 1, as discussed above, being done illegally, is, therefore, cancelled and for that reason it is not necessary to search for any supervening circumstance.

18. Accordingly, the order of bail granted in favour of opp. party No. 1 is cancelled and the S.D.J.M., Jagatisnghpur is directed to issue notice to the

accused and his sureties to immediately produce opp. party No. 1 for his remand to the jail custody. In that respect, if necessary, coercive action may be taken without hesitation.

19. The crl. misc. case is accordingly allowed.