

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO.38 OF 2020**

Sagar Sitaram Mitre,
S/o. Sagar Sitaram Mitre,
R/o. 31, Mum H.No.244,
Sittaram Bhagoji Chawl,
Bhavani Shankar Road (East)
Near Maszid Dadar Mum,
Presently in Judicial
Lock Up, Colvale.

...Petitioner

versus

Bhanu Pratap, Intelligence Officer,
Narcotics Control Bureau Sub-Zone, Goa.

...Respondent

Shri Marvin D'Souza, Advocate for the Petitioner.
Shri S.R. Rivankar, Special Public Prosecutor with Shri G. Nagvekar,
Additional Public Prosecutor for the Respondent.

Coram: DAMA SESHADRI NAIDU, J.

Date: 1st September 2020

JUDGMENT:

Heard. Rule. The learned Special Public Prosecutor waives service for the respondent.

Facts:

Petitioner Sagar Sitaram Mitre is the Accused No.2 in Spl. Crl. Case (NDPS) No.11 of 2016. He was charged with the offence punishable under Sections 8(c), 20(B) and 29 of the NDPS Act. He allegedly possessed a narcotic drug—a prohibited substance.

2. Sagar was granted bail with conditions. Later, he was found to have violated a condition. So the prosecution applied for the cancellation

of bail. And, eventually, the trial Court cancelled the bail. Aggrieved, Sagar has filed this Criminal Writ Petition. Under these circumstances, we will narrate the facts only to a limited extent.

3. In the first week of December 2015, the officials attached to the Narcotic Control Board (NCB), Sub Zone, Goa, were informed that the accused, with three other persons, was to arrive at Thivim Railway Station. All were suspected of possessing illegal drugs. At the railway station, the raiding party apprehended all the accused along with a lady. But the lady was let go for she was found not to have been connected with them. Nor did she carry any contraband.

4. If we confine ourselves to Sagar, who is the 2nd accused, he was allegedly carrying Ganja “in two white parcels weighing 5.5 grams”. All the three accused filed separate bail applications. By a common order, dt.18.12.2018, the trial Court enlarged them on bail—with conditions. One of the conditions was that the accused should not leave the State of Goa without the Court’s leave.

5. Later, on 06.06.2019, the prosecution applied to the trial Court for the cancellation of the Sagar’s bail. It has alleged that Sagar has violated the bail conditions. On the merits, the trial Court, through order, dt.15.06.2019, cancelled the bail and sent Sagar back to judicial custody. At any rate, lodged in the prison, Sagar once again applied, under Ext.80, for a bail. But through an order, dt.07.10.2019, the trial Court rejected that bail application. After that, in the first week of December 2019, Sagar has filed this Criminal Writ Petition, assailing the trial Court’s order,

dt.15.06.2019, that cancelled bail; and order, dt.07.10.2019, that refused bail after Sagar's surrender.

Submissions:

Petitioner:

6. Shri Marvin D'Souza, the learned counsel for Sagar, has essentially focused on the cancellation of bail, though the challenge in the Writ Petition relates to both orders—cancellation of bail and refusal of subsequent bail. According to him, from the beginning Sagar adhered to the bail conditions, but the trial prolonged for no reason. In the meanwhile, Sagar's mother took ill; so he had to rush to Mumbai to take care of her.

7. The learned counsel also points out that when Sagar left for Mumbai, there was no date fixed for trial. In fact, the Special Judge at Panaji, Goa, had been granting long adjournments at the prosecution's instance. Besides, the learned counsel contends that Sagar was carrying only a minor quantity. And Sagar's long pre-trial incarceration has already exceeded the sentence the alleged crime carries for minor quantity.

8. Placing reliance on certain authorities, the learned counsel has contended that no bail should be cancelled for the mere asking. And not every minor violation should be treated as a transgression deserving cancellation of bail. The alleged breach of a bail condition must have caused prejudice to the prosecution. In this context, the Courts ought to remember that an individual's liberty is inalienable.

