

25.04.2022.
27.
Ct.No.28
as/PA

C.R.M.7460 of 2020

In Re: An application for cancellation of bail under section 439(2) of the Code of Criminal Procedure, 1973

Annu Das
Vs.
State of West Bengal and Another

Mr. Arindam Jana,
Mr. Sabyasahi Chatterjee,
Mr. Soumajit Chatterjee,
Mr. Pintu Karan
Mr. Akashdeep Mukherjee,
Mr. Pritam Chatterjee,
...for the Petitioner.

Mr. N.P. Agarwala,
Mr. Saryati Datta.
... for the State.

Mr. Jayanta Narayan Chatterjee,
Ms. Moumita Pandit,
Ms. Nandini Chatterjee,
Mr. Nazir Ahmed
Mr. Supreem Naskar,
Ms. Jayashree Patra
Ms. Sreparna Ghosh.
.... for the opposite party No.2

The application has been filed by the de-facto complainant challenging the orders dated 10.09.2020 and 14.10.2020 granting bail to the opposite party No.2 in the present case.

Genesis of the case:-

The factual matrix of the case discloses a chequered history which is summarized herein below:-

On 04.05.2020 a First Information Report was lodged at Belghoria Police station against the opposite party No.2 and eight other accused persons alleging as follows :-

One Soumen Dutta along with his associates was distributing ration amongst needy people in the locality during the Covid pandemic. They had videographed the charitable activities undertaken by them. This enraged their political rivals who under the leadership of the local Councillor i.e. the opposite party No.2 herein attacked Soumen and his friends. Soumen was brutally assaulted resulting in severe injuries including damages to his spinal cord. He was hospitalized. While he was struggling for life in the hospital, the aforesaid FIR came to be lodged.

On 07.05.2020 and 13.05.2020 some of the co-accuseds were arrested and remanded to custody.

On 18.05.2020 opposite party No.2 along with Abhay Tiwari and Durgesh Mishra appeared before the learned Magistrate and prayed for bail. Payer for bail of Abhay Tiwari and Durgesh Mishra was rejected and they were remanded to police custody. For reasons best known to prosecution, police custody was not sought for in respect of opposite party No. 2 and primarily on the ground she was a lady, she was enlarged on interim bail.

On 19.05.2020 Soumen unfortunately succumbed to his injuries. A prayer was made for adding Section 302 of the Indian Penal Code which the learned Magistrate erroneously rejected and by order dated 27.05.2020 directed addition of

lesser offence under section 304 of the Indian Penal Code to the FIR.

A prayer for cancellation of bail was preferred by the Investigating Agency on 07.06.2020 on the ground of post-bail conduct of opposite party No.2 and other accused persons. However, owing to the prevailing pandemic conditions, said prayer for cancellation was not considered and interim bail of opposite party No.2 was extended from time to time.

Upon addition of Section 304 IPC, as aforesaid, on 10.07.2020 opposite party No.2 appeared and prayed for fresh bail. Learned Magistrate allowed the bail application on the self same day and permitted the opposite party No.2 to continue on interim bail.

On 13.07.2020 charge sheet was filed against the opposite party no.2 and other accused persons under Section 304 of the Indian Penal Code.

On the self-same day, another case being Belghoria P.S. 326 dated 13.07.2020 under Section 195(A) IPC was registered, inter alia, against the opposite party 2 alleging she along with others were threatening witnesses. Being aggrieved by non-inclusion of the graver offence under section 302 IPC to the array of offences in the FIR/charge-sheet petitioner approached this court in CRR 1081 of 2020. While admitting the application, a learned Single Judge of this Court directed the investigating agency to proceed investigation under Section 302 of the Indian Penal Code. Notwithstanding such direction, the investigating agency did

not make any prayer for addition of offence under section 302 IPC in the FIR and conduct further investigation in respect of the said offence.

On 12.08.2020, petitioner filed an application seeking cancellation of bail granted to opposite party no.2 vide order dated 10.07.2020, as aforesaid.

