

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.07.2019

CORAM

THE HON'BLE MR.JUSTICE N.ANAND VENKATESH

Crl.O.P.No.15721 of 2019

Mrs.Dhurga Vaishnavi Shivamoorthi

...Petitioner/
Defacto Complainant

-Vs-

1.Murthy

... 1st Respondent/2nd Accused

2.State rep by:

Inspector of Police,
Tiruppur North Police Station,
Tiruppur District.
(Crime No.760 of 2018).

...2nd Respondent/Complainant

Prayer:

Criminal Original petition filed under Section 439(2) of Code of Criminal Procedure, to cancel the bail granted by order dated 08.05.2019 in Crl.O.P.No.8288 of 2019 for Murthy-A2 the 1st respondent herein, in S.C.No.2 of 2019, on the file of the Principal Sessions Judge, Tiruppur, Tiruppur District, to ensure fair trial.

For Petitioner : M/s.Nalini Chidambaram
Senior Counsel
for M/s.C.Uma

For Respondent : Mr.M.Mohamed Riyaz
Additional Public Prosecutor
for R2 M/s.B.Mohan for R1

ORDER

This Criminal Original Petition has been filed by the defacto complainant to cancel the bail granted in favour of the petitioner by this Court in Crl.O.P.No.8288 of 2019, by order dated 08.05.2019.

2. There are totally four accused persons in this case and the petitioner has been ranked as A2 (wrongly mentioned as A3 in the order).

3. The case in brief of the prosecution is that the deceased was kidnapped by the accused persons and ransom was demanded from the defacto complainant. Thereafter, the deceased was attacked by the accused persons and his body was thrown into Kelavarappalli Dam.

4. The bail petition was moved before the vacation Court. At that point of time, it was informed to the Court that the investigation has been completed and the case is pending at the stage of trial. The gravity of the offence and the nature of accusation was not projected before the Court. This Court was also not informed about the dismissal of the bail petition filed by A1, A3 and A4. Therefore, this Court proceeded to consider the bail petition of A2 by applying the rudimentary principles, by taking into consideration the length of incarceration that has already been suffered by the accused person and the stage of the proceedings before the trial Court.

5. Mrs. Nalini Chidambaram, learned Senior Counsel appearing on behalf of the defacto complainant submitted that all the accused persons had conspired and kidnapped the husband of the defacto complainant in a car. He was beaten mercilessly and he was murdered in the most grotesque manner and the body was thrown into the dam at Kelavarappalli. The learned Senior Counsel further submitted that the family members of the deceased found it difficult even to identify the deceased and they were shocked at the manner, in which the entire crime has taken place. The learned Senior Counsel further submitted that the co-accused namely A1, A3 and A4 had filed bail applications before this Court and this Court, by a detailed order dated 11.12.2018 had dismissed the bail petitions after taking into consideration the nature of accusation and the impact this incident will have on the society at large. The learned counsel therefore submitted that these vital facts were not brought to the notice of this Court, while considering the bail petition and it has been intentionally suppressed.

6. The learned Senior counsel also relied upon the judgment of Anil Kumar Yadav Vs. The State (NCT of Delhi) reported in 2018 12 SCC page 129, wherein the Supreme Court has given guidelines to be kept in mind at the time of considering a bail petition. One of the main guideline that was given by the Hon'ble Supreme Court was that the Court must taken into consideration, the nature of accusation and the impact that the release of the accused person makes on the prosecution, witness and the society at large.

7. The learned Senior Counsel concluded the arguments by submitting that supervening circumstances were available even on the date of which, the bail petition was considered by this

Court and since the same has not been taken note by this Court, the bail granted to the accused person has to be cancelled.

8. Per contra, the learned counsel appearing on behalf of the first respondent submitted that this Court had taken into consideration, the fact that the investigation was completed and the case was at the stage of trial and the first respondent had already suffered incarceration for nearly a year.

9. The learned counsel submitted that merely because the bail petition filed by the co-accused has been dismissed, that cannot be put against the first respondent and the same is not a ground for cancellation of bail. The learned counsel further submitted that the case is at the stage of trial and the first respondent has complied with all the conditions imposed by this Court and he is appearing before the Court below during every date of hearing. The learned counsel in order to substantiate his arguments relied upon the judgment of the Hon'ble Supreme Court in *Kashmira Singh Vs. Duman Singh* reported in CDJ 1996 SC 1579 and *Abdul Basit @ Raju and others Vs. Md. Abdul Kadir Chaudhary* and another reported in CDJ 2014 SC 1023.