9. In the end, the learned counsel has submitted that Sagar's conduct has been bona fide; he attended the next date of hearing on his

own. He only went out to tend to his ailing mother. That apart, his getting involved in other crimes after his enlargement should not result in bail cancellation. For there was no condition concerning any future offences.

Prosecution:

10. Shri Rivankar, the learned Special Public Prosecutor, has opposed the Sagar's application. According to him, Sagar willfully and with impunity violated the bail condition. Also, Sagar, according to the learned Public Prosecutor, has indulged in two crimes while free on bail.

11. The learned public prosecutor has also demonstrated before me that Sagar's story about his mother's ill health was concocted. He has also reminded me that the trial court has exercised its discretion and cancelled the bail. While exercising the supervisory or revisional power, this court ought not to upset that order as if it were on the merits in an appeal.

Discussion:

12. In the Common Order, dt.18.12.2018, Sagar and two other accused were enlarged on bail subject to these conditions:

“(I) The applicants shall not leave the State of Goa without prior permission of this Court.

(II) the applicants shall file their respective native addresses along with proof before this Court.

(III) the applicants shall not threaten any of the witnesses.

(IV) the applicants shall not tamper with the evidence in any manner.

(V) the applicants shall remain present before this Court on every date of hearing in the present case.

13. Now Sagar faces the allegation that he violated the first condition. The record reveals that on 31 May 2019, the Superintendent of NCB of Goa Sub-Zone received a letter from Senior Inspector of Police, Dadar Police Station, that Sagar was arrested in Mumbai on 12 May 2019 for an alleged crime under sections 324, 323, 504, 506, 427, and 34 IPC. It was in Crime Number 124 of 2019. Soon after his arrest, Sagar however secured a bail.

14. Again, on 30 May 2019, Sagar was arrested in Crime No. 139 of 2019 by the same police station at Mumbai. This time, the offence is said to be under sections 506 (2), 504, 34 IPC, section 4 and 25 of Arms Act, read with section 34A (1), 135 of MP Act. In this case, too, Sagar secured bail, came back to Goa, and attended the court.

15. Before me, the learned public prosecutor has demolished the Sagar's case about his mother's ill health. In this context, he has pointed out that as soon as Sagar left Goa, he indulged in two crimes in Mumbai. His mother's alleged illness was much later. Even that illness was minor, as the Doctor's prescription revealed. She was prescribed antacid. At any rate, the learned Public Prosecutor has submitted that Sagar's violating the bail condition *per se* is enough for the court to cancel the bail. No prejudice needs to be established.

16. Indeed, even from the documents Sagar has produced, we can gather he went to Mumbai either in the first or the second week of May 2019. His mother seems to have been treated as an outpatient in the last week of May. Sagar could not have divined well in advance about his mother's impending ill health. Therefore, we may safely conclude that he

left Goa without a valid reason. This myth of medical emergency exposed, nothing prevented Sagar from applying in advance to the trial Court and got either the bail condition relaxed or secured the permission to leave Goa. He did neither.

17. Once the trial Court cancelled the bail, upon his surrender, Sagar did not immediately challenge the trial Court's order cancelling the bail. Instead, he waited a couple of months and, then, filed a fresh bail application. Even that one was dismissed. Therefore, technically speaking, the order cancelling the bail no longer remained open for challenge. It is, in a sense, attained finality because of the later developments. And Sagar's conduct demonstrates that he accepted that order, acted on it, and after that he applied for a fresh bail. Nevertheless, as the case involves the liberty or the freedom of an individual who, incidentally, also enjoys the common-law presumption of innocence, I will decide this issue on the merits, rather than on technicalities.

18. That said, Sagar's counsel has laid much emphasis on the principle of prejudice. According to him, if the accused's violating the bail condition has not disturbed the trial or caused no prejudice to the prosecution's case, there ought to be no bail cancellation.

