

(2012) 09 BOM CK 0176

In the Bombay High Court

Case No : Criminal Application No. 3622 of 2012

Uttamkumar Wagh and Madhukar Wagh

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 26-09-2012

Acts Referred:

Bombay Prevention of Gambling Act, 1887 — Section 4, 5
Criminal Procedure Code, 1973 (CrPC) — Section 437(5), 439, 482
Penal Code, 1860 (IPC) — Section 307, 420, 437, 437(1)(i), 439

Citation : (2012) BomCR(Cri) 697

Hon'ble Judges : P. Davare, J

Bench : Single Bench

Advocate : V.D. Salunke, with Mr. B.N. Patil, for the Appellant; B.J. Sonwane, Additional Public Prosecutor, for the Respondent

Judgement

Shrihari P. Davare, J.—Heard Adv. Mr. V.D. Salunke with Adv. Mr. B.N. Patil for the applicants, and learned APP Mr. B.J. Sonwane for the respondent. Rule. Rule made returnable forthwith. With the consent of parties, taken up for final hearing.

2. By the present application preferred by the applicant nos. 1 and 2, u/s 482 of the Code of Criminal Procedure, 1973, the applicants have prayed that the judgment and order dated 4-8-2012, passed by the learned Ad hoc Additional Sessions Judge-1, Latur, in Criminal Revision No. 58/2012, thereby dismissing the revision, and the order dated 25-7-2012, passed by the learned Judicial Magistrate (F.C.), Court No. 5, Latur, C.R. No. 3015/2012, registered at M.I.D.C. Police Station, Latur, in respect of cancellation of bail of the applicants, be quashed and set aside.

3. The factual matrix which gave rise to the present application is as follows :

(a) An offence was registered bearing No. 3015/2012 under the provisions of Sections 4 and 5 of Bombay Prevention of Gambling Act, 1887, at MIDC Police Station, Latur, against one Jugalkishor Badrinarayan Ladda, Balaji Dhondiram Patil and Madhav Vyankat Alat. However, names of the present applicants were

neither shown in the FIR nor in PCR list dated 23-5-2012. The PCR list discloses that the Muddemal property was already seized by the Police personnel at the time of raid conducted by them as per information dated 22-5-2012. However, present applicants were not found at the place of said raid. The allegations in the FIR and the PCR list dated 23-5-2012 reflect that the gambling in respect of IPL matches was going on at the place of raid. Copy of the FIR and PCR list dated 23-5-2012 is annexed at Exhibit "A". The applicants got knowledge from the newspaper contents that the accused in the FIR were trying to implicate the applicants in false case. Hence, applicants suo motu appeared before learned Judicial Magistrate (F.C.), Latur, and the learned Judicial Magistrate (F.C.) granted bail to the applicants by order dated 24-5-2012. Accordingly, communication 24-5-2012 was issued to the respondents, not to arrest present applicants and copy thereof is produced at Exhibit "B".

(b) It appears that the respondent herein made an application before learned Judicial Magistrate (F.C.), Latur, on 18-6-2012 seeking permission to include Section 420 of Indian Penal Code in the FIR, and also sought permission to re-arrest the applicants for the purpose of investigation. Copy of the said application is produced at Exhibit "C". The applicants appeared through Advocate and opposed the said application. Moreover, the respondent also preferred an application on 21st July 2012, for cancellation of bail granted to the applicants. The applicants herein opposed the said application also. However, learned Judicial Magistrate (F.C.) Court No. 5, Latur, passed an order on the said applications on 25-7-2012 and cancelled the bail granted to the applicants and other co-accused in C.R. No. 3015/2012, registered at MIDC Police Station, Latur, under Sections 4 and 5 of Bombay Prevention of Gambling Act, and Investigation Officer was permitted to arrest the accused for detail investigation according to law.

