

(1998) 10 MAD CK 0009

In the Madras High Court

Case No : Criminal Original Petition No. 3523/98 and Criminal M.P. No's. 2046 and 2047/98

State by the Directorate of Revenue, Intelligence, Chennai

APPELLANT

Vs

R. Narasimhan

RESPONDENT

Date of Decision : 13-10-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167(2), 437, 437(5), 438, 439

Citation : (1999) 1 LW(Cri) 238

Hon'ble Judges : A. Raman, J

Bench : Single Bench

Advocate : P. Rajamanickam, Special Public Prosecutor, for the Appellant; K. Asokan, for M/s. Strata Kumar and S. Vannila, Advocates for the Respondent, for the Respondent

Final Decision : Dismissed

Judgement

A. Raman, J.—The Director of Revenue Intelligence Bureau, Chennai, viz, the complainant, has filed this application u/s 439 of Cr.P.C.

read with Section 482 of Cr.P.C, for cancellation of bail granted to the respondent herein, who is the 3rd accused.

2. The facts, in brief, are as follows:-

A consignment of 14 packages said to contain leather garments were seized at the point of export at the Air Cargo Complex, Chennai. The packs

were found to contain mandras tablets and white powder. The total weight of the mandras tablets was 382.043 Kgs. and the weight of the white

powder was 14.68 Kgs. The seizure was effected under the cover of a mahazar attested by independent witnesses. The samples drawn from the

seized contraband were sent to the chemical Examiner, Custom House, Chennai for analysis through Special Court for NDPS Act cases at

Chennai. The seized contraband, samples drawn therefrom and other incriminating materials that were used to pack the contraband were also

produced before the Special Court for NDPS Act, Chennai. The investigation is said to have revealed that the accused herein and others entered

into a criminal conspiracy to possess, conceal, transport and export the contraband to South Africa. The said contraband was initially attempted to

be smuggled out by concealing amongst cotton fabrics in 35 bales in the name of a fictitious company. The said consignment was sought to be

cleared through M/s.Intermode Freight Systems: Private Limited, Chennai, run by the respondent herein. But it could not be transported owing to

the increased vigil mounted by the Customs Department, and therefore, the said contraband concealed in cotton bales were removed and stuffed

amongst leather garments which were booked in the name of a fictitious company. Of the 6 accused, the accused 1 and 2 are absconding, and the

other accused have been recorded. The respondent herein was produced before the Additional Chief Metropolitan Magistrate, Chennai on

16.7.1997. The Chemical Examiner has given a report, stating that the seized tablets are Mandrax (Methaqualone) Tablets, a psychotropic

substance. As regards the white powder, the Chemical Examiner has given an inconclusive opinion. The respondent herein filed an earlier

application, praying for grant of bail, in CrI.M.P.No.2026 of 1997. The same was dismissed by the Special Judge for NDPS Act cases, Chennai,

on 23.01.1998. On 12.2.1998, the final report viz, the complaint has been filed before the Special Court for NDPS Act Cases, Chennai, and the

same was taken on file in C.C.No.24 of 1998. Again, the petitioner has filed an application in CrI.M.P. No.237 of 1998 praying for his release on

bail, and the same was ordered by the Special Judge of NDPS Act cases, Chennai, on 12.3.1998. The 3rd accused, viz., the respondent herein

could not enjoy the benefit of the order of bail, for by then, the complainant filed this application before this Court, and obtained a stay of the said

order. The resultant position is that the respondent, who was arrested on 16.11.1997, is in custody till date, viz., for the last ten months and more.

3. Learned Special Prosecutor Mr.P.Rajamanickam representing the Department submitted that the order passed by the Special Judge, granting

bail, is vitiated by non application of mind. Secondly he contended that the order passed by the Special Judge is based upon erroneous grounds.

Thirdly, he submitted that he has over-ruled his earlier order. Lastly, he contended that there was no substantial change in the factual situation.

4. Before ever we take up for consideration, the grounds urged by the learned counsel for the petitioner for cancellation of bail, it is necessary to

refer to the Rulings of the Supreme Court on the issue of cancellation of bail.