19. Let us examine this proposition: the principle of bias. In *Sunil Fulchand Shah v. Union of India*^[1], a Constitution Bench of the Supreme Court has dealt with, among others, the detention period: how we should count it. This judgment may not be relevant here.

¹(2000) 3 SCC 409

20. The next judgment is Karnataka High Court's *Khajim v. State of Karnataka*². There, the petitioner was granted antifactory bail in a crime punishable under sections 302, 392, 201 r/w Section 34 of IPC. One condition was that the petitioner should "not indulge in similar or any offence". But the petitioner breached that condition. The State applied for cancellation of the bail because the petitioner was involved in two more crimes while on bail. And the bail was cancelled. So the petitioner approached the High Court of Karnataka.

21. The only question, according *Khajim*, to be decided is this: Merely because there is a breach of condition, was the court below justified in canceling the bail? It has pointed out that the State has not alleged that the petitioner is not regular in attending the trial, nor has it alleged that the petitioner has threatened the witnesses, affecting the trial. The only question raised is that "two more cases have been registered against him and there is a breach of condition". Then, *Khajim* holds that "it is the duty of the Court to satisfy itself on the basis of the material placed on record that whether the said breach of condition goes to the root of the trial in question". To hold thus, *Khajim* has relied on a couple of decisions. The first one is *Dolat Ram v. State of Haryana*³.

22. In *Dolat Ram*, the offence concerns dowry death. For the accused other than the husband, the trial Court granted anticipatory bail. The State appealed to the Sessions Court, which cancelled the bail. In that process, the Sessions Court has simply observed that dowry death was a

²Decided on 12 December 2019

³(1995) 1 SCC 349

severe crime. The matter taken to the Supreme Court, it has held that “very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. According to it, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are these:

- (a) interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice;
- (b) abuse of the concession granted to the accused in any manner; (c) the possibility of the accused absconding.

23. Indeed, as the Supreme Court has held, the instances cited by it are not exhaustive. Nor is *Dolat Ram* a case of bail cancellation on the allegation of breach of conditions. It is a case of an appellate Court’s reversing the trial Court’s order granting bail. The bail order was set aside, not cancelled—so to speak.

24. In *State of Rajasthan v. Mubin*^[4], the trial Court granted bail, imposing a condition that the accused should not commit any offence during the pendency of the appeal. But an F.I.R. came to be filed against them; as a result, the Magistrate forfeited bail bonds and ordered the accused’s custody. In that context, the High Court of Rajasthan has held that a mere lodging of an FIR does not amount to commission of an offence, for it is only an accusation or allegation. An accused is said to have committed an offence, according to *Mubin*, only under this circumstance: after considering the material before it and after hearing the parties, when a court opines “to that effect, at the time of framing of charge.” So *Mubin* concluded that the accused breached no condition.

With utmost respect, I reckon that *Mubin's* case holding is sweeping. If a crime was not to be treated as an offence until a charge was framed, in every case, to my mind, the granting of bail becomes a matter of course.

25. That said, the ameliorating factor in *Mubin* is that the cancellation was sought pending appeal. And that appeal was against acquittal. That is, the accused have already earned an acquittal on the merits. The bail in an appeal, more or less, was a formality, and its cancellation needed grounds stronger than those the prosecution had established.

26. In *Samarendra Nath Bhattacharjee Appellant v. State of W.B*^[6], the petitioner was charged under, among others, sections 498-A and 120-B of Penal Code. He applied for bail on the grounds of “age and ailments”. The trial Court granted bail on stringent conditions. Later, the respondent-complainant moved the court for bail cancellation. It was on the ground of intimidation. Indeed, the trial Court cancelled the bail “by approaching the case as if it is an appeal against the conviction by giving findings on factual issues which are yet to be decided”. In this context, the Supreme Court has, first, observed that intimidation was not proved and, second, the findings on factual issues at the stage of cancellation of Bail are likely to prejudice the defence. So the bail cancellation was held to be improper.

