

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 2624 OF 2015

Kum. Mahima D/o Santosh Jain

Age : 16 Yrs., Occ. : Education,

R/o : Andrel 2nd Floor, 208 Happy

Trade Centre, Opp. Clock Tower,

Secandarabad, through her natural

guardian Shri. Santosh Jain

Age : 47 Yrs., Occ. : Business,

R/o : as above, now at present

Mumbai.

.... APPLICANT

V E R S U S

1. The State of Maharashtra
Through Incharge – MIDC
Police Station, Aurangabad.

2. Abhishek S/o Dinesh Paribhar
Age : 24 Yrs., Occ. : Business,
R/o : “Guruchhaya”,
Yashomangal Society,
Khadkeshwar, Aurangabad.

.... RESPONDENTS

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Mr. V.D.Sapkal, Advocate for Applicant.

Mrs. Pratibha Bharad, A.P.P. for R.No.1 - State.

Mr. Shirish Gupte a/w Mr. A.D.Ostwal

i/b Mr.Joydeep Chatterji and Mr.S.S.Thombre,

Advocate for R.No. 2.

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CORAM : V.M.DESHPANDE, J.

DATE OF JUDGMENT : 21st JULY, 2015

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JUDGMENT :

1. Rule. Rule is made returnable forthwith. Heard finally by the consent of the learned counsel for the parties.

2. This is an application u/s 439 (2) of the Code of Criminal Procedure for cancellation of bail. Learned Additional Sessions Judge, Aurangabad vide Order dated 20/03/2015 granted application filed on behalf of respondent No. 2 u/s 439 of the Code of Criminal Procedure and thereby released him on bail on he executing P.R. and surety Bond of ₹ 1,00,000/- [Rupees One Lakh] in connection with Crime No. 17/2015 registered with M.I.D.C. CIDCO police station,

Aurangabad for the offences punishable u/s 376 (2), (I),354(D)(ii),504,506 of the Indian Penal Code and u/s 3 (b)(d),4,5(H)(I),6 of the Protection of Children from Sexual Offences Act.

3. Heard Mr. V.D.Sapkal, learned counsel for the applicant, Mrs. Pratibha Bharad, learned A.P.P. for Respondent No. 1 – State and Mr. Shirish Gupte, learned Senior Counsel along with Mr. A.D.Ostwal, learned counsel instructed by Mr.Joydeep Chatterji and Mr.S.S.Thombre, learned counsel for Respondent No. 2 in extenso.

4. A very detail and elaborate submissions were made from both the sides. However, I wish not to make any observations on the merits or de-merits of the prosecution case since it will prejudice the case of the prosecution as well as respondent No. 2.

At this stage, Court is expected to observe only whether a case is made out for cancellation of bail or not.

5. The gist of the submissions made by Mr. V.D.Sapkal, learned counsel for the applicant is as under :-

- [I] Order impugned is perverse.
- [II] Order impugned is passed without considering the record.
- [III] Considered the material which is not placed along with the charge sheet.
- [IV] Learned Judge of the Court below himself, on earlier occasion, rejected the bail application filed by respondent No. 2. Thus, there was no change in the circumstances.

The learned counsel for the applicant has pointed out various Judgments.

6. Per contra, Mr. Shirish Gupte, learned Senior Counsel submitted that the first bail application of respondent No. 2 was filed prior to filing of the charge sheet and its rejection was prior to the submission of the charge sheet.

Learned Senior Counsel submitted that another bail application, which was granted by the learned Court below, was filed after filing of the charge sheet. He submitted that filing of the charge sheet itself is the change of circumstance. He also relied upon various Judgments. He submitted that after grant of bail, it is not reported that

respondent No. 2 has mis-used the liberty.

7. It is an admitted position that applicant/prosecutrix is resident of Secandarabad, whereas respondent No. 2 is resident of Aurangabad [Maharashtra].

As per prosecution both prosecutrix and respondent No.2 were Face Book friends. On 22/05/2013, prosecutrix had been to Aurangabad in connection with the marriage of her relative. It is the further case of the prosecution that at Aurangabad, prosecutrix met respondent No. 2. Sum and substance of the F.I.R. is that after having a coffee, while they were going by car, respondent No. 2 started touching private parts of the prosecutrix and also gave his private part in her hand. Though the prosecutrix resisted such obnoxious act of respondent No. 2, on the point of knife he extended threat to kill her. Thereafter, he dropped prosecutrix at Jymkhana Club, wherein she was staying. According to prosecution, she was tensed and, therefore, she did not narrate the same to anybody. As per the prosecution, on 21/01/2015, she made Complaint by E-mail to the Police Commissioner and narrated the entire incident and thereafter formal F.I.R. was lodged on 23/01/2015.

Thus, for the incidence of 23/05/2013, F.I.R. is lodged on 23/01/2015.

8. There is no quarrel on the part of respondent No. 2 that his first bail application was rejected by the Additional Sessions Judge, Aurangabad. Said bail application was rejected on 26/02/2015. There is no dispute by either side that when the said bail application was rejected, charge sheet was not filed.

9. It is also not in dispute that the second bail application bearing Bail Application No. 31/2015, which was successive bail application, was filed after filing of the charge sheet.

Accused is entitled to file successive bail applications. However, to file successive bail application, accused has to point out the change in circumstance warranting the evaluation and consideration of his bail application afresh.

