

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

918 CRIMINAL WRIT PETITION NO.1203 OF 2022

- 1) Rushikesh S/o. Ramesh Gaikwad.
- 2) Rameshwar S/o. Dilip Jogdand,
- 3) Siddheshwar S/o. Dilip Jogdand. **... Petitioners**

Versus

The State of Maharashtra. **... Respondent**

...

Mr. D. A. Mane, Advocate for Petitioners.

Mr. P. G. Borade, APP for Respondent/State.

...

CORAM : **SHRIKANT D. KULKARNI, J.**

DATE : 08th September, 2022.

PER COURT:

. Heard Mr. D. A. Mane, learned counsel for the petitioners.

2 Issue notice the respondent/State.

3 Mr. P. G. Borade, learned APP waives notice for the respondent/State.

4 Heard finally with consent of both the sides.

5 The petitioners have challenged the judgment and order rendered by the learned Additional Sessions Judge, Vaijapur in Criminal Revision Application No.09 of 2022 dated 25th August, 2022.

6 Heard Mr. D. A. Mane, learned counsel for the petitioners and Mr. P. G. Borade, learned APP for the respondent/State.

7 Mr. Mane, learned counsel for the petitioners submitted that there are two FIRs filed by the parties against each other practically about same incident with the same police station namely Gangapur Police Station. Crime No.239 of 2022 came to be registered at Gangapur Police Station at the instance of Anil Asaram Mulak Chavhan against the present petitioners for the offences punishable under Sections 143, 147, 148, 149, 323, 324, 341 and 504 of the Indian Penal Code, where as Crime No.240 of 2022 came to be registered against the opposite party at the instance of Siddheshwar Dilip Jogdand (one of the petitioners) at the same police station for the offences punishable under Sections 143, 147, 148, 149, 323, 324 and 504 of the Indian Penal Code. He submitted that there is dispute of way and on that count, there was quarrel between the parties. He

submitted that the present petitioners in connection with Crime No.239 of 2022 approached before the Court of Judicial Magistrate First Class at Gangapur and surrendered themselves. The learned Magistrate was pleased to release the petitioners on bail vide order dated 19th June, 2022. He submitted that after two days, the police officer filed one report before the learned Judicial Magistrate First Class, Gangapur dated 21st June, 2022 and sought cancellation of bail of the present petitioners and permission to re-arrest them in view of addition of Section 307 of the Indian Penal Code. He pointed out that the learned Magistrate without giving an opportunity of being heard or without issuing any notice to the petitioners/accused, straightway cancelled the bail granted earlier to the petitioners vide order dated 21st June, 2022. He submitted that the learned Magistrate is not empowered to cancel the bail granted by him in view of Section 439(2) of the Code of Criminal Procedure. It is for the High Court or the Sessions Court to cancel the bail by invoking Section 439(2) of the Code of Criminal Procedure. He, therefore, submitted that the order passed by the learned Magistrate dated 21st June, 2022 cancelling the bail of the present petitioners is bad in law.

8 Mr. Mane, learned counsel for the petitioners further invited my attention that after passing that order by the learned Magistrate and in the light of the apprehension of arrest, the petitioners

rushed to the High Court by filing Anticipatory Bail Application No.921 of 2022. This Court (Coram: S.G. Mehare, J.) vide order dated 14th July, 2022 (page No.24) was pleased to grant interim protection with certain conditions. He submitted that the criminal revision application was also filed by the present petitioners challenging the order of cancellation of bail passed by the learned Magistrate vide Criminal Revision Application No.09 of 2022. The learned Additional Sessions Judge, Vaijapur was pleased to dismiss the revision vide order dated 25th August, 2022. He submitted that the order passed by the learned Additional Sessions Judge, Vaijapur is also bad in law. He submitted that it is observed by this Court while granting interim anticipatory bail that weapons allegedly used in the commission of the offence have been recovered. As such, there is no need to have custodial interrogation with the petitioners even after adding Section 307 of the Indian Penal Code. He submitted that the reasons given by the investigation officer in the report for cancellation of bail and re-arrest of petitioners, those grounds are now not remained. As such, there was no reason for the learned Additional Sessions Judge to confirm the order passed by the learned Magistrate by dismissing the revision. He submitted that the findings recorded by the learned Additional Sessions Judge are also erroneous. He submitted that the alleged incident had taken place on account of civil dispute and the parties have filed counter cases against each other. This aspect needs to be

considered, which is overlooked by the Courts below. He, therefore, urged that this petition may be allowed and the orders passed by the Courts below may be quashed and set aside. The liberty granted to the petitioners earlier may be restored.

