

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR CANCELLATION OF BAIL NO.111 OF 2022

X.Y.Z.

.. Applicant
(Original complainant)

Versus

1. Amol S/o. Gangadhar Shinde,
Age 32 years, Occu. Agri.,
2. Gangadhar s/o. Ramkrushna Shinde,
Age 60 years, Occu. Agri.,
3. Kusum w/o. Ramkrushna Shinde,
Age 52 years, Occu. Agri.,
4. Bhushan s/o. Ramkrushna Shinde,
Age 34 years, Occu. Agri.,
5. Rani w/o. Bhushan Shinde,
Age 60 years, Occu. Agri.,

All R/o. Newasa Bk., Tq. Newasa,
District Ahmednagar.
6. Bharati w/o. Mahesh Gondkar,
Age 30 years, Occu. Agri.,
R/o. Near Muk-Badhir Vidyalaya,
Samrat Nagar, Shirdi, Pimpalwadi,
Tq. Rahata, District Ahmednagar.
7. The State of Maharashtra
Through Investigation Officer,
Newasa Police Station, Taluka Newasa,
District Ahmednagar.

.. Respondents

Mr. Narayan B. Narwade, Advocate for Applicant :
Ms. V. S. Choudhari, APP for Respondent No. 7 / State

CORAM : S. G. MEHARE, J.

DATE : 19-07-2022

ORAL ORDER :

1. Heard the learned counsel for the applicant at the admission stage before notice to the respondents.
2. The applicant has filed this application under Section 439(2) of the Code of Criminal Procedure ("Cr.P.C.") for cancellation of anticipatory bail granted to the respondents/accused by the learned Additional Sessions Judge, Newasa, by its order dated 08.06.2022, in Criminal Bail Application No. 177 of 2022.
3. The applicant is the victim and wife of respondent no.1. The hearing was granted to her before the learned Additional Sessions Judge. The learned Sessions Judge has heard the present victim and the learned APP at length and recorded the submissions made by the respective parties.
4. The applicant has raised objections that the learned Sessions Judge did not consider that she was a minor when kidnapped and raped. She was in the custody of the respondents; therefore, she could not immediately lodge the report against them. The respondents have terror in the locality. The learned Sessions Court did not direct the Investigating Officer to produce the materials like a letter written in the handwriting of her father. The learned sessions judge has given unnecessary weightage to the delay,

ignoring that she was a minor. The learned Sessions Judge has erroneously observed that the Investigating Officer, as well as the first informant, did not point out any such crime details, and on this ground wrong conclusion has been drawn. The Court has also brushed aside the gravity of the offence. At the time of hearing the bail application, she had no details against the respondents. She has also levelled allegations against the Investigating Officer that he did not take care to submit the complete material before the Court. The learned Judge has not properly considered the aspects of the rape and kidnapping case. In short, mainly, she has the objection that the learned Additional Sessions Judge has not considered the material before it. Hence, the bail granted to the respondents is liable to be cancelled.

5. The learned counsel for the applicant has vehemently argued that the serious allegations of committing rape by applicant No.1 and taking photographs of their sex by brothers of respondent no.1/accused have not been considered by the learned Sessions Judge. The educational documents and ornaments lying in the custody of the respondents/accused were to be recovered from the accused. At least for that purpose, the custodial interrogation of the respondent/accused was necessary. Referring to the reply filed by the learned APP, he pointed out that the ground was raised before the learned Sessions Judge that about 11 tolas of golden ornaments and educational testimonials of the

applicant/victim are required to be recovered from the respondents.

6. To prove the antecedent against the respondents/accused, he relied on order of seizure of the property of respondent No.1/accused by the Tahsildar, Newasa. He also argued that the custodial interrogation of the respondents was essential to recovering the dowry amount of Rs.50,000/- which was transferred from the account of Mr. Suresh Jadhav. This material aspect has also been brushed aside by the learned Sessions Court. He has further argued that the purpose of enacting the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act") is to protect children from sexual assault and sexual harassment. The victim was a minor at the time of the alleged incident. Therefore, the matter should have been viewed from the object of the POCSO Act. Whatsoever the delay caused in lodging the FIR, it is subject to explanation during the trial. For all these reasons, the anticipatory bail granted to the respondents/accused is liable to be cancelled.

