

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR CANCELLATION OF BAIL NO.5 OF 2020

Kanchan Gopal Kabra
Age: 46 years, Occu.: Household
R/o.8, Sarela Society,
Behind Bank of Baroda,
Navrangpura, Ahmedabad
(Gujarat)

... Applicant

Versus

1. The State of Maharashtra,
Through : Songir Police Station
Tq. & Dist. Dhule
2. Vihang Bipinchandra Trivedi
Age: 51 years, Occu.: Service,
R/o. F1/32 Siren Heights, Atladra,
Baroda, (Gujarat State)

... Respondents

WITH
APPLICATION FOR CANCELLATION OF BAIL NO.6 OF 2020

Kanchan Gopal Kabra
Age: 46 years, Occu.: Household
R/o.8, Sarela Society,
Behind Bank of Baroda,
Navrangpura, Ahmedabad
(Gujarat)

... Applicant

Versus

1. The State of Maharashtra,
Through : Songir Police Station
Tq. & Dist. Dhule
2. Krishna Gendalal Somani
Age: 52 years, Occu.: Business
R/o.11, Uday Park, Jetalpur Park,
Baroda, (Gujarat State)

... Respondents

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Mr. K. C. Sant, Advocate for applicant in both the matters.

Mr. A. M. Phule, APP for respondent No.1 – State in both the matters.

Mr. N. L. Choudhary, Advocate for respondent No.2 in ACB No.5 of 2020.

Mr. P. M. Lakhani and Mr. R. N. Chavan, Advocate for respondent No.2 in ACB No.6 of 2020.

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 14th October, 2020

PRONOUNCED ON : 24th November, 2020

COMMON ORDER :

. Both these applications have been filed by the original informant for cancellation of bail, under Section 439 (2) of Code of Criminal Procedure, granted to respondent No.2 in both the cases by learned Sessions Judge, Dhule. Respondent No.2 in ACB No.5 of 2020 is accused No.1 and respondent No.2 in ACB No.6 of 2020 is accused No.2 (for the sake of convenience hereinafter they are referred to as 'Accused Nos.1 and 2'). Both of them have been arrested in connection with Crime No.77 of 2019 registered with Songir Police Station, Dist. Dhule for the offences punishable under Sections 302, 201, 120(B) read with Section 34 of Indian Penal Code. Both of them were arrested on 03-06-2019. Accused No.1 had filed application at Exhibit-4 after the committal of the case to the Sessions Court, which has been now numbered as Sessions Case No.217 of 2019, whereas accused No.2 had filed application at Exhibit-14/D in the said Sessions case for his release on bail. Thus, both the accused persons had filed

the said applications under Section 439 of the Code of Criminal Procedure. Both the applications came to be allowed and they have been released on bail by order dated 22-10-2019 and 12-11-2019 respectively.

2. Heard learned Advocate Mr. K. C. Sant for applicant in both the cases, learned APP Mr. A. M. Phule for respondent No.1 – State in both the cases, learned Advocate Mr. N. L. Chudhary for respondent No.2 in ACB No.5 of 2020 and learned Advocate Mr. P. M. Lakhani and Mr. R. N Chavan for respondent No.2 in ACB No.6 of 2020.

3. The learned Advocate appearing for the applicant – original informant submitted that the learned Sessions Judge committed gross error in granting bail to both the accused persons. In fact, accused No.2 is behind the murder of deceased Gopal Kabra, who was the husband of the informant. Accused No. 2 had hatched up the criminal conspiracy with accused No.1 and others. Accused No.2 is the husband of maternal aunt of deceased. By hatching up the conspiracy, they had called deceased to Shirdi and, thereafter, while returning, the murder has been committed at a place on Songir to Dondaicha road, within the jurisdiction of Songir Police Station, Dist. Dhule. The prosecution had not produced the criminal antecedents of accused No.2. He is involved in Crime No.146 of 2019 registered with Gotri Police Station, Baroda, Gujarat for the offences punishable under Sections 406, 420, 386, 123 of Indian