5. In the Ruling reported in 1978 S.C.C. Cri. 223 : 1978 L.W. (Cri.) 76 S.N. State (Delhi Administration) v. Sanjay Gandhi, the Supreme Court

has observed as follows:-

Rejection of bail when bail is applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a

non bailable case than to cancel a bail in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by

and large be permitted only, if by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain

his freedom during the trial.... The Prosecution therefore, can establish its case in an application for cancellation of bail by showing on a

preponderance of probabilities that the accused has attempted to tamper or has tampered with its witnesses. Proving by the test of balance of

probabilities that the accused has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice is all

that is necessary for the prosecution to do in order to succeed in an application for cancellation of bail. Therefore, the power to take back in

custody an accused who has been enlarged on bail has to be exercised with care and circumspection.

6. In the decision reported in 1984 SCC (Cri) 63 Bhagirathsinh v. State of Gujarat, again the Supreme Court has emphasised as follows:-

Very cogent overwhelming circumstances are necessary for an order seeking cancellation of the bail. Even where a prima facie case is established,

the approach of the Court in the matter of bail is not that the accused should be detained by way of punishment but whether the presence of the

accused would be readily available for trial or that he is likely to abuse the discretion granted in his favour by tampering with evidence.

7. In another decision reported in Raghubir Singh and Others Vs. State of Bihar, , while considering the question of cancellation of bail, the

Supreme Court has observed as follows:-

Generally 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 course of justice, or abuse of the liberty granted to him. The due administration of the justice may be interfered with

by intimidating or suborning witnesses, by interfering with investigation, by creating or causing disappearance of evidence etc. The course of justice

may be evaded or attempted to be evaded by leaving the country or going underground or otherwise placing himself beyond the reach of the

sureties. He may abuse the liberty granted to him by indulging in similar or other unlawful acts. Where bail has been granted under the proviso to

Section 167(2) for the default of the prosecution in not completing the investigation in 60 days, after the defect is cured by the filing of a charge-

sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has

committed a non bailable offence and that it is necessary to arrest him and commit him to custody. In the last mentioned case, one would expect

very strong grounds indeed.

8. In the decision reported in *Aslam Babalal Desai Vs. State of Maharashtra*, the Apex Court has observed as follows:-

Cancellation of bail after filing of charge sheet -factors to be considered factum of dismissal of bail on earlier occasion not relevant Cancellation

different from refusal to grant bail-Cancellation involves review on merits of the decision granting bail.

Bail granted u/s 437 (1) or (2) or Section 439 (1) can be cancelled under Sections 437(5) and 439(2) where (i) the accused misuses his liberty by

indulging in similar criminal activity, interferes with the course of investigation (iii) attempts to tamper with evidence of 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. Rejection of bail stands on the 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. "... Once the accused has been released on bail, his liberty cannot be interfered with lightly ie., on the ground that the prosecution has subsequently submitted a charge sheet. Such a view would introduce a sense of complacency in the investigating agency and would destroy the very purpose of instilling a sense of urgency expected by Sections 57 and 167(2) of the Code. Therefore, once an accused is released on bail u/s 167(2) he cannot be taken back in custody merely on the filing of a charge-sheet but there must exist special reasons for so doing besides the fact that the charge sheet reveals the commission of a non bailable crime.

The ratio of Rajkant Case (1989 SCC (Cri.) 612) to the extent it is inconsistent herewith does not, with respect state the law correctly. In the

above Judgement, Ramaswamy, J. has observed as follows:-

Cancellation of the bail would be necessitated by the conduct of the accused himself after the release.... Undue emphasis on either would impede

harmony and hamper public good as well as disturb social weal and peace. To keep the wheel balanced must be the prime duty of the Judiciary.

In his dissenting Judgment Punchhi, J as he then was has observed as follows:-

When a decision of bail already made on merit, after due deliberation, is required to be reviewed on prayer for cancellation of bail, it would require

the exercise to be undertaken with the necessary care and circumspection. The power of the High Court or Court of Session to cancel bail is

exercisable vis-a-vis an order passed by the High Court or the Court of Session under Sub-section (1) of Section 439, as the case may be, as also

to an order of bail passed by a Court other than the High Court or the Court of Sessions under Sub Section (1) and (2) of Section 437 of the

Code. Bail orders under the aforesaid provisions by the very nature are decisions on merit and if a review is attempted a strong case has to be

made out so as to secure cancellation of bail. Hence, the apparent distinction is in the approach of the Court while granting bail and cancelling bail.

This field is covered entirely by Judge-made law. The tests to be applied by courts in granting bail is by reference to many considerations, such as

the nature of the accusation, the evidence in support thereof, the severity of punishment on conviction which would entail; the character, behaviour,

means and standing of the accused, etc., etc. But alongside is the larger interest of the State to be kept in view in granting or refusing bail. By no

means are the afore-mentioned factors exhaustive. There may be other considerations which may be determinative for taking one view or the other. The Court is obligated, all the same, to strike a balance. The decision of the Court after consideration of the afore factors and others of the like conceivable results in a verdict judicial in character capable of being reviewed or altered again by a judicial exercise within judicially set out parameters.

