

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-32375-2022

Date of Decision: 21.10.2022

Zahur Haider Zaidi

.....Petitioner

Versus

Central Bureau of Investigation

.....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: Mr. Vinod Ghai, Sr. Advocate with
Mr. Sanjeev Kodan, Advocate,
Ms. Kanika Ahuja, Advocate,
Ms. Kirti Ahuja, Advocate,
for the petitioner.

Mr. Rajeev Anand, Standing Counsel
for the respondent-CBI.

ARUN MONGA, J. (ORAL)

This is the second round of bail litigation which the petitioner is undergoing before this court. In fact, it is his 7th foray of seeking bail, notwithstanding that Apex Court had though granted him bail, but yet again he landed up in Jail. More of it later.

2. After registration of the FIR, the first bail petition was dismissed by the Sessions Court at Shimla followed by unsuccessful challenge to the same before the High Court of Himachal Pradesh. Eventually in a third foray, the Supreme Court granted bail vide order dated 05.04.2019. It transpires that subsequently, during the trial proceedings, one of the witnesses, namely, Ms. Soumya Sambasivan, who herself is a serving IPS Officer in the State of Himachal Pradesh, had filed a

complaint before her departmental superiors that the petitioner being a higher ranked IPS officer than her was trying to pressurize and influence her to depose in his favour during her slated testimony before the trial Court. To the similar effect, she also gave an application to the trial Court and in the course of recording of her testimony also deposed about the influence and pressure being exerted by the petitioner. The said alleged conduct of the petitioner was adversarially noted by the trial Court and perhaps taking a cue therefrom, the prosecution then filed an application (Annexure P-12) for cancellation of petitioner's bail.

3. The bail cancellation application of the prosecution was accepted by the trial Court vide an order dated 24.01.2020 (Annexure P-14) and petitioner was taken in custody and continues to be confined ever since. Pertinently, the original bail order dated 05.04.2019 granting bail to the petitioner was passed by the Supreme Court. Thus, the resultant second round of the *lis* in which the petitioner has so far remained unsuccessful to secure bail either before the trial Court or this Court.

4. Bail cancellation was earlier assailed by the petitioner before this Court by filing a bail petition bearing CRM-M No.7434 of 2020, which was dismissed by a co-ordinate bench of this Court vide order dated 21.05.2020 Annexure P-16, later further recalled and clarified vide another order dated 15.06.2020 Annexure P-17. Ultimately at the request of learned Senior Counsel appearing for the petitioner, the same was dismissed as withdrawn with liberty to file at later stage vide order dated 01.09.2020 Annexure P-18. Subsequent thereto, still another bail application bearing CRM-M No.44221 of 2020 was preferred which was heard and dismissed on merits by me on 19.04.2021 (Annexure P-19). For the sake of brevity, facts noted therein are being reproduced verbatim, instead of repeating the same,:

“2. Adumbrating a brief factual narrative first. Petitioner, an IPS officer of Himachal Pradesh cadre, at the relevant time, was posted as Inspector General of Police. Pursuant to an order dated 19.07.2017 passed by the High Court of Himachal Pradesh, an

FIR dated 22.07.2017 was registered at Police Station CBI, New Delhi under section 302 IPC etc in connection with an alleged custodial death of one Suraj Singh, who was in police custody being an accused in another criminal case. The petitioner was arrested on 29.08.2017. After investigation, charge sheet for offences under sections 302, 330, 331, 348, 323, 326, 218, 195, 196, 201 read with 120B of IPC was filed in CBI Court. It was followed up by filing of two supplementary challans. Petitioner could not secure bail upto the level of High Court of Himachal Pradesh. Order dated 05.04.2019, Annexure P/6, was passed by the Supreme Court in Criminal Appeal No.605 of 2019 directing that petitioner be released on bail, on satisfaction of the appropriate condition(s) as may be imposed by the trial court (at Shimla). Vide another order dated 07.05.2019, passed in the same appeal, Apex Court transferred trial of case from the court in Shimla to the competent court of CBI in Chandigarh (hereafter referred to as the trial Court).