(c) Being aggrieved and dissatisfied by the said order, the applicants herein had preferred Criminal Revision No. 58 of 2012 before Court of Sessions at Latur. The respondent herein opposed the said revision. After hearing rival submissions, learned Ad hoc Additional Sessions Judge-1, Latur, dismissed the said revision by judgment and order dated 4-8-2012, and thereby confirmed the impugned order therein passed by the learned Judicial Magistrate (F.C.), Court No. 5, Latur, on 25-7-2012. Hence, applicants have questioned the correctness and legality of both the said orders in the present Criminal Application.

4. Adv. Mr. V.D. Salunke appearing for the applicants canvassed that there are no cogent and overwhelming circumstances to cancel the bail which was granted to the applicants earlier only because of inclusion of Section 420 of IPC in the FIR subsequently. It is also submitted that there is no grievance of the respondent that the applicants misused the liberty granted to them. It is further submitted that there is no question of exercise of discretion while granting bail to the applicants earlier since the offences alleged against them under Sections 4 and 5 of Bombay Prevention of Gambling Act are bailable. Moreover, it is further contended by the learned Counsel for the applicants that even there is no change

in circumstance which require the accused to be in custody except inclusion of Section 420 of IPC in the FIR although there is no change in the contents of the FIR for the said inclusion. According to the learned Counsel for the applicants, once bail is granted to the applicants, as mentioned herein above, same cannot be cancelled abruptly only on the count of inclusion of Section 420 of IPC in the FIR. Learned Counsel for the applicants strenuously contended that ingredients of Section 420 of IPC are not attracted in the matter and both the impugned orders passed by the learned Judicial Magistrate (F.C.), and the revision court, respectively, are erroneous. Accordingly, he urged that present application be allowed and the impugned orders be quashed and set aside.

5. To substantiate contentions of the applicants, learned Counsel for the applicants has relied upon following judicial pronouncements :

(i) Judgment of learned Single Judge of this Court, in the case of Salim Khan Saheb Khan & others Vs. The State of Maharashtra, reported at 2012 ALL MR (Cri) 822, wherein this Court has observed thus :

The considerations which are required to be taken into account at the stage of consideration of a bail application and those which are required to be examined at the time of consideration of an application for cancellation of bail, are drastically different. Once bail is granted, there is need for very cogent and overwhelming circumstances to upset the order of bail. The grounds for cancellation of bail could possibly be where there is an attempt to interfere with the due course of administration of justice, or where there is an abuse of the concession granted to the accused, or where new material comes on record to necessitate the cancellation of the Bail, or where bail was earlier granted on the basis of suppression of facts and or misrepresentation/misstatement. It is also clear that a Court of concurrent jurisdiction ought not to interfere with an order of bail already granted, inasmuch as such interference would amount to the subsequent court virtually functioning as a Court of appeal / revision in respect of the earlier court, which is not permissible. It is only in exceptional circumstances, as indicated by the Supreme Court that a Court of concurrent jurisdiction can interfere with an order of bail already granted. Cancellation of bail necessarily involves the review of a decision already made and can 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. However, bail granted illegally or improperly by a wrong, arbitrary exercise of judicial discretion can be cancelled even if there is absence of supervening circumstances. If there is no material to prove that the accused abused his freedom, court may not cancel the bail.

(ii) Judgment of Hon. Apex Court, in the case of Prahlad Singh Bhati Vs. N.C.T. Delhi and Another, , wherein Hon. Apex Court has observed thus :

9. In the instant case while exercising the jurisdiction, apparently u/s 437 of the Code, the Metropolitan Magistrate appears to have completely ignored the basic