27. In *Abdul Basit v. Abdul Kadir Choudhary*^[7], the issue is a bit complicated. There, the police registered a crime against two accused for offences under sections 365, 120B, 302 and 201 of IPC, read with section 27 of the Arms Act. It was Sessions Case No. 75 of 2012. Later, the police registered another case for offences under sections 365, 120B, 302, 201 of IPC, read with section 25(1-B)(a), (2) and (3) of the Arms Act. It was “for threatening to commit murder of the witnesses” in the previous crime.

5AIR 2004 SC 4207

6(2014) 10 SCC 754

The second case was registered as Sessions Case No. 182 of 2012. But in Sessions Case No. 75 of 2012, the accused were acquitted.

28. In the meanwhile, the deceased's wife filed a writ petition. She wanted a direction to the investigating agency in the latter crime for a proper investigation. Then, the High Court took note of the fact that the case was at the stage of framing of charges. So it gave liberty to the trial Court to invoke Section 173(8) of the Cr PC if necessary. The Trial Court directed further investigation by the CID, stayed the trial proceedings, and rejected the accused's bail application. But the High Court granted the bail.

29. The respondent-complainant applied to the High Court for cancellation of the bail. It was on a technical ground. Nevertheless, the High Court entertained that application and cancelled the bail. It has, in fact, observed that "there would be no difficulty in holding that granting of bail contrary to law or contrary to law laid down by the Apex Court can constitute a valid ground for cancellation of bail already granted; this will not fall foul of Section 362 of the Code."

30. In the above context, the Supreme Court has held that the High Court's cancelling the bail has amounted to its reviewing an earlier order or judgment. And that power is unavailable for the High Court. The Apex Court has pertinently observed that "even though the cancellation of bail rides on the satisfaction and discretion of the Court under Section 439(2) of the Code, it does not vest the power of review in the Court which granted bail". Thus, *Abdul Basit* is not a case involving bail-condition violation. It is a plain case of the High Court's reviewing its judgment.

31. If we revert to *Khajim*, we may notice that it has held that "merely because condition has been imposed while granting the anticipatory bail, then automatically it should not be cancelled on technical grounds." In this context, it has also noted that bail cancellation affects the accused's liberty guaranteed under Article 21 of the

Constitution. True. But exalted as the Human Rights jurisprudence is, its constitutional command has always been subject to restrictions. And the due process of law answers the right-to-life or -liberty imperative under Article 21 of the Constitution.

32. No doubt the theory of prejudice rescues the prosecution sometime and the accused other times. In either event, it has its limitations; we cannot stretch it to a snapping point. Faced with an allegation of a crime, the accused applies for bail. He pleads innocence, aided by the common law presumption to that effect. But, in cognizable cases, the bail has never been a matter of course. The Court concerned considers various aspects, including the severity of allegations, the nature of the offence, the accused's antecedents, the societal impact of the crime, and the victim's interest and protection. The conviction depends on the accused's conduct before the registration of crime. The bail, on the other hand, depends the accused's conduct pre- and post-registration of crime. Bail granted, the accused is expected to conduct himself strictly in tune with the conditions imposed. Every minor deviation may not result in bail cancellation. That said, granting, refusing and cancelling bail are matters of discretion, legal discretion at that. But no court can countenance an accused's conduct—especially his going on a crime spree—on the premise his post-bail behavior has not affected the case in which he secured bail. Prejudice theory is no panacea.

33. Being Dr Jekyll during the daytime does not absolve his sins as Mr Hyde at night. Dr Jekyll and Mr Hyde must account for 'his' misdeeds, if any, as one.

34. The Criminal Writ Petition is dismissed. But Sagar may apply for a regular bail before the trial Court in three months from today. Then, the trial Court will consider it on the merits. While doing so, it may take into account the petitioner's prolonged pre-trial incarceration.

The Criminal Writ Petition stands dismissed subject to the above observation. That observation, I may note, in no manner limits the trial Court's discretion in granting or refusing bail.

DAMA SESHADRI NAIDU, J.

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