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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 20th May, 2015

+ CRL.M.C. 3589/2014

PRIYANKA

..... Petitioner

Through: Mr Vinay Jaidka and Mr Ankit
Batra, Advs.

versus

STATE & ANR

..... Respondent

Through: Ms. Ritu Gauba, Additional Public
Prosecutor for the State alongwith
WASI Sushma Police Station Uttam
Nagar, Delhi
Mr Vimal Puggal, Adv. for
respondent no.2.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. This is a petition u/s 482 read with Section 439(2) of the Code of Criminal Procedure, (hereinafter referred as 'Cr.P.C'), 1973 against the order for grant of bail dated 26.04.2014 passed by the learned Metropolitan Magistrate in case FIR No.549/2013, P.S. Uttam Nagar u/s 354/376/506/34 IPC.

2. The FIR in the instant case was registered on the basis of a complaint made by the petitioner regarding commission of rape upon her by respondent no.2 which resulted in registration of the aforesaid FIR.

3. It is submitted by learned counsel for the petitioner, that pursuant to the complaint made by the petitioner, respondent no.2 moved an application for anticipatory bail before the Sessions Court which was dismissed vide order dated 08.10.2013. Thereafter bail application no. 1945/13 was moved before this Court and the same was dismissed vide order dated 31.10.2013. Respondent no.2 filed an SLP(Crl.No.10133/2013) before Hon'ble Supreme Court. While issuing notice, Hon'ble Supreme Court passed an interim order not to arrest the petitioner (respondent no.2 herein). After completion of service, when the SLP was called up for hearing on 03.07.2014, counsel for respondent no.2 made a statement that respondent no.2 has already been granted regular bail by the competent Court. In view of this statement, the SLP was dismissed as infructuous. It is submitted that thereafter counsel for the petitioner inspected the judicial file which revealed that on 09.04.2014, the Investigating Officer filed charge sheet before the learned Metropolitan Magistrate, New Delhi. The Court took cognizance of the offence. The learned Metropolitan Magistrate noted in the order that all three accused persons are stated to be not arrested but this fact was not verified by the learned Metropolitan Magistrate. The accused persons were summoned for 26.04.2014.

4. On 19.04.2014, there was no order from any Court regarding stay of arrest of accused Bhanwar Pal and Anmol nor were they on bail. An incorrect statement was made by the Investigating Officer on that day. On 26.04.2014, respondent no.2 appeared along with his counsel. However, the remaining two accused Bhanwar Pal and Anmol did not appear and were granted exemption from personal appearance. Without filing a bail application by respondent no.2 and without notice to the State, by completely ignoring the bar u/s 437(1)(i) Cr.P.C, the Metropolitan

Magistrate, Delhi granted regular court bail to respondent no.2 for offences punishable u/s 354/376/506/34 IPC. The learned Metropolitan Magistrate did not even deem it proper to impose any condition on respondent no.2 while admitting him on regular bail nor recorded any reasons for granting regular bail. On 01.05.2014, the learned Metropolitan Magistrate also granted regular bail to accused Bhanwar and Anmol without filing any bail application. The learned Metropolitan Magistrate thereafter committed the matter to the Sessions Court as offence is exclusively triable by the Sessions Court.

5. It is submitted that the bail order passed by the learned Metropolitan Magistrate is illegal, improper, contrary to law and has caused fragrant miscarriage of justice inasmuch as Section 376 IPC is punishable with rigorous imprisonment for not less than 7 years but which may extend to imprisonment for life and with fine. Section 437(1) restrains the Magistrate from granting bail in cases where a reasonable ground appears for believing that a person is guilty of offence punishable with death or imprisonment for life. Further proviso attached to Section 437(1)(i) Cr.P.C restrains the Court from granting bail without giving an opportunity of hearing to the Public Prosecutor for the State. The Magistrate can exercise powers u/s 437 Cr.P.C only on filing a proper application for grant of bail. The learned Metropolitan Magistrate failed to assign any reasons for admitting respondent no.2 to regular court bail. Even no condition was imposed on respondent no.2 while admitting him on regular bail. Under the circumstances, the order is illegal. Same is also liable to be set aside inasmuch as respondent no.2. has been constantly extending threats to the petitioner and her family with the result petitioner had to shift to a rental accommodation. A letter to this effect was also written to the SHO but no action was taken. Reliance was placed on ***Prahlad Singh Bhati v. N.C.T***

