

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

932 CRIMINAL WRIT PETITION NO.1371 OF 2018

- 1] Ravi S/o Narayan Gaikwad
Age: 30 years, Occu.: Labour
- 2] Shakuntala W/o Narayan Gaikwad
Age: 50 years, Occu.: Household,
- 3] Firoz Babu Shaikh
Age: 28 years, Occu.: Labour

All R/o. Ashok Nagar, Ahmedpur,
Taluka Ahmedpur,
District Latur.

..Petitioners
(Orig. Accused Nos.1 to 3)

Versus

The State of Maharashtra,
Through Police Inspector,
Police Station, Ahmedpur,
Taluka Ahmedpur,
District Latur.

..Respondent

...
Advocate for Petitioners : Shri Chaitanya C. Deshpande
APP for Respondent : Shri S.P.Sonpawale
Advocate for Informant : Ms.P.V.Bodkhe Patil

**...
WITH
CRIMINAL APPLICATION NO.3690 OF 2018
IN
CRIMINAL WRIT PETITION NO.1371 OF 2018**

Hussain Rasulsab Shaikh
Age: 50 years, Occu.: Labour,
R/o. Ashok Nagar, Ahmedpur,
Tq.Ahmedpur, Dist.Latur.

..Applicant
(Orig. Complainant)

Versus

- 1] Ravi S/o Narayan Gaikwad
Age: 30 years, Occu.: Photographer

2] Shakuntala W/o Narayan Gaikwad
Age: 50 years, Occu.: Photographer

3] Feroj s/o Babu Shaikh
Age: 30 years, Occu.: Photographer

All R/o. Ashok Nagar,
Gaikwad Colony, Ahmedpur,
Tq. Ahmedpur, Dist. Latur.

4] The State of Maharashtra
Through Police Inspector,
Police Station Ahmedpur,
Tq.Ahmedpur, Dist.Latur. ..Respondents
(R-1 to 3 Org. Petitioners/Accused)
(R-4 Org. Respondent)

...
Advocate for Applicant/Informant : Ms.P.V.Bodkhe Patil
Advocate for Nos.1 to 3 : Shri Chaitanya C. Deshpande
APP for Respondent No.4 : Shri S.P.Sonpawale

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CORAM : P.R.BORA, J.

DATE: 12th December, 2018

ORAL JUDGMENT:-

1. Criminal Application No.3690 of 2018 is not on board. The same is taken on board. The applicant has filed this application seeking permission to assist the APP in Criminal Writ Petition No.1371 of 2018. Application is allowed. Permission is granted.

2. Heard Shri C.C.Deshpande, learned Counsel for the petitioners. The petitioners have challenged the order passed below Exh.1 in Criminal Miscellaneous Application No.7 of 2018, by the Additional Sessions Judge, Ahmedpur on 18.09.2018. The

aforesaid application was filed under Section 439 (2) of the Code of Criminal Procedure (hereinafter referred to as 'the Code') for cancellation of bail of the present petitioners in connection with Crime No.174 of 2018 registered at Ahmedpur Police Station for the offence punishable under Sections 306, 354-D, 504 and 506 of the Indian Penal Code. The material on record shows that the present petitioners were being prosecuted in aforesaid Crime No.174 of 2018 initially for the offences punishable under Section 354-D, 504 and 506 of the Indian Penal Code. The petitioners were released on bail in the said crime on 26.05.2018 by the learned JMFC.

3. The material on record further shows that subsequently a chit written by deceased Anjum Hussain Shaikh was found whereupon, the offence punishable under Section 306 of the Indian Penal Code was added against the present petitioners. After adding of the said offence, since the prosecution was intending to interrogate the accused, an application was preferred by the Investigating Officer before the JMFC Court seeking cancellation of the bail, earlier granted by it on 26.05.2018. The learned JMFC, however, declined to entertain the application observing that such power lies with the Sessions Court and passed the order accordingly.