In the course of hearing of the said application, report was called for with regard to the post-bail conduct of opposite party no.2, which had given rise to Belghoria Police Station Case No.326 dated 13.07.2020 under Section 195(A) of the Indian Penal Code. Report was submitted by police wherein it was stated presence of opposite party no.2 was not disclosed in the statements of witnesses. Relying on such report which pertained exclusively to post- bail conduct and without going into the issue of propriety of grant of bail to opposite party No.2 after addition of Section 304 of the Indian Penal Code, a Co-ordinate Bench of this Court dismissed the prayer of the petitioner for cancellation of bail.

Subsequent thereto, by order dated 14.08.2020, CRR 1081 of 2020 filed by the petitioner was disposed of and direction was given to the investigating agency to submit supplementary charge sheet incorporating Section 302 of the Indian Penal Code. Pursuant to such direction, supplementary charge sheet under Sections 302/34 IPC was filed before the learned Magistrate and by order dated 08.09.2020 cognizance was taken thereon.

On 10.09.2020 opposite party no.2 appeared before the Magistrate and prayed for bail in respect of addition of the graver offence under section 302 IPC in the charge-sheet.

Without going into the gravity of the offence and the role of the opposite party no.2 therein, the Magistrate referring to the conduct of the opposite party no.2 in voluntarily appearing and praying for regular bail and the fact that she was a lady granted interim bail to her which came to be confirmed by order dated 14.10.2020.

These orders are presently under challenge in this application.

It may be apposite to clarify due to typographical/inadvertent error the impugned order dated 10.9.2020 was incorrectly described as 10.07.2020 in the main application. With leave of this Court, petitioner was permitted to file supplementary affidavit to correct the aforesaid inadvertent error and also to challenge the consequential order dated 14.10.2020 confirming the interim bail granted to opposite party No. 2 after addition of section 302 IPC.

Deliberations at the Bar:-

Mr. Arindam Jana, learned Advocate appearing for the petitioner/de-facto complainant submits none of the orders granting bail to opposite party No.2 at various stages of the proceeding had adverted to the gravity of the offence and the involvement of the said accused therein. All the orders referred to the gender of the opposite party no.2 and she was enlarged on bail on the very day she had appeared before the

Court. It is argued the court below failed to consider the status of the opposite party no.2, who was a prominent political leader and a local Councillor at the time when the incident occurred. Her political patronage and leadership had given confidence and encouraged the other accused persons to perpetrate a murderous assault on a political opponent whose only fault was to extend humanitarian aid to needy people during COVID outbreak. Circumstances of the case and the status and position of opposite party no.2 far outweigh the disadvantage, if any, arising out of her gender. By a complete misapplication of the proviso to Section 437 of the Code of Criminal Procedure and without considering the relevant factors like gravity of the offence, bail had been granted to her. It is also contended the rejection of the prayer for cancellation with regard to an earlier order would not affect the jurisdiction of this court to consider the legality and propriety of the subsequent order granting bail upon addition of graver offence under Section 302 IPC. Moreover, in the earlier application, the Coordinate Bench had only dealt with post-bail conduct of opposite party no.2 and not other aspects of the matter. Hence, he prays that the bail granted to the opposite party no.2 be cancelled in the interest of justice.

Per contra, Mr. Jayanta Narayan Chatterjee, learned Advocate appearing for the opposite party no.2 submits his client is on bail for the last two years. She has not misused the liberty granted to her. In fact, allegation of misuse of liberty was found to be unsubstantiated in the earlier

application for cancellation being CRM 5349 of 2020. This subsequent application for similar relief is a harrasive and motivated effort to subject the opposite party no.2 to unnecessary pre-trial detention. Opposite party no.2 is ready and willing to face the trial. She cooperated with investigation and appeared before the court below on each occasion when a graver charge was added to the array of offences. Learned Magistrate upon consideration of all relevant factors including her conduct and gender enlarged her on bail. Under such circumstances, interference into the liberty of the opposite party no.2 is wholly uncalled for.

Mr. Saryati Datta, learned Advocate appearing for the State produces the case diary. He submits investigation was conducted and statements of witnesses have been recorded. Statements disclosed role of opposite party no.2 in the incident. He, however, submitted opposite party no.2 had appeared before the court below upon addition of graver charges and was released on bail.