of Delhi & Another, (2001) 4 SCC 280; *Gurcharan Singh & Ors v. State (Delhi Administration)*, 1978 SCR(2) 358; *Hanuman s/o Vishwanath Nehare v. State of Maharashtra and ors.*, 2001(5) Bom CR 879; *Parasnath Dubey and others v. State of U.P & Others; State of Maharashtra & Anr v. Mohd. Sajid Husain Mohd. s Husain* in Crl.A.No.1402-1409/2007 and *Union of India v. Hassan Ali Khan & Anr.*, in Crl.A.No.1883/2011.

6. On the other hand, Sh. Vimal Puggal, Advocate appearing for respondent no.2 submits that since the arrest of petitioner was stayed by Hon'ble Supreme Court, therefore, there is no infirmity in the order passed by the learned Trial Court which calls for interference. Reliance was placed on *Court On Its Own Motion v. Central Bureau of Investigation*, 2004(1) JCC 308 and *Dolat Ram v. State of Haryana*, (1995) 1 SCC 349.

7. The undisputed facts are that pursuant to the complaint made by the petitioner FIR u/s 354/376/506 IPC was registered against respondent no.2. The application for grant of anticipatory bail filed by respondent no.2 was dismissed by the learned Additional Sessions Judge vide order dated 08.10.2013 and it met the same fate before this Court when the application for anticipatory bail was dismissed vide order dated 31.10.2013. SLP was filed by respondent no.2 and while issuing notice, Hon'ble Supreme Court passed an interim order:-

“In the meantime, the petitioner shall not be arrested in connection with FIR No.549/13 dated 04.10.2013 registered at P.S. Uttam Nagar, New Delhi.”

8. Thereafter charge sheet was submitted by the Investigating Officer of the case. As per the certified copy of the charge sheet placed on record

by the petitioner, in the column of “Particulars of accused person charge sheeted”, it was mentioned as under:-

“(a) Name – Arvind Kumar

(l) date of arrest- Without Arrest

(q) status of accused - Stay on arrest by Supreme Court

(i) Name – Bhanwar Pal

(xv) Date of arrest- Without Arrest

(xxi) Status of the accused- Not Arrest

(i) Name- Anmol Kumar

(ii) Date of Arrest-Without Arrest

(iii) Status of the accused-Stay on arrest by Supreme Court/Not Arrested.”

9. The relevant order sheets of the learned Metropolitan Magistrate are reproduced as under:-

“FIR No.549/13

PS Uttam Nagar

19.04.2014

Fresh challan along with E-challan filed. It be checked and registered.

Present: Ld. APP for the State

IO SI Satyawati present.

All three accused persons are stated to be not arrested.

It take cognizance of the offence.

Let accused be summoned for 26.04.14.”

26.04.2014

Present: None for the State.

Accused Arvind with counsel.

Rest two accused absent.

An application for exemption has been moved on behalf of the accused Bhanwar Pal and Anmol. Same is allowed only for

today and it is made clear to the counsel for the accused persons that no such applications shall be allowed in future.

Documents supplied to accused Arvind.

Further accused Arvind is being admitted to regular court bail on furnishing personal bond of Rs.20,000/- with one surety of the like amount. Bail Bond to be furnished on the NDOH.

List for appearance of all the accused persons for 01.05.14.”

01.05.2014

Present: Ld. APP for the State.

All three accused with Ld. Counsel.

Bail bond of accused Arvind Kumar furnished and the same be verified through the SHO for the next date of hearing.

