

(2019) 02 KAR CK 0044

In the Karnataka High Court

Case No : Criminal Petition No. 101203, 101462 Of 2018

Nilofer D/O Sharifsab Sahebanavar

APPELLANT

Vs

Khwajahusen @ Saddam Allasab

RESPONDENT

Date of Decision : 28-02-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 195(A), 323, 341, 353A, 376, 420, 504, 506
Code Of Criminal Procedure, 1973 — Section 167(2), 439(2)

Citation : (2019) 02 KAR CK 0044

Hon'ble Judges : H.P. Sandesh, J

Bench : Single Bench

Advocate : Aravind D Kulkarni, K.M. Shiralli, A.R. Rodrigues

Judgement

1. Heard the petitioner's counsel in Crl.P. No.101203/2018 and learned AGA for the petitioner in Crl.P. No.101462/2018 and also learned counsel for the respondent in both the petitions.

2. The petitioner in Crl.P. No.101203/2018 is the complainant, who filed a complaint against respondent No.1-accused and based on the complaint, case has been registered against the accused for the offences punishable under Sections 376, 506 and 420 of IPC. Crl.P. No.101462/2018 is filed by the State against respondent/accused. In both the petitions invoking Section 439(2) of Cr.P.C., the petitioner/complainant and State have sought for an order of cancellation of bail granted by this Court in Crl.P. No.101241/2014 dated 24.07.2014 granting anticipatory bail in favour of the respondent/accused.

3. The factual matrix of the case is that the complainant has filed a complaint before the respondent No.2-Police against respondent No.1/accused that he had committed rape on her under the guise of promise to marry the petitioner/complainant, subsequently, he refused to marry her and it is the allegation in the complaint that he committed rape on her; herself and respondent No.2 both belongs to same community and the petitioner/complainant was often visiting the house of her relative by name Imamsab Sahebanavar. During that period,

since 2010, he came in contact with the complainant and in fact, it is stated that they were traveling in the same bus to go to college and they were talking with each other freely. Thereafter, this friendship has developed into love affair between them.

It is alleged that the accused assured her that he would marry and by saying so, in the year 2013, he took her to his farmhouse and had sexual intercourse with her forcibly and subsequently, she came to know that his marriage was fixed with some other girl; knowing this, the complainant and her family members went to the house of the petitioner in order to have the marriage talks but he refused to marry her, in that back ground, the complaint was given and case was registered against the accused stating that he threatened the complainant with dire consequences, if she lodges any complaint against him, by showing a knife. The petitioner in CrI.P. No.101241/2014 who is the accused had prayed this Court seeking anticipatory bail and this Court had granted bail vide order dated 24.07.2014 subject to certain conditions.

4. The petitioner in CrI.P. No.101203/2018 who is the complainant has contended that trial Court has fixed the trial fixing the date as 16.04.2018; in the meanwhile, on 26.03.2018, the accused came on motor cycle along with unknown person and threatened her not to give evidence against him in the case; even pulled her hands and assaulted her, pillion rider gave iron rod to the accused; accused by showing the same to the complainant caused threat. The petitioner/complainant could not file a complaint on the next day, since she was under the fear, but on 28.03.2018 at the assurance and advice of her mother-in-law and other elders of the village, complainant along with her father went to the office of the SP, Dharwad, but on that day, SP was not available, hence, on the next day i.e. on 29.03.2018, she again went to the SP office and given the complaint and thereafter, till 31.03.2018, Hubballi Rural Police have not registered the case and gave evasive reply, the complainant left with no other option approached the Higher Police Officers, only thereafter on 4.4.2018, case was registered against the accused for the offences punishable under Sections 341, 195(A), 353A, 323, 504, 506 read with Section 34 of IPC. Though the police secured the accused, they did not arrest him and only on insistence of the complainant, the accused was arrested, thereafter, he made an application before the concerned Magistrate for bail and the same was rejected and he also approached the District Court, wherein also the bail petition was rejected. The Investigating Officer ought to have filed final report within the stipulated period of 60 days, but only with an intention to help the accused to get statutory bail under Section 167(2) of Cr.P.C., have not filed final report and later he has been enlarged on bail invoking Section 167(2) of Cr.P.C. In the meanwhile, the petitioner/complainant approached the V Addl. District and Sessions Judge, Hubballi seeking for cancellation of bail under Section 439(2) of Cr.P.C in SC No.149/2015, but the trial Court was not passed any orders on the said petition, hence, the said petition was withdrawn by the complainant. Hence, the complainant has filed this petition before this Court for cancellation of bail since