3. *During the course of trial, on 08.01.2020 PW Ms. Saumya Sambasivan, herself an IPS Officer, moved an application before the trial court, alleging that the petitioner was trying to influence and pressurize her to change her statement in Court. She also made a statement in person, to the same effect, before trial Court. Copies of said application and statement were forwarded by trial Court vide an order dated 08.01.2020, Annexure P/11, to the DGP, Himachal Pradesh for information and necessary action, inter alia, observing that the Public Prosecutor for the CBI was also at liberty to act in accordance with law. Subsequently, an independent application, Annexure P/12, was moved by the CBI before trial Court sometime in January, 2020 seeking to cancel the bail of the petitioner and to pass an order of his re-arrest. Petitioner filed a reply controverting the allegations attributed to him in the application and statement of PW Ms. Saumya Sambasivan and the application of CBI for cancellation of petitioner's bail. 4. Trial Court accepted the application for cancellation of the bail vide its order dated 24.01.2020, Annexure P/14. Relevant part reads as under:*

"This order of mine shall dispose of an application under section 439(2) read with section 437(5) of the Criminal Procedure Code for cancellation of regular bail granted by the Hon'ble Supreme Court of India to accused Zahur Haider Zaidi.

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At this stage, this Court has to see whether any supervening circumstances justified the cancellation of bail of accused Zahur Haider Zaidi, which clearly exists in the present case, as discussed above.

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37. In view of the facts and law position as explained above, the present application is allowed and accused Zahur Haider Zaidi is ordered to be taken into custody. Bail bonds stand discharged."

5. Pursuant to the aforesaid order of bail cancellation, the petitioner was taken into custody on the same day i.e. 24.01.2020. He is in custody ever since. "

5. Aforesaid bail petition was dismissed by me essentially being of the opinion that the previous request for bail, immediately prior thereto was since dismissed merely 11 months earlier and there was apparently no material change of circumstances, as well as, on account of fact that out of judicial propriety, I could not possibly have *de novo* indulged in reappraisal of the events and facts upto the passing of earlier dismissal order dated 21.05.2020. In fact, it would be apposite to reproduce the reasons of the dismissal of the earlier bail petition, recorded in my order dated 19.04.2021, same are extracted herein below:

"9. As noted above, petitioner's first etition seeking fresh bail, inter alia, sought qushing of trial cour bail cancellation order, which was dismissed on merits by a co-ordine bench of this Court vide order dted 21.05.2020.

10. Indisputably, it was prior to 21.05.2020 that PW Ms. Saumya Sambasivan had filed application and made her statement before the trial court. Subsequently, the prosecution also moved application for cancellation of petitioner's bail and the trial court vide its order dated 24.01.2020, Annexure P/14, cancelled the petitioner's bail. Till then, out of total 107 (83+24) witnesses cited by the prosecution, 25 PWs had been examined. The co-accused were granted bail, while the petitioner's plea for fresh bail was dismissed by the co-ordinate bench vide order dated 21.05.2020. Needless to say, the main reason in the order dated 24.01.2020 passed by the trial court cancelling the petitioner's bail was that he had tried to intimidate, pressurize and influence PW Ms. Saumya Sambasivan. And that, there was possibility of the petitioner intimidating, influencing and pressurizing the other witnesses from the police department of the lower ranks like constables, Head constables and other material witnesses, who were yet to be examined. These events, circumstances and observations in the order dated 24.01.2020 passed by the trial

court were before the co-ordinate bench, at the time of dismissal of the petitioner's first petition for fresh bail on 21.05.2020.

11. For reasons of judicial discipline and propriety, I am unable to enter into any de novo re-appraisal of the events and circumstances upto the passage of order dated 21.05.2020, Annexure P/16, by a co-ordinate bench and on any such re-appraisal decide the instant second petition for fresh bail, either way, on merits or otherwise. Events prior 21.05.2020 and their effect, for or against, qua the grant of fresh bail to the petitioner can not thus be gone into once again, there being no change in the same.

12. Let us now see whether after the dismissal petitioner's first petition for fresh bail on 21.05.2020, there has been any material change of circumstances, so as to justify, at this stage, grant of fresh bail to him.