Accused Bhanwar Pal and Anmol Kumar is admitted to court bail on furnishing a personal bond in the sum of Rs.20,000/- with one surety each in the like amount.

Bail bond of accused Anmol Kumar furnished and accepted.

Bail bond of accused Bhanwar Pal furnished and the same be verified through SHO for 06.05.2014.

Documents are stated to be completed.

List for verification of bail bonds and for committal proceedings on 06.05.2014.”

06.05.2014

Present: Ld. APP for the State.

All three accused with Ld. Counsel.

Bail bond of Arvind and Bhanwar Pal accepted.

Copies are stated to be complete. Since the offence is exclusively triable by the Court of Sessions, hence file be placed before Ld. District Judge(W) cum ASJ for 12.05.2014 for committal to the Court of Sessions.

Accused be produced accordingly. Ahlmad is directed to send the file complete in all respects well within time. Ld. APP for the State be notified.”

10. When the matter came up for hearing before the Hon’ble Supreme Court on 03.07.2014, counsel for respondent no.2 made a statement that

respondent no.2 has already been granted regular bail by the Competent Court, as such the SLP was dismissed as infructuous.

11. The sole question for consideration is whether the learned Metropolitan Magistrate was competent to grant bail in a case u/s 376 IPC which entails minimum sentence of 7 years which may extend to imprisonment for life and if so, whether while passing the order for release on bail, provisions of Section 437 Cr.P.C were complied with or not. Before proceeding further, it will be advantageous to reproduce Section 437 Cr.P.C which provides for “when bail may be taken in case of non-bailable offence.” It reads as under:-

“437. When bail may be taken in case of non- bailable offence-

(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of [a cognizable offence punishable with imprisonment for three years or more but not less than seven years]:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that It is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.]

[Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or

imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.]

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non- bailable offence, but that there are sufficient grounds for further inquiry into his ¹ guilt the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail] or at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub- section (1), the Court may impose any condition which the Court considers necessary-

- (a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or
- (b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or
- (c) otherwise in the interests of justice.

(4) An officer or a Court releasing any person on bail under sub- section (1) or sub- section (2), shall record in writing his or its ¹ reasons or special seasons] for so doing.

(5) Any Court which has released a person on bail under sub- section (1) or sub- section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non- bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non- bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution

by him of a bond without sureties for his appearance to hear judgment delivered.”

12. In ***Prahlad Singh*** (supra), similar question arose. In that case, respondent no.2 who was alleged to have murdered his wife and against whom the FIR u/s 302 of the IPC was registered, was released on bail by the Metropolitan Magistrate, New Delhi. The revision filed against the said order was dismissed by the High Court. The matter went to Hon’ble Supreme Court. The relevant observations made by Hon’ble Supreme Court which has a material bearing in the present case are reproduced as under:-

“5. Chapter XXXIII relates to the provisions as to bails and bonds. Section 436 provides that when any person accused of a bailable offence is arrested or detained without warrant by an officer in charge of the police station, or appears or is brought before a court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person shall be released on bail. Under Section 437 of the Code when a person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court, he may be released on bail by a court other than the High Court and Sessions subject to the conditions that he does not reasonably appear to have been guilty of an offence punishable with death or imprisonment for life. The condition of not releasing the person on bail charged with an offence punishable with death or imprisonment for life shall not be applicable if such person is under the age of 16 years or is a woman or is sick or infirm, subject to such conditions as may be imposed. It does not, however, mean that persons specified in the first proviso to sub-section (1) of Section 437 should necessarily be released on bail. The proviso is an enabling provision which confers jurisdiction upon a court, other than the High Court and the court of Sessions, to release a person on bail despite the fact that there appears reasonable ground for believing that such person has been guilty of an offence punishable with death or imprisonment for life. There is no gainsaying that the discretion conferred by the Code has to be exercised judicially. Section 438 of the Code empowers the High Court and the Court of Sessions to grant anticipatory bail to a person who apprehends his arrest, subject to the conditions specified under sub-section (2) thereof.