According to the learned counsel for the applicant, after the rejection of first bail application on 26/02/2015, there was no change in the circumstance. On

the other hand, according to the learned Senior Counsel for respondent No. 2, subsequent presentation of charge sheet before the Court below itself is the change of circumstance, which entitles respondent No. 2 for fresh consideration of his liberty.

In that behalf, it would be useful to have a reference to paragraph 9 of the reported decision of this Court in the case of Laxman Irappa Hatti Vs. State of Maharashtra, 2004 (2) Bom.C.R.(Cri.) 525. It is reproduced herein under :-

“ The powers conferred upon the sessions Judge or the High Court under section 439 of Cr.P.C. are wide enough to grant bail. There is no hard and fast rule and no inflexible principle governing the exercise of the discretion conferred by section 439 and that the only principle which was established was that the discretion should be exercised judiciously. The dominant criteria is whether there is any change of circumstance and the change should be substantial and not merely cosmetic. Under section 207 of Cr.P.C., an accused gets documents relied upon by the prosecution as of right. He is thus better equipped to address the Court

and invite the Court to examine the evidence after filing of the charge sheet from his point of view and to point out lacunas, if any, in the investigation, which could be fatal to the prosecution or sufficient enough to convince the Court that there exists reasonable grounds for, prima facie, believing that the applicant has not been guilty of an offence punishable with death or imprisonment for life. Until filing of the charge sheet, one of the important fact that weigh on the mind of a Judge is the continuity of investigation and whether the investigation will be hampered if the accused is set at large. However, after filing of the charge sheet, this approach changes and the Court, apart from merits of the case, requires to consider whether the accused should be continued in custody even after the investigation is over. This change, in the approach of the Court after filing of the charge sheet towards evaluating the need of keeping the accused in custody, should be termed as substantial change. It is open for the Court to take similar view which was taken while rejecting earlier application for bail made before filing of the charge

sheet. However, in my opinion, it is not open for the Court to hold that filing of the charge sheet is not a substantive change of circumstance and refuse to enter into merits of the case. The Court is obliged to consider merits of the case afresh by allowing the applicant or his Advocate to argue an application for bail on the basis of documents supplied to the accused with the charge sheet as required under section 207 of Cr.P.C. ”.

[Emphasis is supplied by me.]

10. I am in complete agreement with the aforesaid observations. In my view, filing of the charge sheet subsequent to the rejection of the first bail application would operate as change in the circumstance, by which the accused can press his prayer for liberty on the evaluation of the material placed in the charge sheet by the prosecution.

In that view of the matter, objection raised by the learned counsel for the applicant in that behalf can not sustain.

11. There is inordinate delay in lodging of F.I.R.

Learned trial Court has considered various texts of chats exchanged between the prosecutrix and respondent No. 2.

According to the learned counsel for the applicant, these texts are not part and parcel of the charge sheet and, therefore, the order impugned is attacked by him that the learned Judge of the Court below has considered extraneous documents.

During the course of the submissions, learned Senior Counsel for respondent No. 2 submitted that all these texts of chat were handed over by respondent No. 2 to the Investigating Officer when he was interrogated. This particular submission is not countered by the learned counsel for the applicant or the learned A.P.P.

12. Though it is the prerogative of the Investigating Officer to file such documents along with charge sheet, however, at the same time, it is expected from the prosecution and from the Investigating Officer to place all material on record, which came in his possession during investigation. The investigation should be impartial. It should not have tendency to take the side of either party.

Learned trial Court has considered all these text

messages, text chats in between the prosecutrix and respondent No. 2. Merely because those were not forming part and parcel of the charge sheet, Court can not be prevented from looking to such material which was available with the Investigating Officer and for the reasons best known to the investigating agency, it does not form the part and parcel of the charge sheet. Grant or refusal of bail deals with the personal liberty. While dealing with this delicate issue, Court has to consider each and every aspect. No one can expect from the Court that while deciding such issue, the view of the Court should pass through narrow lane. In my view, while deciding the liberty of a person, who is languishing in jail, it is appropriate on the part of the Court to consider every material brought before the Court, if its authenticity is not doubted.

In that behalf, I see no reason to brand the order passed by the learned Court below as perverse as claimed by the learned counsel for the applicant.

13. At this stage, I am reminded of the observations made by the Hon'ble Apex Court in the reported case of **Dolat Ram and Ors. Vs. State of Haryana, (1995) 1 Supreme**

Court Cases 349. I reproduce the observations in paragraph 4 as under :

“ *Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) 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. The satisfaction of the Court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason 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. These principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted. The High Court it appears to us overlooked the distinction of the factors relevant for rejecting bail in a non-bailable case in the first instance and the cancellation of bail already granted ”.

14. In one of the recent authoritative pronouncements of the Hon'ble Apex Court in **Sanjay Chandra Vs. Central Bureau of Investigation, AIR 2012 Supreme Court 830,** In the said Judgment, Hon'ble Apex Court observed that, :

“ The object of bail is neither punitive nor preventive. Deprivation of the liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect of the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty ”.

15. Further, it is not the case of the prosecution or

the applicant that after releasing respondent No. 2 on bail, he has mis-used the liberty.

16. The over-all discussion leads me to pass the following order.

ORDER

- (i) Criminal Application No. 2624 of 2015 is dismissed.
- (ii) Rule is discharged.

[V.M.DESHPANDE, J.]