10. The learned Additional Public Prosecutor appearing on behalf of the respondent police submitted that the bail petition filed by the co-accused (A1, A3 and A4) has been dismissed by this Court earlier and even after the bail was granted by this Court to the first respondent (A2), this Court was not inclined to grant bail to A1, A3 and A4 in the second bail petition filed by them. The learned counsel submitted that this Court should take into consideration the supervening circumstances that were prevailing on the date, when the bail was granted in favour of the first respondent.

11. This Court has considered the submissions made on either side and perused the materials available on record.

12. The defacto complainant, who is the wife of the deceased had intervened in the bail petition filed by A1, A3 and A4 before this Court and had assisted the prosecution by bringing to the notice of this Court, the facts of the case and the gravity of the offence. While, this Court dismissed the bail petition filed by A1, A3 and A4, this Court had taken into consideration the gravity of the offence and the role played by each of the accused person in the offence. This Court also took note of the guidelines given by the Hon'ble Supreme Court in *Neeran Yadav Vs. State of Uttar Pradesh* and another reported in 2016 (15) SCC 422. This Court dismissed the bail petition filed by the co-accused mainly on the ground it is a heinous offence and murder for gain and the evidence available on record is sufficient to prima facie satisfy the Court about the

involvement of the accused persons in the crime.

13. The first respondent had moved the bail petition before this Court, during vacation and this Court did not have the advantage of hearing the intervenor, since the defacto complainant was not aware about bail the petition moved by the first respondent. At least the respondent police should have instructed the Additional Public Prosecutor, who was appearing in the case about the earlier orders passed by this Court, dismissing the bail petition of the co-accused. This was also not done in this case. The dismissal of the bail petition filed by the co-accused would have had a very serious impact, while, this Court ed the bail petition of A2, since the learned Judge, while dismissing the bail petition of the co-accused, had discussed elaborately on the part played by all the accused persons in the crime. That apart, it is also seen from records that there is recovery from the petitioner also and in a case governed by circumstantial evidence, recovery also plays a vital part and it is also link in the chain of circumstances. It is also seen that the petitioner has five previous cases against him.

14. All the above circumstances are supervening circumstances, which were available on the date, when this Court had considered the bail petition filed by the first respondent.

15. It will be relevant to rely upon the judgment of the Hon'ble Supreme Court in Subodh Kumar Yadav Vs. State of Bihar and Another reported in (2010) 2 MLJ (Cr1) 348 (SC) . The relevant portions of the judgment is extracted hereunder:

"9. Learned counsel for the appellant contended that cancellation of bail can be only with reference to conduct subsequent to release on bail and the supervening circumstances. According to him an application for cancellation will not be maintainable with reference to what transpired prior to the grant of bail. He relied upon the following observations in State of U.P. v. Amarmani Tripathi AIR 2005 SC 3490 : (2005) SCC (Cr) 1960 : (2006) 1 MLJ (Cr1) 39, in support of the said contention at p.45 of MLJ (Cr1):

"17. ...The decisions in Dolat Ram v. State of Haryana (1995) 1 MLJ (Cr1) 211 (SC) and Samarendranath Bhattacharjee v. State of West Bengal (2005) 1 MLJ (Cr1) 104 (SC), relate to applications for cancellation of bail and not appeals against orders granting bail. In an application for cancellation, 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 under Section 439 read with Section 437, continue to be relevant. We, however, agree that while considering and deciding the appeals against grant of bail, where the accused has been at large for a considerable time, the post-bail conduct and supervening circumstances will also have to be taken note of. But they are not the only factors to be considered as in the case of applications for cancellation of bail."

A careful reading of the said observations shows that while considering the factors relevant for consideration of bail already granted vis-a-vis the factors relevant for rejection of bail, this Court pointed out that for cancellation of bail, conduct subsequent to release on bail and supervening circumstances will be relevant. The said observations were not intended to restrict the power of a superior Court to cancel bail in appropriate cases on other grounds. In fact it is now well settled that if a superior Court finds that the Court granting bail had acted on irrelevant material or if there was non-application of mind or failure to take note of any statutory bar to grant bail, or if there was manifest impropriety as for example failure to hear the public prosecutor/complainant where required, an order for cancellation of bail can in fact be made. (See *Gajanand Agarwal v. State of Orissa* (2007) 1 MLJ (Cr1) 377 (SC) : (2006) 9 SCALE 378 and *Rizwan Akbar Hussain Syed v. Mehmood Hussain* (2007) 10 SCC 368 : (2008) 1 MLJ (Cr1) 356.

10. Further, while cancelling bail, the superior Court would be justified in considering the question whether irrelevant material were taken into consideration by the Court granting bail.