Relevant extracts of the bail orders:-

To test the issue whether the court below applied its mind to all relevant factors while granting bail to opposite party no. 2, we consider it prudent to set out the relevant portions of the orders granting bail to the opposite party no.2 at various stages of the proceeding:-

(a) Upon registration of FIR, inter alia, for commission of offence punishable under Section 308 IPC, opposite party No.2 appeared before the learned Magistrate on 18.05.2020

and prayed for bail. On the self-same day, she was granted interim bail observing as follows :-

“Accused, Rupali Sarkar, lady accused, is not required for P.C. her custodial detention for purpose of investigation is not required.”

(b) On the next day i.e. on 19.05.2020, the victim died and Section 304 IPC was added to the array of offences on 27.05.2020. Prosecuting agency prayed for cancellation of bail of opposite party no.2 which, however, was not taken up for consideration in view of the prevailing pandemic conditions. In the meantime, opposite party no.2 appeared before the learned Magistrate and prayed for fresh bail in view of the addition of graver offence under Section 304 IPC. Both the prosecuting agency and the petitioner/de-facto complainant raised objection to her release on bail in view of the added graver offence. Rejecting such objection, the court below granted interim bail to the opposite party no.2 observing as follows :-

“In fact the settled position of the Hon’ble Apex Court laid out in the aforesaid judgements is that the accused must surrender and apply for bail pertaining to the graver section added which shows that the accused has the right to apply for bail even upon adding of graver section. There has not been any adverse report against the accused Rupali Sarkar. Moreover, I do not find any fruitful development in the C.D. and considering the fact that the accused happens to be a female and has shown her bona fide to face the investigation by surrendering today and with the proviso appended to Section 437 of Cr.P.C. which speaks of consideration of the bail as regards female, child and sick and infirm persons, the bail petition of the accused stands allowed but in interim form with the conditions that (I) she will cooperate with the investigation

and (ii) she will not tamper with the witnesses and evidences.

(c) Thereafter, charge sheet came to be filed under Section 304 IPC against the opposite party No.2 and others. Being aggrieved by non-addition of Section 302 IPC in the charge sheet, petitioner approached this Court in CRR 1081 of 2020. By order dated 14.08.2020, this Court directed filing of supplementary charge sheet under Section 302 IPC. Pursuant to such direction supplementary charge sheet was filed under Section 302 IPC against opposite party no.2. Opposite party No.2 appeared before the learned Magistrate in view of the addition of the graver offence of Section 302 IPC and was again enlarged on interim bail by order dated 10.09.2020 observing as follows :-

“In fact the settled position of the Hon’ble Apex Court laid out in the aforesaid judgements is that the accused must surrender and apply for bail pertaining to the graver section added which shows that the accused has the right to apply for bail even upon adding of grater section. There has not been any adverse report against the accused Rupali Sarkar. Moreover, the accused is a female and has shown her bona fide to face the investigation and trial by surrendering before this Court from time to time and also today and with the proviso appended to Section 437 of Cr.P.C. which speaks of consideration of the bail as regards female, child, sick and infirm person, the bail petition of the accused Rupali Sarkar stands allowed but in interim form with the condition that she will not tamper with the witnesses and evidences.

(d) Interim bail was confirmed by order dated 14.10.2020 observing as follows:-

“Ld. Advocate for the D/C raised objection. Ld. APP raised no objection. Status report of the case has also been

submitted by the I.O. C.S. has already been submitted in the case. There is no adverse report against the accused Rupali Sarkar, who is on A/I bail. In view of the same, the A/I bail of the accused Rupali Sarkar stands confirmed.”

All the bail orders were passed on the same day the opposite party no.2 surrender before the Magistrate without considering the gravity of the offence. Even after the addition of as grave a charge as murder, opposite party no.2 was not taken into custody for a single day. The orders of bail passed subsequent to the addition of the charge of murder are the subject matter of challenge in this application.