Penal Code. Though presently accused No.2 is acquitted in appeal by Hon'ble High Court of Gujarat, yet, accused No.2 was convicted in the year 1997 by the Sessions Court, Baroda for the offences punishable under Sections 302, 120-B, 201 of Indian Penal Code. He was directed to suffer imprisonment for life. Another case is filed against him in the year 2004, which was lodged by Bank of Baroda for defrauding the bank to the extent of Rs.2.95 Crores. Accused No.2 was declared as wanted by Madhya Pradesh Police in connection with the offence of committing gang rape in the year 2009. A bounty of Rs.15,000/- was declared by the police against accused No.2. Accused No.2 is also facing trial for the offence punishable under the N.D.P.S. Act at Baroda. The things are crystal clear that when accused No.2 is practically in judicial custody, though he is released on bail in Crime No.146 of 2019 registered with Gotri Police Station, yet while so in custody, he has hatched up a conspiracy. Under such circumstance, he ought not to have been released on bail. As regards the evidence that has been collected against accused No.2, he has been identified in the identification parade that was arranged in connection with this case. Taking into consideration the close relation between the informant and accused No.2, possibility of pressurizing the witnesses cannot be ruled out. Definitely there is fear to the life of witnesses, when he has already committed cold blooded murder. As regards accused No.1 is concerned, he is actively involved in a murder case. He, as a part of conspiracy hatched up by him with accused No.2, had called the deceased

to Shirdi under the pretext of giving money. He made the deceased to leave hotel in Dhule and further asked him to proceed in the night itself. The CCTV footage collected from various points in Shirdi as well as the hotel would clearly show that he is involved and the same has not been considered by the learned Sessions Judge. A very cryptic order has been passed taking into consideration the fact that case is based on circumstantial evidence. Though the case is based on circumstantial evidence, the circumstances and the material collected in respect of each of the accused ought to have been considered. Learned Advocate for applicant prayed for cancellation of bail.

4. Learned Advocate Mr. Lakhani and learned Advocate Mr. N. L. Choudhary for respondent No.2 in respective matters would submit that both the applications are not maintainable and the applicant ought to have knocked the doors of the same Court. Further, the applications have been filed after the completion of investigation and when charge sheet was filed. Therefore, entire material was available before the Court. The prosecution had not come with the case that the investigation has been hampered in any way. The case is definitely based on circumstantial evidence and on the basis of the suspicion that was raised, the discretion that has been used by the learned Sessions Judge does not require any interference. Even in the present applications, the informant has not come with the case that accused Nos.1 and 2 have violated any condition. Sound and sufficient reasons have been given by the learned Sessions Judge.

5. Learned Advocate Mr. Lakhani representing accused No.2 referred to the affidavit-in-reply given by accused No.2, especially giving the details as to in which case he is involved and what is the result. As regards the case registered with Gotri Police Station, Dist. Baroda, he submits that he has been released on bail and the observations have been quoted by the Hon'ble Gujarat High Court in the order of bail application. It is further stated that in the appeal he has been acquitted from the offences punishable under Sections 302, 120(B) and 201 of Indian Penal Code. It cannot be taken as criminal antecedents. It is stated that he has never been arrested in the FIR filed by Bank of Baroda in the year 2004, which was later on given for investigation to CBI. Further, as regards the case registered with Gandhinagar Police Station, Bhopal, Madhya Pradesh under Section 376 of Indian Penal Code, he states that he has been acquitted and the 2nd Additional Sessions Judge, Bhopal, Madhya Pradesh has issued criminal proceedings against the prosecutrix under Section 340 of the Code of Criminal Procedure. Further, as regards the N.D.P.S. case is concerned, he submits that the High Court of Gujarat has granted him regular bail and the attempt to cancel that bail by the informant therein before the Hon'ble Supreme Court did not succeed. Therefore, there are no such criminal antecedents against accused No.2, which would disentitle him from getting bail. There is absolutely no direct evidence which can be spelt from the charge sheet and, therefore, the learned Sessions Judge has rightly granted the bail by using the discretionary power.

6. Learned Advocate Mr. N. L. Choudhary has relied on the decision in ***Bhagirath Singh s/o Mahipat Singh Vs. State of Gujarat, [1984 AIR 372]***, wherein it has been held :-

“Very cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail and the trend today is towards granting bail because it is now well-settled that the power to grant bail is not to be exercised as if the punishment before trial is being imposed. The only material considerations in such a situation are 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 evidence.”