4. The Investigating Officer, therefore, filed an application before the Sessions Court under Section 439(2) of the Code thereby praying for cancellation of bail of the petitioners and seeking permission to rearrest them. The application so filed was resisted by the accused i.e. present petitioners. The learned Additional Session Judge, after hearing the submissions of the prosecution and the accused, vide order dated 18.09.2018, allowed the said application and thereby cancelled the bail granted to the accused and permitted the Investigating Officer to re-arrest the accused in Crime No.174 of 2018 in connection with added offence under Section 306 of the Indian Penal Code. Aggrieved by, the petitioners have filed the present petition.

5. Shri Deshpande, learned Counsel appearing for the petitioners assailed the impugned order stating that the order so passed is against the provisions of law. The learned Counsel further submitted that the bail of the present petitioners could have been cancelled by the Sessions Court only on the ground that any of the conditions imposed upon the petitioners while releasing them on bail, is breached by them, but not on the ground of mere adding of the offence under Section 306 of the Indian Penal Code. The learned Counsel relied upon the

Judgment of this Court in the case of ***Uttamkumar s/o Chandrakant Wagh and another Vs. The State of Maharashtra [2012 ALL MR (Cri.) 3468]***. The learned Counsel submitted that in the said matter also, after offence under Section 420 was added in the FIR, the bail of the petitioners therein was cancelled and the said order was set aside by the High Court in the aforesaid Writ Petition. The learned Counsel on the aforesaid grounds, prayed for setting aside the impugned order.

6. Shri S.P.Sonpawale, learned APP has resisted the submissions made on behalf of the petitioners. The learned APP submitted that the order passed by the learned Additional Sessions Judge is perfectly within his rights and no fault can be found in the order so passed. The learned APP placed his reliance on the Judgment of Hon'ble Apex Court in the case of ***Prahlad Singh Bhati Vs. N.C.T., Delhi and Another [2001 (4) SCC 280]***. The learned APP invited my attention to the law laid down by the Hon'ble Apex Court in the said Judgment to the effect that "With the change of the nature of the offence, the accused becomes dis-entitled to the liberty granted to him in relation to a minor offence, if the offence is altered for an aggravated crime." The learned APP submitted that no interference is, therefore, called for in the order so passed.

7. The learned APP also relied upon the Judgment of Rajasthan High Court in the case of ***Mayank Kumar Sharma S/o. Shri Bhagwan Sharma Vs. State of Rajasthan and Another [2017(2) WLC (Raj.) (UC), 176]*** . The learned APP also relied upon the decision of the Hon'ble Apex Court dated 07.05.2018 in the case of ***Manoj Suresh Jadhav and others Vs. The State of Maharashtra, in Special Leave to Appeal (Cri.) No.10179 of 2017.***

8. I have given due consideration to the submissions advanced by the learned Counsel appearing for the petitioners and learned APP appearing for the State. The following questions fall for determination in the present matter:-

a) What course is to be followed if a person earlier arrested for bailable offence and released on bail under Section 436 of the Code of Criminal Procedure, is to be re-arrested by the Police, if the graver offence is subsequently charged/added against him ?

b) Whether the bail earlier granted to the petitioners in relation to the offences punishable under Section 354-D, 504 and 506 of the Indian Penal Code, by Judicial Magistrate First Class vide order dated 26.05.2018, was liable to be cancelled after the charge under Section 306 of the Indian

Penal Code was subsequently added against them based on the evidence received to the Investigating Officer in the further investigation ?

9. Relying on the Judgment of this Court in the case of ***Uttamkumar s/o Chandrakant Wagh and another*** (supra), it has been argued by the learned Counsel for the petitioners that the cancellation of bail granted to the petitioners for the bailable offence was not liable to be cancelled. Paragraph No.11 of the said Judgment was relied upon by the learned Counsel, which reads thus:-

“11. 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. under Section 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.”

