

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**954 APPLICATION FOR CANCELLATION OF BAIL NO.193 OF
2021**

Sunil s/o. Sahebrao Pawar,
Age : 34 years, Occ : Agri.,
R/o. Bhatkheda,
Tq. & Dist. Jalna

... Applicant

Versus

1. The State of Maharashtra
Through Police Station Chandanzira,
Tq. & Dist. Jalna.
 2. Sadanand s/o Gulabrao Gonde,
Age : 30 years, Occu : Nil,
R/o. Gayatri Nagar, Jalna,
Tq. & Dist. Jalna.
 3. Pandharinath @ Guntya s/o. Gulabrao Gonde,
Age : 32 years, Occu : Nil,
R/o. As above.
 4. Shivaji s/o Rambhau Gangawane,
Age : 33 years, Occu : Nil,
R/o. Nutanwadi,
Tq. & Dist. Jalna
- ... Respondents

...

Mr. Suraj R. Bagal h/f Mr. B.N Gadegaonkar, Advocate for the applicant.

Mr. Y.G. Gujarati, APP for the respondent/State.

Mr. R.V. Gore, Advocate for respondent nos.2 to 4.

...

CORAM : S.G. MEHARE, J.

DATED : JUNE 23, 2023

ORDER :-

1. Heard learned counsel for the applicant and counsel for respondents nos.2 to 4.

2. The applicant, brother of the deceased, filed this application for cancellation of the bail under Section 439(2) of the Criminal Procedure Code, granted to respondent nos.2 to 4 by order dated 29.07.2021 in Criminal Bail Application No.819 of 2021 by the learned Additional Sessions Judge-5, Jalna in Crime No.240 of 2021 registered with Chandanzira Police Station. He also impugned the order of the learned Additional Session Judge, Jalna, dated 22.10.2021 passed in Criminal Miscellaneous Application No.43 of 2021, moved by the State for cancellation of bail on the ground of adding the new sections.

3. Before advertizing to the arguments and the legal issues raised by the respective counsels, the Court feels it appropriate to have a few facts on record. The applicant filed the report on 21.07.2021 with the police station, alleging that all the respondents had assaulted the deceased. Since he was assaulted, he was admitted to the hospital. When he was under treatment, the accused were released on bail. Initially, the

offence under Sections 307, 326, 323, 341, 143, 147, 148, 149, and 504 of the Indian Penal Code and Section 4/25 of the Arms Act was registered. Since the deceased died under treatment, the prosecution added Section 302 of the Indian Penal Code.

4. Firstly, learned counsel for the applicant would submit that the learned Additional Sessions Judge granted the bail to the respondent nos.2 to 4 hastily without considering the facts that the deceased was hospitalized and under treatment. The relevant papers were not properly examined. The Judge granting bail did not apply his mind and mechanically granted the bail. Respondents nos.2 to 4 were granted bail within six days of the incident. The reasons assigned for the bail were not conformed to the facts of the case and material collected by the investigating officer. The investigation, in fact, was in progress. The deceased had suffered multiple injuries. The applicants were named in the FIR with their specific roles. The delay in lodging the report ought not to have been the ground for granting bail.

5. Secondly, he would argue that after adding a new grave section, the prosecution had filed an application for cancellation of bail before the learned Additional Sessions

Judge, Jalna. However, he has erroneously rejected the prayer of the prosecution, in which he was also the party, barely on the ground that the prosecution had simply asked for cancellation of bail because the nature of the offence got changed subsequently. The investigating officer had not sought permission from the Court to arrest the accused and also not shown how custodial interrogation of the applicants is necessary. The learned Judge did not consider the ratio laid down in the case of Pradeep Ram Vs. State of Jharkhand and another, 2019 (17) SCC 326. Therefore, the said order is erroneous on the face of the record.

6. Per contra, learned counsel for respondents nos.2 to 4 vehemently argued that the order refusing the cancellation dated 22.10.2021 is legal, correct and proper. There was no prayer for the arrest of the respondents. The learned Additional Sessions Judge, Jalna, in the impugned order dated 22.10.2021, has expressed the option available to the investigating officer to seek the order from the Court for the arrest of the accused. However, there were no grounds for custodial interrogation; hence, it appears that he did not opt for the arrest of respondents and directly filed the charge sheet. He has also pressed into service the injuries caused to

the deceased and argued that those injuries were simple. He would argue that the deceased died some days after his discharge from the hospital. So, it cannot be said that his death was the direct result of the injuries caused to him in the alleged incident. He would also argue that the investigation was completed. Nothing was to be recovered from the respondents. In such circumstances, barely adding a section for a grave offence shall not be grounds for either cancelling the bail, directing the accused to surrender, or the investigating officer may be granted leave to arrest the accused. To bolster his arguments, he relied on the case of Rohan Sunil Abbott Vs. State of Maharashtra, 2021 ALL M.R. (Cri) 4686.