12. The findings recorded by the learned Sessions Judge and the High Court make it clear that the learned Magistrate had exercised discretion vested in him under Section 437 with oblique motive. The learned Magistrate was apparently bent upon granting bail to the appellant and, therefore, not only decided to hear

the bail application presented by the appellant on the same day, but had also called for record from the superior Court and granted bail to the appellant without hearing the learned counsel for the complainant. As the judicial discretion was exercised by the learned Judicial Magistrate First Class in an arbitrary manner and with oblique motives, the learned Sessions Court was justified in setting aside the order granting bail to the appellant. To say the least, the order passed by the learned Magistrate was the result of arbitrary exercise of discretion vested in him. Further the learned Magistrate had taken into consideration totally irrelevant documents which were never referred to in the complaint at all. By taking into consideration those documents the learned Magistrate exhibited his anxiety to release the appellant anyhow on bail. On the facts and in the circumstances of the case, this Court is of the opinion that the High Court did not commit any error in confirming the order of the Sessions Judge cancelling the bail which was arbitrarily granted to the appellant by the learned Judicial Magistrate First Class and, therefore, the instant appeal is liable to be dismissed."

16. It will also be relevant to rely upon the judgment of the Hon'ble Supreme Court in State of Bihar Vs. Rajballav Prasad reported in 2016(3) MWN (Cr.) 517 (SC). The relevant portion of the judgment is extracted hereunder:

12. We may observe at the outset that we are conscious of the limitations which bind us while entertaining a plea against grant of bail by the lower Court, that too, which is a superior Court like High Court. It is expected that once the discretion is exercised by the High Court on relevant considerations and bail is granted, this Court would normally not interfere with such a discretion, unless it is found that the discretion itself is exercised on extraneous considerations and/or the relevant factors which need to be taken into account while exercising such a discretion are ignored or bypassed. In the Judgments relied upon by the learned Counsel for the Respondent, which have already been noticed above, this Court mentioned the considerations which are to be kept in mind while examining as to whether Order of Bail granted by the Court below was justified. There have to be very cogent and overwhelming circumstances that are necessary to interfere with the discretion in

granting the bail. These material considerations are also spelled out in the aforesaid Judgments, viz. Whether the Accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with the evidence. We have kept these very considerations in mind while examining the correctness of the impugned Order.

13. We may also, at this stage, refer to the Judgment in the case of *Puran v. Rambilas and anr.*, 2001 (6) SCC 338, wherein principles while dealing with Application for Bail as well as Petition for cancellation of bail were delineated and elaborated. Insofar as entertainment of Application for Bail is concerned, the Court pointed out that reasons must be recorded while granting the bail, but without discussion of merits and demerits of evidence. It was clarified that discussing evidence is totally different from giving reasons for a decision. This Court also pointed out that where order granting bail was passed by ignoring material evidence on record and without giving reasons, it would be perverse and contrary to the principles of law. Such an Order would itself provide a ground for moving an Application for cancellation of bail. This ground for cancellation, the Court held, is different from the ground that the accused misconducted himself or some new facts call for cancellation.

14. The present case falls in the former category as the Appellant is not seeking cancellation of bail on the ground that the Respondent misconducted himself after the grant of bail or new facts have emerged which warrant cancellation of bail. That would be a case, where conduct or events based grant of bail are to be examined and considered. On the other hand, when Order of grant of bail is challenged on the ground that grant of bail itself is given contrary to principles of law, while undertaking the Judicial Review of such an Order, it needs to be examined as to whether there was arbitrary or wrong exercise of jurisdiction by the Court granting bail. If that be so, this Court has power to correct the same.

21. Keeping in view all the aforesaid considerations in mind, we are of the opinion that it was not a fit case for grant of bail to the Respondent at this stage and grave error is committed by the High Court in this behalf. We would like to reproduce following discussion from the Judgment in the case of

Kanwar Singh Meena v. State of Rajasthan and anr.,
2013 (1) MWN (Cr.) 151 (SC) : 2012 (12) SCC 180:

"10. .. While cancelling bail under Section 439 (2) of the Code, the primary considerations which weigh with the Court are whether the Accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice. But, that is not all. The High Court or the Sessions Court can cancel bail even in cases where the Order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the Court granting bail ignores relevant materials indicating prima facie involvement of the Accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the Accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such orders are against the well recognized principles underlying the power to grant bail. Such Orders are legally infirm and vulnerable leading to miscarriage of justice and absence of supervening circumstances such as the propensity of the Accused to tamper with the evidence, to flee from justice, etc. would not deter the Court from cancelling the bail. The High Court or the Sessions Court is bound to cancel such Bail Orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening the Prosecution case and have adverse impact on the society. Needless to say that though the powers of this Court are much wider, this Court is equally guided by the above principles in the matter of grant or cancellation of bail.