the bail was granted by this Court.

5. The main ground urged by the petitioner/complainant in the petition is that the accused in this case along with another, caused threat to the petitioner/complainant, and her family members are afraid of coming to the Court to give evidence against accused. Though the Sessions Court issued witness summons to CW9 to CW14 to appear and give evidence before the Court on 16.04.2018, but they did not appear before the Court and an endorsement was made that they refused to receive the witness summons, since threat was given to them. The complainant has also taken two photographs from her mobile. Though the accused was very much present in the police station at the time of registering the crime, police did not arrest him and he was arrested on 5.4.2018 almost after 20 hours when the photographs were produced to the higher police officers and due to the said threat, case also registered against him and he was in custody and obtained statutory bail on account of non-filing of the charge sheet within stipulated period and there is apprehension, since the accused caused life threat holding iron rod when the witness summons was issued to the petitioner/complainant. Hence, prayed this Court to cancel the bail.

6. The State has also filed another petition in CrI.P. No.101462/2018 praying to cancel the bail granted by this Court and further contended that the complaint in Crime No.22/2014 was charge sheeted and thereafter it was committed to the V Addl. District and Sessions Judge, Hubballi in SC No.149/2015. During the course of trial, the witness summons were issued to the prosecution witnesses and the present respondent/accused was fully aware of the fact, posed threat to CW9 and 13 who are the prime witnesses in the said case and also caused threat to CW1 and case has been registered against him in Crime No.103/2018. When the witness summons were issued to the witnesses, this respondent/accused caused threat and he is continuing to tamper the prosecution witnesses, which may cause adverse affect to the case of the prosecution and the witness summons were returned with an endorsement that the accused has caused threat and also, there is threat of tampering the prosecution witnesses, hence, bail granted by this Court has to be cancelled.

7. The counsel for the accused has filed a separate statement of objections contending that there was no alleged threat from 2014 to 2018 when the witness summons has been issued to the witnesses, a false allegation is made against this accused that he caused threat and the Court has to take note of the conduct of the petitioner/complainant and the complainant not only filed false case against the accused and also made false allegations against the police officials as well as Presiding Officer. Further contended that the complaint is not given immediately and there was delay in lodging the complaint and it is clear that no such incident was taken place. Further contended that the complainant had approached the SP instead of lodging the complaint to the jurisdictional police and later she had given complaint to the jurisdictional police. It is further contended that she also made allegation against the police that he was not

arrested and only on her insistence, he was arrested. The accused is in custody in connection with SC No.149/2015 and when the date has been fixed for trial, the complainant ought to have appeared before the trial Court and in spite of it, the accused is in custody and she did not come forward to give evidence, hence, conduct of the complainant has to be looked into.

8. The learned AGA has contended that the accused is causing threat to the witnesses and order sheet reveals that witness summons which were sent to the witnesses were refused, since he caused life threat to the witnesses and also it affects the case of the prosecution, hence, prayed this Court to cancel the bail.