7. Learned counsel for the applicant further argued that where the prosecution did not opt to prefer the revision or appeal against the order of the sub-ordinate Court, the person aggrieved has a right to impugn such orders. To bolster his arguments, he relied on the case of Nana @ Narsing Vishwasarao Nayak and others Vs. State of Maharashtra, 2021 ALL M.R. (Cri) 2718 and the order of this Court in Application for Cancellation of Bail No.123 of 2021 (Pooja Alias Pranjali Shrikant Khandare Vs. Shrikant Dattatraya Khandare and another with other applications) dated 08.06.2022. In a

nutshell, he argued that an illegal order may be impugned either by the State or by the victim. He prayed to allow the application and set aside the orders granting bail dated 29.07.2021 and 22.10.2021. The applicant, in both ways, seeks the cancellation of bail.

8. Let us test the legality, propriety and correctness of the impugned orders. In the case of Mahipal Vs. Rajesh Kumar (2020) 2 SCC 118, the Hon'ble Supreme Court observed as regards the cancellation of bail in para 16 that reads thus:

“16. The considerations that guide the power of an appellate court in assessing the correctness of an order granting bail stand on a different footing from an assessment of an application for the cancellation of bail. The correctness of an order granting bail is tested on the anvil of whether there was an improper or arbitrary exercise of the discretion in the grant of bail. The test is whether the order granting bail is perverse, illegal or unjustified. On the other hand, an application for cancellation of bail is generally examined on the anvil of the existence of supervening circumstances or violations of the conditions of bail by a person to whom bail has been granted.”

9. In the case of Ram Govind Upadhyay Vs. Sudarshan Singh (2002) 3 SCC 598, the Hon'ble Supreme

Court in para 3 has observed as regards the grant of bail, which reads thus:

“3. Grant of bail though being a discretionary order but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the Court and facts however do always vary from case to case. While placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic considerations for the grant of bail more heinous is a crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.”

10. The law is settled that the Court considering the bail application, cannot undertake the detailed examination of evidence and an elaborate discussion of the merits of the case. The Court is required to assign the prima facie reasons justifying the grant of bail. When the order granting bail was passed, the Court was aware that the injured were hospitalized, and it was submitted by the accused that they

were out of danger and there were no life-threatening injuries to them except fractures of hands and legs. By way of precaution, the Court called the investigating officer and observed that it was admitted that the recovery was done. Such was the observation recorded by the Court granting bail without the medical report on record. The investigating officer had requested the custodial interrogation of the accused/respondents nos.2 to 4. However, the Court granting bail observed that no fruitful purpose would be served just by keeping the applicants/accused behind bars. While granting bail, it has also been observed that the sword and iron rod used to commit the crime were seized.

11. Normally, like the case in hand, the discharge of the injured from the hospital is a material consideration. It is for the reason that the injured may die due to the injuries caused to him, or it helps to ascertain whether the injuries were grievous or simple. The period of hospitalization of the injured is considered to decide the nature of the injuries. Considering the reasons assigned by the Court granting bail, the Court is of the view that it was a hasty order granting bail. The discretion appears not exercised in the proper perception

of the law. The order granting bail is against the law laid down by the Hon'ble Supreme Court in Mahipal (cited supra).

12. As far as the cancellation of bail sought by the investigating officer is concerned, both sides relied upon the case of Pradeep Ram (cited supra). In this case, the divergent views of different Courts as regards cancellation of bail after releasing the accused on bail were considered, and finally, the Hon'ble Supreme Court recorded its conclusion in para 29, which reads thus :

“29. In view of the foregoing discussions, we arrive at following conclusions in respect of a circumstance where after grant of bail to an accused, further cognizable and non-bailable offences are added:-

(i) 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.

(ii) The investigating agency can seek order from the Court under Section 437(5) or 439(2) of Cr.P.C. for arrest of the accused and his custody.

(iii) The Court, in exercise of power under Section 437(5) or 439(2) of Cr.P.C., 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-cognizable offences which may not be necessary always with order of cancelling of earlier bail.

