

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

CRIMINAL WRIT PETITION NO. 1718 OF 2022

Ganesh Baban Thorat .. Petitioner

Versus

The State of Maharashtra .. Respondent

Mr.S.J. Salunke, Advocate for the petitioner.

Mr.S.R. Yadav-Lonikar, APP for the respondent/Setate.

CORAM	:	KISHORE C. SANT, J.
RESERVED ON	:	06.02.2023
PRONOUNCED ON	:	02.03.2023

ORDER :-

01. This petition is filed by the original accused challenging an order of cancellation of bail granted to him under section 167 (2) of the Cr.P.C., passed by the learned Judicial Magistrate, First Class (Court No.5), Aurangabad dated 09.11.2022.

02. The facts giving rise to the present petition in short are that a crime came to be registered against the present petitioner for the offence punishable under section 304 Part II of the Indian Penal Code at the instance of one Pallavi Niraj Thorat on 27.08.2022. She alleged that present

petitioner/accused and herself came in contact when her husband was suffering from kidney problem was admitted in the hospital. The mother of the petitioner was also admitted in the same hospital. It transpired in the conversation that he happens to be distant relative of the informant. Because of the kidney problem now her husband stayed at Indore. Taking advantage of this, the petitioner developed illicit relations with the informant. Though he had wife at Buldhana, the petitioner frequently started visiting the informant. He used to stay with her and lived as husband and wife. They even celebrated some occasions together.

03. On 30.06.2022 when the son of the informant was at home at about 12.30 p.m. the petitioner came in the house from the hind door. He beaten up the son telling the informant that her son was trying to run away. He was severely beaten up by the cable wire. Son became unconscious and was therefore, taken to the hospital. The petitioner told the informant to give history in the hospital as it is the informant who beaten up her son. Then he asked telling the informant that if offence is registered against him, he will lose his job from the military and thereby they both would come in trouble etc. Later on he told that since he had beaten his wife at Sindhkhed Raja and

therefore he was under pressure and therefore he had asked the informant to give this history in the hospital. On 27.08.2022 while treatment was going on the son of the informant unfortunately died. The informant, therefore, lodged offence. The police registered crime under section 304 Part II of the IPC. The petitioner was thereafter arrested on 28.08.2022 and taken into custody. He was in police custody till 05.09.2022 and since then the petitioner is in the Magistrate's custody.

04. On 08.11.2022 the petitioner filed an application under section 167(2) of the Cr.P.C. since by that time he was in custody for more than 60 days and since offence under section 304(2) is punishable with imprisonment up to 10 years. On the same date the learned JMFC allowed the application and the petitioner was ordered to be released on bail.

05. On 09.11.2022 the petitioner submitted application seeking permission to furnish surety. However, on the same day, the Investigating Officer filed an application for cancellation of bail stating that section 302 of the IPC and section 75 of the Juvenile Justice Act are added in the crime and therefore the period for filing charge-sheet is 90 days.

06. The learned Magistrate, on application by the Investigating Officer, cancelled the order dated 08.11.2022 stating that period of 90 days was yet to be expired. Thus, the petitioner is before this Court.

07. The learned Advocate for the petitioner submits that once the bail was granted to the petitioner it could not have been cancelled without sufficient and strong reason. He submits that the learned Court of JMFC on the default application had directed the Assistant Superintendent of the Court calling report as to whether charge-sheet is filed or not, on which specific report is submitted that till 04.05 p.m. on 08.11.2022 no charge-sheet was filed. He submits that, thus, the application for default bail was rightly granted. When the application is rightly granted, there was no reason for the Court to cancel the same.

08. The learned Advocate further submits that it is only on 09.11.2022 when the petitioner was to furnish the security, the Investigating Officer filed the application. If the Investigating Officer wanted to file an application, he could have filed it before expiry of sixty days. He thus

challenges the order of cancellation of bail. The learned Advocate further submits that once the order of bail was granted, the Magistrate had no power to cancel his own order. If at all the prosecution wanted to cancel the bail, same could have been done only by filing application under section 439(2) of the Cr.P.C. He submits that there is no provision of review of the order in the Cr.P.C. and also challenges the maintainability of the application filed by the prosecution.

09. The learned APP submits that the learned Public Prosecutor had filed say on 08.11.2022 itself stating that from the reading of the complaint it appears to be a case wherein section 302 of IPC is attracted and therefore say of the Investigating Officer was necessary. Thus, he submits that it was necessary to call for say from the Investigating Officer. The order could not have been passed without calling say from the Investigating Officer. The learned JMFC realized that the order was wrongly passed and therefore he has recalled the order. It is submitted that this order is not in the nature of review. The learned Court has only corrected the mistake that was committed inadvertently. It is further submitted that this is not a case where order of granting bail was challenged or that the cancellation was sought on the

ground of breach of condition etc. The learned APP further submits that immediately on the next day the Investigating Officer filed application before the petitioner could actually be released on bail. In this case, admittedly section 302 of the IPC was added before 60 days and in view of this now only option for the petitioner is to file application seeking regular bail.

10. This Court, therefore, has to consider as to whether the learned Court was justified in cancelling the order granting bail under section 167 (2) of the Cr.P.C. On going through the application filed by the Investigating Officer, it is seen that the Investigating Officer had added section 302 of the IPC on 26.10.2022 itself and the report was submitted to the Court on the same day by communication bearing outward No.4782 of 2022. However, for some reason it was not placed in Court file inadvertently by the concerned person. Thus, it is seen that on 26.06.2022, much prior to completion of 60 days, the section was added and only it was not taken on record. The learned JMFC observed that intimation was given to the Magistrate on 26.10.2022 and the office copy of the intimation letter was produced. The learned JMFC perused the office copy of the intimation that was given to the in-charge Magistrate on 26.10.2022 and during that period there was Diwali vacation

from 24.10.2022 to 30.10.2022. Till passing of the order the copy of intimation was not on record because of failure in duty of the concerned clerk of the incharge Court. It is for this reason, the Court had no knowledge about the insertion of section 302 of the IPC in the said crime.

11. Thus, on going through the order this Court is satisfied that it was failure on the part of the concerned Court clerk of the incharge court in producing the intimation letter on record. It is well settled principle that the act of the Court shall prejudice none. In this case it is clear that no fault can be attributed to the Investigating Officer or the prosecution, as the Investigating Officer had given intimation in time to the Court. Only because of the Diwali vacation, proper intimation could not be placed in file. It is for this reason the intimation could not be brought to the notice of the Court while passing order dated 08.11.2022. This Court finds that order of cancellation of bail which was granted on technical ground cannot be said to be review. While considering bail under section 167(2) of the Cr.P.C. the Court has to see only dates of taking the accused in the custody and the date of filing of the charge-sheet or non-filing of the charge-sheet etc. Said order of bail was passed only by taking into consideration the above factors and said

order cannot be said to be an order passed on merits of the case and it is not necessary to file application for cancellation of bail in the superior Court or for breach of condition. This Court finds that there is no substance in the submission that the order of cancellation of bail amounts to review in this case. As already recorded, even no fault is found on the part of the prosecution. Therefore, this Court finds that no interference is called for with the impugned order dated 09.11.2022. Hence, the petition fails and the same is dismissed.

[KISHORE C. SANT, J.]