

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR CANCELLATION OF BAIL NO.168 OF 2019

Mrs. 'X'

... Applicant

Versus

1. The State of Maharashtra
2. The Superintendent of Police,
at Nanded.
3. Pushpraj s/o Subhash Rathod

... Respondents

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Mr. Amit A. Mukhedkar, Advocate for applicant.

Mrs. R. P. Gaur, APP for respondent Nos.1 and 2 – State.

Mr. R. S. Deshmukh, Senior Counsel i/b Mr. Govind Kulkarni, Advocate for respondent No.3.

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 26-11-2020

PRONOUNCED ON : 04-12-2020

ORDER :

. Present application has been filed by original informant under Section 439(2) of the Code of Criminal Procedure for cancellation of bail granted to respondent No.3 in Miscellaneous Criminal Application (Bail) No.871 of 2019 by learned Additional Sessions Judge-2, Nanded on 14-10-2019. Respondent No.3-original accused was arrested in Crime No.362 of 2019 registered with Shivaji Nagar Police Station for the offences punishable under Sections 376(2)

(N), 506 read with Section 34 of Indian Penal Code on the basis of the FIR lodged by the present applicant.

2. Heard learned Advocate Mr. Amit A. Mukhedkar for applicant, learned APP Mrs. R. P. Gaur for respondent Nos.1 and 2 – State and learned Senior Counsel Mr. R. S. Deshmukh instructed by learned Advocate Mr. Govind Kulkarni for respondent No.3 – State.

3. It has been vehemently submitted on behalf of the applicant that the learned Additional Sessions Judge did not take into consideration the facts properly and made unnecessary observations contrary to the interest of the applicant without there being any evidence at *prima facie* stage. The applicant is a married lady, however, there is dispute between her and her husband since January, 2017. Therefore, they are residing separately. The applicant is serving in primary health centre and in connection with her job, she became acquainted with the accused. In fact, he had helped the applicant in Court proceedings which she had taken up against her husband. After getting her confidence, he had invited her in his rented house on couple of occasions. In the month of September 2017, when she had gone to his house, he gave a juice (*Sharbat*) laced with sedatives to her. After drinking the said juice, taking disadvantage of the situation of the applicant, the accused has committed forcible sexual intercourse with her. In fact, she became pregnant from the accused and gave

birth to a child. The accused has extracted amount of Rs.1,00,000/- from her by giving threats. So also, he has taken away her gold ornaments. She was also forced to give the custody of the child to the accused under the threat that they have connection with the police department and politicians. She was also forced to give her salary of two months to the accused. With such kind of torture, when the applicant collected courage to lodge the report against the accused persons, accused No.1 has been granted anticipatory bail without understanding the gravity of the offence. The observations that there appears to be consensual act and the applicant was cohabiting with accused as husband and wife, delay in lodging the report, are the observations which do not stand to the sentiments of the applicant.

4. Learned Advocate appearing for the applicant pointed out that, in fact, respondent No.3 – original accused No.1 (hereinafter referred to as ‘accused’) had filed first anticipatory bail application i.e. Miscellaneous Criminal Application No.863 of 2019 on 30-09-2019 before the Sessions Court and it was allotted to learned Additional Sessions Judge-1, Nanded. That first bail application was not pressed by the accused and as per the said order it appears that it was disposed of on 07-10-2019. It was stated that it was not pressed by the learned Advocate for the accused on technical grounds by reserving the right to file fresh application. However, on 01-10-2019, accused had filed Miscellaneous Criminal Application No.871 of 2019 and it was allotted to

learned Additional Sessions Judge-2, Nanded. Thus, the accused had succeeded in moving the second bail application by pretending that it was the first bail application and got the bench of his choice. This act on the part of the accused and his Advocate before the Sessions Court ought to have been noticed by the learned Additional Sessions Judge. Therefore, under these circumstances, the bail granted to respondent No.3 deserves to be cancelled.