7. The Honourable Apex Court, in the case of ***Puran, Shekhar and another Vs Rambilas and others, AIR 2001 SC 2023***, has laid down the law on the cancellation of bail. It has been observed that the High Court can exercise the powers to cancel the bail order passed by the Sessions Court under Section 439, 482 of the

Cr.P.C. The Honourable Apex Court has elaborately dealt with the subject by observing that in the hierarchy of Courts, the High Court is the Superior Court. A restrictive interpretation which would have the effect of nullifying Section 439 (2) cannot be given. When Section 439 (2) grants the High Court the power to cancel bail, it necessarily follows that such powers can also be exercised in respect of orders passed by the Court of Sessions. Of course, cancellation of bail has to be on principles set out and only in appropriate cases. It cannot be denied that for securing the ends of justice, the High Court can interfere with the order which causes a miscarriage of justice or is palpably illegal or unjustified.

8. The Honourable Apex Court, in the above case, has reproduced the ratio laid in the case of ***Dolat Ram and Others vs State of Haryana (1995) 1 SCC 349***, that the rejection of bail in non-bailable case at the initial stage and cancellation of bail already granted have to be considered and dealt with on different basis. It has been held that very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted. It has been held, generally speaking, the grounds for cancellation of bail broadly are interference or attempt to interfere with due course of administration of justice or evasion or attempt to evade the course of justice or abuse of concession granted to the accused in any manner. It is, however, to be noted that this Court has clarified

that these instances are merely illustrative and not exhaustive. One such ground for cancellation of bail would be where ignoring material or evidence on record, a perverse order is passed in a heinous crime on the nature like bride burning and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the Society. Therefore, an arbitrary and wrong exercise of discretion by the trial Court has to be corrected.

9. The Hon'ble Apex Court, in the case of **Puran** cited supra, has reproduced the ratio laid down in the case of **Gurucharan Singh vs State (Delhi Administration) AIR 1978 SC 179**, It has been extracted as below;

"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 bail. This position follows from the subordinate position of the Court of Sessions vis-a-vis the High Court."

10. The law is settled that at the stage of considering the application for bail, a detailed examination of evidence and elaborate documentation on the merits of the case has not to be undertaken. However, prima facie evidence has to be seen.

11. Delay in lodging the FIR may not be fatal to the prosecution in every case if satisfactorily explained. If the delay is explained satisfactorily, it may be condoned. However, When the prosecution is unable to explain or fails to explain the inordinate delay in lodging the FIR, the FIR should be doubted.

12. Section 437 of the Cr.P.C. prescribes the grounds for granting the bail. The condition has been laid down for refusing the bail that (i) such person shall not be released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life; (ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven year.

13. The Hon'ble Supreme Court, in the case of **Gurbaksh Singh Sibbia vs State of Punjab, 1980 AIR, 1632**, has laid down the law as regards anticipatory bail in the following words;

“In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and equally that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the Court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence of being secured at the trial, a reasonable apprehension that witnesses will be tampered with and the "larger interest of the public or the state" are some of the considerations which the Court has to keep in mind while deciding an application for anticipatory bail...”

14. The prosecution has to satisfy the Court in an application under Section 438 of the Cr.P.C. that the recovery of relevant material, particularly the evidence proving the allegations, is required from the custody of the accused.

15. The present case has its facts and chequered history of allegations from 2015 onwards. It has been alleged that, when the victim was of 16 years and 11 months old, all the respondents/accused went to her home to demand her in the

marriage. Since her father refused, she was kidnapped and threatened to kill. At that time, her husband Amol/respondent No.1 did sex with her, and his two brothers took the photographs. Admittedly, she did not lodge the report of the said incident. However, subsequently, she got married to respondent no.1.

