

(1997) 07 AP CK 0051

In the Andhra Pradesh High Court

Case No : Criminal Miscellaneous Petition No. 2464 of 1997

Sardela Damodar

APPELLANT

Vs

State of Andhra Pradesh and Others

RESPONDENT

Date of Decision : 09-07-1997

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 301(2), 439
Penal Code, 1860 (IPC) — Section 306, 498A

Citation : (1996) 2 ALD 859 : (1997) 2 ALT(Cri) 254 : (1998) CriLJ 277 : (1997) 2 DMC 485 : (1998) 3 RCR(Criminal) 98

Hon'ble Judges : G. Bikshapathy, J

Bench : Single Bench

Advocate : S. Lakshma Reddy, for the Appellant; Public Prosecutor, for the Respondent

Judgement

1. The question that calls for consideration in this petition is whether the Complainant or the relations or interested persons of deceased victim can lay application u/s 439 Cr.P.C. for cancellation of bail granted to the accused.

2. This petition is filed u/s 439 Cr.P.C. by the brother of the deceased for cancellation of bail granted by the II Additional District and Sessions Judge, Warangal in Crime No. 46/97, dated : 21-5-1997.

3. The brief facts of the case are that the Respondents No. 2 to 6 herein are the Accused No. 1 to 5 in Crime No. 46/97 of P.S. Parkal. They are alleged to have committed offences under sections 498-A and 306 IPC. The deceased was sister of the petitioner who was married to A-1 in 1988 and some dowry was given to A-1. But, however, when the brothers of A-1 namely A-2 and A-3 got married, they received higher dowry and therefore A-1 also started demanding additional dowry and in that process she was being subjected the deceased to cruelty and harassment. Unable to bear with the harassment, the deceased committed suicide by pouring kerosene on her. According to the petitioner, he suspects that

it is a murder and not a suicide. The incident took place on 1-5-1997, and the deceased by name Smt. Prabha alias Prashanti died in the hospital on the same day. The Police recorded the F.I.R. and registered a crime under sections 498-A Read with Section 306 IPC and they were arrested and remanded. A-1 to A-5 moved bail application before the learned II Additional District and Sessions Judge, in Cri.M.P. No. 887/97 and it was allowed. It is the case of the petitioner that the bail petition was moved in the morning on 21-5-97, the bail was granted on the same day. It is the complaint of the petitioner that the material evidence has been ignored by the learned Judge and without giving any notice to the Public Prosecutor, the bail was granted on the same day giving untenable reasons, more especially when the matter is pending further investigation. It had caused mental torture and there is every possibility of Respondents tampering the witnesses and obstructing the progress of the investigation.

4. The learned Public Prosecutor submits that the Application for cancellation of bail by the petitioner who is the brother of the deceased is not maintainable, and, that it is only for the State to approach this Court for cancellation whenever the occasion arises. On the other hand, the learned counsel for the petitioner submits that the petitioner being the brother of the deceased is entitled to seek cancellation of the bail as the Respondents have been acting detriment to the interest of prosecution. He relies on the judgments reported in Bohre Singh and Others Vs. State, , Talab Haji Hussain Vs. Madhukar Purshottam Mondkar and Another, and State of Maharashtra v. Tukaram Shiva Patil 1977 Cri LJ 394 and submits that whenever there is a threat or obstruction to the witnesses and whenever there is apprehension of prejudice to the investigation, it is always open for the aggrieved person to assail orders granted and seek cancellation of the bail granted to the accused.

5. As already narrated, a crime was registered against the Accused under Sections 498-A and 306 IPC. The learned II Additional Sessions Judge, Warangal holding that it would be improbable to think that the dowry was demanded at the belated stage enlarged the accused on bail on executing a bond for a sum of Rs. 3,000/- each with two sureties for like sum.