5. In his affidavit-in-reply, respondent No.3, has denied all the allegations. It has been stated that, in fact, on the technical ground, the first bail application was not pressed by him on 01-10-2019 and the order came to be passed on that day itself. On the same day, he had filed Criminal Application No.871 of 2019 and it has been decided on merits. Allegation of forum hunting is wrong. In fact, present respondent No.3 had no idea as to why his Advocate had not pressed the earlier application when, in fact, he had not given such instructions to his Advocate.

6. Learned Senior Counsel Mr. R. S. Deshmukh instructed by learned Advocate Mr. Govind Kulkarni vehemently submitted that after the first application was not pressed on 01-10-2019, the second application was filed, however, as per the procedure that is adopted at Nanded, the roster changed and the application went to another judge. It cannot be said to be a deliberate act on the part of the Advocate representing the accused to choose a proper forum. The

earlier bail application was not pressed for technical ground, however, the right was reserved to file fresh application. As regards the bail application which has been granted by learned Additional Sessions Judge-2, he has taken note of all the documents which were made available by the prosecution for his perusal. The facts of the case were also considered. The facts by itself would show the delay in lodging the FIR. Even the child was born, yet, the informant says that she was under threat. Further, proper conditions have been imposed by the concerned Court when it was found that his custody is not required. Under such circumstance, no case is made out to cancel the bail that has been granted to respondent No.3.

7. Learned Advocate appearing for the applicant – informant has relied on the decision in *State of Maharashtra Vs. Sayyad Abdulhak Sayyad Khaja and others, (2014 (2) Bom.C.R. 506)* wherein it has been held that, “Court has power under Section 439 (2) of the Code of Criminal Procedure to cancel orders of bail when Court granting bail committed gross error in not considering relevant material and also on point of law.”

8. At the outset, it can be seen that the present applicant has come to this Court with two-fold submissions. One is regarding forum hunting and second is in respect of not considering the facts properly and committing error in making contrary observations. As regards the first point i.e. forum hunting is

concerned, it will not be out of place to mention that this Court by order dated 26-10-2020 had called for the remarks from learned Sessions Judge, Nanded on the point that when the bail applications are accepted at one place only i.e. the filing desk, then what is the system that is followed at Nanded after filing of such petition by same person in the same matter. The remarks those have been received would show that the learned Sessions Judge on his own appears to have taken remarks from the concerned Judicial Officer, which is in fact not contemplated under the order that was passed on 26-10-2020. Learned Sessions Judge, being the ultimate administrative head, was required to give his remarks regarding the procedure that is adopted and then he has given that the remand work as well as bail applications are allotted on monthly rotation basis to all the Additional Sessions Judges. It is stated that as per the practice, if the initial bail petition is decided on merits, then the second or subsequent petition would be allotted to the same Court who have decided the earlier petitions irrespective of turn. But, if such earlier bail application is withdrawn or not pressed, then the same procedure is not followed, but it will go as per the rotation. The remarks of the learned Sessions Judge are not being pointly answering the procedure that is adopted at the filing desk. The filing desk is required to scrutinize the applications also and if it is seen that a bail application is pending with one Court, then objection should be raised regarding maintainability of the second application. Such application then should be

placed before the Sessions Judge for further orders. Perusal of the record and proceedings of both the matters i.e. Criminal Application No.863 of 2019 and 871 of 2019 would show that Criminal Application No.863 of 2019 was filed on 30-09-2019. The order of issuing notice to the respondent was passed by the learned Sessions Judge, to whom the application was allotted, on the same day and it was made returnable on 01-10-2019. Thereafter, there appears to be a remark by Advocate “not pressed on technical ground by reserving right to file fresh application”. Interestingly, the learned Advocate has not given date below his signature. Thereafter, there is order by the learned Additional Sessions Judge that “applicant not pressed the application, hence filed”. Though the date below the order can be interpreted as 01-10-2019, or 07-10-2019, yet, it appears that it was disposed of on 01-10-2019 itself. Unfortunately, the timing has not come on record or it has not been put. But the fact remain that on 01-10-2019 itself, another Criminal Application i.e. Miscellaneous Criminal Application No.871 of 2019 was filed. It can be seen that the earlier application appears to have been filed by one C. Y. Metkar and this second application is filed by Advocate Sameer S. Patil. However, below the prayer in Bail Application No.863 of 2019, Advocate Sameer S. Patil has signed, who appears to be the signatory to the second application also. One more important fact that is required to be seen is that on the first page of Miscellaneous Criminal Application No.863 of 2019, it is stated that it is the first bail application and on the first page of Miscellaneous