Maintainability of the case:-

Mr. Chatterjee has objected to the maintainability of such challenge. He submits earlier order dated 10.07.2020 (enlarging the opposite party no.2 on bail after adding Section 304 IPC) was unsuccessfully challenged in CRM 5349 of 2020. Prior to disposal of the earlier application, a Single Judge of this Court in CRR 1081 of 2020 vide order dated 21.07.2020 had already directed further investigation with regard to the graver offence under Section 302 IPC. In this backdrop, present challenge to grant of bail upon addition of offence under Section 302 IPC is wholly cosmetic in nature. There was no change in the gravity of the offence or the role of the opposite party no.2 therein at the time when the earlier application for cancellation was considered. On the first blush, such submissions appear to be attractive. However, deeper scrutiny of the matter particularly order dated 12.08.2020 in CRM 5349 of 2020 would show that the Coordinate Bench had addressed the issue of cancellation of

bail in respect of a different order and that too on a completely different premise. The Bench while considering the prayer for cancelling order dated 10.07.2020 did not advert to the issues which have been raised in the present application regarding the legality and propriety of the subsequent order granting bail to an accused upon addition of a graver offence punishable under section 302 IPC.

In the earlier proceeding, the Bench considered a police report pertaining to post-bail conduct of opposite party no.2 vis-à-vis a subsequent criminal case viz., Belghoria Police Station Case No.326 dated 13.07.2020 and in the light of the report which do not disclose the presence of the opposite party no.2 in respect of the said incident declined to cancel the bail. Neither the order of the learned Single Judge in CRR 1081 of 2020 directing further investigation in respect of offence under Section 302 IPC was placed before the Coordinate Bench nor the indolence of the investigating agency in failing to act in terms thereof was highlighted in course of such proceeding.

It is relevant to note only after CRR 1081 of 2020 was disposed of by order dated 14.08.2020 did the investigating agency filed supplementary charge-sheet under section 302 IPC against opposite party no. 2 and other accused persons. Gravity of offence was substantially changed upon filing of the supplementary charge-sheet including the charge of murder and the subsequent orders granting bail dated 10.09.2020/14.10.2020 which came to be passed is clearly distinct from the order dated 10.07.2020 which was the

subject matter of challenge in the earlier proceeding seeking cancellation of bail.

It is also apposite to bear in mind the co-ordinate Bench had not decided the legality and propriety of grant of bail to opposite party no.2 upon addition of offence under section 304 IPC. In this backdrop, entertaining this application challenging the orders granting bail to opposite party no.2 after addition of graver offence under section 302 IPC on the ground of perversity and/or non-consideration of relevant facts cannot amount to review or re-opening of any issue decided in the earlier applications.

Whether impugned orders suffer from the vice of perversity:-

In *Pradeep Ram vs. State of Jharkhand & Anr.*¹ the Hon'ble Apex Court inter alia held when a graver offence is added to the array of offences in the FIR/charge sheet an accused who is on bail may be arrested even if the earlier order of bail is not cancelled in terms of section 437(5)/439(2) Cr.P.C.

Where after grant of bail to an accused, further cognizable and non-bailable offences are added, the Apex Court laid down the following procedure for consideration of grant of bail under changed circumstances:-

“31.1. The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested.

¹ (2019) 17 SCC 326

31.2. The investigating agency can seek order from the court under Section 437(5) or 439(2) CrPC for arrest of the accused and his custody.

31.3 The court, in exercise of power under Section 437(5) or 439(2) CrPC, can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The court in exercise of power under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-bailable offences which may not be necessary always with order of cancelling of earlier bail.

31.4. In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it needs to obtain an order to arrest the accused from the court which had granted the bail.”