9. This Court has reiterated the propositions laid down by the Supreme Court in the ruling reported in 1993 MLJ Cri. 659 : 1993 L.W.(Cri) 598

State v. Radhakrishnari.

10. Section 37 of the NDPS Act sets down certain conditions for grant of bail. Those conditions are in addition to the limitations imposed on

Court by the relevant provisions of the Cr.P.C. But when the matter is regarding cancellation of bail so granted, it is a different proposition. The

conditions that are necessary to satisfy the court are quite different. The Supreme Court has thus observed practically that cancellation of bail

already granted is quite another matter. As observed by the Supreme Court, it is easier to reject a bail application in a non-bailable case than to

cancel a bail granted in such a case for the cancellation of bail involves the review of a decision already made and can by and large be permitted

only, if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the

trial. The prosecution has to establish its case by proving preponderance of probabilities that the accused has attempted to tamper or has tampered

with its witnesses. Therefore the power for cancellation of bail has to be exercised with care and circumspection, for it is an extraordinary which is

meant to be exercised only in appropriate cases where it is shown that the accused is interfering with the course of investigation by tampering with

the witnesses. Therefore, when the petitioner herein wants this Court to cancel the bail granted to the respondent, necessarily, the burden is very

heavy upon the petitioner to prove the essential facts and circumstances that make it imperative for this Court to cancel the bail.

11. I have already pointed out that the petitioner is in custody from 16.11.1997. Thus, he is in custody for more than 10 months. It is not stated

anywhere in the application that the respondent herein at any point of time,

while before or while in custody, had attempted to interfere with the course of investigation in any manner. Nor any apprehension is set out in the application filed, suggesting that the respondent is likely to threaten the witnesses or make himself scarce or flee away from the country. The question of attempting to interfere with the course of investigation does not arise because investigation has been completed and final report has been filed in the form of complaint. Thus, we find in this case that there is no apprehension expressed in this application to suggest that the respondent would abscond and make himself scarce. It is also to be pointed out that the accused 1 and 2 are not apprehended. They are still at large. The earlier application for bail filed by the respondent was dismissed in the month of January 1998, while in the month of February, final report was filed. Again in the month of March, the respondent moved for bail which was granted. As held by the Supreme Court, the fact that the earlier application filed by the petitioner was dismissed is not necessary for consideration.

12. It is to be pointed out that after the disposal of the earlier application, final report has been filed, thereby indicating that the process of investigation has been completed. Therefore, the interference with the course of investigation was not an objection that could be raised. Huge quantity of mandrax tablets was seized along with about 14 Kgs. of white powder. In this application, it has been clearly stated that as regards the white powder no conclusive opinion has been given by the Chemical Analyst. Therefore, the suggestion that the white powder is heroin, is not there.

13. Learned counsel for the petitioner referred to the statement said to have been recorded from the respondent u/s 67 of Cr. P. C. (?) According to the learned counsel for the respondent, the said statement has been retracted and obtained under coercion. Whether the statement was extracted under coercion or not, is not a point for consideration at this stage. The fact remains that the retraction of statement and the truth of which can only be considered in the course of trial. Assuming mere are confessions of co-accused, the said confessions of the co-accused cannot form basis for conviction. At best, they can be taken only as circumstances lending assurance to the materials placed before the court as against the accused. Even then circumstances cannot be relevant now, as they are only

considering the request for cancellation.

14. Learned counsel for the petitioner submitted that there is no substantial change in the circumstances, meaning thereby that when the lower court

had dismissed the earlier application in the month of January, the grant of bail in the month of March by the same officer is not proper as there is no

drastic change in the factual situation, warranting the officer concerned to take a different view of the matter. In his order, the lower court has

referred to the filing of the complaint subsequent to the disposal of the earlier application and also to the report of the Chemical Analyst to the

effect that the white powder seized is not heroin. Thus, these points have been taken note of by the lower court as a change of circumstances,

warranting the Court to take a different view of the matter. A reading of the order of the lower court indicates such a view on the part of the lower

court. Whether the report of the Chemical Analyst which is not conclusive as regards the white powder and whether the filing of the final report

may be taken note of as change of circumstance or not, is a different proposition. But those facts have been taken into account by the lower court

and considered as circumstances bringing about a change in the situation. Therefore, it cannot be strictly contended that there has been no

substantial change, and that repeat was not considered by the court. Definitely, there has been a change in the sense that the investigation has been

completed and the gravity of the offence is softened by the report of the Chemical Analyst on the test of the white powder. Of course, the Rule is

that filing of the charge sheet cannot be taken as substantial change in the circumstance, but one has to take into account certain peculiar

circumstances. If the contention of the learned counsel for the Department is accepted, then no one who is accused of an offence punishable under the