principles governing the grant of bail. The Magistrate referred to certain facts and the provisions of law which were not, in any way, relevant for the purposes of deciding the application for bail in a case where accused was charged with an offence punishable with death or imprisonment for life. The mere initial grant of anticipatory bail for lesser offence, did not entitle the respondent to insist for regular bail even if he was subsequently found to be involved in the case of murder. Neither S. 437(5) nor S. 439(1) of the Code was attracted. There was no question of cancellation of bail earlier granted to the accused for an offence punishable under Ss. 498-A, 306 and 406, I.P.C. The Magistrate committed an irregularity by holding that "I do not agree with the submission made by the learned Prosecutor inasmuch as if we go by his submissions then the accused would be liable for arrest every time the charge is altered or enhanced at any stage, which is certainly not the spirit of law." With the change of the nature of the offence, the accused becomes disentitled to the liberty granted to him in relation to a minor offence, if the offence is altered for an aggravated crime. Instead of referring to the grounds which entitled the respondent-accused the grant of bail, the Magistrate adopted a wrong approach to confer him the benefit of liberty on allegedly finding that no grounds were made out for cancellation of bail.

10. Despite the involvement of important questions of law, the High Court failed in its obligation to adjudicate the pleas of law raised before it and dismissed the petition of the appellant by a one sentence order. The orders of the Magistrate as also of the High Court being contrary to law are liable to be set aside.

11. While allowing this appeal and setting aside the orders impugned we permit the respondent-accused to apply for regular bail in the trial Court. If any such application is filed, the same shall be disposed of on its merits keeping in view the position of law and the observations made herein above. We would reiterate that in cases where the offence is punishable with death or imprisonment for life which is triable exclusively by a Court of Session, the Magistrate may, in his wisdom, refrain to exercise the powers of granting the bail and refer the accused to approach the higher Courts unless he is fully satisfied that there is no reasonable ground for believing that the accused has been guilty of an offence punishable with death or imprisonment for life.

(iii) Judgment of learned Single Judge of Punjab & Haryana High Court, in the case of Sonu alias Rinku alias Lambu Vs. State of Punjab, , wherein Court has observed thus :

Once an accused was enlarged on bail for certain offence and if during the investigation new section is added for which minimum punishment is not life imprisonment or death penalty then Magistrate will be within its jurisdiction to ask the petitioner to furnish fresh bonds for the newly added section. However, it is clarified that if newly added section is punishable minimum with life imprisonment or death penalty then Magistrate shall not be within its jurisdiction to ask the accused to furnish the fresh bail bonds for the newly added section

unless case is covered under the proviso of Section 437 IPC is punishable with death or life imprisonment, therefore, Magistrate shall be well within its jurisdiction to ask the accused to furnish fresh bonds for the newly added section.

6. Learned APP Mr. B.J. Sonwane for the respondent / State countered the said arguments and opposed the present application vehemently, and submitted that there is change in circumstances after grant of bail to the applicants earlier, since serious offence u/s 420 of IPC was added in the FIR. It is further submitted that due opportunity was given to the applicants and the impugned order was passed by the learned Judicial Magistrate (F.C.) after giving audience to the applicants. According to the learned APP, added Section 420 of IPC is non-bailable and cognizable, and he submitted that unless there is physical custody of the applicants with the Police, further investigation cannot be carried out in constructive manner. It is further submitted that during the investigation it was transpired that the applicants have misused the mobile of other persons for playing gambling and, therefore, considering the nature and gravity of the offence, it was necessary to cancel the bail granted to the applicants as custodial interrogation of the applicants was imperative and, therefore, it is submitted that the learned Judicial Magistrate (F.C.) has rightly passed impugned order dated 25-7-2012 and the revisional court has rightly rejected the revision preferred against the said order. It was also pointed out that the investigating agency applied to the Superintendent of Police and sought permission to arrest the applicants and, thereafter preferred the application for cancellation of bail of the applicants which was rightly allowed by the learned Judicial Magistrate (F.C.), and further submitted that the revision preferred against the said order was rightly dismissed by the learned revisional court. Accordingly, learned APP urged that the present application be dismissed.