6. The question that falls for consideration is whether the petitioner has locus-standi to file the present application u/s 439 Cr.P.C. which reads as follows :

"Special powers of High Court or Court of Sessions regarding bail - (1) A High Court or Court of Sessions may direct -

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified :

Provided that the High Court or the Court of Sessions shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which though not so triable, is punishable with imprisonment for Life, giving notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

The learned counsel submits that taking clue from sub-section 2 submits that the High Court or Sessions Court may direct that any person who has been released on bail can be arrested and committed to custody. There is no quarrel about the provision, but the question is whether the petitioner has locus-standi. On the other hand, the learned Public Prosecutor submits that a perusal of various provisions in the Criminal Procedure Code discloses that it is for the prosecution to take up the cause and the petitioner is not entitled to file an application u/s 439 of Cr.P.C. It may be open for him to assist the Public Prosecutor by taking prior permission but he cannot straightway approach this Court for cancellation of the bail.

7. In this regard, reference to certain relevant provisions in the Code are necessary for proper appreciation of the case. They are extracted below :

"Section 24 : Public Prosecutors - (1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district, or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district :

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons who are, in his opinion fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where in a State

there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre :

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint for the purposes of any case or class of cases, a person who has been in practice as advocate for not less than ten years as a Special Public Prosecutor.

(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person, has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.)

Section 209 : Commitment of case to Court of Session when offence is triable exclusively by it : When in case instituted on a Police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions, he shall -

(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

Section 225 : Trial to be conducted by Public Prosecutor :- In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.

Section 226 : Opening cases for prosecutions :- When the accused appears or is

brought before the Court in pursuance of a commitment of the case u/s 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.

Section 301 : Appearance by Public Prosecutors :- (1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs, a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

Section 302 : Permission to conduct prosecution :- (1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector : but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission :

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.

Section 397 : Calling for records to exercise powers of revision :- (1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation :- All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same

person shall be entertained by the other of them.

8. A conjoint reading of the above provisions, it is clear that Public Prosecutor or Additional Public Prosecutors are appointed by Central Government or State Governments for conducting any prosecution, appeal or other proceedings in the High Courts on behalf of Central or State Government as the case may be. The trial of cases before a Court of Sessions, the prosecution shall be conducted by the Public Prosecutor. The prosecution shall commence its case by leading evidence u/s 231 Cr.P.C. It is competent for the Public Prosecutor to appear and plead.

9. In Bohre Singh's case (1st cited supra), the Division Bench observed that it is the duty of the Court to cancel the bail in proper circumstances, and no application is required on behalf of any party. If the matter is brought to the notice of the learned Sessions Judge by the complainant, it is open to the Sessions Judge to pass an order u/s 497(5) of Cr.P.C. In that case, application was filed by the complainant for cancellation of the bail and in such circumstances, the Division Bench held if the matter is brought to the notice of the Sessions Judge by the Complainant, it is open for the Sessions Judge to pass the order u/s 497(5) of the Old Cr.P.C. In *Re Rakhan Ojha alias Rakhal Chandra Ojha*, 1988 Cri LJ 278, the Division Bench of Calcutta High Court ruled that if in a case which is in charge of a Public Prosecutor or Asst. Public Prosecutor, a private person engages a Lawyer then, notwithstanding such engagement, the Public Prosecutor or Asst. Public Prosecutor concern shall conduct the prosecution and the Lawyer engaged by the private person shall act therein under the directions of the Public Prosecutor and he can only submit written arguments and that too with the permission of the Court. Thus, it was held that Lawyer engaged by a private person has no right of audience in a case which is in charge of a Public Prosecutor. The learned Public Prosecutor relied on the judgment of this Court reported in *Medichetty Ramakistiah and Others Vs. The State of Andhra Pradesh*, wherein it is observed that mere fact that Pleader privately instructed, acted for the prosecution in a Sessions Case does not involve a violation of Section 270 if the conduct of the prosecution could be said to have been in the hands of the Public Prosecutor. It was further observed that it is open for the Pleader, privately engaged to assist the Public Prosecutor and at the same time if the conduct of the prosecution is left in the hands of such a Pleader, then the provisions of the Code must be held to have been violated. While summing-up the matter, the Divisional Bench observed at Page 1407 (of Cri LJ) :

"To sum up, the conduct of all prosecutions before a Court of Sessions shall be in the hands of a Public Prosecutor appointed u/s 492 subject to his power to instruct a duly qualified person acting under his directions, and where either before a Magistrate or before a Court of Sessions, a Pleader is instructed by a private individual to prosecute any person in a case before any Court, the pleader so instructed may act in that case subject to the overall supervision of the Public Prosecutor. Such a pleader can conduct the examination, cross-

examination and re-examination of witnesses as also address arguments to the Court. These provisions do not, however, authorise the abdication of his functions by the Public Prosecutor; he should continue to be in charge of the case and to issue directions on all important matters.