Let us examine whether in the present case learned Magistrate correctly applied the principles laid down in **Pradeep Ram** (supra) or not. Perusal of the impugned order dated 10.09.2020 and 14.10.2020 would show learned Magistrate had mechanically considered the issue of grant of bail upon appearance of the accused after addition of the graver offence of murder. The Magistrate failed to consider the gravity of the offence or the involvement of the accused therein. On the other hand, court below merely referred to post bail conduct of opposite party no. 2 and in absence of no adverse report enlarged her on bail. It did not consider the impact of the addition of graver offence of section 302 IPC in the facts of the case and incorrectly mentioned there was no further development in the case. Filing of supplementary charge-sheet under the graver offence of section 302 IPC is a drastic change in the profile of accusation which was

completely lost sight of by the court below. Role of opposite party no. 2 in the crime was also not considered. On the other hand, she was extended the relief on the ground of being a lady in the light of proviso in section 437 Cr.P.C. Proviso to section 437 Cr.P.C inter alia gives discretion to the Magistrate to enlarge on bail a person accused of an offence punishable with death or life imprisonment on the ground she is below 16 years of age or a lady or sick or infirm. Categories of persons referred to in the said proviso would indicate that they fall in weak and vulnerable groups whose unnecessary detention needs to be avoided.

The aforesaid proviso cannot be read in isolation to extend relief to every female accused irrespective of the gravity of the offence, her status and position and role in commission of the crime. In the present case, opposite party no. 2 is an influential political leader. She was the councillor of the area where the crime was committed against her political opponent. She gave leadership to the group who came in a body armed with weapons and mercilessly assaulted the victim resulting in his death. Political status of opposite party no. 2 and her position as a peoples' representative creates a sense of arrogant immunity from law. Power dynamics flowing from her political status far outweighs any perception of weakness which may arise from her gender. In this backdrop, to extend the beneficial impact of the proviso to the opposite party no. 2 is a clear and perverse reading of law which requires intervention by the superior court. Status and position of the accused and her role in the crime are equally if not more

important than her gender while considering the prayer for bail. For example, would a mother-in-law who sets the daughter-in-law on fire be extended the benefit of bail by reference to the proviso to section 437 Cr.P.C.? Similarly, a person holding predominant position in society as a political leader and councillor of the area who abused her position and led her followers in a murderous assault resulting in death of the unfortunate victim (whose only fault was to give humanitarian aid to helpless poor during the pandemic) does not deserve to be extended the benefit of bail on the very day of appearance by reference to proviso to section 437 Cr.P.C

Mr. Chatterjee refers to an order of this court in CRM 6773 of 2020 rejecting bail of the co-accuseds wherein the opposite party was described as instigator. It would be appropriate to clarify this court while considering the prayer for bail of co-accuseds was primarily dealing with the role of the co-accuseds in the crime. A passing observation in the said order cannot be a determinant factor with regard to role of opposite party no. 2 therein. To satisfy our conscience, we have gone through the statements of witnesses recorded under Section 161 Cr.P.C. These statements particularly those of eye-witnesses, namely, Sonu Das, Suman Kuril and Mira Mitra unequivocally state opposite party no. 2 not only gave leadership to the co-accuseds but had played an active party by dragging the victim by the collar to the road and thereafter all of them had assaulted him. Name of opposite party no. 2 has transpired as one of the assailants at the first instance in

the injury report of the victim which is annexed at page 39 of the case diary.

In view of the aforesaid overwhelming materials on record disclosing active role of opposite party no. 2 in the murder of the victim, we are of the opinion the court below erred in law in mechanically granting bail to her notwithstanding addition of offence under section 302 IPC. Order granting bail is wholly perverse and has caused serious miscarriage of justice. It needs no emphasis cancellation of bail on the ground of perversity in the order stands on a completely different footing from post bail conduct. When an order granting bail is perverse and based on incorrect appreciation of law it is the bounden duty of a superior court to interfere and correct such error lest unjust and unfair advantage to an accused would create deleterious impact on the confidence of the victim in particular and the society at large in the criminal justice delivery system.

For these reasons, we are inclined to set aside the impugned orders dated 10.09.2020 and 14.10.2020 granting bail to opposite party no. 2.

Conclusion:-

Opposite party no. 2 is directed to surrender before court below within a week from date and pray for regular bail in accordance with law. Needless to mention such prayer shall be considered afresh on merits having due regard to all relevant factors including the role of the opposite party no.2 in the crime.

In the event, opposite party no.2 fails to surrender before the court below, as aforesaid, it shall be open to the said court to issue appropriate processes for her apprehension in accordance with law.

Accordingly, CRM 7460 of 2020 is disposed of.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)