7. To substantiate the arguments, learned Additional Public Prosecutor has placed reliance on the judicial pronouncement of learned Single Judge of this Court, in the case of Satish Dhond Vs. State of Goa, reported at 2006 ALL MR (Cri) 1412, wherein this Court has observed thus :

17. Likewise, sub-section (2) of Section 439 which gives power to the Court of Session and to the High Court to cancel bail does not specify in what cases bail once granted could be cancelled but here again several pronouncements of the Supreme Court indicate that bail once granted could be cancelled in three broad situations. They are :-

(1) When the grant of bail is unjustified, arbitrary, or otherwise vitiated by serious infirmity or wrong exercise of discretion.

(2) Post bail conduct of the accused being not conducive for further investigations and/or a fair trial.

(3) Change of circumstances which would require the accused to be in custody.

8. I have perused the present application, its annexures, impugned orders

passed by the learned Judicial Magistrate (F.C.), and the revisional court, and heard the submissions advanced by the learned Counsel for the parties anxiously, and perused the judicial pronouncements cited by the learned Counsel for the parties, carefully.

9. At the outset, the respondent has preferred two applications before learned trial court i.e. first on 18th June 2012, with a request to re-arrest the applicants since Section 420 of IPC was added in the CR, and another application on 21st July 2012, for cancellation of bail granted to the applicants earlier, for offences punishable under Sections 4 and 5 of Bombay Prevention of Gambling Act. Accordingly, learned trial court passed common impugned order on 25th July 2012 on both the said applications and cancelled the bail granted to the applicants and other co-accused in CR No. 3015/2012 registered at MIDC Police Station, Latur, under Sections 4 and 5 of Bombay Prevention of Gambling Act, and also permitted the Investigating Officer to arrest the accused for detail investigation according to law. However, while passing the said order, it appears to have been escaped from the mind of learned trial court, that firstly Sections 4 and 5 of Bombay Prevention of Gambling Act are bailable and secondly, very cogent and overwhelming circumstances are necessary for an order directing cancellation of the bail already granted. Generally speaking, grounds for cancellation of bail are, interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner, as well as, satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding and change in the circumstances entailing the accused to be in custody, are yet other reasons justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial.

10. In fact, Section 437(5) of the Code of Criminal Procedure gives power to the court which has released a person on bail under Sub-Section (1) or Sub-Section (2), if it considers it necessary to do so, direct that such person be arrested and committed to custody. Sub-Section 2 of Section 439 of the Code of Criminal Procedure, which gives power to the Court of Sessions and to the High Court to cancel bail, do not specify in what cases bail once granted would be cancelled, but here again several pronouncements of the Supreme Court indicate that bail once granted would be cancelled in three broad situations, as mentioned below :

- (1) When the grant of bail is unjustified, arbitrary, or otherwise vitiated by serious infirmity or wrong exercise of discretion.
- (2) Post bail conduct of the accused being not conducive for further investigations and/or a fair trial.
- (3) Change of circumstances which would require the accused to be in custody.

However, present case does not come in the compass of aforesaid first two situations, but apparently, may come under the purview of third situation since Section 420 of IPC was incorporated in the CR subsequently. However, for carrying of the investigation in respect of offence subsequently added in the CR i.e. u/s 420 of IPC, the course adopted by the learned trial court, of cancellation of bail of the applicants which was already granted for the offences punishable under Sections 4 and 5 of Bombay Prevention of Gambling Act, which are bailable, is erroneous since no cogent and overwhelming circumstances were pointed out for cancellation of the said bail which was already granted.

11. Admittedly, added Section 420 of IPC, in the instant case, attracts the punishment of imprisonment of either description for a term which may extend to 7 years and shall also liable to fine and hence, the maximum punishment prescribed u/s 420 of IPC is a substantive sentence to the extent of 7 years, and the said offence is cognizable and non-bailable and triable by the Magistrate of the First Class.

