

(1993) 05 MP CK 0012

In the Madhya Pradesh High Court

Case No : Criminal Revision No. 226 of 1992

State of M.P.

APPELLANT

Vs

Maniklal Shah

RESPONDENT

Date of Decision : 14-05-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 397(2), 439, 439(1), 439(2)
Penal Code, 1860 (IPC) — Section 120B, 419, 420, 467, 468

Citation : (1994) JLI 436

Hon'ble Judges : Shacheendra Dwivedi, J

Bench : Single Bench

Advocate : H.D. Gupta, Deputy A.G. and M.K. Jain, for the Appellant; Sardar Rajendra Singh and V.K. Saxena, for the Respondent

Judgement

Shacheendra Dwivedi, J.—The State of M.P. has preferred this revision, against the non-applicant-accused, seeking the cancellation of the order of bail passed by Shri R.N.S. Chauhan, Second Additional Sessions Judge, Gwalior, in Case No. 3227/92, on 20.10.1992.

2. The non-applicant is being prosecuted for the offences under Sections 419, 420, 467, 468 and 120B, Indian Penal Code for which Crime No. 258/92 was registered. On completing the investigation, the Police filed the challan against the non-applicant-accused and other accused persons on the allegations that in lieu of a planned conspiracy, under the forged drafts, the amount totalling to Rs. 19,56,000/- was withdrawn from the Banks at Gwalior. Out of that amount Rs. 18,39,000/- have been recovered by the Police from the non-applicant and other co-accused persons. Many bundles of currency notes had the slips and seals of the concerned Banks.

3. In the Court below on an application for the grant of bail having been moved by the non-applicant-accused, the prosecution in lieu of the notice, filed kaifiyat in the case and the learned Second Additional Sessions Judge, on 13.10.1992 ordered that the record of the case from the lower Court be summoned for

deciding the bail application. The case was then fixed on 15.10.1992. On 15.10.1992, it was found that the record was not summoned and the learned Additional Sessions Judge was informed that the case No. 5842/92 (State v. Ravi and Ors.) was in fact pending in the Court of the Chief Judicial Magistrate, Gwalior, in which 23rd October, 1992 was the next date fixed. The learned Court below directed the said record to be summoned fixing the case for 19.10.92. No work could be conducted on 19.10.92 due to the said demise of Hon"ble Shri Justice N.K. Singh. As such, the bail petition was taken up on 20.10.92. On this date, counsel for the defence while submitting the challan papers, contended that despite many opportunities, the prosecution has failed to produce the case-diary nor the record was received from the Court of the Chief Judicial Magistrate, Gwalior, therefore, the application be heard on the strength of challan papers.

4. The learned lower Court without calling for the case-diary and in the absence of the record, heard the bail application and very generously granted it.

5. The contention of the State is that the order passed in such circumstances cannot be allowed to stand as the learned Court below without calling for the case-diary and without looking into the material facts of the case and acting on the challan papers, when even the copy of which was not available to the State counsel, who was taken by surprise, passed the impugned order which is illegal and perverse and has been passed without application of mind to the facts and circumstances, while depriving the State of proper opportunity to oppose the same, and, therefore, deserves to be cancelled. It is further contended that the learned lower Court without examining the facts proceeded on a wrong assumption that since co-accused Dhiraj Shah has already been enlarged on bail, the non-applicant-accused was also directed to be released on bail. The learned lower Court failed to examine the allegations against the two accused persons, as for raising the release on bail of Dhiraj Shah as a ground for the release of the Petitioner, the assessment of the similarity of their cases was necessary. It was further contended that the bail applications of other accused persons, namely, Billo Bhai and Tarun were dismissed by the Sessions Court much earlier to the passing of the impugned order but these facts were also not taken rather could not be taken into account while passing the impugned order in the absence of record. A further ground for the cancellation of the order was raised submitting that there was every possibility of the accused repeating the offence as against the accused-non-applicant, there were about 40 criminal cases pending in the different parts of the country, some of them with the similar allegations. It was, therefore, contended that the order passed by the Court below without taking into account this material fact as well, is a serious infirmity in the impugned order and the impugned order, therefore, deserves cancellation.

6. Shri Sardar Rajendra Singh, Senior counsel, appearing with Shri V.K. Saxena, Advocate, for the non-applicant-accused, raised the preliminary objection that against the order of granting bail, no revision can be entertained, as the order granting bail is an interlocutory order and a revision is barred u/s 397, Code of

Criminal Procedure It was further contended that the bail once granted to an accused can be cancelled only under the provision of Section 439(2) of the Code of Criminal Procedure , on some new circumstances coming on record.

