

(2008) 12 CAL CK 0020
In the Calcutta High Court
Case No : C.R.M. No. 7608 of 2008

Sanjoy Yadav

APPELLANT

Vs

State of West Bengal and Another

RESPONDENT

Date of Decision : 12-12-2008

Acts Referred:

Arms Act, 1959 — Section 25(1b)(a), 27
Criminal Procedure Code, 1973 (CrPC) — Section 438
Penal Code, 1860 (IPC) — Section 307, 34

Citation : (2008) 12 CAL CK 0020

Hon'ble Judges : Prabuddha Sankar Banerjee, J; Amit Talukdar, J

Bench : Division Bench

Advocate : Joymalya Bagchi, Deep Chaim Kabir, for the Appellant; Sandipan Ganguly, S. Mukherjee Opposite party No. 2 S.K. Mallick, for the Respondent

Final Decision : Allowed

Judgement

The Judgment of the Court was as follows:

1. Fallacious inception cannot sanctify the fructification. If we simply keep this in mind, there will be no difficulty for us in scuttling the liberty obtained by the opposite party No. 2 achieved under circumstances; which in judicial parlance can neither be said to be a legal order nor it be termed as a just order.
2. Seeking to reverse the order passed by the learned Chief Judicial Magistrate in C.G.R. Case No. 2084 of 2008 whereby the opposite party No. 2 was admitted on ad interim bail, which was later confirmed on 26.08.2008 after the learned Sessions Judge-in-Charge on 05.07.2008 in Criminal Misc. Case No. 3657 of 2008 allowed the prayer of the opposite party No. 2 made u/s 438 Cr. PC this application has been taken out by the petitioner on sundry grounds.
3. Shri Joymalya Bagchi with Shri D.C. Kabir appearing in support of this application has invited our attention to the order No. 2 dated 05.07.2008 passed by the learned Sessions Judge-in-Charge in Criminal Misc. Case No. 3657 of

2008 and submitted that based on the papers with regard to the treatment of the opposite party No. 2 at the concerned Health Care Centre and the fact that there is no recovery - at the first instance the Court should not have considered the prayer made u/s 438 Cr. PC.

4. Secondly, Shri Bagchi was of the view that the learned Chief Judicial Magistrate-in-Charge, Alipore on 15.01.2008 simply acting on the basis of the order passed u/s 438 Cr. PC by the learned Sessions Judge granted ad interim bail without considering the objection raised on behalf of the de facto complainant.

5. Shri Bagchi referred to the decision of the Supreme Court in Naresh Pal Singh vs. Raj Karan & Anr., 1999 SCC (Cri) 466, in support of his contention that the ground of treatment of the opposite party No. 2 was his plea for alibi, which should not have been taken at that initial stage for allowing the prayer of the opposite party No. 2.

6. He was of the view that the order itself being susceptible to an inherent defect, the subsequent orders of the learned Chief Judicial Magistrate-in-Charge, Alipore, which practically carried out the earlier direction were also nugatory in the eye of law.

7. Shri Ganguly with Ms. Mukherjee submitted that the order was passed on 15.07.2008. Subsequently, the ad interim bail was confirmed on 26.08.2008 This is a stale cause of action. There is also absence of any material to suggest, according to Shri Ganguly, that after his release on bail the opposite party No. 2 has in anyway abused the liberty or has tampered with the evidence.

8. Shri Ganguly very strongly contended that the opposite party No. 2 was admitted with an order u/s 438 Cr. PC on the basis of the appreciation of materials in the case diary and considering the fact that he was undergoing treatment at the concerned Health Care Centre; the plea of being a genuine one and opposite party No. 2 being innocent, there was no question of his implication in the case. As such, at this late hour canceling the said order would not be justified.

9. As a part of his submission Shri Ganguly referred to the decision of Dolat Ram & Ors. vs. State of Haryana, 1995 C Cr. LR(SC) 124, to show that in the absence of any supervening circumstances the Court should not interfere with the order of bail.

10. He thereafter referred to the decision of Mehbaab Dawood Shaikh vs. State of Maharashtra, 2004 C Cr. LR (SC) 441, to the extent that the grant of bail and cancellation of the said order are quite different propositions and should not be lightly resorted to.

11. Referring to the decision of Nityanand Rai vs. State of Bihar & Anr., 2005 SCC (Cri) 1159, Shri Ganguly submitted that the conduct of the opposite party No. 2 after his release on bail, cannot be faulted. As such the said question of canceling

the bail, which he has been enjoying for a long period, did not arise.

12. He also referred to the decision of a Division Bench of this Court in *Srikanta Dutta vs. State of West Bengal & Ors.*, 2008(2) C Cr. LR(Cal) 563, on the same point.