12. Keeping in mind the said aspect and coming to the judicial pronouncement of the Hon. Apex Court, in the case of Prahlad Singh Bhati Vs. N.C.T., Delhi and another (supra), wherein Apex Court has not ruled that if offence not punishable with minimum life imprisonment or death penalty is added, then also accused has to seek fresh bail. Hence, in this scenario, I am of the view that once an accused was enlarged on bail for certain offence and during the investigation new section is added for which minimum punishment is not life imprisonment or death penalty, then Magistrate will be within his jurisdiction to ask the applicant to furnish fresh bonds for newly added section. However, it is clarified that if newly added section is punishable with minimum life imprisonment or death penalty, then the Magistrate shall not be within his jurisdiction to ask the accused to furnish fresh bail bonds for the newly added section unless case is covered under the proviso of Section 437 of IPC. In the instant case, the fact remains that the newly added section i.e. Section 420 of IPC attracts maximum punishment to the extent of 7 years and it is not punishable with death or life imprisonment and, therefore, the learned Magistrate shall be well within his jurisdiction to ask the applicants to furnish fresh bonds for the newly added section. In the said context, I find support from the judgment of learned Single Judge of Allahabad High Court in the case of Raj Kumar and Others Vs. State of U.P. and Another, , wherein learned Single Judge of Allahabad High Court in para 4 has observed as under :

4. Now, Section 437(1)(i) restrains the Court other than High Court or Court of Session (i.e. the Magistrate) from granting bail only in those cases where a reasonable ground appears for believing that a person is guilty of an offence punishable with death or imprisonment for life. In this view of the matter, there is no fetter on the Magistrate's right to grant bail in this case and the decision of the Apex Court in Prahlad Singh Bhati Vs. N.C.T. Delhi and Another, does not come in the way of this Court permitting the revisionists to continue on the

earlier bail granted to them by the Magistrate. Accordingly, this revision is allowed to this extent and the revisionists are permitted to continue to remain on bail also u/s 307 IPC, provided they furnish fresh bail bonds with sureties to the satisfaction of the Court concerned.

13. I am also fortified for the said view by the judgment of learned Single Judge of Punjab & Haryana High Court, in the case of Sonu alias Rinku alias Lambu Vs. State of Punjab (supra), and the said learned Single Judge has taken similar view to the view taken by the learned Single Judge of Allahabad High Court, in the case of Raj Kumar Vs. State of U.P. (supra), as mentioned herein above.

14. In the circumstances, present Application deserves to be allowed to that extent and the impugned judgment and order dated 25-7-2012, passed by the learned Judicial Magistrate (F.C.), Court No. 5, Latur, in C.R. No. 3015/12, and the consequent order dated 4-8-2012, passed by the learned Ad hoc Additional Sessions Judge-1, Latur, in Criminal Revision No. 58/2012, deserve to be quashed and set aside and the applicants herein are required to be directed to furnish fresh bail bonds and surety bonds to the satisfaction of the learned Magistrate in respect of newly added Section 420 of IPC, and on furnishing such fresh bonds, they shall be required to be directed to continue on the same bail, but simultaneously they are required to be directed to give attendance before in-charge of concerned Police Station as and when required to facilitate further investigation in respect of add Section 420 of IPC.

15. In the result, present Application is allowed and the impugned order dated 25-7-2012, passed by the learned Judicial Magistrate (F.C.), Court No. 5, Latur, in CR No. 3015/2012, registered at MIDC Police Station, Latur, cancelling bail of the applicants, and the consequent judgment and order dated 4-8-2012, passed by the learned Ad hoc Additional Sessions Judge-1, Latur, in Criminal Revision No. 58/2012, dismissing the revision preferred by the applicants, stand quashed and set aside, and the applicants herein are directed to furnish fresh bail bonds and surety bonds to the satisfaction of the learned Magistrate, for the newly added Section i.e. Section 420 of IPC in the said CR, and on furnishing such fresh bonds, they shall continue on the same bail. However, applicants are directed to give attendance before the concerned investigator as and when required and to cooperate in the investigation for the newly added section i.e. Section 420 of IPC for a period of eight weeks from today, and the present petition is disposed of accordingly. Rule is made absolute in the aforesaid terms.