

(1983) 12 KL CK 0021

In the High Court Of Kerala

Case No : Criminal M.C. No. 810 of 1983

Superintendent of Police C.B.I./S.P.E.

APPELLANT

Vs

P.V. Vijayaraghavan and Others

RESPONDENT

Date of Decision : 09-12-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 11(1), 11(2), 14(3), 397(3), 435(1)
Penal Code, 1860 (IPC) — Section 120, 302

Citation : (1983) KLJ 760

Hon'ble Judges : V. Bhaskaran Nambiar, J

Bench : Single Bench

Advocate : C. Sankaran Nair, State Prosecutor, for the Appellant; M.K. Damodaran, for the Respondent

Judgement

Bhaskaran Nambiar, J.—Soman, Sub Inspector of Police, Panoor Police Station died of gun shot injuries on 12th March 1981. Investigation is proceeding and seven Police Officers-four Head Constables and three Constables-attached to that Police Station are suspected to have caused the death of the Sub Inspector, an offence punishable u/s 302 read with Section 120 I.P.C. Investigation is being conducted by the Special Police establishment constituted under the Delhi Police Establishment Act, after a senior I.A.S. Officer, Sri Zachariah Mathew, Member, Board of Revenue, as Commission of Inquiry, submitted a report that the case be investigated by a special agency.

2. The accused were arrested on 11th November 1983 and produced before the Chief Judicial Magistrate, Ernakulam, who remanded them to custody. An application for bail was rejected by the Magistrate on 19th November 1983 and a bail application was moved before this Court in CrI. M.C. No. 776 of 1983. The application was withdrawn on 28th November 1983 and the court ordered thus:

Petitioner wants to move Sessions Court, Tellicherry for bail. Hence withdrawn
Closed as withdrawn.

3. Thereafter an application was filed before the Sessions Court, Tellicherry. By order, dated 5th December 1983 the Sessions Court granted bail subject to certain conditions. On coming to know that the accused have been directed to be enlarged on bail, the State Prosecutor filed Crl. M.C. 810 of 1983, u/s 439(2) of the Code of Criminal Procedure for cancelling the order of bail and Crl. M.P. No. 1213 of 1983 for stay of the order of the Sessions Court. Both the petitions were filed on 5th December 1983 itself.

4. The State Prosecutor contended that the Tellicherry Sessions Court has no jurisdiction to grant bail. He stated that as per notification issued u/s 11(1) Code of Criminal Procedure by the State Government, after consultation with the High Court, a common court of Judicial Magistrate of the First Class "for all districts of Kerala with its place of sitting at Ernakulam" was established to try or inquire into and commit to the Court of Session all such cases arising in any local area within the State of Kerala in which investigations are made or charge sheets filed by the Special Police Establishment constituted under the Delhi Act 25 of 1946. Pursuant to the above notification, the High Court, in exercise of the powers conferred u/s 11(2) Code of Criminal Procedure appointed the Chief Judicial Magistrate as the Judicial Magistrate of the First Class with Headquarters at Ernakulam as "the presiding officer of such courts". Therefore he contended that u/s 14(3) Code of Criminal Procedure (omitting the unnecessary portion) which reads thus:

Where the jurisdiction of a Magistrate extends to an area beyond the District, in which he ordinarily holds Court, any reference to the Court of Session in relation to such Magistrate, be construed as a reference to the Court of Session exercising jurisdiction in relation to the said District.

the Sessions Court, Ernakulam alone has jurisdiction to grant bail.

5. He also contended on the merits that the investigation was not complete and in the special circumstances of this case and the position of the accused, release at this stage was bound to be detrimental to the investigation process.

6. This Court issued notice and granted interim stay of the operation of the order of the Sessions Court, Tellicherry by order passed on 5th December, 1983.