7. While proceeding to deal with the preliminary objection, and its effect, it would be proper to examine the provision of Section 397(2), Code of Criminal Procedure which provides that the powers of revision "shall not be exercised in relation to any "interlocutory order" passed in, appeal, inquiry, trial or other proceedings". Their Lordships of the Supreme Court while discussing the import of Section 397, Code of Criminal Procedure observed in *Amar Nath and Others Vs. State of Haryana and Another*, as follows:

Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may not doubt amount to interlocutory orders against which no revision would lie u/s 397(2)...

8. While providing the instances of some of the interlocutory orders, their Lordships have included the passing of orders of bail, in the category of interlocutory orders. In this view, it is not necessary to refer to other authority cited on the point. But if an order passed by the Court below falls short of the legal requirements and is found to be the abuse of the process of law or results in palpable injustice even if no revision lies, this Court has been vested with the powers to cancel such an order u/s 439/482, Code of Criminal Procedure.

9. It was only in the Old Code u/s 498(2) that a person admitted to bail by a Court of Session, could be committed to custody by that Court. Under the New Code the restriction has been lifted and the High Court may now cancel the bail and take and accused in custody. Moreover, a Court of law does not suffer a wrong to be without a remedy. If a legal wrong has been committed against anyone, why should not that be undone by passing an appropriate order. It is only with such object that the law has made the provision of inherent powers. A wrong order of granting bail may be cancelled u/s 439(2) or u/s 482, Code of Criminal Procedure , but only when there are very strong grounds to do so.

10. As such, the legality and the propriety of the impugned order has to be examined to see whether the order was vitiated by any serious infirmity so as to require interference by this Court. It would be relevant to mention before proceeding to discuss on the main issue, that proviso to Section 439(1), Code of Criminal Procedure , which empowers the granting of bail, makes it obligatory on the Court as a condition precedent before granting bail to a person, that a notice of the application shall be given to the public prosecutor. Giving of such a notice is not a bare formality. The issuance of a notice implies the providing of a proper opportunity to that party of explaining the circumstances and contemplates the hearing and placing of the relevant material on record. When the public prosecutor is noticed under the legal requirement of the proviso to Section 439(1), Code of Criminal Procedure , the Court has also to summon or afford an

opportunity to the prosecutor to produce the case-diary and make submissions on that basis to enable the Court to apply its mind and to examine the relevant material on record before passing any order. If the facts of a case disclose that such an opportunity was not provided or the Court failed to discharge its legal obligation, it would be a very serious infirmity in the order passed and may provide an instance of arbitrary exercise of judicial discretion.

11. In the instant case, the learned Court below never sought the production of the police case-diary and opted for the calling of the record from the Court of the Chief Judicial Magistrate, Gwalior. The Court of the Chief Judicial Magistrate which was very close to the Court-room of lower Court and in the same vicinity, its record could have been called by the lower Court through a special messenger but instead of making any sincere effort for the production of the record, the learned Court below proceeded only on the challan papers. The impugned order shows that the challan papers were made available by counsel for the accused-non-applicant only to the Court and soon thereafter the arguments were heard. The circumstances speak for themselves. The learned Public Prosecutor could not be said to have been given a proper opportunity of hearing after going through the papers and of opposing the bail application. Merely because no objection was raised by the Public Prosecutor, would not absolve the Court from the legal requirement of the perusal of the record or the case-diary before allowing the bail application.

12. Now advertent to the main issue, as raised by the Petitioner that in the instant case there are no grounds to cancel the order of granting bail, it is very (SIC) submitted by the State contending that if the record or the case-diary could be perused by the Court below which contained the bail rejection orders of the other co-accused persons, namely, Billo Bhai and Tarun, the Court might have reached to a different conclusion. It is also contended that the record as also the case-diary contain the long list of the cases which are pending against the accused-non-applicant in the different parts of the country which shows the criminality of his conduct and the possibility of his repeating the offences, but since the learned Court below decided the bail application only on the strength of challan papers, it had no opportunity of examining the above material facts. The accused-non-applicant is alleged to be the habitual offender involved in many of the cases of similar nature and it is alleged that in many of the cases the accused-non-applicant has also been convicted. The impugned order further shows that the memo of identification of the accused-non-applicant and the result thereof was also not before the Court when it proceeded to decide the bail application. In the test parade, the prosecution witnesses have identified the accused-non-applicant as a person who visited the concerned Banks at Gwalior and was master-minding the whole episode. The Court below had no opportunity of examining the above documents. It is difficult to accept the argument that the accused-non-applicant is an Income Tax payee, who has been falsely implicated in the offence and would not run away from justice. There can be no presumption that the wealthy and mighty will submit themselves to trial and that

the humble and the poor will run away from the course of justice. Nor it can be accepted that former are not likely to commit a crime and the latter are more likely to commit it.