... ..

18. Taking an overall view of the matter, we are of the opinion that in the interest of justice, the impugned Order granting bail to the Accused deserves to be quashed and a direction needs to be given to the police to take the Accused in custody..."

17. It will also be relevant to rely upon the judgment cited by the learned counsel for the first respondent in Abdul Basit @ Raju and others Vs. Md. Abdul Kadir Chaudhary and another reported in CDJ 2014 SC 1023. The relevant portion of the judgment is extracted hereunder:

19. The scope of this power to the High Court under Section 439(2) has been considered by this Court in

Gurcharan Singh and Ors. v. State (Delhi Administration), (1978) 1 SCC 118.

20. In Gurcharan Singh case (supra) this Court has succinctly explained the provision regarding cancellation of bail under the Code, culled out the differences from the Code of Criminal Procedure, 1898 (for short, "old Code") and elucidated the position of law vis-à-vis powers of the Courts granting and cancelling the bail. This Court observed as under:

"16. Section 439 of the new Code confers special powers on High Court or Court of Session regarding bail. This was also the position under Section 498, Cr.P.C. 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 under Section 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 worded 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, under Section 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 under Section 489(2). Under Section 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 under Section 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."

21. In this context, it is profitable to render reliance upon the decision of this Court in *Puran v. Rambilas and Anr.* (2001) 6 SCC 318. In the said case, this Court held that the concept of setting aside an unjustified, illegal or perverse order is absolutely different from the cancelling an order of bail on the ground that the accused has misconducted himself or because of some supervening circumstances warranting such cancellation. In *Dr. Narendra K. Amin v. State of Gujarat and Anr.* (2008) 13 SCC 584, the three-Judge Bench of this Court has reiterated the aforesaid principle and further drawn the distinction between the two in respect of relief available in review or appeal. In this case, the High Court had cancelled the bail granted to the appellant in exercise of power under Section 439(2) of the Code. In appeal, it was contended before this Court that the High Court had erred by not appreciating the distinction between the parameters for grant of bail and cancellation of bail. The Bench while affirming the principle laid down in *Puran* case (*supra*) has observed that when irrelevant materials have been taken into consideration by the Court granting order of bail, the same makes the said order vulnerable and subject to scrutiny by the appellate Court and that no review would lie under Section 362 of the Code. In essence, this Court has opined that if the order of grant of bail is perverse, the same can be set at naught only by the superior Court and has left no room for a review by the same Court."

22. Reverberating the aforesaid principle, this Court in the recent decision in *Ranjit Singh Vs. State of M.P. and others.*

23. Therefore, the concept of setting aside an unjustified, illegal or perverse order is different

from the concept of cancellation of a bail on the ground of accused's misconduct or new adverse facts having surfaced after the grant of bail which require such cancellation and a perusal of the aforesaid decisions would present before us that an order granting bail can only be set aside on grounds of being illegal or contrary to law by the Court superior to the Court which granted the bail and not by the same Court.

24. In the instant case, the respondents herein had filed the criminal miscellaneous petition before the High Court seeking cancellation of bail on grounds that the bail was obtained by the petitioners herein by gross misrepresentation of facts, misleading the Court and indulging in fraud. Thus, the petition challenged the legality of the grant of bail and required the bail order to be set aside on ground of it being perverse in law. Such determination would entail eventual cancellation of bail. The circumstances brought on record did not reflect any situation where the bail was misused by the petitioner-accused. Therefore, the High Court could not have entertained the said petition and cancelled the bail on grounds of it being perverse in law."

18. From the above judgments, it is clear that the High Court, in exercise of its jurisdiction under Section 439 (2) of Cr.P.C, can cancel the bail even in cases, where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the Court granting bail, in ignorance of the relevant materials indicating prima facie involvement of the accused person or has taken into account irrelevant materials which has no relevance to the question of grant of bail to the accused, the High Court would be justified in cancelling the bail.

19. In an application for cancellation of bail, the conduct subsequent to release on bail and supervening circumstances alone are relevant. If the case does not fall within these two heads, this Court should not proceed to cancel the bail, since the same virtually amounts to reviewing the earlier order, which is barred under Section 362 of Cr.P.C.