7. The Respondents have appeared through their learned Counsel, Sri M.K. Damodaran to vacate the stay order in Crl. M.P. No. 1213 of 1983. When the petition came up for hearing, he submitted that he proposed to file a detailed counter-affidavit later; but that he was raising a preliminary objection that the main application Crl. M.C. 810 of 1983 is not maintainable u/s 439(2) Code of Criminal Procedure and this may be decided at the outset without going into the merits of the case. He has also filed a short verified counter which read thus:

The petitioners are accused in the above crime. All the accused in the above crime moved an application for bail before the Hon'ble High Court of Kerala. Since the petitioners did not move before the Court of Sessions an application for

bail, the Hon"ble Judge was pleased to observe that the petitioners should move first before the Sessions Court. When the petition came up for hearing on 28th November 1983, the Petitioner's counsel submitted before the Court that the petitioners are withdrawing the application to present it before the Sessions Court, Tellicherry. When this was represented before the Court, the Director of Prosecution and the Public Prosecutor, C.B.I. were present in the Court. Notice was given to the C.B.I. on 30th November 1983 about the filing of the application for bail before the Sessions Court, Tellicherry. But the C.B.I. did not file any counter questioning the jurisdiction of the Sessions Judge, Tellicherry.

The learned Sessions Judge passed orders in the application for bail on 5th December 1983. The prosecution has filed this petition before this Hon"ble Court u/s 439(2) of the Code of Criminal Procedure. Sub-section (2) of Section 439 reads as follows:

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.

In view of the above provision, the petition filed by the Prosecution is not maintainable, since the petitioners are not released on bail. The learned Sessions Judge has issued orders granting bail to the petitioners imposing certain conditions. At this stage, no petition is maintainable under Sub-section (2) of Section 439. Section 439 gives power to Special High Court or Court of Sessions for granting bail. Section 439(2) is enacted for a specific purpose. While the accused are on bail, if they violate any conditions of bail the State may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and then to the High Court. About the other contentions raised regarding the jurisdiction, etc., the petitioners may be permitted to file a detailed counter. The contentions raised in the petition regarding jurisdiction of the Sessions Court to grant bail is not available in support of this petition in view of Section 462 of the Code of Criminal Procedure

In the circumstances, the stay granted by this Hon"ble Court may be vacated.

8. The learned State Prosecutor agreed to meet this contention which affects the jurisdiction of this Court to entertain the main application and I have heard the counsel on both sides only on this preliminary point and not on the merits of the case.

9. Section 439(2) Code of Criminal Procedure under which the application is filed reads as follows:

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.

10. Sri M.K. Damodaran rightly does not dispute the proposition that the High Court has got powers to cancel bail u/s 439(2) Code of Criminal Procedure but he says that the power can be exercised only (1) if the accused has been released on bail and (2) "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 trial". He invites my attention to the decision in Sanjay Gandhi's case 1978 S.C.C.223. He also submits that assuming without conceding that the Sessions Court, Tellicherry, did not have jurisdiction to grant bail, Section 462 Code of Criminal Procedure did not warrant any interference. Section 462 Code of Criminal Procedure reads thus:

Proceedings in wrong place.--No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice.

11. The learned State Prosecutor strongly relies on the decision in Gurcharan Singh v. State AIR 1978 S.C. 179, where, according to him, the Supreme Court in fairly identical circumstances, accepted the power of the High Court to cancel bail u/s 439(2), as a superior court correcting the errors of the Subordinate Court in the interests of justice.

12. In the above decision, the Supreme Court has observed thus:

Section 439 of the new Code confers special powers on High Court or Court of Session regarding bail. This was also the position u/s 498, Code of Criminal Procedure of the old Code. That is to say, even if a Magistrate refuses to grant bail to an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases. Similarly u/s 439(2) of the new Code, the High Court or the Court of Session may direct any person who has been released on bail to be arrested and committed to custody. In the old Code, Section 498(2) was worked in somewhat different language when it said that a High Court or Court of Session may cause any person who has been admitted to bail under Sub-section (1) to be arrested and may commit him to custody. In other words, u/s 498(2) of the old Code, a person who had been admitted to bail by the High Court could be committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This restriction upon the power of entertainment of an application for committing a person, already admitted to bail, to custody, is lifted in the new Code u/s 439(2). u/s 439(2) of the new Code a High Court may commit a person released on bail under Chapter XXXIII by any Court including the Court of session to custody, if it thinks appropriate to do so. It must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the High Court. 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.