13. Bail is a valuable right of an accused but it can only be granted by the Court on valid grounds only after due application of mind to all the relevant factors and the circumstances relating to the alleged offence. Justice with one should not result injustice to Anr. . Justice implies the reasonable and legal treatment to all concerned. In considering the question of bail, justice to both sides governs judicious exercise of the Court's judicial discretion. To reproduce the elegant words of Benjamin Cardozo-

The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinate to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains.

Discretion is the unspoken but inescapable silent command of our judicial system, and those who exercise it must remember that the discretion, when applied to a Court of justice, means sound discretion, guided by law. It must be governed by rule, it must not be arbitrary, vague and fanciful but legal and regular. It must be exercised not in opposition to, but in accordance with established principles of law. In the instant case, the learned Court below passed the hurried order without there being circumstances which could warrant the immediate passing of the order, that too even without the production of record and without calling for the police case-diary. No urgency was disclosed even by the defence. The defence statement that many opportunities were allowed to the prosecution for producing the case-diary is against the record. The prosecution was never required to produce the case-diary. The record shows that it was only on 15.10.92 that the date was adjourned by the Court for summoning the record. There is an endorsement on the file that the record was summoned on 16.10.92 under dispatch No. 1161. Even if the learned lower Court felt that the prayer for the grant of bail was urgent by itself, it could have very well called the case record from the adjoining Court-room of the Chief Judicial Magistrate by sending a special messenger. About the impugned order, less said is better, the failure on the part of the Court in seeking the production of the record or the case-diary and the passing of the impugned order in the absence thereof without the perusal of the relevant documents, has materially and substantially affected the order. Such practice has to be deprecated and condemned.

14. Much was argued by the Petitioner's counsel on the scope of Section 439(2), Code of Criminal Procedure to submit that unless those conditions or the grounds, which have been set-out in judicial pronouncements of the Apex Court,

existed, the bail once granted, could not be cancelled. Strong reliance was placed on Gurucharan Singh v. State (Delhi Admn.) AIR 1978 SC 179, State (Delhi Administration) Vs. Sanjay Gandhi, , Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, Bhagirathsinh Judeja Vs. State of Gujarat, and Aslam Babalal Desai Vs. State of Maharashtra,

The authorities cited, only give few instances, which are not exhaustive and each case has to be judged on its own facts. The circumstances in which the Court will exercise the power of the cancellation of bail have been set-out in a number of judgments of Supreme Court, but those are only illustrative and not exhaustive.

15. It is well settled that rejection of bail, when bail is applied for, is one thing, but cancellation of a bail already granted is quite Anr. . It is easier to reject a bail application in a non-bailable case, than to cancel a bail once granted. Power to take back in custody an accused, who has been enlarged on bail, has to be exercised with care and circumspection. But as observed by their Lordships of Supreme Court in State (Delhi Administration) Vs. Sanjay Gandhi, "That does not mean that the power though extraordinary in character must not be exercised, even if the ends of justice so demand." Certainly, the larger interests of the public or of the State and the possibility of the accused repeating the offences are the relevant considerations on which a bail may be refused or cancelled. The record of the case from Chief Judicial Magistrate, Gwalior as also the police case-diary contain a letter from Inspector of Police, C.B.I. Madras dated 11.9.92, a copy of which has also been filed on record of this petition, which goes to show that the accused-non-applicant absconded from Madras, after he was produced there from Gwalior, under a production warrant. This is again a very material circumstance which may disentitle the accused of his release on bail, as the fact raises a reasonable possibility of the accused's presence not being secured at the trial.

16. I am also unable to accept the contention advanced by the Petitioner that unless there were new circumstances which arose, after the passing of the bail order, the granted bail could not be cancelled. It was held by Supreme Court in Gurcharan Singh (supra) that:

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 u/s 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 existed, 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-a-vis the High Court.

(Emphasis supplied by me)

17. Under the powers vested in this Court by virtue of Sub-section (2) of Section 439 of Code of Criminal Procedure , the orders which suffer from any serious legal infirmity or which are of arbitrary character and are passed without considering the most material circumstances and are based on irrelevant consideration, deserve to be quashed. This is necessary even for the proper functioning of the Court in the process of administration of criminal justice.

18. The facts of the case demand that the learned lower Court be allowed to examine the relevant circumstances and the documents on record and then to pass a fresh order.

19. In view of the above discussions, treating the petition to be one u/s 439(2) as the section is also pressed in service by the State in this petition and while maintaining the restraint in making any comments on the merits and without discussing the facts of the case. The petition is allowed and the impugned order is set aside and the learned Court below is directed to pass a fresh order after providing due opportunity to the prosecution and on the consideration of all material circumstances and on the perusal of the relevant documents in the record and/or in the case-diary.

20. In the circumstances, instead of requiring the non-applicant-accused to file a fresh application, it is directed that an order would be passed by the Court below afresh on his earlier bail application dated 9.10.92, numbered as Criminal Misc. Case No. 3227/92.