9. The petitioner's counsel in Crl.P. No.101203/2018 in support of his contentions, he relied upon the judgment of the Hon'ble Apex Court in the case of Rizwan Akbar Hussain Syed Vs. Mehmood Hussain, reported in (2007) 10 SCC 368, referring para-7 of the judgment contends that even if no condition is specifically stipulated, the accused, while on bail, is not supposed to tamper with evidence. Cancellation of bail should not be done in a routine manner. Where it appears to the superior court that the Court granting bail acted on irrelevant materials or there was non-application of mind or where Court does not take note of any statutory bar to grant of bail, order for cancellation of bail can be made. The Court considering the application for cancellation of bail has to take note of all relevant aspects.

10. The counsel also relied upon another judgment of the Apex Court in the case of R. Rathinam Vs. State by DSP, District Crime Branch, Madurai, reported in (2000) 2 SCC 391 and brought to my notice para-8 of the judgment and contends that it is not in dispute before us that the power so vested in the High Court can be invoked either by the State or by any aggrieved party. Hence, the petitioner who is the complainant has approached this Court as aggrieved party since threat is caused to the complainant, and hence, the complainant has sought relief of cancellation of bail.

11. Per contra, learned counsel for the accused in his arguments he also relied upon the judgment of the Apex Court in the case of Raj Kumar Jain and Another Vs. Kundan Jain and Another, reported in 2004 SCC (Cri) 2034 and brought to my notice para-10 of the judgment regarding delay in lodging the complaint and contends that the Apex Court has held in this judgment that if really a threat as alleged by Harish Bhuva was administered to him on 15.02.2003, a complaint in this regard would have certainly been lodged either on that day or on the next day. On the contrary, as could be seen from the records, a complaint was posted only on 17.02.2003 at about 19.56 hours through speed post. Of course, there is an allegation that on 16th evening, an oral complaint was lodged but there is no record substantiating the same and in this back ground of the case, the Apex Court has held that it is difficult to believe that this witness would have failed to inform the first respondent of the visit of the appellants on 15.02.2003 or 16.02.2003. The actual complaint lodged as stated above, was only on 17.02.2003 and that too was only posted at 19.56 hours. This delay in lodging a

complaint itself creates a doubt in the mind of the Court as to the authenticity of this complaint and held not justified in canceling the bail granted.

12. Counsel relied upon this judgment vehemently contends that in the instant case, though alleged incident was taken place on 26.03.2018, the complaint was given on 29.03.2018 and subsequently, on 4. 4.2018 the complaint was given to the jurisdictional police and the same has been registered and he further contends that the Court has to take note of the delay in lodging the complaint and also the Court has to take note of the conduct of the complainant, hence, prayed this Court to dismiss both the petitions.

13. Having heard the petitioner's counsel as well as State and also the counsel for the accused in both the petitions, this Court has to examine whether this Court can exercise the power under Section 439(2) of Cr.P.C. to cancel the bail granted by this Court as sought in both the petitions.

14. Having considered the contentions of the petitioner's counsel and also the counsel for the accused, no dispute with regard to the fact that in respect of SC No.149/2015 for the offence punishable under Sections 376 and other offences, this Court has granted bail in favour of the accused on 24.07.2014 and it is rightly pointed out by the petitioner's counsel that even if no condition with regard to not to tamper the prosecution witnesses, it is understood and implicit that not to tamper the prosecution witnesses in the absence of specific condition and also the Apex Court in the judgment as referred supra has held the same as contended by the petitioner's counsel.

15. In the back ground of the principles laid down in the judgments referred supra and also the contentions urged by both the counsels, this Court has to take note of the fact that the case was registered in 2014 and the trial is fixed by the trial Court on 15.03.2018 by issuing witness summons and the alleged incident of threat caused to the complainant on 26.03.2018 and it is the case of the petitioner/complainant that due to the said incident, the complainant could not move on the next date i.e. on 27.03.2018 and she went to the office of SP on 28.03.2018 and the SP was not available, hence, she again went on the next day along with her father to lodge the complaint in the office of the PS and gave complaint but no action is taken and she waited till 31. 03.2018 and she again went to the jurisdictional Rural Police on 4.4.2018 and lodged the complaint and it is also the case of the petitioner/complainant that though the accused was secured on the same day in connection with the said crime, he was not arrested and the complainant took photographs of the accused stating that he was in the police station and he was not taken to custody and only when she made insistence for the arrest of the accused, he was taken to the custody on 5.4.2018 in respect of second complaint of threat and thereafter, he approached the concerned Magistrate for bail and the same was rejected, thereafter, he approached the Sessions Court and the same was also rejected by the Sessions Judge. In the meanwhile, the police did not file charge sheet within stipulated period hence, he is enlarged on bail invoking Section 167(2) of Cr.P.C.