6. Even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a court of Sessions yet it would be proper and

appropriate that in such a case the Magistrate directs the accused person to approach the Court of Sessions for the purposes of getting the relief of bail. Even in a case where any Magistrate opts to make an adventure of exercising the powers under Section 437 of the Code in respect of a person who is, suspected of the commission of such an offence, arrested and detained in that connection, such Magistrate has to specifically negotiate the existence of reasonable ground for believing that such accused is guilty of an offence punishable with the sentence of death or imprisonment for life. In a case, where the Magistrate has no occasion and in fact does not find, that there were no reasonable grounds to believe that the accused had not committed the offence punishable with death or imprisonment for life, he shall be deemed to be having no jurisdiction to enlarge the accused on bail.

7. Powers of the Magistrate, while dealing with the applications for grant of bail, are regulated by the punishment prescribed for the offence in which the bail is sought. Generally speaking if punishment prescribed is for imprisonment for life and death penalty and the offence is exclusively triable by the Court of Sessions, Magistrate has no jurisdiction to grant bail unless the matter is covered by the provisos attached to Section 437 of the Code. The limitations circumscribing the jurisdiction of the Magistrate are evident and apparent. Assumption of jurisdiction to entertain the application is distinguishable from the exercise of the jurisdiction.

8. The jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behavior, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not excepted, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

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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 hereinabove. 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 Sessions, 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.”

13. Again in *Gurcharan Singh*(supra) it was observed that under sub-section 4 of Section 457 Cr.P.C., an officer or a Court releasing any person on bail under sub-section1 or sub-section2 of that section is required to record in writing his or its reason for doing so. That is to say, law requires that in non-bailable offences punishable with death or imprisonment for life, reasons to be recorded for releasing a person on bail, clearly disclosing how discretion has been exercised in that behalf.

14. *Hanuman*(supra) was a case where the respondent was arrested in connection with an attempt to murder u/s 307 IPC. On the same day, when the bail application was filed, the respondents were ordered to be enlarged on bail by the learned Metropolitan Magistrate even though APP was not available in the Court. The victim died and, therefore, Section 302 IPC was attracted and charge sheet was filed u/s 302 IPC. Son of the deceased moved application for cancellation of bail. The Mumbai High Court observed that in respect of offence for which the maximum sentence prescribed is life imprisonment but alternatively lesser punishment is provided for instance ten years, the bar of Section 437 would operate and such person cannot be released on bail by the Magistrate as the magistrate has no jurisdiction to grant bail to such person u/s 437(1) Cr.P.C. The Magistrate without giving opportunity to the prosecution, in a hasty manner granted bail to the respondent on the same date, as such it was observed that the Magistrate had acted in an arbitrary and capricious manner while dealing with the matter and hastily granted bail to the respondent, accordingly the bail was cancelled.

15. Adverting to the case in hand, the charge sheet was submitted against respondent no.2 for offence u/s 354/376/506 IPC. As per sub-section(1) of Section 376 IPC, the punishment prescribed for offence of rape is not less than seven years which may extend to imprisonment for life and fine. As per first schedule of the Cr.P.C, offence u/s 376 IPC is triable by a Court of Session. As observed in ***Prahlad Singh***(supra) even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a court of Sessions yet it would be proper and appropriate that in such a case, the Magistrate directs the accused persons to approach the Court of Sessions for the purpose of getting the relief of bail. Even if, the Magistrate opts to exercise the powers u/s 437 of the Code, in such a case, he or she has to comply with the relevant provisions incorporated in Section 437.

16. A bare reading of the provisions of Section 437 Cr.P.C makes it clear that in case the Metropolitan Magistrate deems it appropriate to release the accused on bail, who is accused of offence punishable with imprisonment which may extend to seven years or more, it is incumbent upon him/her to record such reasons for releasing on bail [vide proviso to sub-section(1)]. Furthermore, no such order is to be passed unless an opportunity of hearing is given to the Public Prosecutor (vide fourth proviso to sub-section (1). While releasing on bail, the conditions as prescribed in sub-section(3) of Section 437 besides any other condition which the Court may consider necessary, has to be imposed.