These provisions are clearly conceived in the public interest as well as in the interest of the accused because the position of the Public Prosecutor is, it must be borne in mind, unlike that of any advocate appearing for a private party. It is well-recognised to use the words of Crompton J., in *R. v. Puddick*, (1865) 4 F and F 497 at p. 499, Public Prosecutors "should regard themselves rather as Ministers of Justice assisting in its administration than as advocates" - an observation which was adopted by the Court of Criminal Appeal in *R. v. Banks* 1916-2 KB 621.

Unless, therefore, the control of the Public Prosecutor is there, the prosecution by a pleader for a private party may degenerate into a legalized means for wreaking private vengeance. The prosecution instead of being a fair and dispassionate presentation of the facts of the case for the determination of the Court would be transformed into a battle between two parties in which one was trying to get better of the other, by whatever means available. It is true that in every case there is the over-all control of the Court in regard to the conduct of the case by either party. But it cannot extend to the point of ensuring that in all matters one party is fair to the other.

A prosecution to use a familiar phrase, ought not to be a persecution. The principle that the Public Prosecutor should be scrupulously fair to the accused and present his case with detachment and without evincing any anxiety to secure a conviction, is based upon high policy and as such Court should be astute to suffer no inroad upon its integrity. Otherwise there will be no guarantee that the trial will be as fair to the accused as a criminal trial ought to be. The State and the Public Prosecutor acting for it are only supposed to be putting all the facts of the case before the Court to obtain its decision thereon and not to obtain a conviction by any means fair or foul. Therefore, it is right and proper that Courts should be zealous to see that the prosecution of an offender is not handed over completely to a professional gentleman instructed by a private party."

The Division Bench of Bombay High Court in *Tukaram Shiva Patil's* case (3rd cited supra), observed thus : at Page 399 (of Cri LJ).

"It is the inherent nature of bail pending trial that it is always liable to be cancelled for good reasons such as that the accused were tampering with the prosecution evidence or were threatening the witnesses. The contention that because there was no application filed by the State against the previous order of the Sessions Judge granting bail, it was not open to the State to apply for cancellation of the bail or to apply against the refusal to cancel, is without substance. The High Court and even the Sessions Court have powers to cancel the bail granted earlier pending the trial or investigation u/s 439(2). The High

Court can further cancel it in exercise of its inherent jurisdiction u/s 482, apart from the powers under Article 227 of the Constitution (1940) 41 Cri LJ 251 (Bom) : (AIR 1940 Bom 40), Rel. on."

While interpreting Section 302 of Criminal Procedure Code, the Division Bench of Kerala High Court in Babu Vs. State of Kerala, , observed as follows : at Page 501.