13. Response/report dated 12.02.2021 by the CBI shows that till its filing, evidence of 28 prosecution witnesses had been recorded and the cross examination of all of them was still pending. Obviously, large numbers of prosecution witnesses yet remain to be examined. It cannot be said that after 21.05.2020, there is any such material change on this score, so as to say that now, there is no scope left for influencing any one out of large number of the witnesses, who still remain to be examined by the prosecution.

14. Judicial notice may be though taken of covid -19 pandemic, seriously affecting everyone, including the working of Courts, preventing in person appearances and hearings, almost holding up the pending trials and compellingly resort to virtual hearings in cases of extreme emergencies. In his application, Annexure R/2, filed in the trial court after 21.05.2020, the petitioner himself has vehemently opposed the course of examining the prosecution witnesses through virtual hearing, saying that the same would cause serious prejudice to him. He cannot, therefore, lay blame at the door of the prosecution for not producing remaining prosecution witnesses or deliberately delaying trial, leading to his continued detention after 21.05.2020.

15. Grant of bail to the co-accused vide order dated 21.05.2020 would have been obviously factored into by the co-ordinate bench, while declining fresh bail to the petitioner vide another order of the same date. Even otherwise, the co-accused were granted initial bail only on 21.05.2020 by the co ordinate bench of this court. Whereas, the petitioner was granted his initial bail much earlier vide an order dated 07.05.2019 passed by the Apex Court. Later, his bail was cancelled on 24.01.2020 and he applied for fresh bail before this Court which was declined vide order dated 21.05.2020. There is thus no parity or similarity between the two situations.

16. No doubt, about 11 months have passed since the dismissal of the petitioner's first petition for fresh bail vide order dated 21.05.2020 by the co-ordinate bench. However, in my opinion this by itself does not constitute a sufficient new ground, at this stage, for the grant of fresh bail to the petitioner, if one takes into consideration the gravity of the offences and other aver all circumstances of the case.

17. Thus, in my opinion, there is no such material change of circumstances after the dismissal petitioner's first petition for fresh bail on 21.05.2020, as would justify allowing the instant petition for the grant of fresh bail to the petitioner.

18. Resultantly, the instant petition for fresh bail is liable to be dismissed.

19. Having though held as above, but before parting, and in all deference to the earlier co-ordinate bench order dated 21.05.2020 (rendered by my learned Brother Amol Rattan Singh, J.), I do, however, feel that something more needs to be said qua the trial court bail cancellation order dated 24.01.2020, vide which bail granted by Supreme court was cancelled.

20. As noticed earlier, the petitioner was arrested on 29.08.2017. He remained unsuccessful to secure bail upto the High Court of Himachal Pradesh. Ultimately, order dated 05.04.2019, Annexure P/6, was passed by the Supreme Court in Criminal Appeal No.605 of 2019 directing that the petitioner be released on bail, on satisfaction of the appropriate condition(s) as may be imposed by trial court (at Shimla). In its order dated 24.01.2020, Annexure P/14, the trial Court, inter alia, observed that certain conditions were imposed by the then Special Judge, CBI Court, Shimla, qua which, the petitioner was found to be in violation of one of the conditions i.e. that he (Zahur Haider Zaidi) shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the court or to any police officer. Further, petitioner was held to have violated the undertaking given by him, submitted in the form of personal bond, at the time of furnishing the bail bonds and surety bonds. At that stage, the trial court had to see whether any supervening circumstances justified the cancellation of bail of accused Zahur Haider Zaidi. Upon appraisal thereof, trial court held such circumstances clearly existed in the case. On that basis, the trial Court passed its order dated 24.01.2020, Annexure P/14, allowing the application of CBI under section 439(2) read with section 437(5) of the Criminal Procedure Code for cancellation of regular bail granted by the Supreme Court of India to the petitioner and ordered that he be taken into custody and that the bail bonds stood discharged.

21. The relevant order of the then Special Judge, CBI Court, Shimla imposing the conditions pursuant to the bail order passed

by the Supreme Court, the personal bond and the surety bond submitted by the petitioner have not been produced on record. In absence thereof, I would take the same as correct and proceed on the basis of the aforesaid factual observations noted by me qua the order dated 24.01.2020 passed by the Special Judge, CBI Court, Chandigarh.