13. On behalf of the State Shri Mallick produced the case diary before us.

14. Shri Mallick submitted that from the statement of the doctor attached with the concerned Health Care Centre it would appear that the opposite party No. 2 was admitted in the said centre from 20.06.008 at about 12-32 hrs. and stayed there till 23.06.2008 till 17-07 hrs.

15. Shri Mallick however, has placed before us the case diary and submitted that there is the statement of the eye-witnesses and other materials to show the complicity of the opposite party No. 1 with the incident.

16. Shri Mallick, in the presence of the Investigating Officer did not vouchsafe with regard to the credentials of the opposite party No. 2. He stated that the investigation is still in progress and it is felt that the continuation of the opposite party No. 2 on bail would not be a very taciturn situation.

17. Once we have had the occasion to listen to the submissions made at the Bar and have had access to the materials-both, in the case diary and order granting bail, we would now proceed to appreciate the same in the light of the submissions made by Shri Bagchi in opposition to that of Shri Ganguly and Shri Mallick.

18. It appears that on the basis of a written information lodged by the petitioner hereinabove, Kalighat Police Station Case No. 108 of 2008 dated 20.06.2008 was registered for investigation against the opposite party No. 2 and eleven others in respect of the offence punishable under sections 307/34 of the Indian Penal Code under sections 25(1b)(a) /27 of the Arms Act.

19. Perhaps, driven by an apprehension of arrest the opposite party No. 2 moved an application before the learned Sessions Judge-in-Charge, Alipore. The learned Sessions Judge-in-Charge, Alipore by order No. 2 dated 05.07.2008 allowed the prayer of the opposite party No. 2 within the ambit of section 438 Cr. PC principally, being guided by the interment of the petitioner in the Health Care Centre that there was no recovery.

20. As if, the learned Chief Judicial Magistrate was acting as an Executing Court of the learned Sessions Judge-in-Charge mechanically, without any application of mind after accepting the surrender of the opposite party No. 2, enlarged him on his furnishing ad interim bail. The same was confirmed on 26.08.2008 - even though it was on record before him on the same day that the prayer of the other accused persons viz., Bhola Mallick @ Bhola, Dilip Yadav @ Dilip and Vicky Das @ Bachha Vicky was rejected.

21. It is further interesting to note on the date on which the ad interim bail was

confirmed, the case diary was not produced.

22. After having gained control over the factual matrix which lead to the filing of the present application by Shri Bagchi, we find that the initial order passed by the learned Sessions Judge-in-Charge on 05.07.2008 is absolutely a bad order as the ground of alibi was considered at the stage of considering a prayer made u/s 438 Cr. PC, which was the subject which should have been allowed to be canvassed after the accused had entered upon his defence. The decision of Naresh Pal Singh vs. Raj Karan & Anr. (supra) is absolutely apposite on this point, which has been cited by Shri Bagchi.

23. As such, the said order passed by the learned Sessions Judge-in-Charge, Alipore is absolutely a vulnerable order. [See Dinesh M.N. (S.P.) vs. State of Gujarat, 2008(2) SCC (Cri) 508].

24. Now the subsequent orders passed by the learned Chief Judicial Magistrate, Alipore, which flowed from the order passed by the learned Sessions Judge-in-Charge, in our view, militates against the ratio of the decision of D.K. Ganesh Babu Vs. P.T. Manokaran and Others, Naresh Kumar Yadav Vs. Ravindra Kumar and Others, as well as the Division Bench decision of this Court In Re: Joydeb Pradhan & Ors., reported in 2005(2) C Cr. LR(Cal) 316, under the Caption-FINDING (paragraph-35) and EPILOGUE (paragraph-37).

25. It was incumbent upon the learned Chief Judicial Magistrate-in-Charge to independently assess the materials available against the opposite party No. 2 and after formation of opinion thereto, then only he could have taken a decision with regard to grant of bail in favour of the opposite party No. 2. But the order impugned dated 15.07.2008 passed by the learned Chief Judicial Magistrate-in-Charge granting ad interim bail to the opposite party No. 2 and the subsequent order dated 26.08.2008 confirming the ad interim bail show that as if he was acting as a mere Post Office and simply carried out the order of the learned Sessions Judge-in-Charge, Alipore passed u/s 438 Cr. PC.

26. Now, simply, this by itself, would not be sufficient for us to cancel the bail granted by a Court of otherwise, competent jurisdiction.

27. We do agree with Shri Ganguly that the order of bail granted by a Court of otherwise, competent jurisdiction in howsoever grave offence may be is one aspect of the matter but canceling the same is absolutely a diametrically opposite proposition. It is who correct that an order of cancellation of bail is a harsh step and should not be lightly resorted. The decisions cited by Shri Ganguly in Dolat Ram & Ors. (supra) and Mehboob Dawood Shaikh (supra) has square application on the proposition expounded by Shri Ganguly.