It is significant to note that u/s 397 Code of Criminal Procedure of the new Code while the High Court and the Sessions Judge have the concurrent powers of revision, it is expressly provided under Sub-section (3) of that section that when an application under that section has been made by any person to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them. This is the position explicitly made clear under the new Code with regard to revision when the authorities have concurrent powers. Similar was the position u/s 435(4), Code of Criminal Procedure of the old Code with regard to concurrent revision powers of the Sessions Judge and the District Magistrate. Although u/s 435(1) Code of Criminal Procedure of the old Code the High Court, a Sessions Judge or a District Magistrate had concurrent powers of revision, the High Court's Jurisdiction in revision was left untouched. There is no provision in the new Code excluding the jurisdiction of the High Court in dealing with an application u/s 439(2), Code of Criminal Procedure to cancel bail after the Sessions Judge had been moved and an order had been passed by him granting bail. The High Court has undoubtedly jurisdiction to entertain the application u/s 439(2), Code of Criminal Procedure for cancellation of bail notwithstanding that the Sessions Judge had earlier admitted the Appellants to bail. There is therefore, no force in the submission of Mr. Mukherjee to the contrary.

13. The content of the power of bail is contained in Chapter XXXIII, of the Code of Criminal Procedure. Section 439 confers certain special powers on the High Court and the Courts of Sessions in the matter of bail and the power exercised by these two courts is concurrent. Section 439(1) enables the release of an accused on bail subject to certain conditions and empowers the court to set aside or modify any condition imposed by a Subordinate Magistrate. Section 439(1) does not deal with the power to cancel bail. "Rejection of bail when bail is applied for is one thing; cancellation of bail already granted is another". It is this power of cancellation that is conferred u/s 439(2) to the High Court and the Sessions Court. Even then, the Sessions Court cannot cancel a bail granted by the High Court. If a Court of Sessions has directed release of a person on bail, any supervening circumstance which warranted a rearrest of the accused could be urged before the Sessions Court itself for modification or cancellation of the bail. If cancellation of bail is sought on any other ground, the State can move the High Court for cancelling the bail ordered by the Sessions Court, for, "this position follows from the Subordinate position of the Court of Session vis-a-vis the High Court". The power u/s 439(2) Code of Criminal Procedure can be exercised by the High Court "after the Sessions Judge had been moved and an

order had been passed by him granting the bail". The High Court has jurisdiction "notwithstanding that the Sessions Judge had earlier admitted the Respondents herein to bail". The undoubted power of the High Court to cancel or modify an order of the Sessions Court enlarging an accused on bail, is corrective in its content, original in character and not appellate or revisional in nature and scope. The power is exercised sparingly, but, in appropriate cases, in the interest of justice, and its exercise need not await the actual or physical release of the accused on bail. The expression " released on bail" in Section 439(2) has therefore to receive a reasonable construction, considering the object sought to be achieved and has to be understood to mean "admitted to bail". These conclusions follow from the judgment of the Supreme Court above cited and I hold that the High Court has jurisdiction to entertain this application u/s 439(2) Code of Criminal Procedure.

14. The question as to whether the Sessions Court, Tellicherry, did or did not have jurisdiction to grant bail and even assuming it did not have jurisdiction, whether its decision has occasioned a failure of justice are matters to be decided at the final hearing. Of course, if there was no jurisdiction for the Sessions Court, Tellicherry, no such jurisdiction could be conferred by consensus or conduct of parties. I do not express any opinion on those points now.

The preliminary objection raised is overruled.