

(2005) 04 CAL CK 0053
In the Calcutta High Court
Case No : C.R.M. 8217 of 2004

Smt. Ashoka Das

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 28-04-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 120B, 201, 202, 302, 330
Penal Code, 1860 (IPC) — Section 379, 461

Citation : (2005) 3 CALLT 37 : (2005) 4 CHN 189

Hon'ble Judges : V.S. Sirpurkar, C.J.;Asok Kumar Ganguly, J

Bench : Division Bench

Advocate : Subhasish Roy, Biplab Dey and Subhyojyoti Mitra, for the Appellant;Joymalya Bagchi and L. Bishal Kumar for accused Nos. 2, 4 and 5, Sudipto Moitra and Sutapa Sanyal for accused No. 3, Kazi Safiullah, Public Prosecutor and Kabita Mukherjee, for the Respondent

Judgement

1. This is an application filed u/s 439(2) of the Code of Criminal Procedure.
2. The petition is at the instance of one Sm. Ashoka Das wife of Sri Lokenath Das of Village Madhubati. She alleges that she had a son called Netai who was about 36 years. According to her, on 18th February, 2002 at about 1.00/1.30 P.M. the said Netai Das was picked up by 2/3 persons in civil dress claiming themselves to be the Police Officers. He was taken to Singur Police Station. However, ultimately the petitioner came to know that he was taken to Bally Police Station. It is further claimed that on the next day some persons went to see Netai in Bally Police Station where he was detained and after great persuasion the sentry allowed the persons concerned to talk with said Netai when Netai disclosed that he was beaten by the accused police. (The allegation is against 4 accused persons. They being (1) Sri Sunil Biswas, Inspector-in-Charge, Bally Police Station; (2) Sri Amal Kanti Das, Sub-Inspector of Police, Bally Police Station; (3) Sri Srimanta Banerjee, Sub-Inspector of Police, Bally Police Station and (4) Sri A. Tarafdar, Assistant Sub-Inspector of Police, Bally Police Station.) It was claimed that some relations met Netai on 24.02.2002 again and at that time also be

disclosed his apprehension that he would be liquidated by the police as the accused persons had beaten him severely and they would kill him if he had not agreed to give confessional statement as required by the police personnel. It was suspected that Netai was involved in Bally Police Station Crime Case No. 179 dated 16.9.2001 for the offence under Sections 461 and 379 of the Indian Penal Code. He was also produced before the learned Sub-divisional Judicial Magistrate, Howrah on 21.2.2002. On 25.2.2002 the police of Singur Police Station informed the complainant that her son Netai committed suicide at Bally Police Station lock up at about 4.30 A.M. with a "Gamcha" (a towel). The matter was reported to the West Bengal Human Rights Commission and post mortem was done at the Calcutta Medical College Morgue under Video Camera. Photographs were taken of the dead body suggesting therein that the dead body had several marks of injuries. Ultimately Netai was cremated at Manicknagar Burning Ghat on 26.02.2002.

3. The petitioner also pointed out that on her inquiry she came to know that on 25.2.2002 at about 4.45 A.M. the police, attached to Bally Police Station, had taken Netai at T.L. Jaiswal Hospital, Howrah where doctor had declared that Netai was brought dead to the hospital. The petitioner then suggested that finding that no action was being taken she filed a criminal complaint in the Court of the learned Chief Judicial Magistrate, Howrah which was registered as Cri. Case No. 792C of 2002 whereupon the concerned Magistrate took cognisance and proceeded to inquire into the matter. In the complaint she had given list of about 12 witnesses including doctors and post mortem doctor. She had relied on the records, of Bally Police Station and Singur Police Station etc.

4. It seems that the learned Magistrate finding that this was a case triable by the learned Sessions Judge started inquiry u/s 202 of the Code of Criminal Procedure to find out as to whether there was any material to suggest that the offences under Sections 342/343/330/331/302/201/120B read with Section 34 were committed by the accused or any of them.

5. The complainant examined about 15 witnesses at the inquiry and ultimately the learned Magistrate by his order dated 5.8.2004 came to the conclusion that there was enough material against all the accused. He, therefore, ordered issuing warrant of arrest against the four accused persons.