7. When the point of maintainability was raised, the learned Advocate Mr. K. C. Sant representing the informant relied on the decision in ***Brij Nandan Jaiswal Vs. Munna @ Munna Jaiswal and another, [2009 AIR SCW 134]***, wherein it has been observed :-

“ It is now a settled law that complainant can always question the order granting bail if the said order is not validly passed. It is not as if once a bail is granted by any court, the only way is to get it cancelled on account of its misuse. The bail order can be tested on merits also. In our opinion, therefore, the complainant could question the merits of the order granting bail. However, we find from the order that no reasons were given by the learned Judge while granting the bail and it seems to have been granted almost mechanically without considering the pros and cons of the matter. While granting bail, particularly in serious cases like murder some reasons justifying the grant are necessary.”

8. First of all as regards the maintainability of the application is concerned, definitely the ratio laid down in ***Brij Nandan Jaiswal (Supra)*** would be applicable and, therefore, when the informant is coming with the case that certain factors, which were required to be considered by the learned Sessions Judge have not been considered, then definitely when the same Court cannot sit as an appeal against its own order, the only remedy would be to approach the higher Court, which is higher in superintendence. Here, in this case, though the application is under Section 439(2) of the Code of Criminal Procedure and High Court as well as Court of Sessions have concurrent jurisdiction, yet, for the foregoing reasons that the same Court cannot sit as an appeal and on the basis of certain factors not considered, cannot deal with such application. Here, in these applications, the informant is criticizing and challenging the said orders, then definitely this Court as the superior Court is empowered to hear the applications. There is no substance in the said point raised.

9. At the outset, after going through the impugned orders passed by the learned Sessions Judge, Dhule one thing is clear that a very cryptic order has been passed, when the entire charge sheet was before the learned Sessions Judge. All the factors involved ought to have been considered in detail, though simultaneously considering them *prima facie* for the purpose of bail. In other words, it ought to have been seen what evidence is against the particular accused, role attributed specifically, whether the evidence shows any kind of

active role, criminal antecedents, if any, possibility of tampering etc.

10. In *Myakala Dharmarajam and others etc. Vs. State of Telangana and another*, (2020 CRI. L. J. 1457 : AIROnline 2020 SC 5), it has been observed that, “the factors are to be considered while granting bail have been considered by this Court to be the gravity of the crime, the character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the evidence and witnesses, and obstructing the course of justice etc. Each criminal case presents its own peculiar factual scenario and, therefore, the certain grounds peculiar to a particular case may have to be taken into account by the Court. The Court has to only opine as to whether there is any *prima facie* case against the accused. For the purpose of bail, the Court must not undertake meticulous examination of the evidence collected by the police and comment on the same.” Therefore, when the law is crystal clear as to what should be seen/considered by the Courts while dealing with an application under Section 439 of the Code of Criminal Procedure, then the order should reflect all those factors. Merely by saying that the case is dependent on circumstantial evidence, it cannot be stated that the concerned Judge had considered all the material that is placed on record along with the charge sheet.

11. Now, though the learned Sessions Judge appears to have given a cryptic order, yet, it is required to be seen as to what kind of evidence the

investigating agency had placed with the charge sheet. Informant, who is widow of the deceased Gopal Kabra has given the first information report. Gopal Kabra was found murdered in the intervening night of 29-05-2019 and 30-05-2019 on Songir-Dondaicha road. It is to be noted that the informant and deceased were resident of Ahmedabad, Gujarat State. Deceased was in the business of commission agent. He was dealing with the immovable properties on commission basis. He came in contact with accused No.1 through accused No.2. As aforesaid, accused No.2 is the relative of deceased. A land dealing had taken place between accused No.1 and one Mehul Prajapati, through deceased as agent. The informant says that she had the knowledge about said transaction, as she had heard it when her husband was in conversation with the other party on his mobile. In connection with that transaction, accused No.1 had told deceased that his Jyotishi (Astrologer) had told him to pay the amount on 28-05-2019, which was the auspicious day. He told that he would pay the amount at Shirdi and asked deceased to come. He had managed his own driver by name Lalit from Baroda. Accused No.2 had stated that he would be in Delhi from 28-05-2019 for 3-4 days. Accused No.1 had given two new mobile handsets for the deceased and it was told that the conversation should be from said new mobiles only. Deceased Gopal went to Shirdi on 28-05-2019. On the way, he had conversation with the informant. It has been stated that he had stayed at Prabhat Palace Hotel in Shirdi. On the next day, he had conversation with the