10. As against it, placing reliance on the Judgment of Hon'ble Apex Court in the case of **Prahlad Singh Bhati** (supra), it has been argued by the learned APP that due to the change of the nature of the offence, the accused becomes dis-entitled to the liberty granted to him in relation to the minor offence, if the offence is altered for an aggravated crime. The learned Single Judge of the Rajasthan High Court (Jaipur Bench) in the case of **Mayank Kumar Sharma S/o. Shri Bhagwan Sharma** (supra) has considered the import of the Judgment of the Hon'ble Apex Court in **Prahlad Singh Bhati** (supra) in Paragraph No.24 of the said Judgment, which reads thus:-

“24. In the judgment of Prahlad Singh Bhati's case, the issue has already been decided by the Hon'ble Supreme Court that if a

person arrested for bailable offence and released on bail under Section 436 Cr.P.C., same cannot be re-arrested by the Police without canceling the bail by the Court under Section 439 (2) Cr.P.C. and if the grave offence is added then Court can cancel the bail under Section 439 Cr.P.C. Similarly, if the accused is released on bail under Section 436 Cr.P.C. by the Police and thereafter non-bailable offence is added then Sessions Court and High Court can exercise its powers under Section 439 (2) Cr.P.C. for cancellation of bail.”

11. In the matter of ***Vijendra Vs. State of Rajasthan [1988 RCC 431]***, initially, the case was registered under bailable offence, bail was granted by the Police under Section 436 of the Code. Subsequently, non-bailable offence was added whereupon the question was raised whether in such circumstances, Police can cancel the bail and arrest the accused. The Rajasthan High Court held that the Police cannot cancel the bail and it was observed that the bail granted under Section 436 of the Code, is under Chapter 33 of the Code and can be cancelled only by the High Court and Sessions Court under Section 439(2) of the Code.

12. In the case of ***Mool Chand alias Murli and another V. Station House Officer, Police Station Renewal, Jaipur [2009 Cri.L.J. 3158]***, the charge-sheet was filed against the accused in the said case under Sections 341, 323 and 325 of the Indian Penal Code. Since all the aforesaid offences were bailable, the accused were released on bail. Subsequently, the injured in the case suffered

death due to septicemia as a result of ante-mortem injuries. The offence under Section 302 of the Indian Penal Code was therefore, added against the accused. Thereafter, application for cancellation of bail was preferred by the prosecution before the Sessions Court and the same was allowed by the Session Court. The said order was challenged by the accused before the High Court and the High Court turned down the objection so raised relying on the Judgment in the case of **Prahlad Singh Bhati** (supra). In the said case also, initially an application under Section 437(5) of the Code was filed before the learned Magistrate concerned, who dismissed the said application as not maintainable. Subsequently, the prosecution had filed an application under Section 439(2) of the Code before the Sessions Court and the Sessions Court had allowed the said application and thereby cancelled the bail earlier granted to the accused for the bailable offences charged against them.

13. In the recent Judgment in the case of **Manoj Suresh Jadhav and others Vs. The State of Maharashtra in Special Leave to Appeal (Cri.) No.10179 of 2017** decided on 07-05-2018, the Hon'ble Apex Court has ruled that for cancellation of bail, the prosecution has to file an application under Section 439(2) of the Code and seek the custody of the accused, if any graver offence is made out against the accused, who had been earlier released on bail in

the minor offence.

14. After having considered the law laid down in the aforesaid Judgments, it does not appear to me that any error has been committed by the prosecuting agency in approaching the Sessions Court for cancellation of the bail earlier granted to the petitioners by invoking the provision under Section 439(2) of the Code. No fault can be found in the order passed by the learned Sessions Judge whereby he has cancelled the bail earlier granted to the petitioners and permitted the prosecuting agency to re-arrest the petitioners in an offence under Section 306 of the Indian Penal Code.

15. For the reasons stated above, the petition deserves to be dismissed and is accordingly dismissed. It need not be stated that the petitioners are not precluded from availing the appropriate remedy for their released on bail.

(P.R.BORA)
JUDGE

SPT