6. It seems that thereafter the accused persons applied to the learned Sessions Judge, Howrah for an order u/s 438 Cr PC. The records reveal that the learned Sessions Judge firstly directed notice of the petition to the mother of the said Netai, the complainant/petitioner herein. It seems that even before the said summons were served on her the learned Sessions Judge proceeded to pass the order on 24.9.04 granting application u/s 438 Cr PC. The complainant then appeared before the learned Sessions Judge and filed an application for recall of the order. That application was dismissed as not maintainable by an order dated 12.11.04. The complainant then approached this Court by way of a petition u/s 439(2) Cr PC to quash the order dated 24.09.2004.

7. The learned Counsel appearing on behalf of the complainant contends before us that the learned Sessions Judge was totally in error procedurally as well as in law in allowing the application. The learned Counsel points out that on 14.09.04 the matter came up before the learned Sessions Judge in charge, Howrah whereupon notice was issued to the complainant and the matter was adjourned till 20th September 2004 for Report of Service Return and hearing. On 20th September 2004, the Service Report was not received by the Court and therefore, the matter was fixed on 24th September 2004 for Service Report and hearing. On 24th September 2004 also Service Report had not been returned, yet the matter was taken up for final hearing. Very interestingly the learned Sessions Judge in-charge mentions in his order.

"in this case notice was sent to O.P./complainant by speed post but none appeared from her side to the said notice fixing this day of hearing was sent by speed post on 21.09.04 and that in all probability the same was served upon her within 24 hours."

It seems that learned Sessions Judge in charge then proceeded to hear the learned public prosecutor as well as the learned Counsel appearing on behalf of the accused and then passed the order granting the application.

8. The learned Sessions Judge in charge seems to have granted bail completely ignoring the evidence led before the learned Magistrate who was pleased to commit the matter to the Court of Session after taking full fledged inquiry wherein 15 witnesses were examined. We clearly get this impression for the order. The whole record of the complaint case was made available before him. We have scanned the whole order but do not find any deposition of witnesses or any document having been appreciated or even referred to in the order. Instead, the learned Sessions Judge has referred to some papers annexed with the petition u/s 438 and then relied on the opinion of one Dr. Gupta to reach following finding:

"It appears from the opinion of Dr. Gupta that the injuries found on the person of Netai Das may be caused in the process of bringing down him from the place of hanging and then shifted him to the hospital hurriedly in view of the fact that the floor of the hazat was a rough one."

These documents were not the part of record before the Magistrate. We are amazed by this reasoning which is the only reason given for allowing Section 438 application.

9. It was also before the learned Sessions Judge in-charge by the public prosecutor that since the matter had already been inquired u/s 202 Cr PC and since he was pleased to issue warrant of arrest against all the accused there would be no justification in granting an order u/s 438 particularly because this was a very serious offence u/s 302 and further the seriousness of the offence was heightened by the fact that this was a custodial death. The learned Sessions Judge however purportedly on considering the totality of the materials lying in

the case record as well as in the petition praying for Anticipatory Bail seems to have passed order in favour of the accused persons. Beyond this there is very precious little in the name of reasons. No material is referred to in the order.

10. We are not at all convinced with the so called reasons given by the Sessions Judge because those do not amount to proper reasons in law. Those are slipshod sketchy and skeleton like findings. The learned Sessions Judge in charge has merely used the general expressions which we have underlined. We are surprised at the fact that 15 witnesses were examined before the learned Magistrate and not one name is referred to in the order of the learned Sessions Judge in charge. We are also surprised at the expressions which are of absolutely general in nature suggesting that the accused persons deserved to be released on bail. We fail to follow as to what logic was applied by the learned Sessions Judge except referring to the opinion of Dr. Gupta. Even if we assume that report to be a be all and end all of the matter one falls to follow as to how the accused explained the death in the custody. Even assuming the death to be suicidal still the accused would be required to answer the question as to how the detenu was successful in committing suicide while he was in their custody or further what led him to commit suicide. As per post mortem report, there were 11 injuries on the dead body. Nothing has been stated in the order to explain the injuries. The so called opinion of Dr. Gupta is to say the least absurd as the injuries were antemortem. The opinion suggests that Netai hanged himself and was half dead when he was removed from the noose and at that time, the body must have fallen down on the "rough surface" of the cell where he was kept and that must have resulted in causing 12 abrasions. All this appears to be absurd and tailor made opinion to suit the accused. There was nothing before the said Dr. Gupta to note that the cell flooring was rough or that Netai was "half dead" when he was removed from the noose with which he had hanged himself. The opinion was more based on imagination than on facts, at least prima facie.