22. At the cost of repetition, it has to be borne in mind that the petitioner was granted bail by the Supreme Court vide an order dated 05.04.2019, Annexure P/6, directing that the petitioner be released on bail on satisfaction of the appropriate condition(s) as may be imposed by the trial court (at Shimla). Merely because the Supreme Court directed that the petitioner be released on satisfaction of the appropriate condition(s) as may be imposed by the trial court (at Shimla) would not and can not change the reality that the order granting bail to the petitioner was that of the Supreme Court and not the trial Court. 23. At this juncture, it would be useful to notice the following provisions in Sections 437(1) & (2), 437(5), 439(2), 446 and 446A of the Code of Criminal Procedure:

“437. When bail may be taken in case of non- bailable offence:-

(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court other than the High Court or Court of Session, he may be released on bail, but-

(i) such person shall not be so 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 non-bailable and cognizable offence:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that It is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.]

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non- bailable offence, but that there are sufficient grounds for further inquiry into his guilt the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail] or at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

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(5) Any Court which has released a person on bail under sub- section (1) or sub- section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

439. Special powers of High Court or Court of Session regarding bail.

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(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

446. Procedure when bond has been forfeited.

(1) Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited, or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid.

Explanation.- A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before

any Court to which the case may subsequently be transferred.

- (2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code. Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.]*
- (3) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.*
- (4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.*
- (5) Where any person who has furnished security under section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 448, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and,; if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.*

446A. Cancellation of bond and bail- bond. Without prejudice to the provisions of section 446, where a bond under this Code is for appearance of a person in a case and it is forfeited for breach of a condition-

(a) the bond executed by such person as well as the bond, if any, executed by one or more of his sureties in that case shall stand cancelled; and

(b) thereafter no such person shall be released only on his own bond in that case, if the Police Officer or the Court, as the case may be, for appearance before whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition:

Provided that subject to any other provision of this Code he may be released in that case upon the execution of a fresh personal bond for such sum of money and bond by one or more of such sureties as the Police Officer or the Court, as the case may be, thinks sufficient.”

*24. I am of the opinion, once the trial Court held that the petitioner had violated the undertaking given by him in the form of personal bond submitted by him at the time of furnishing the bail bonds and surety bonds, it ought to have followed the course of action prescribed in the provisions *ibid*, for the forfeiture of the bonds executed by the petitioner and the surety/sureties, imposition and recovery of penalty thereof. Instead, the trial court straightaway cancelled the bail granted to the petitioner by the Supreme Court. To my mind, the trial court of Special Judge, being lower in the hierarchy, naturally and logically, could not, or even otherwise, at least for reasons of judicial discipline and propriety, ought not to have straightaway cancelled the bail granted to the petitioner by the Supreme Court.”*

6. As regards the bail cancellation order dated 24.01.2020 (Annexure P-14) passed by the Ld. Trial Court, I have already expressed my aforesaid reservations in the order dated 19.04.2021 passed in CRM-M No.44221 of 2020, of which relevant part has been reproduced above.

7. After dismissal of the aforesaid bail petition and for the reasons already stated herein above, the petitioner continues to be in custody and the trial has been going on. In the interregnum, petitioner has thus already undergone 4 years and 3 months in preventive custody. He was granted bail by the Supreme Court vide order dated 05.04.2019 (Annexure P-6) and prior thereto, he had already remained in custody for 1 year and 6 months. Following cancellation of the bail by trial Court, the petitioner was again taken into custody and since then has been in further detention for 2 years and 9 months. Resultantly, total period of his incarceration comes to 4 years and 3 months, as aforesaid.

8. On a Court query, the learned Standing Counsel for the CBI submits that there are as many as 12 witnesses yet to be examined and who are likely to depose *qua* the role attributed by the petitioner. He would, therefore, urge that the possibility

of his influencing the witnesses cannot be ruled out considering his past misconduct, as has been already noted by the Ld. Trial Court while cancelling his bail.

9. I have heard the rival contentions of the parties and also have seen the list of 12 witnesses. Most of them are Government officials. Three of them are serving Judicial Officers, whose testimony is required as a standard formality, inasmuch as, at the relevant time two of them had recorded the statements under Section 164 Cr.P.C. The third Judicial officer (ACJM) had conducted judicial inquest in the death of Suraj, which eventually resulted in registration of the FIR. A look at the list of other remaining witnesses reflects that even they are either senior serving IPS officers (one now retired as DGP) and/or are non-IPS police officials.