20. In the instant case, this Court is not concerned about the conduct of the first respondent, subsequent to the bail granted by this Court and this case falls under the category of supervening circumstances. The supervening circumstances that were available on the date, when this Court considered the bail petition were:

(a) The co-accused had been denied bail by this Court, after taking into consideration, the gravity of the offence;

(b) The prima facie materials that were available against the first respondent like recoveries that were made from the petitioner and which prima facie shows the involvement of the first respondent in the crime, were not brought to the notice of this Court;

(c) The gravity of the offence and the grotesque manner in which, the crime has taken place and the impact it will have on the defacto complainant and the society at large, were not considered by this Court;

(d) The Criminal antecedents of the first respondent, who had five previous cases against him.

21. These supervening circumstances were never considered / brought to the notice of this Court, and this Court had dealt with the bail petition in a routine manner.

22. Therefore, this Court is of the considered view that the bail granted by this Court in favour of the first respondent has to be necessarily cancelled, since he is also placed on par with the other co-accused persons. The grant of bail in a case of this nature which involves a heinous offence, will certainly have the impact on the society. Therefore, this Court has no hesitation to cancel the bail granted in favour of the first respondent.

23. In the result, the bail granted by this Court in CrI.O.P.No.8288 of 2019, by an order dated 08.05.2019, is hereby cancelled and this Criminal Original Petition is accordingly allowed. The respondent police is directed to immediately secure the first respondent and commit him to judicial custody. This Court had already fixed a time limit for the completion of the proceedings in the earlier order passed by this court and this Court expects the trial Court to adhere to the time limit and complete the proceedings and file a compliance report before this Court.

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Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Sessions Judge,
Tiruppur, Tiruppur District.
2. Inspector of Police,
Tiruppur North Police Station,
Tiruppur District.
3. The Public Prosecutor,
High Court, Madras,

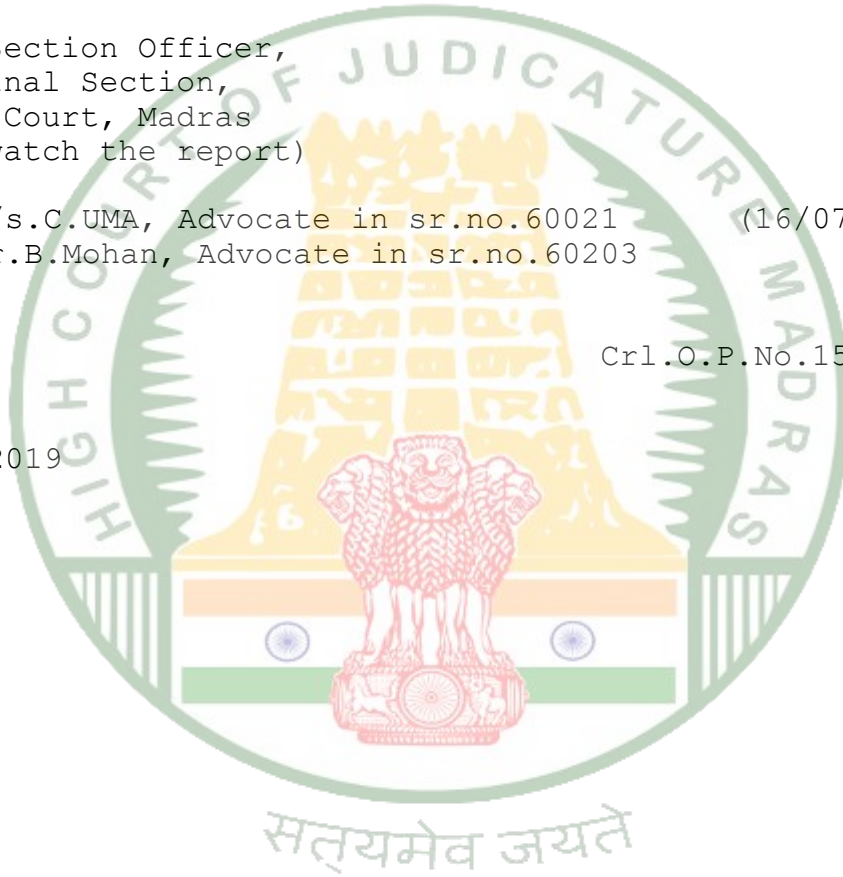
Copy To

The Section Officer,
Criminal Section,
High Court, Madras
(To watch the report)

+1cc to M/s.C.UMA, Advocate in sr.no.60021 (16/07/2019)
+1cc to Mr.B.Mohan, Advocate in sr.no.60203

CrI.O.P.No.15721 of 2019

RSY(CO)
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