11. The learned Counsel for the petitioner rightly points out that the bail order was passed casually, carelessly and without any appreciation of the facts on record. It is obvious that some persons had met Netai while he was in custody and Netai had complained to them that he was severely beaten by the police officers who are accused persons and that he apprehended that he would be liquidated unless he was willing to give a confession as required by the Investigating Officer from him. There was a clear reference to the accused persons in the said statement. True it is that those statements did not specifically refer to the individual acts of the accused persons. However, if this was a custodial death, a death which was unnatural and if there were ante mortem injuries 12 in number on the body of Netai, these facts had to be appreciated by the learned Sessions Judge. He has not even mentioned these facts in his order. When we see the order passed by the learned Magistrate dated 5.8.2004, it is clear that the learned Magistrate has referred to the evidence of the witnesses from which it was established that Netai was taken away by some of the accused persons and that he complained about the beating. The Magistrate has made

reference to various other documents namely the telephone messages, requisitions made to the hospitals by the police station, the injury report of Netai, the photographs of the body of Netai, the statement of the doctor who examined the dead body of Netai etc. He has also referred to the opinion of the doctor who conducted the autopsy suggesting that the death was due to effect of hanging as noted and ante mortem in nature. If this was all the material available that at least should have been considered by the learned Sessions Judge and in the absence of any such consideration we had to go through the whole record which was made available before us.

12. It was tried to be suggested by Mr. Bagchi and Mr. Maitra, learned Counsel appearing on behalf of the accused that there was in reality no material to suggest that the accused persons or any one of them had any hand in the death of Netai. The learned Counsel pointed out very earnestly before us that there were about 17 police officers attached to Bally Police Station and only the accused persons could not have been picked and chosen by the complainant for making allegations and there had to be some material to suggest that the accused had nexus with the crime. The contention is incorrect. There is a clear allegation in the complaint against "accused persons" based on Netai's apprehension expressed before the witnesses.

13. In the first place we must consider that this was an application u/s 438. It was not as if the Sessions Judge was considering the bail application u/s 439. As per the law laid down in *Salauddin Abdulsamad Shaikh Vs. State of Maharashtra*, which is now reiterated by the Supreme Court in *Sunita Devi Vs. State of Bihar and Another*, the order u/s 438 should have been for some limited period. It should not have been treated as if it was a final order of bail after considering all the material against the accused. The order passed by the learned Sessions Judge is defective firstly on this ground that the learned Sessions Judge treats this to be an application u/s 439 and granted a final bail order.

14. The learned Counsel Mr. Bagchi however brings to our notice a reported decision in *M.P. Lohia etc. Vs. State of West Bengal and Another*. According to the learned Counsel the Supreme Court had granted bail in the nature of a permanent bail on the basis of an application u/s 438. From this the learned Counsel wanted to suggest that even u/s 438 a bail of a permanent nature comparable to one u/s 439 Cr PC can be granted. The decision is a binding precedent only on the law which emanates from the decision. Merely because the Apex Court had granted such bail it does not mean that the Supreme Court has held that permanent bail can be granted while dealing with the application u/s 438 Cr PC. That is not the expression in the Judgment of the Supreme Court. What has been simply done in that Judgment is granting bail order while acting on the application u/s 438 Cr PC which bail was probably refused by the Calcutta High Court. There is no principle of law decided upon by the Supreme Court.

15. We are, therefore, unable to accept the contention raised by the counsel that

the expression in Salauddin's case or in Sunita Debi's case has in any way been varied or diluted by the decision in M.P. Lohia's case.