"Under Section 301, a pleader engaged by a private person can assist the Public Prosecutor or the Assistant Public Prosecutor, as the case may be, in the conduct of the prosecution while u/s 302 the Magistrate may permit the prosecution itself to be conducted by any person or by a pleader instructed by him. The distinction is when permission u/s 302 is given, the Public Prosecutor or the Assistant Public Prosecutor as the case may be disappears from the scene and the Pleader engaged by the person who will invariably be the de facto complainant will be in full charge of the prosecution. The question is even if the Magistrate has got the discretion to grant permission is it to be granted as a matter of course ? There is an ocean of difference between assisting the Public Prosecutor u/s 301 and conducting the prosecution on the basis of a permission granted u/s 302. Public Prosecutors are really ministers of justice whose job is none other than assisting the State in the administration of justice. They are not representatives of any party. Their job is to assist the Court by placing before the Court all relevant aspect of the case. They are not there to see the innocents go to the gallows. They are also not there to see the culprits escape a conviction. But, the Pleader engaged by a private person who is a de facto complainant cannot be expected to be so impartial. Not only that, it will be his endeavour to get a conviction even if a conviction may not be possible. So, the real assistance that Public Prosecutor is expected to render will not be there if a pleader engaged by a private person is allowed to take the role of a Public Prosecutor by granting permission u/s 302 of the Code. This does not mean that permission cannot at all be granted u/s 302. Under very very exceptional circumstances permission can be granted u/s 302. Otherwise, there is no reason why the provision is there in the Code. But that is to be done only in cases where the circumstances are such that a denial of permission u/s 302 will stand in the way of meeting out justice in the case. A mere apprehension of a party that the public Prosecutor will not be serious in conducting the prosecution simply because a conviction or an acquittal in the case will affect another case pending will not by itself be enough. At the same time, if the apprehension of the party is going to materialise, the Court can, pending the trial, grant permission u/s 302 even if a request for permission was rejected at the outset."

The Supreme Court in Talab Haji Hussain's case (2nd cited supra), while interpreting Section 561-A in the Cr.P.C. 1898 held that the High Court has inherent power to cancel the bail granted to a person accused of a bailable offence and in a proper case such a power can be exercised in the interest of justice. It was held that it is always open for the High Court to cancel the bail

granted to the accused if the subsequent conduct of the accused is found to be prejudicial to a fair trial. However, we are concerned with the locus of a person seeking cancellation of the bail.

10. A perusal of the above case law, leads to conclusion that it is open for the complainant to appoint a private Advocate to assist the Public Prosecutor, and only in exceptional cases the private advocate is permitted to assist the Public Prosecutor subject to the limitations in Section 301(2) of the Cr.P.C. It is only the Public Prosecutor, who is entitled to proceed with the prosecution of the case. When the Public Prosecutor is specifically authorised by the statute, to prosecute a case, it would only meant that others are not entitled to prosecute the matter except to the extent stated in Section 301 of the Cr.P.C. Thus it is clear that the prosecution alone has power and the petitioner has no locus-standi and such a provision is not contained in the Code. Except to the extent of assisting the prosecution with the permission of the Public Prosecutor and submitting written brief, the third party has no role to play, in the matter of trial, appeal of the criminal cases. Hence, neither the de facto complainant nor any person interested in the complainant can be said to have any locus in this regard. If the petitioner felt that the prosecution would be hampered and that the accused would interfere with the witnesses, it is open for him to bring it to the notice of the State, so that the same can be considered and appropriate action will be taken if necessity arises. If the contention that anybody purporting to be aggrieved by the order granting bail to an accused could be permitted to file an application is accepted there would be spate of litigation and causes avoidable obstacles to the prosecution. In as much as the State is satisfied that the release of the accused on bail would not interfere with the prosecution or there was no incident or intimidation of the accused with the witnesses or influencing the witnesses either directly or indirectly, the prosecution felt that it would not be necessary to cancel the bail. Unless there are any acts which tend to prejudice or jeopardise the course of justice, there will not be any necessity to approach either Court of Sessions or High Court for cancellation of the bail. The opposition of the petition by the learned Public Prosecutor itself indicates that the State is not interested in cancellation of the bail.

11. Therefore, I am of the considered opinion that the petitioner has no locus-standi to file the present application for cancellation of the bail as he cannot be treated on par with the Public Prosecutor. As already observed, it is for the prosecution to satisfy itself whether by granting bail, the accused will be interfering with the trial or the evidence and if it finds that the accused is conducting himself prejudicial to the interest of the prosecution, it is open for the prosecution to file an application or bring to the notice of the Court for cancellation of the bail. But, it would not authorise the private person to step in the shoe of Public Prosecutor and file the application u/s 439(2) Cr.P.C.

12. Under these circumstances I do not find any merit in the application and accordingly the same is dismissed.

13. It is however open for the petitioner to make representation to the state making out a case for cancellation of the bail granted to the Respondents and it is open for the state to consider the same and take appropriate decision.

Petition dismissed.