10. Already, the petitioner has had a bitter dose. He would have learnt, though the hard way, consequences for trying to influence one of the witnesses. It would and should serve as a deterrent against repetition of similar attempt by him. It seems unlikely that once again he tread the same path in trying to influence or would be able at this stage, to exercise any influence on them. In my opinion, even assuming such hypothetical situation, it would be punitive and quite oppressive to the petitioner. It will be a travesty of justice to keep him in further incarceration indefinitely based on presumptions.

11. Vide police report under section 173 Cr.PC Annexure P-4, the petitioner has been challaned for offences under sections 120-B read with sections 302, 330, 331, 348, 323, 326, 218, 195, 196, 201 of IPC. The top most of them - under Section 302 IPC is punishable with death, or imprisonment for life and fine. It is only in the rarest of the rare cases that death penalty is awarded. Gist of allegations against the petitioner is that (i) on 18.07.2017, he directed DSP Manoj Joshi to extract confession from Suraj, the arrested person; on 19.07.2007, the petitioner was aware that said arrested person Suraj had died due to custodial torture; (iii) when the

petitioner questioned Dinesh (Sentry), he told the complete truth, which the petitioner recorded in his phone and (iv) the petitioner ordered that Dinesh's signature be obtained on statement under section 154 Cr.PC, upon which statement a false FIR had already been registered regarding Suraj's death.

12. Even assuming that on conclusion of trial, the petitioner would be convicted, still for the role ascribed to him in the commission of offences, it is highly unlikely that the extreme penalty of death would be awarded to him. In **Dharam Pal v/s State**¹ (Division Bench) followed by **Dalip Singh @ Deepa Vs. State of Punjab**² (Full Bench), this Court has held that in appeal against award of life imprisonment by trial Court, if the convict has remained in detention for five years, normally he would be entitled to suspension of sentence pending disposal of the appeal. Though it is not to be taken as any strait jacket formula for grant of bail, but the view of this Court (in Dharam Pal/Dilip Singh) is being relied upon as a mitigating factor for the purposes of according the concession of bail to the petitioner at this stage.

13. Petitioner has been in custody for more than 4 years and during that period all the private witnesses have since been examined. Details have not been given about those yet to be examined, as to what Statements they would give *qua* allegations attributed to the petitioner. But since most of them are government officials, I am of the opinion that the petitioner in his own interest could refrain from approaching them, in any manner whatsoever, having already suffered ignominy of cancellation of bail by the Ld. Trial Court and suffered the consequences as already observed. Also, his being under suspension would also be another factor that shall keep him away from police officials, who are stated to be the unexamined witnesses.

¹ 1999 (4) RCR (Criminal) 600

² 2010 (2) RCR (Criminal) 566

14. Apart therefrom, Mr. Vinod Ghai, the learned Senior Counsel representing the petitioner argues that in order to obviate the apprehension of prosecution, as has been expressed, the petitioner during the pendency of trial or till the time all the rest of prosecution witnesses are examined, is ready to furnish an undertaking before the trial Court to the effect that he would not enter the territorial limits of State of Himachal Pradesh. Being a native of Lucknow, he will reside there and shall appear before the trial Court as and when required.

15. Considering the overall scenario and without commenting on the merits of the case, I am of the view that, merely on the ground of apprehension, based on unsubstantiated past conduct, it would be punitive and oppressive to the petitioner, besides being unjust and unfair to keep him in further preventive custody, given the change of circumstances since his last bail application was dismissed, more particulalry in the light of already undergone inordinate incarceration.

16. Accordingly, the instant petition is allowed and the petitioner is ordered to be released on bail qua FIR in question, on his furnishing bail bonds and surety bonds to the satisfaction of learned trial Court/ learned Duty Judge, as the case may be. He shall also give specific undertaking, *inter alia*, that he will not directly or indirectly approach or try to influence any of the remaining prosecution witnesses and shall appear before the Trial Court as and when required till the conclusion of trial.

(ARUN MONGA)
JUDGE

October 21, 2022
ashish

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No