16. There is one aspect on which must concentrate. The Supreme Court in the reported decision in *Puran Vs. Rambilas and Another etc. etc.*, has upheld the High Court's decision wherein the High Court had concluded that the order of the Additional Sessions Judge did not give any reason for grant of bail and on that count the High Court had cancelled the bail u/s 439(2). There is no doubt that in this decision the scope of Section 439(2) has been widened and it was reiterated that while considering the application u/s 439(2) the High Court could go into the merits of the order passed granting the bail, and if not satisfied that the bail was properly granted on justifiable grounds, on that count the bail order could be cancelled. We are doing just that. We have referred to this decision because there was an argument though haltingly that the accused had not in any way abused their bail and, therefore, we would be justified in canceling the bail. The learned Counsel contended that the considerable for cancellation of bail u/s 439(2) would be entirely different and we would have to consider as to whether the accused had in any manner tampered with the evidence etc. Learned Counsel takes pains to point out that the accused had done nothing of the sort and, therefore, we would not be justified in testing the order on its merits and canceling the bail on that count. The case of *Puran* is a complete answer for this argument. But that is not the end of the matter.

17. Even on that count we find that it will be very risky to allow the liberty of bail to the accused. During the debate the learned Counsel produced the original certificates/opinion issued by Dr. Gupta on which reliance has been made by the learned Sessions Judge, along with some other papers which were undoubtedly relevant. Those documents were used in Magisterial inquiry conducted by SDM, Howrah regarding the custodial death of Netai. The whole record was then despatched to the District Magistrate, Howrah. When it was asked as to how those papers could go into the custody of the accused the learned Counsel very candidly pointed out that the documents were handed over to him by accused Amal Kumar Das, the opposite party No. 4. We, therefore, directed the concerned Amal Kumar Das to file an affidavit as to how the documents came into his possession. He has very interestingly deposed before us that he "carried those documents from Bally Police Station" (Para 16 of his affidavit). We were at a loss to understand as to how the police officer who was not then attached to the Bally Police Station at all can walk into the Bally Police Station and come out with the documents which pertain to the prosecution of that very police officer. We do not want to say anything at this juncture. But one thing is certain that these police officer who are still on duty though attached to some different police stations are very much in a position to influence the prosecution. If a police officer who was not attached to Bally Police Station walked into the police station and came out with the documents to be produced before the High Court in support of his plea that the accused had suffered injuries on account of his body falling down while being taken out from the noose, we do not know as to what

further steps can be taken by this police officer who are yet reported to be on duty. These are four police officers against whom there were warrants. They had already surrendered and let out on bail and yet they are actively serving as police officer so as to be able to influence the prosecution. We do not want to go further than this. We feel that the authorities would take proper steps in inquiring as to how the documents travelled from SDM Howrah to D.M. Howrah and from D.M. Howrah to Bally Police Station and from Bally Police Station to the hands of the accused Amal Kumar Das so as to help him and the - fellow accused in defending an application u/s 439(2).

18. The argument was raised before us by Mr. Maitra learned Counsel appearing for the third accused Srimanta Banerjee that after the order u/s 438 was granted by the Sessions Judge all the accused went and appeared before the learned Magistrate and they were released on bail and, therefore, when the matter was committed to the Sessions they presented themselves before the learned Sessions Judge, they were also granted bail there and therefore, this does not remain to be the bail on the basis of an order u/s 438 and in fact, should be treated as a bail u/s 439. We find the contention to be without any merit. There can be no doubt that subsequent bail was only on the basis of the impugned order u/s 438 Cr PC.

19. Learned Counsel averred that at the time when bail was granted the complainant had not opposed the grant of bail. Non-opposition on the part of the complainant will not be an estoppel against the complainant in the realm of criminal law. It will be the duty on the part of the High Court to see as to whether the bail had been properly granted or not, whether it was opposed by the complainant or not. Again we are certain that the subsequent orders or bail were passed only in pursuance of the earlier order passed by the learned Sessions Judge u/s 438 Cr PC.

20. Under the circumstances, we are of the clear opinion that the order passed by the learned Sessions Judge cannot be sustained and has to be cancelled and that order is set aside. The application made u/s 438 is dismissed. The accused shall now surrender before the learned Sessions Judge, Fourth Additional Court, Howrah and shall be dealt with in accordance with law.

21. The application thus stands disposed of.

22. As prayed for let copies of this order be sent to the office of the learned Advocate General.

23. If urgent xerox certified copy of this order and order dated 21.4.2005 is applied for, the same be supplied to the applicant upon compliance of all the formalities.