16. Records also disclose that though the complainant not only made the allegations against the accused but also made allegation against the Presiding Officer and the order sheet which has been produced before the Court shows with regard to the conduct of the complainant and also admittedly, petition is filed before this Court for transfer of the Presiding Officer from the said Court and the said transfer petition is also withdrawn since in the meanwhile, the Presiding Officer is transferred. It is pertinent to note that when the witness summons were issued to the witnesses and the same were returned on 16.04.2018 with an endorsement that some of the witnesses were refused to receive the summons, since the accused was caused threat to the witnesses. No doubt, it is rightly pointed out by the counsel for the accused that in spite of the accused is in custody from 5.4.2018, the complainant did not choose to appear before the Court and give evidence. The records also reveals that there is an endorsement on the order sheet that who have been appeared before the Court were bound over on the ground that the witnesses would be examined only after the examination of CW1 and further records disclose that the police did not file charge sheet within stipulated period when the accused was in custody and now the State has come before this Court filing the petition for cancellation of the bail granted by this Court and it is astonishing that when the accused was in custody, the State did not file charge sheet within time stipulated. When the bail is rejected by the Magistrate as well as District Judge, the Police, it appears that, were hand in glove with the accused and made the accused to get bail i.e. statutory bail by invoking Section 167(2) of Cr.P.C. for non-filing of charge sheet. The Police indirectly helped the accused to get the statutory bail since he failed to get the bail from the concerned Court. It is lapses on the part of the police officials that instead of filing the charge sheet within time stipulated, now the State has filed petition before this Court for cancellation of the bail. Hence, I am of the view that the police officials who are responsible for not filing of the charge sheet within time and made an opportunity to the accused to get statutory bail in ingenious method. Non-filing of the charge sheet within stipulated time needs to be viewed seriously and action has to be taken against erred police officials and the State cannot blow hot and cold in one breath coming before this Court for cancellation of the bail and in another breath, not filing of the charge sheet within stipulated period when the accused is in custody. Hence, it is appropriate to direct the concerned Disciplinary Authority i.e. Inspector of General of the concerned Region and the Superintendent of Police of Dharwad District to take action against the erred police officials with regard to non-filing of the charge sheet within the stipulated time and submit the report for having taken action against the erred police officials.

17. Now, coming to the merits of the case for cancellation of the bail is concerned, no doubt it is the contention of the petitioner's counsel that the bail was granted in 2014 and there was no any threat or allegations against the accused. On perusal of the records, the complaint is filed in 2018 and it has to be noted that though the bail was granted in 2014, trial is commenced in the March,

2018 (15.03.2018) and issued witness summons. It is alleged that the accused went along with unknown person with iron rod and caused threat to the complainant and it is natural that only after the issuance of the witness summons, all these would happen. When the witness summons are issued, alleged incident of threat is taken place and it is important to note that no doubt there is delay of two days in lodging the complaint and on perusal of the complaint, explanation is given for giving the complaint to the SP that she could not move to lodge the complaint on the next day due to the said threat and fear and on the very next day, she went along with her father, but SP was not there in the office and hence, on the next date, she went and gave complaint. It is the argument of the counsel for the accused that the complainant instead of going to the jurisdictional Police, she directly went to the SP and it shows that no such incident was taken place and it is only afterthought, the complaint is given only in order to keep the accuse behind the bar and it is important to note that the other contention of the petitioner's counsel that though the accused was arrested on 4.4.2018, he was given free but on the next day, he was arrested and produced before the Court only on insistence when the photo is produced that he was arrested and set free on the same day.