informant. It was also told that, accused No.1 was with his friend Niruben Thakkar. It was told by the deceased that accused No.1 has not given cash, but has given three pouches of diamonds to him and then deceased started his return journey. He went to Dhule and stayed at Hotel Zankaar. At night time, he informed the informant that the remaining 30% of the amount in the form of diamond has been given to his driver Lalit and then he should move to Ahmedabad at night time itself. Believing in him deceased left Dhule at about 2.30 a.m. At about 3.20 a.m., informant received phone call from deceased and, at that time, he was in a frightened condition. He informed that the driver has left the main road and taken the vehicle to a *kaccha* road. He has a fear to his life and, therefore, he asked the informant to contact accused No.2. She tried to contact accused No.2, however, the contact could not be established. She received a phone call at about 7.00 a.m. from the mobile of her husband, which was provided by accused No.1. The person calling informed that he is a truck driver and by standing near car, he was informing that there is a person lying in dead condition from whom he got the mobile and he is informing the same. He gave the location and, thereafter, the brother-in-law of the informant informed Songir Police Station about the incident. After getting the information, informant went to Dhule, saw the dead body of her husband and, thereafter, lodged report.

12. Thus, after taking into consideration the FIR, we are required to consider as to what evidence has been collected against accused Nos.1 and 2. In connection with role of accused No.2, police have recorded statement of Nitin Beniprasad Sahu, who is a travel consultant from Bhopal. He has stated that he received a phone call from Advocate Rajendra Sharma on 29-06-2019 stating that his client need a vehicle and accordingly, he provided the car. According to him, that car was provided for accused No.2. The driver was in contact with this witness and it appears that as regards the events those had taken place on 30-05-2019 narrated by him that accused No.2, though with the driver of this witness, was not picking up phones and the relatives and others were under fear that he would have been abducted. The driver had told him that accused No.2 had taken the vehicle at Songir, near Dhule and they had stayed at Hotel Swagat. They had left for Bhopal on 10.15 a.m. Statement of said driver Amir Khan Anwar Khan from Bhopal has also been recorded. As regards the fact that accused No.2 had hired the said vehicle and he had driven that vehicle is concerned, he states the same facts and then he says that near Khalghat which is 30 Kms away from Manpur, some person who was accompanying accused No.2 whom he had picked up from Bhopal itself was left and accused No.2 and the driver were the only persons who proceeded further to Songir. They had reached Songir at about 12.30 p.m. on 29-05-2019. He states that after he had got down at the hotel and had dinner, he went to sleep. He was informed by accused No.2

at about 7.30 a.m. on 30-05-2019 that he is at Malegaon and accused No.2 asked him to come to pick him up. When it was informed by this witness to accused No.2 that Malegaon is about 70 Kms, then accused No.2 asked him to stop at that place itself. He then says that accused No.2 came at about 10.15 a.m. and asked him to take the vehicle to Dhule. Three persons, who were standing by the side of the road near a puncture shop were taken in the car. Accused No.2 and those three persons were not talking with each other and all of them had put off their mobile phones. In the meantime, the owner of the car had contacted the driver from Bhopal asking about the whereabouts and when he tried to give the said phone to accused No.2, he had cut it. He told the driver that if anybody tries to contact him for accused No.2, then he should tell them that he is not with him. However, in respect of the phone call by his owner, he made the conference call and told him about location. Accused No.2 asked the vehicle to be stopped at about 110 kms from Indore and those three persons then got down. They were talking in Gujarati and, therefore, the witness could not understand it. Thereafter, he took accused No.2 to Bhopal. In his supplementary statement, he has identified accused No.2 and Lalit @ Dayabhai Nagjibhai Waghela, who is also an accused in this case now. Thereafter, there are statements of Mehul Prajapati, who had entered into transaction and it is in respect of the role of accused No.1. Statement of Niruben Rathod is also recorded, who was along with accused No.1 at Shirdi. She has stated about the

meeting that had taken place between deceased and accused No.1. She has also stated that accused No.1 had shown her some diamonds and according to her, the cost of the diamonds was about Rs.4 crores. She has also stated about the phone call between accused Nos.1 and 2, but then she says that she was with accused No.1 and they had separately travelling, but then she also states that accused No.1 was receiving phone call from accused No.2 in the journey. Statement of Advocate Rajendra Sharma from Bhopal has also been recorded. He states that accused No.2 had met him on 29-05-2019 at about 1.30 p.m. Prior to that on 28-05-2019 itself, accused No.2 had given him phone call and explained his plan to come to Bhopal and requested him to make arrangement of a vehicle for going to Shirpur. Accordingly, he had made the said arrangement. He also states that he had received a phone call at about 9.30 a.m. on 30-05-2019 informing him by accused No.2 in frightened condition that there is a murder at Dhule and his name is involved in the same.