NDPS Act can ever be released on bail. Then the provision for the grant of bail enshrined in the Act will become meaningless. The incarceration of

an individual cannot be prolonged in the name of investigation or by citing the stringent provisions of Section 37 of the NDPS Act. Further as

pointed out by the learned Senior Counsel, the standard to be applied when it comes to the matter of cancellation of bail is not the same as its for

one considering the application for grant of bail. It cannot be made an inflexible and inflexible rule that no one should be released on bail, the

moment he is accused of an offense punishable under the NDPS Act. That would amount to a punishment without trial. The spirit of law is not that.

Here whether there is change of circumstance or not, we are not considering the request of an accused for grant of bail.

15. Now, this court is called upon to consider the request of the Department for cancellation of the bail granted to the accused. The Supreme

Court has uniformly held that different factors and considerations rule the question of cancellation of bail. Assuming for the purpose of argument

that there has not been factual change of situation or circumstance, even then that cannot be made a ground for cancellation of bail. The

cancellation of bail can be effected only in the circumstances indicated by the Apex Court. Even assuming that there was some error on the part of

the lower court in holding that there has been a factual change of circumstance by reason of filing of the final report, by virtue of the report of the

Chemical Analyst, such error cannot edge out the considerations that have to be taken into account for cancelling the bail. Therefore, the

objections raised to the grant of bail by the lower court on these grounds, as put forward by the Special Prosecutor appearing for the Department,

are in my opinion not acceptable.

16. It is true that NDPS Act, u/s 37 sets out conditions for the grant of bail. The conditions are that the Public Prosecutor shall be given an

opportunity to oppose the application. That the said condition was complied with in all earnestness, is not a point of dispute here. The further

conditions are that there shall be reasonable grounds for believing that he is not guilty of such offence and he is not likely to commit any offence

while on bail. The Lower Court has held that it is of the opinion that there are reasonable grounds for believing that the respondent herein is not

guilty. The lower Court has also held that the respondent herein is not likely to commit any offence while on bail. Thus the lower court was satisfied

with the essential conditions specified in Section 37 of the Act, and therefore, the Special Judge thought it fit and proper to grant bail.

17. Learned counsel for the Department urged that the lower court has committed a mistake in concluding that the petitioner therein had no role to

play in the conspiracy. Learned counsel for the petitioner referred to the sentence in para 4 of the order which runs as follows:-

So admittedly, in that conspiracy, this petitioner had no role to play.

In my opinion this sentence is rather loosely framed and worded by the lower court. He did not mean by that that the complainant has admitted that

the petitioner had no role to play. It is more attributable to a lack of care in usage of words or perhaps a short of ignorance that had brought about

this mistake. Learned counsel again pointed out a passage in the same page. Where the learned Special Judge has stated that the criminal

conspiracy between this petitioner and the other accused have got to be proved substantially in the absence of any direct evidence for the same

only during the time of trial. I am not able to say that his observation that the criminal conspiracy to be proved substantially in the course of trial can

be objected to as an erroneous expression. He has also referred to the observation that the consignment was not dealt with by the 3rd accused,

the respondent herein, directly. In that connection, he referred to the statements of the co-accused and some witnesses to show that the petitioner

was present at the time of packing or repacking or unpacking to show that he was aware of the concealment of the mandrax tablets in the

consignment and therefore, this observation of the lower court is also erroneous. In this aspect, he has also relied upon certain rulings.

18. In the decision reported in *The State Vs. Captain Jagjit Singh*, wherein the Supreme Court has observed that among other consideration,

which a court has to take into account in deciding whether bail should be granted in a non-bailable offence is the nature of the offence, and if the

offence is of a kind in which bail should not be granted considering its seriousness, the Court should refuse bail even though it has every wide

powers u/s 438 of the Code.

