
(2017) 04 DEL CK 0023
In the Delhi High Court
Case No : CRL.M.C. 1143 of 2016

P.B.	Vs	APPELLANT
State (Govt of NCT of Delhi)		RESPONDENT

Date of Decision : 12-04-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439(2)
Penal Code, 1860 (IPC) — Section 376

Citation : (2017) 4 ADDelhi 215

Hon'ble Judges : Ms. Mukta Gupta, J.

Bench : Single Bench

Advocate : Ms. Manika Tripathy with Mr. Ashutosh Kaushik, Advocates, for the Petitioner; Mr. Hirein Sharma, APP with Mr. Rahul Alwal, ACP/Kalyanpuri, Insp. C.R. Meena, SHO/New Ashok Nagar and SI Neeraj Kumar, PS New Ashok Nagar, for the Respondents; Mr. Muhammad Arif, Advocate, for the Respondent No. 2

Final Decision : Dismissed

Judgement

Ms. Mukta Gupta, J.—Aggrieved by the order dated 19th October, 2015 dismissing the application of the petitioner seeking cancellation of bail of the respondent No.2, the petitioner prefers the present petition. The name of the petitioner has been changed in the cause title to conceal the identity of the petitioner.

2. FIR No.252/2014 was registered on the complaint of the petitioner for offences punishable under Section 376 IPC and Section 4 of the Protection of Children from Sexual offences Act (In short the POCSO Act). The petitioner alleged that she was staying on rent with her mother for the last two years and studying in 10th standard. On 28th February, 2014 while going to the School she was standing at Kondli Mode when at around 11.00 AM the respondent No.2 whom she knew earlier came on a motorcycle and stated that he would drop her at the school. Influenced by his words she sat on the motorcycle, however on reaching the school he did not drop her and did not even pay heed to her words

that he should stop the motorcycle. The respondent No.2 threatened her to remain seated on the motorcycle otherwise the petitioner would face consequences. The respondent No.2 took the motorcycle to a room near Chilla Regulator where he committed rape on her. After committing rape he dropped her at her school at around 3.00 PM. Due to fear she did not tell the facts to her mother and later revealed the facts where after the FIR was registered on 4th March, 2015. The respondent No.2 was arrested and was sent to judicial custody on 6th March, 2014.

3. After completion of investigation charge-sheet was filed and the petitioner was examined and cross-examined by the learned APP on 25th August, 2014. After the petitioner was examined, vide order dated 20th October, 2014, the learned ASJ noting that the statement of the prosecutrix had been recorded and it would take time to conclude the trial, keeping in view the facts and circumstances of the case admitted the respondent No.2 to bail.

4. Challenging the said order dated 20th October, 2014 being perverse and that after being released on bail the respondent No.2 was harassing the petitioner, application for cancellation of bail was filed by the petitioner which was dismissed by the order dated 19th October, 2015. Hence the present petition.

5. The legal position on the twin grounds agitated for preferring the present petition for cancellation of bail i.e. perversity in the order and harassment to the witness was dealt by the Supreme Court in the decision reported as (2001) 67 SCC 338 *Puran v. Rambilas & Anr.* and it was held:

"10. Mr Lalit next submitted that once bail has been granted it should not be cancelled unless there is evidence that the conditions of bail are being infringed. In support of this submission he relies upon the authority in the case of *Dolat Ram v. State of Haryana* [(1995) 1 SCC 349 : 1995 SCC (Cri) 237] . In this case it has been held that rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted have to be considered and dealt with on different basis. It has been held that very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted. It has been held that generally speaking the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. It is, however, to be noted that this Court has clarified that these instances are merely illustrative and not exhaustive. One such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of this nature and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the society. Therefore, an arbitrary and wrong exercise of discretion by the trial court has to be corrected.

11. Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in *Gurcharan Singh v. State (Delhi Admn.)* [(1978) 1 SCC 118 : 1978 SCC (Cri) 41 : AIR 1978 SC 179] . In that case the Court observed as under: (SCC p. 124, para 16) "If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that court. The State may as well approach the High Court being the superior court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-?-vis the High Court."

6. Supreme Court in the decision reported as (2004) 2 SCC 362 *Mehboob Dawood Shaikh v. State of Maharashtra* laying down the criteria for cancellation of bail also held that the Court should be careful in weighing the acceptability of the allegations and pass orders as circumstances warrant in law. It was held:

"7. It is trite law that the considerations for grant of bail and cancellation of bail stand on different footings. By a majority judgment in *Aslam Babalal Desai v. State of Maharashtra* [(1992) 4 SCC 272 : 1992 SCC (Cri) 870] the circumstances when bail granted can be cancelled were highlighted in the following words: (SCC pp. 289-90, para 11) "11. On a conjoint reading of Sections 57 and 167 of the Code it is clear that the legislative object was to ensure speedy investigation after a person has been taken in custody. It expects that the investigation should be completed within 24 hours and if this is not possible within 15 days and failing that within the time stipulated in clause (a) of the proviso to Section 167(2) of the Code. The law expects that the investigation must be completed with dispatch and the role of the Magistrate is to oversee the course of investigation and to prevent abuse of the law by the investigating agency. As stated earlier, the legislative history shows that before the introduction of the proviso to Section 167(2) the maximum time allowed to the investigating agency was 15 days under sub-section (2) of Section 167 failing which the accused could be enlarged on bail. From experience this was found to be insufficient particularly in complex case and hence the proviso was added to enable the Magistrate to detain the accused in custody for a period exceeding 15 days but not exceeding the outer limit fixed under the proviso (a) to that sub-section. We may here mention that the period prescribed by the proviso has been enlarged by State amendments and wherever there is such enlargement, the proviso will have to be read accordingly. The purpose and object of providing for the release of the accused under sub-section (2) of Section 167 on the failure

of the investigating agency completing the investigation within the extended time allowed by the proviso was to instil a sense of urgency in the investigating agency to complete the investigation promptly and within the statutory time frame. The deeming fiction of correlating the release on bail under sub-section (2) of Section 167 with Chapter XXXIII i.e. Sections 437 and 439 of the Code, was to treat the order as one passed under the latter provisions. Once the order of release is by fiction of law an order passed under Section 437(1) or (2) or Section 439(1) it follows as a natural consequence that the said order can be cancelled under sub-section (5) of Section 437 or sub-section (2) of Section 439 on considerations relevant for cancellation of an order thereunder. As stated in *Raghubir Singh v. State of Bihar* [(1986) 4 SCC 481 : 1986 SCC (Cri) 511] the grounds for cancellation under Sections 437(5) and 439(2) are identical, namely, bail granted under Section 437(1) or (2) or Section 439(1) can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety etc. These grounds are illustrative and not exhaustive. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to."

8. It is, therefore, clear that when a person to whom bail has been granted either tries to interfere with the course of justice or attempts to tamper with evidence or witnesses or threatens witnesses or indulges in similar activities which would hamper smooth investigation or trial, bail granted can be cancelled. Rejection of bail stands on one footing, but cancellation of bail is a harsh order because it takes away the liberty of an individual granted and is not to be lightly resorted to.

9. It is undisputed that an affidavit of the Police Inspector attached to Control Room, Solapur was filed which indicated the threat given to the complainant in the court premises on 16-7-2003. Merely because in the evidence recorded there is no reference to the threat, that does not go to prove the negative or sufficient to infer that there was no such threat. Learned counsel for the appellant submitted that at least some reference should have been made to the threat. That there was no such reference, according to us, is really of no consequence. The evidence was being recorded with regard to the incident dated 11-10-2002 and not in relation to a subsequent event which is the subject-matter of consideration in the case registered in relation to the alleged threat. In the affidavit it has been clearly mentioned that a case (CR No. 3097 of 2003) was registered under Section 188 IPC in relation to the threat.

10. It is fairly accepted by learned counsel for the appellant that nothing seemed to have been urged by way of reply to the affidavit or the truth or otherwise to

the contents thereof before the High Court, as the order impugned shows. That being so, the appellant cannot make a grievance that no enquiry was made to find out the truth or otherwise of the statement made in the affidavit. As there were allegations prima facie showing that the witnesses have been threatened, a ground for cancellation of bail did exist.

11. Learned counsel for the appellant is correct on principles that mere assertion of an alleged threat to witnesses should not be utilized as a ground for cancellation of bail, routinely. Otherwise, there is ample scope for making such allegation to nullify the bail granted. The Court before which such allegations are made should in each case carefully weigh the acceptability of the allegations and pass orders as circumstances warrant in law. Such matters should be dealt with expeditiously so that actual interference with the ordinary and normal course of justice is nipped in the bud and an irretrievable stage is not reached."

7. As regards the plea of perversity in the order granting bail it may be noted that the respondent No.2 was granted bail only after the prosecutrix was examined. It is well settled that even in serious cases if material witnesses are examined and the trial is likely to take time, the exercise of discretion by the Court in granting bail to the accused cannot be held to be perverse. Learned counsel for the petitioner had vehemently submitted that the reason for grant of bail to the respondent No.2 as noted by the learned Additional Sessions Judge was that the petitioner failed to identify the respondent as the accused which is incorrect as in her cross-examination by the learned APP she has identified the respondent No.2 as accused who raped her and that she could not identify him earlier because she was scared.

8. The order dated 20th October, 2014 passed by the learned Additional Sessions Judge granting bail to the petitioner reads as under:

"Learned counsel for the accused submits that accused is in J/C since 06.03.14 and was falsely implicated in this case. It is stated that this is first bail application moved after recording of statement of prosecutrix.

Learned Addl. PP for the State opposes bail application submitting that prosecution is supporting the prosecution case and if released on bail, accused may abscond.

Accused is facing charge under Section 363/376 IPC and 4 POCSO Act. Statement of the prosecutrix has been recorded, as per which she was kidnapped by accused on a motorcycle and had taken her to Chilla Regulator and there she was raped. Statement of the prosecutrix has been recorded. It will take time to conclude the trial.

Keeping in view the facts and circumstances of this case, accused/applicant is admitted on bail on furnishing PB/SB in the sum of Rs. 25,000/-.