(iv) 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 need to obtain an order to arrest the accused from the Court which had granted the bail.”

13. Reading the above conclusion of the Hon'ble Supreme Court, the investigating officer had two options. Firstly he may apply for cancellation of bail under Section 439(2) of Cr.P.C. for his arrest and custody, and secondly, he may arrest the accused, obtaining the orders to arrest the accused from the Court which has granted the bail. In the case of Rohan Sunil Abbott (cited supra), this Court has observed that it is not necessary that in all cases, earlier bail should be cancelled by the Court before granting permission to arrest an accused on the basis of new offences. In the said case, the bail was granted under Section 436 of Cr.P.C. and thereafter, Section 304-II was added. An application was moved before the learned Magistrate seeking the cancellation of bail granted to the accused under Section 436 of Cr. P.C. The cancellation of bail and police custody was refused. The Court accepted the

contentions of the petitioner/accused that since the petitioner has been granted bail under Section 436 of Cr.P.C, the prosecution could not have moved an application under Section 437(5) of Cr. P.C. Herein the case, the accused/respondent nos.2 to 4 had moved an application before the Sessions Court under Section 439 of Cr. P.C. The principles of granting bail under Section 436 and 439 are different. Therefore, with due respect, this Court says that the ratio laid down in the case of Rohan Sunil Abbott (cited supra) would not apply to the case at hand.

14. In the case of Pooja (cited supra), the principle laid down in the case of Pradeep Ram (cited supra) was followed, and the ratio laid down in the case of Jagjit Singh and Ors Vs. Ashish Mishra @ Monu and another, (2022) 9 SCC 321 has also been considered as regards the right of the person aggrieved to be heard. Here, the present petitioner is the brother of the deceased. So, he is the victim, as defined in Cr. P.C. He has every right to impugn the order granting bail and refusing the cancellation. Since Pradeep Ram (cited supra) has expressed an option to the investigating officer to seek either the cancellation or leave to arrest, the option exercised by the

investigating office seeking cancellation of bail is within the four corners of the law.

15. Learned counsel for respondents nos.2 to 4/accused has tried to argue that, seeking cancellation of bail as the severe sections have been applied subsequent to granting bail unless the prosecution satisfies the Court, the bail should not be cancelled mechanically. The Court dealing with such an application should examine the material and explore whether the custodial interrogation of the accused is essential. However, Pradeep Ram (cited supra) landmark judgment on the cancellation of bail after adding sections does not speak about any such examination of the essentiality of the custodial interrogation. The reason may be that the principle granting bail for lesser and severe offences differs. The offence punishable under Section 302 provides for the punishment of either imprisonment for life or death. It is the most serious offence in the list of offences in the Indian Penal Code. So while granting bail normally, the Court has to consider the facts, the gravity of the offence, the possibility of tampering with the prosecution witnesses and fleeing away of the accused from justice and the heinous nature of the crime. Since Section 302 was applied, all these aspects would fall for

consideration if the accused opts to seek bail under Section 439 of Cr.PC.

16. The discussions made above led this Court to arrive at a conclusion that the order granting bail dated 29.07.2021 in Criminal Bail Application No.819 of 2021 and the order dated 22.10.2021 in Criminal Miscellaneous Application No.43 of 2021 refusing the cancellation of bail on technical grounds not seeking the arrest of the accused also are perverse, illegal and improper. It seems that the ratio laid down in the case of Pradeep Ram (cited supra) was not correctly applied while refusing the cancellation of bail moved by the prosecution. Therefore, both orders are liable to be quashed and set aside. Hence, the following order :

ORDER

- (i) Application for Cancellation of Bail is allowed.
- (ii) The order granting bail in Criminal Bail Application No.819 of 2021 dated 29.07.2021 passed by the learned Additional Sessions Judge-5, Jalna and the order refusing cancellation of bail passed by the learned Additional Sessions Judge, Jalna, in Criminal Miscellaneous Application No.43 of 2021 dated 22.10.2021, stand quashed and set aside.

(iii) The bail granted to respondent nos.2 to 4 stands cancelled.

(iv) Bail and surety bonds are also cancelled.

(v) Respondents nos.2 to 4 to surrender before the investigating officer on or before 05.07.2023.

(vi) The right of respondents nos. 2 to 4 to claim afresh is protected. They may apply for bail on merit after being sent to Magisterial custody.

(S.G. MEHARE, J.)

Mujaheed//