28. But we found not only the learned Chief Judicial Magistrate has simply acted as an Executing Court of the learned Sessions Judge-in-Charge and admitted the opposite party No. 2 on ad interim bail but confirmed the same without consulting the case diary. In the case diary there are overwhelming materials

suggesting the involvement of the opposite party No. 2 in the Crime.

29. The opposite party No. 2, after his release on bail, has been involved in connection with the neighbouring Bhowanipore Police Station Case No. 195 dated 31.07.2008. The order of confirmation made by the learned Chief Judicial Magistrate, Alipore on 26.08.2008 was in oblivion of the said aspect of the order since the case diary was not consulted by him.

30. That apart, we find the post bail conduct of the opposite party No. 2 is not very satisfactory. After his release on bail he has threatened the witnesses. This has been categorised by Shri Bagchi in his application, which Shri Mallick for the State could not dispute. This is another aspect which has to be taken into account. The decision cited by Shri Ganguly in Nityanand Rai vs. State of Bihar (supra) and the Division Bench decision in Srikanta Dutta's case (supra) will have no manner of application in the present case considering the post-bail conduct of the present opposite party No. 2.

31. Besides this, the plea of treatment taken by the opposite party No. 2, which has haunted the entire scepter of the learned Session Judge's order was not very much appreciable.

32. The statement of one Dr. Rajesh Chatterjee recorded by the Investigating Officer on 06.12.2008 showing the interment of the accused/opposite party No. 2 in the Health Care Institution from the time which we have discussed hereinabove and the various treatment sheets does not at all, inspire any confidence in the mind of the Court in view of the very cogent and clinching materials available in the case diary implicating the opposite party No. 2 with the crime.

33. We also have before us the injury report at page-13 of the case diary prepared by Dr. Chandan Roy, the Senior Emergency Medical Officer of the SSKM Hospital on 20.06.2008 i.e. the day of the occurrence itself. Name of the opposite party No. 2 was mentioned in the injury report almost contemporaneously. We have no reason to accept the alibi at this stage on the basis of the documents of a private Health Care Centre, which can not be given any reduction in the eye of the overwhelming ocular version, but on the contrary there is the injury report prepared by a Premier Government Hospital of the State which is more sacrosanct and inspires much confidence in our mind.

34. We are of the considered opinion, keeping in mind the subsequent conduct of the opposite party No. 2 and the entire profile of the case it would be unsafe to allow him to remain on bail.

35. A plain reading of the order passed by the learned Chief Judicial Magistrate-in-Charge, Alipore enlarging the opposite party No. 2 on ad interim bail and subsequently, confirming the same show there has been total non-application of mind and the order passed on the basis of the same should not be allowed to remain alive [See Rizwan Akbar Hussain Syed Vs. Mehmood Hussain and

Another,].

36. More so when the parent orders (read the order passed by the learned Sessions Judge-in-Charge, Alipore and the learned Chief Judicial Magistrate-in-Charge, Alipore) were vulnerable and not in accordance with law subsequent order flowing therefrom is also non est in the eye of law [See Jarnail Singh vs. Pitamber Singh & Ors., 2001(5) Supra 470 & Damayanti Majhi vs. State of West Bengal, 2002 C Cr. LR (Cal) 823.]

37. We are conscious of the fact that the ad interim bail was confirmed by the learned Chief Judicial Magistrate-in-Charge, Alipore on 26.08.2008 and the opposite party No. 2 was on ad interim bail from 15.07.2008. Even though there has been some lapse of time but we cannot agree with Shri Ganguly that the cause of action has become stale. On the contrary reading the materials in the case diary (which is akin to that of a Horror Fiction) gives us the impression that the presence of the opposite party No. 2 outside on bail would give rise to a fresh cause of action each day.

38. On a wholesome impact of the bundle of materials and the strange situation which has bubbled up before us, we would be of the single view and would be left with no other option but to allow the application by way of cancelling the order of bail.

39. Accordingly, the bond furnished by the opposite party No. 2 pursuant to the direction passed by the learned Chief Judicial Magistrate-in-Charge, Alipore stands cancelled.

40. The opposite party No. 2 will at once surrender to his bond.

41. In the event he does not do so, the learned Chief Judicial Magistrate will forthwith issue a non-bailable warrant of arrest against him for the purpose of securing his attendance.

42. Application accordingly allowed.

43. Return the case diary.

44. After this order was dictated and pronounced in open Court in presence of the learned Counsel for the petitioner, the opposite party No. 2 and the State; the learned Counsel for the petitioner and the opposite party No. 2 prayed for urgent xerox certified copy. The same may be given according to rules.