Bail application is accordingly disposed of."

9. The consideration as to whether the prosecutrix had identified the accused or not did not weigh with the learned Additional Sessions Judge while granting bail and the only consideration was that the statement of the prosecutrix had been recorded and the trial was likely to take some time. Hence the order granting bail to the respondent No.2 cannot be held to be perverse warranting interference and cancellation of the bail on this ground.

10. In respect of the other ground seeking cancellation of bail that the petitioner is being threatened and harassed by the respondent No.2 this Court sought for a report from the investigating agency. The above-noted FIR was registered on the complaint of the prosecutrix on 3rd March, 2014 and on 6th March, 2014 respondent No.2 was arrested and released on bail on 20th October, 2014. After the respondent No.2 was released on bail the petitioner got lodged 3 FIRs against him and the report filed by the State in this regard is as under:

"(a) It is submitted that on 25.4.15, an information was received in PS New Ashok Nagar vide DD No.10A and same was marked to SI Rajiv Gautam. On this SI Rajiv Gautam reached at the spot i.e. D-1/103 New Kondli Delhi where complainant "PB" met him. There was an injury on her left hand. Medical of "PB" was conducted in LBS Hospital and Dr. opined "self inflicted injury simple fresh". Statement of complainant "PB" was recorded and she stated that on 22.4.15 at about 9.30 AM she came to her school and she saw Brahm Pal @ Raju. She further alleged that he was following her. Accordingly a case vide FIR No.529/15 under Section 354D was registered in PS New Ashok Nagar, Delhi. During the course of investigation of this case accused Brahm Pal was bound down by the IO of this case. After completion of investigation charge sheet was filed before the Court on 26.7.16. This case is now pending trial. Next date of hearing in Trial Court is fixed for 8.2.2017 for appearance.

(b) Further it is submitted that on 8.6.2015, mother of the complainant made a complaint in PS Ghazipur mentioning that somebody sent abusive messages and calls by some unknown numbers to her daughter "PB". Accordingly a case vide FIR No.543/15 under Section 506/509 IPC was registered in PS Ghazipur. During the course of investigation of this case statement of victim "PB" was got recorded under Section 164 Cr.P.C. Victim "PB" has stated in her statement under Section 161 Cr.P.C. that accused Raju made threatening calls and vulgar messages and calls between January 2014 and March 2014. She has also stated that she has not saved any vulgar message or recording of any threatening call. IO of this case obtained ownership of alleged 3 mobile phone numbers. Alleged mobile number 9990011383 is registered in the name of Shakil Ahmed who on examination told that he knows "PB" as she lived in his neighbourhood in 2014 but he never made any call or sent any message to her. The other alleged mobile number 8285591487 is registered in the name of Brahm kumar (accused in the present case). Alleged mobile number 9891397519 is registered in the name of Munni Joshi w/o Darshant r/o B-12A Gali No.17 Baljeet Nagar Nithari and this number has been issued on 7.12.2014 (after the date of allegation made by the

complainant). Case is still pending investigation.

(c) It is further submitted that on 6.10.15, an information from LBS hospital was received in PS New Ashok Nagar, Delhi vide DD No.40A. On this HC Devender reached at LBS Hospital where victim "PB" was found admitted vide MLC No.15920/15. Victim "PB" did not give her statement that day. On 8.10.15, statement of "PB" was recorded wherein she stated that accused Brahm Pal @ Raju along with his other friends and brothers harassed her and threatened her on the way. Due to which on 6.10.2015, she took some poisonous substance for committing suicide due to this harassment. Accordingly another case vide FIR No.1337/15 under Section 354D/195A/506/34 IPC was registered in PS New Ashok Nagar, Delhi. During the course of investigation of this case, statement of victim "PB" was recorded wherein she stated that accused Raju threatened her in her school. He also threatened to withdraw the case otherwise he will murder her. This case is also pending investigation, copies of all the FIRs are also annexed."

11. A perusal of the three complaints filed by the petitioner after the release of the respondent No.2 on bail reveals that in one case i.e. FIR No. 543/15 the allegations relate to period prior to registration of FIR No. 252/2014 and the matter is still pending investigation as one of the phone numbers allegedly used for harassment had not even been issued on that date. In FIR No.529/15 though the petitioner alleges harassment, the injury on her was found to be self-inflicted. FIR No.1337/15 was registered on the statement of the petitioner after she took some poisonous substance and tried to commit suicide. Till date no charge-sheet has been filed in FIR Nos. 543/15 and 1337/15 for want of corroboration. Further all these three FIRs were lodged before and during the pendency of the application for cancellation of bail of the respondent No.2 was filed by the petitioner. As noted by the Supreme Court in Mehboob Dawood (supra) cancellation of the bail and deprivation of the personal liberty is a serious matter and the Court while exercising the jurisdiction should act with circumspection and should carefully weigh the acceptability of the allegations for cancellation of bail. Testing the allegations of the petitioner on the touchstone noted by the Supreme Court present is not a case wherein cancellation of bail of the respondent No.2 is warranted as in none of the FIRs, the allegations of the petitioner are corroborated by any independent material.

12. Petition is dismissed.