18. The another ground contended by the petitioner's counsel is, the local police were hand in glove with the accused and this is also another circumstance to show that the accused is powerful in managing the things. The counsel for the accused further contends that the accused in spite of he is in custody, CW1 did not appear before the Court and give evidence. The complainant's counsel also brought to my notice though there was an order to issue witness summons on 15.03.2018, no summons is served on CW1 and there is no any such endorsement for having served the same to CW1/Complainant, hence, the contention of the counsel for the accused that in spite of the accused was in custody, the complainant did not appear before the Court and given evidence cannot be accepted for the reason unless the summons issued to the witness, question of witness appearing before the Court does not arise. Apart from that, the witness summons issued to the other witnesses were returned with the endorsement that the accused has caused threat to them and that is evident in the order sheet produced before this Court dated 16.04.2018 and also produced a copy of the summons before this Court to substantiate the contention that the witnesses have refused to receive the witness summons because of threat. When the witness summons was returned on 16.04.2018, it is specifically mentioned that CW9 to 13 have stated that the accused has caused threat and hence, they are not ready to receive the witness summons and the same was refused. These are the documents substantiate the contention of the petitioner/complainant that the accused indulged in causing threat to the witnesses not only to CW1 and also other witnesses i.e. CW9 to 13. Having taken note of the facts and circumstances of the case, I am of the opinion that it is a fit case to exercise the power under Section 439(2) of Cr.P.C. and it is also within conscious of this Court that sparingly this Court has to exercise the power under Section 439(2) of Cr.P.C. for

cancellation of the bail. Mere delay in lodging the complaint is not a ground though the counsel for the accused brought to my notice of the judgment of the Apex Court regarding delay in lodging the complaint. In the case on hand, the complainant has given explanation with regard to delay is concerned for filing the complaint in stead of approaching the jurisdictional police, she went to the Superintendent of Police and the material available on record shows that even subsequent to filing of the complaint, he was arrested on 4.4.2018 itself and he was set free and only on 5.4.2018 produced before the Court, it clearly shows that the accused is capable of managing the police and it is evident that he obtained the statutory bail for non-filing of charge sheet within the stipulated period. Hence, having looked into the material on record, I am of the opinion that it is a fit case for invoking Section 439(2) of Cr.P.C. to cancel the bail granted by this Court.

19. However, I have also taken note of the fact that it is the contention of the counsel for the accused that CW1 intentionally did not appear before the Court below when the accused was in custody and the CW1 i.e. the complainant is not assisting the Court, hence, it is made clear that the trial ought to have been completed within time bound of six months, since the trial is not yet commenced and the order sheet also discloses that no trial is commenced and the witnesses who were present also were bound over. Hence, the complainant is directed to assist the Court below to complete the trial within time bound of six months.

20. In view of the discussions made above, I pass the following order:

- i) The petitions filed by the complainant as well as the State for cancellation of the bail under Section 439(2) of Cr.P.C. are allowed.
- ii) The bail granted by this Court in CrI.P.101241/2014, dated 24.07.2014 is cancelled and the accused is directed to surrender before the lower Court immediately.
- iii) The trial Court is directed to dispose of the case within six months from today.
- iv) It is the duty cast upon the complainant's counsel and also counsel for the accused to bring notice of this order immediately to the lower Court's knowledge and even if any further long date is given, advance the case and fix the trial and dispose of the case.
- v) This Court while disposing of these petitions made observation with regard to lapses on the part of the police officials in non-filing of charge sheet within stipulated period, hence, send a copy of this Court order to the concerned ADGP and also concerned Superintendent of Police to take action against the erred police officials and submit the report to this Court for having taken action within one month from today.