16. She has also alleged that the respondents/accused threatened her to viral her photographs and video of having sex with respondent No.1. However, there are no allegations in the report that those photographs have been viral to date. The vital fact is that after the marriage, the victim was blessed with a female child. For the first time in 2017, she alleged against the respondents that they demanded dowry and drove her out. Then she brought Rs. 5 Lakh from her parents and paid; even then, the accused tortured her mentally and physically and harassed her. She was driven out of her house on 21.02.2022 to demand a share of her parent's property. The accused kept her daughter with them. They also retained her educational testimonials and 11 tola golden ornaments.

17. The learned Sessions Judge, from her marriage photographs, has observed that the victim was seen happy and not resisting the marriage with respondent No.1. The learned Sessions Judge has specifically observed that the report was lodged after the divorce petition filed by respondent No.1 against the victim. The learned

Sessions Judge has also observed that before lodging the report, she went to the Bharosa Cell. The public prosecutor had argued for the custodial interrogation of the respondents, for the recovery of the pistol, a mobile handset allegedly used in the commission of the offence and for the recovery of Rs.5 Lakhs. The learned Sessions Court has recorded the specific observations and discussed the statement of the victim before the Bharosa Cell. It was her first statement in which she has levelled serious allegations of threatening, kidnapping, and taking photographs of her sex with her husband by his brothers. The said statement was recorded five days before lodging the FIR. The learned Sessions Court has also recorded the findings that since there is a delay of seven years, the possibility of recovery or discovery of clothes is also bleak.

18. The learned counsel appearing for the present applicant was also heard by the learned Sessions Court. He has argued that the victim was under pressure; therefore, she could not reveal the things for the last seven years. The parents of the victim were not seen in the photographs. The victim did not receive the notice of divorce petition. Therefore, it cannot be said that the FIR is an afterthought. Moreover, there is no certificate under Section 65B of the Indian Evidence Act supporting WhatsApp chats. There is a criminal antecedent against the applicant Bhushan, who had assaulted some persons at a Dhaba. Hence, the application may

be rejected.

19. In the case in hand, the allegations have been levelled against the applicant/accused of the incident that happened around seven years before. No report of any incident as alleged was lodged any time before. However, the victim married respondent No.1, and they were living happily as husband and wife. They have blessed a female child. So far as the antecedents to the discredit of the applicants are concerned, the learned Sessions Judge has observed that the prosecution has not placed material showing antecedents before it. However, for the first time, the learned counsel for the applicant/accused referred to the order of the Tahsildar, Newasa and labelled the applicant/accused as sand Mafia before this Court. This Court is of the view that this incident does not relate to the treatment given to the victim. This document was not before the learned Sessions Court. As far as the allegations of retaining the educational testimonials and the golden ornaments are concerned, they also do not appear the material relevant to prove the allegations. If the victim intends to recover the educational testimonials and the ornaments, she has a remedy available under the law. The allegations are in the context of the incidents that happened seven years before. Such a delayed FIR would surely be a factor to be considered by the Court. The prosecution has no case of absconding of the applicants from justice. There appears to be a marital dispute.

20. The applicant moved this Court against the order of the learned Additional Sessions Judge on the ground that the learned Sessions Judge has not considered the material on record. Hence, his order granting bail is arbitrary and perverse. However, the learned counsel for the applicant could not point out what material from the record the learned Sessions Judge had not considered. The record reveals that learned Sessions Judge has considered the complete material placed before it. Bearing in mind the ratio laid down in the cases of **Puran Shekhar, Gurucharan Singh, and Gurubaksh Singh**, along with the facts of the case, it cannot be accepted that the order granting bail passed by the learned Sessions Judge is perverse or arbitrary.

21. In view of the above discussion, this Court is of the opinion that the applicant/victim has no ground to claim cancellation of the bail granted to the respondents/accused. Hence, the application stands dismissed.

(S. G. MEHARE)
JUDGE

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