19. He has further referred to the decision reported in *Ajay Agarwal Vs. Union of India and others*, for the position that criminal conspiracy itself is

a substantive and continuing offence and would endure till it is executed, rescinded or frustrated by choice or necessity and that each conspirator

need not know all details of the scheme. He also referred to a decision reported in (1995) 1 CCR 156 *Devender Saroha v. State of Haryana &*

another to contend that where the court has granted bail in contravention of the well known factors which are required to be taken into

consideration and has thus, failed to exercise its discretion according to law, that

will be a ground for cancellation of bail and that it is not necessary

to make out a case and that the cancellation of bail can be asked for only if it falls in one of the categories enumerated by the Supreme Court in

Aslam Babalal Desai's case.

20. He further relied upon a decision reported in 1994 (1) Crimes 56 for the position that where legality and propriety of the order granting bail is

challenged, the High Court is competent to cancel the bail in a proper and suitable case. Principles for cancellation of bail however cannot be put in

a strait jacket and facts of each case would govern this matter. In support of his contention, the learned counsel for the Department further relied

upon the decision reported in (1998) 1 CCR 619 Central Bureau of Narcotics v. Jawaharlal in which it is observed that the jurisdiction of the

NDPS court is limited in granting bail and unless the limitations contained in clause (b) are removed, no bail can be granted to the accused persons

and therefore, the order granting bail is not an order passed on proper application of mind and hence, it is liable to be set aside.

21. He further pointed out that even on the ground of improper exercise of jurisdiction, this Court can order cancellation of bail and relied upon a

decision, reported in (1997) 2 CCR 263 State of Orissa v. Bipin Behera and submitted that if the order passed granting bails contrary to the

materials on record, it amounts to non application of mind and an improper exercise of jurisdiction and mere-fore, such an order is liable to be set

aside.

22. In the decision reported in State of Maharashtra Vs. Captain Buddhikota Subha Rao, the Supreme Court has observed as follows:-

Law permits curtailment of liberty of anti social and anti-national elements. Article 22 casts certain obligations on the authorities in the event of

arrest of an individual accused of the commission of a crime against society or the nation. In cases of under trials charged with the commission of

an offence or offences, the court is generally called upon to decide whether to release him on bail or to commit him to jail. This decision has to be

made mainly in non-bailable cases, having regard to the nature of the crime, the circumstances in which it was committed, the background of the

accused, the possibility of his jumping bail, impact that his release may make on the prosecution witnesses, its impact on society and the possibility

of retribution etc.

23. Learned counsel for the Department therefore contended that the order passed by the lower court granting bail was without application of

mind, that it is not a legal exercise of the discretion and therefore, in such circumstances, an application has been filed for cancellation of the same,

and cancellation of the bail on such grounds is competent for this Court. I am unable to accept the contention of the learned counsel for the

Department that there is any improper exercise of jurisdiction. On hearing either sides, the learned Special Judge has come to the conclusion that

there are reasons to believe that the petitioner is not guilty of the offence concerned. He has also held that the petitioner is not likely to commit any

offence while on bail. There has been proper application of mind. Merely because the bail granted it cannot be termed illegal or improper.

24. It is to be pointed out that the petitioner herein was only a carrier of the concern. On the basis of certain statements, it is alleged that the

petitioner had knowledge of the contents of the packages said to be consigned, and himself participated in the packing or unpacking of the

materials. The lower court has observed that the conspiracy is to be proved in the course of trial. Definitely, that is not an erroneous expression.

The statement of the co-accused recorded u/s 67 Cr.P.C. can at best lend some assurance to the materials already on record, which again would

be realised only in the course of trial. Therefore, the Special Judge thought that on the materials placed before him, he was not in a position to

conclude that there are reasonable grounds for believing that he is not guilty. The expressions, words or phraseology employed by the lower court

are perhaps the sole basis for the petitioners to come forward with this application. At best we can only construe it as a faulty language, or hole

expression and definitely not an erroneous approach. The incarceration of the respondents cannot be prolonged unless in the circumstances as set

out by the Apex Court in Aslam Babala Desai 's case. The cancellation is not sought on any of the grounds, indicated by the Apex Court in that

decision. If such a strict view is to be permitted, then everyone accused of an offence under the NDPS Act can never see the day light till the trial

was over and he was acquitted. The purpose is not punitive but preventive to see that the person accused of such offence does not resort to

practices which are likely to affect the quality of the investigation and the cause of justice. Therefore, in my view the petitioner's request for cancellation of bail cannot be accepted.

25. In the result, the petition is dismissed. Consequently, CrI.M.P.Nos.2046 & 2047/98 shall stand closed.