9 Per contra, Mr. Borade, learned APP for the State supported the impugned orders passed by the Courts below. He also invited my attention to the order passed by the learned Additional Sessions Judge, more particularly paragraphs 9 to 13. He submitted that by looking to the seriousness of the offence, the learned Additional Sessions Judge expressed the view that custodial interrogation with the petitioners is necessary. He also invited my attention that the learned Additional Sessions Judge has relied upon the citation of the Honourable Supreme Court in case of *Pradip Ram Vs. State of Jharkhand*, reported in, (2019) 17 SCC 326. He, therefore, submitted that there is no legal defect in the order passed by the learned Additional Sessions Judge while dismissing the revision in view of addition of serious offence of Section 307 of the Indian Penal Code. The custodial interrogation with the petitioners is found necessary and accordingly, the order of cancellation of bail and re-arrest passed by the learned Magistrate came to be upheld. He, therefore, urged that the petition is liable to be dismissed.

10 I have considered the submissions of both the sides. As pointed out earlier, two different crimes have been registered at same police station Gangapur under various offences, against respective parties on account of one civil dispute regarding right of way. It is undisputed position that the present petitioners in connection with Crime No.239 of 2022 registered with Gangapur Police Station approached before the learned Judicial Magistrate First Class, Gangapur and surrendered themselves and prayed for bail. The learned Magistrate after calling the say of the learned APP and after hearing both the sides, was pleased to release the petitioners on bail for the sum of Rs.15,000/- each vide order dated 19th June, 2022. After one day, the investigation officer moved report on 21st June, 2022 to the Judicial Magistrate First Class, Gangapur informing about addition of Section 307 of the Indian Penal Code and cancellation of bail of present petitioners and seeking permission to re-arrest them. The learned Magistrate was pleased to pass the order on the said report on the very day i.e. on 21st June, 2022, which reads thus:

“Considering the contention, bail granted stands cancelled and permission granted to re-arrest accused Nos.1, 2, 3 and 4 as prayed.”

11 The said order is in complete violation of the principles of natural justice. No notice was given to the petitioners/accused before

passing the order of cancellation of bail. It was a question of liberty of a person. Before passing such coercive order thereby curtailing the liberty of a person, it was necessary on the part of the learned Magistrate atleast to issue notice to the petitioners/accused and extend them an opportunity of being heard apart from the fact whether the Magistrate vested with powers of cancellation of bail granted by him. On perusing Section 439(2) of the Code of Criminal Procedure, it would reveal that power is vested with the High Court and Sessions Court to cancel the bail granted earlier by the Court. Section 437(5) of the Code of Criminal Procedure empowers the Magistrate to arrest a person and commit him to custody who has been earlier released on bail under sub-section (1) or sub-section (2) if it considers it necessary.

12 It is further interesting to note that after such development, the petitioners approached this Court by filing application for anticipatory bail vide Anticipatory Bail Application No.921 of 2022. This Court (Coram: S.G. Mehare, J.) vide order dated 14th July, 2022, was pleased to grant interim protection with certain conditions. As such, the order passed by the learned Magistrate was not executed. By way of subsequent development, the petitioners seem to have filed criminal revision application before the Sessions Court, Gangapur vide Criminal Revision Application No.09 of 2022. While hearing Anticipatory Bail Application No.921 of 2022, the fact of filing of

criminal revision application by the petitioners was brought to the notice of this Court by the learned APP. As such, on instructions, the learned counsel for the petitioners withdrew that application and accordingly, that application for anticipatory bail came to be dismissed as withdrawn. In that background, the learned Additional Sessions Judge proceeded to decide Criminal Revision Application No.09 of 2022.