17. Reverting to the case in hand, a perusal of the order sheets reproduced in the foregoing paragraphs reflects that after the challan was filed by the Investigating Officer of the case and it was pointed out by the

Investigating Officer that the accused were not arrested, the Court took cognizance of the offence and ordered summoning of the accused. On 26.04.2014, the petitioner appeared while the other two accused were absent. Their exemption was granted pursuant to an application moved by them. Offence under Section 376 IPC is non-bailable one. That being so, accused was not entitled to be released on bail as a matter of right. He was required to move an application for bail which was not done. Even if the challan was filed showing accused “not arrested”, Court could have informed him that he may, if so desire, move application for release on bail. But, without adopting any such recourse, the Court of its own admitted the accused to regular bail. Neither the Public Prosecutor nor the Investigating Officer of the case was present. As such, no opportunity of hearing was afforded to them. Even no reason was assigned as to why the accused was being admitted to regular bail and while releasing him on bail, even no conditions as were required to be imposed by virtue of sub-section 3 of Section 437 were imposed. In view of the fact that by virtue of orders of Hon’ble Supreme Court dated 13.12.2013, the arrest of the petitioner was stayed till the next date of hearing, the only course available to the learned Metropolitan Magistrate was to await the orders of Hon’ble Supreme Court but without complying with the provisions of Section 437 Cr.P.C, the learned Metropolitan Magistrate could not have released the accused on regular bail. Under the circumstances, the order passed by the learned Metropolitan Magistrate releasing respondent no.2 on regular bail cannot be sustained and deserves to be set aside.

18. ***Court on its own Motion***(supra) relied upon by learned counsel for respondent no.2 has no application to the facts of the case in hand in as much as in that case it was observed that when accused is neither arrested by the police during investigation nor produced in custody, the Court on

appearance of such an accused call upon the accused to move a bail application. If he does so, the Court can release him on bail as the circumstance of his having not been arrested during investigation nor being produced in custody is itself sufficient to entitle him to be released on bail. This case does not help respondent no.2 in as much as according to this judgment also when the accused appears in a non-bailable offence before the Court and himself does not move an application for bail, the Court should apprise him to move a bail application and then release him on bail if the circumstances of the case so warrants. In the instant case, the accused himself has not moved any bail application nor the Court apprised him of his right to move a bail application but suo moto released him on bail which could not have been done.

19. In ***Dolat Ram*** (supra), it was observed that bail once granted cannot be cancelled in a mechanical manner without considering whether any supervening circumstance 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 trial. In this case, anticipatory bail was granted to the appellants. State of Haryana filed a petition for cancellation of anticipatory bail which was allowed. Thereafter the matter went to Hon'ble Supreme Court. It was observed that 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 cancellation of 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 process of justice or abuse of the concession granted to the accused in any manner. Bail once granted should not

cancelled in a mechanical manner. In *State of U.P through CBI v. Amarmani Tripathi*, (2005) 8 SCC 21, it was observed that in an application for cancellation of bail, conduct subsequent to release on bail and the supervening circumstances alone are relevant. But in an appeal against grant of bail, all aspects that were relevant u/s 439 read with Section 437 continue to be relevant.

20. In view of the fact that the orders of the learned Metropolitan Magistrate granting bail to the accused was in violation of the provisions. incorporated u/s 437 of the Cr.P.C., the same is set aside. However, respondent no.2 is enjoying the benefit of bail since 26.04.2014 as such, while allowing this petition and setting aside the order impugned, respondent no.2 is permitted to apply for regular bail in the Sessions Court where the case has been committed for trial within a week. If any such application is filed, the same shall be disposed of on its own merits, failing which learned Additional Sessions Judge who is seized of the matter is directed to take him in custody. The petition is accordingly disposed of.

Order dasti.

(SUNITA GUPTA)
JUDGE

MAY 20, 2015

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