13. Statements of other witnesses have also been taken including the near relatives of deceased, the persons at the hotel where deceased had stayed in Shirdi and Dhule. Many articles have been seized, however, it appears that the CA reports are yet awaited. Inquest panchanama and postmortem report are submitted.

14. Intentionally, all these things are taken in detail, as to which witness has stated what. Definitely, they are stating about role played, however, it

appears that there is no direct evidence, which would specifically state as to how and by whom, the murder was committed. Perusal of the charge sheet would further show that one of the accused is still absconding. The call details have not been produced, which would have shown that there was such conversation between these persons. Certain mobile phones have been seized, so also the seizure has been effected under Section 27 of the Indian Evidence Act, but it is not in connection with any disclosure made by the present accused persons. With such circumstantial evidence, definitely, case was made out to exercise the discretion in favour of releasing the accused persons on bail. It would be for the prosecution to establish all the segments in the chain of events to complete the chain of circumstantial evidence.

15. Now, as regards the criminal antecedents of accused No.2 is concerned, definitely his acquittals are required to be considered when the Court of competent jurisdiction has acquitted him. Further, as regards the present cases are concerned, he appears to have been involved in two cases, one is registered with Gotri Police Station for the offences punishable under Sections 406, 420, 386 of Indian Penal Code and secondly, under the N.D.P.S. Act. In both the cases, he has been released on bail. No doubt, the criminal antecedents should be taken into consideration while dealing with the subsequent application for bail, however, mere involvement may not put a barrier on the powers of the competent Court to use the discretion. The evidence that has been collected in

the present matter is also then required to be considered. Whether the circumstantial evidence collected uptill now is strong enough was also required to be considered in this case. Further, when the conditions are imposed, then definitely the fear of the informant or her relatives cannot be the ground for cancellation. Mere possibility will not be the ground, as since the date of the bail till filing of this application nothing has been reported, which would amount to tampering, at the behest of respondent No.2 in both the cases.

16. As regards the cancellation of bail is concerned, this Court would like to rely upon certain pronouncements. The Hon'ble Supreme Court in ***Ms. X Vs. State of Telangana and another, (2018 SAR (Criminal) 786)*** has held that, *“it is a settled principle of law that bail once granted should not be cancelled, unless a cogent case based on a supervening event made out”*. The principles laid down in ***Daulatram Vs. State of Haryana, (1995) 1 SCC 349)*** have been reiterated, those are as follows :-

“Rejection of a 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, broadly (illustrative and not exhaustive) are: interfere or attempt to interfere with the due course of administration of justice or evasion of 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.”

17. Further, the observations from ***Dataram Singh Vs. State of Uttar Pradesh (2018 (2) SCALE 285)*** has also been taken, which reads thus :-

“It is also relevant to note that there is difference between yardsticks for cancellation of bail and appeal against the order granting bail. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail already granted. Generally speaking, the 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 concessions granted to the accused in any manner. These are all only few illustrative materials. The satisfaction of the Court on the basis of the materials placed on record of the possibility of the accused absconding is another reason justifying the cancellation of bail. In other words, 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.”

18. This Court in ***Mirza Ilyas Baig Mirza Sharif Vs. State of Maharashtra (2006 ALL MR (Cri) 1315)*** has observed that, “when liberty is granted to the

citizen, it should not be taken away unless there is sufficient material against him. So also, the Court entertaining the matter should have cautious approach. Court cannot act in a mechanical manner.” So also the ratio laid down in ***Bhagirath Singh’s*** case (Supra) would then be applicable. There was every opportunity available to the present informant to inform about the criminal antecedents, either directly to the Court by filing an application or to the police who had opposed the bail application. There was no effort by the prosecution also to inform the learned Sessions Judge about the criminal antecedents of accused No. 2. No reason has been assigned in ACB No.6 of 2020 as to why those criminal antecedents of accused No.2 were not brought to the notice of the concerned Court. Now, for the first time, in this application, which is in the nature of an appeal, that point cannot be raised. Even after taking into consideration the material evidence that has been collected, it can be seen that there is no case made out to take away the personal liberty granted to accused No. 1 and 2 by cancelling their bail as contemplated under Section 439(2) of the Code of Criminal Procedure. Hence, both the applications stand rejected.

[SMT. VIBHA KANKANWADI, J.]

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