Criminal Application No.871 of 2019 also, it is stated that “it is the first bail application”. When learned Advocate Mr. Patil had knowledge, when he signed the earlier bail application, that he has already filed the application for the same accused in the same matter, how his subsequent application i.e. Miscellaneous Criminal Application No.871 of 2019 can be first application. In the scrutiny by filing desk this fact could have been noticed. Therefore, remarks from the Sessions Judge were called, but it appears that, that point has been missed. If we can consider both the applications, they are same i.e. the contents are same, it is rather copy paste, then what was the technical ground on which the earlier application was not pressed is a question. Such practices are definitely required to be deprecated that by keeping the Court in dark, the procedure adopted is used in such a manner which would be detrimental to the system. When it went unnoticed that first application filed a day before is still pending, the result was to entertain the second application as first application and it would have been allotted to another Court by rotation. The facts may not lead us conclusively to the allegation of forum hunting, but then definitely there appears to be an attempt by the accused or his Advocate who was representing him before the Additional Sessions Judge to get some advantage of the said procedure of rotation.

9. Taking benefit of this matter, notice of the learned Sessions Judge is required to be drawn to this fact and to expect from him to strengthen the

system and adopt such procedure which will not leave any gap of which suitable advantage can be taken by anybody. As aforesaid, though the procedure might have been utilized by the learned Advocate or the accused for his purpose, yet, we cannot ultimately draw the conclusion, as the learned Advocate for the applicant herein desires and that cannot be the ground to cancel the bail.

10. Now, turning towards the other ground, it is apparent that there is huge delay in lodging the report. The informant has tried to give an explanation for the said delay, but whether that delay is fatal to the prosecution story or not would only be considered at the end of the trial when evidence would be adduced. The learned Judge while granting bail was justified in taking note of the delay. Further, taking into consideration the fact that she has even begotten the child on 15-08-2018, yet, she has filed the FIR on 26-09-2019, the learned Judge has observed that the case appears to be of consensual sex. The FIR also says that there were repeated acts of sexual intercourse before the child was born and even at that time she did not file any complaint. Note has also been taken of N.C. report lodged by her on 14-09-2019 in which she has alleged that the wife of the accused had beaten her. The fact is that she herself was also married and had the knowledge about the marriage of the accused, then it has been observed by the learned Additional Sessions Judge that the case appears to be of consensual sex. These are the *prima facie* observations which were for the sake of bail applications only and, therefore, the informant need not get

offended. The evidence is yet to be led and after the evidence, if the prosecution would be able to prove the offence beyond reasonable doubt, then the consequences are going to follow. Those *prima facie* observations are based on the contents of the FIR itself and, therefore, it cannot be said that the said Court had committed any gross error in not considering relevant material. The ratio laid down in the case of *Sayyad Abdulhak Sayyad Khaja (Supra)* cannot be disputed, however, the facts are different and, therefore, the principles may not be applicable here.

11. 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, it was not necessary for the learned Judge to go into each and

every allegation, consider the evidence that was collected uptill now. Only overview of the evidence collected ought to have been taken.

12. 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."

13. 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.”

14. 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.”*

15. Since no error has been committed by the learned Additional Sessions Judge while granting anticipatory bail to respondent No.3 – original accused and also care has been taken to impose necessary conditions, there is no need to invoke the powers of this Court under Section 439(2) of the Code of Criminal Procedure.

Hence, the application stands rejected.

16. Learned Registrar (Judicial) is directed to forward a copy of this order to the learned Sessions Judge, Nanded for taking appropriate steps in view of the observations in paragraph Nos.8 and 9.

[SMT. VIBHA KANKANWADI, J.]

scm