13 On going through the impugned order passed by the learned Additional Sessions Judge in the criminal revision application, it would reveal that the learned Additional Sessions Judge though referred the citation in case of *Pradip Ram Vs. State of Jharkhand* (supra), did not consider the legal position in a letter and spirit and the mandate of Section 439(2) of the Code of Criminal Procedure. The learned Additional Sessions Judge laid much emphasis about custodial interrogation of the petitioners in view of addition of serious offence of Section 307 of the Indian Penal Code and thereby upholding the order of cancellation of bail passed by the learned Magistrate. As pointed out earlier, it is observed by his Court while granting interim protection in Anticipatory Bail Application No.921 of 2022, the weapons allegedly used in commission of the offence have been recovered at the instance of the petitioners. As such, no question of recovery of weapons and that too by way of custodial interrogation. So far

remaining three grounds as assigned in the police report by the investigation officer, for that, no custodial interrogation is necessary. The clothes of the petitioners can be recovered even without having custodial interrogation. The investigation officer can collect the blood samples by calling the petitioners/accused at the police station and taking them to the concerned Government hospital. So far as the question of tampering with the prosecution witnesses is concerned, that can be taken care of.

14 In fact genesis of two crimes between the two parties is a civil dispute on account of right of way. They are not harden criminals. They are not menace to the society. The unfortunate incident had taken place because of dispute on account of right of way.

15 During the course of argument, Mr. Mane, learned counsel for the petitioners has placed his reliance in case of ***Ravi s/o Narayan Gaikwad and others Vs. State of Maharashtra***, reported in, ***2019(2) Mh.L.J. (Cri.) 611***, wherein this Court has held that the Magistrate has no power to cancel the bail by invoking Section 439(2) of the Code of Criminal Procedure. I have gone through the said decision wherein this Court has taken aid of the decision of the Apex Court in case of ***Manoj Suresh Jadhav and others Vs. The State of Maharashtra***, in Special Leave to Appeal (Cri.) No.10179 of 2017 decided on 7th May,

2018, wherein the Honourable Supreme Court has ruled that for cancellation of bail, the prosecution has to file an application under Section 439(2) of the Code of Criminal Procedure and seek the custody of the accused, if any graver offence is made out against the accused, who had been earlier released on bail in the minor offence. He pointed out that the Magistrate has no power to cancel the bail by relying upon the observations made by this Court in the above said decision by referring the decision in cases of *Vijendra Vs. State of Rajasthan*, reported in, *1988 RCC 431* and *Mool Chand alias Murli and another Vs. Station House Officer, Police Station Renewal, Jaipur*, reported in, *2009 Cri.L.J. 3158*. After considering the stock of above referred citations and in view of the legal position made clear by the Honourable Supreme Court in above referred citations, it is very much clear that the investigation officer ought to have filed an application under Section 439(2) of the Code of Criminal Procedure before the Sessions Court and ought to have sought for custody of the accused. The learned Magistrate has no power to cancel the bail granted by him earlier by invoking the provision of Section 439(2) of the Code of Criminal Procedure.

16 Having regard to the above reasons and discussion, the order passed by the learned Magistrate dated 21st June, 2022 is liable to be quashed and set aside and equally the judgment and order

rendered by the learned Additional Sessions Judge, Vaijapur in Criminal Revision Application No.09 of 2022. The liberty granted to the petitioners needs to be restored when there are no extraordinary circumstances to keep them behind the bars and no case for having custodial interrogation. Hence, the following order is passed:

ORDER

- I. The criminal writ petition stands allowed.
- II. The impugned order passed by the learned Judicial Magistrate First Class, Gangapur dated 21st June, 2022 and the judgment and order passed in Criminal Revision Application No.09 of 2022 by the learned Additional Sessions Judge, Vaijapur dated 25th August, 2022, are hereby quashed and set aside.
- III. The liberty granted to the petitioners while granting bail by the learned Judicial Magistrate First Class, Gangapur vide order dated 19th June, 2022 is restored, however, with following conditions:
 - a) The petitioners shall remain present as and when called by the investigating officer and co-operate to the investigation agency.

- b) The petitioners shall not tamper with prosecution witnesses and evidence in any manner.

IV. Inform to the concerned Court and police station accordingly.

IV. The criminal writ petition is accordingly disposed of.

[SHRIKANT D. KULKARNI, J.]

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