

State of Orissa Vs. Md. Abdul Karim

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Court : Orissa

Decided On : Feb-13-1984

Reported in : 57(1984)CLT281; 1984(I)OLR262

Judge : B.K. Behera and ; R.C. Patnaik, JJ.

Acts : Code of Criminal Procedure (CrPC) - Sections 439 and 439(2)

Appeal No. : Criminal Miscellaneous Case No. 757 of 1983

Appellant : State of Orissa

Respondent : Md. Abdul Karim

Advocate for Def. : J.K. Mishra, Jayant Das, N.C. Mishra and T. Hafiz

Advocate for Pet/Ap. : Indrajit Ray, Addl. Government Adv.

Judgement :

B.K. Behera, J.

1. The question for consideration by us is the cancellation or continuance of bail granted to the opposite party by Mr. N. P. Mohapatra, the learned Additional Sessions Judge, Phulbani, by his order dated July 26, 1983. An application has been moved by the learned Additional Government Advocate under section 439(2) of the Code of Criminal Procedure ('the Code', for short) read with section 482

thereof to cancel bail because of improper and arbitrary exercise of discretion and to prevent an abuse of the process of the court in the manner in which bail has been granted in a case of murder. Mr. J. K. Mishra, the learned counsel for the opposite party, contends that there are no-reasonable grounds for believing that the opposite party had committed the offence and there is no justification to cancel the bail granted to the opposite party.

2. It is alleged against, the opposite party, who was functioning at the relevant time as the Officer-in-Charge of the Raikia Police Station and the Circle Inspector of Police, Phulbani, who had been investigating into a case of dacoity against Rabindra Naik (herein. after referred to as the deceased) and the co-accused persons that the deceased, while being interrogated in the course of investigation into a case of dacoity at the Raikia Police Station, was detailed, tortured and assaulted to death by the police officials during the night of December 28/29, 1982 and then his dead body was hung to a tree in order to give a colour of suicidal hanging. In the course of investigation, the opposite party was arrested on July 24, 1983. He unsuccessfully moved for bail before the learned Judicial Magistrate at G. Udayagiri and then moved the learned Additional Sessions Judge, Phulbani, on July 26, 1983 for his release on bail. A copy of the bail application was served on the learned Public Prosecutor who made an application to call for the up-to-date case diary including the statements of the witnesses recorded under Sections 161 and 164 of the code. The learned Additional Sessions Judge did not accept this submission on the ground that certified copies of the statements of three witnesses recorded under sections 161 and 164 of the code and of the plain paper first information report and the formal first information report had been produced before him by the learned counsel for the opposite party. The learned Judge allowed the application by writing out a six page order by his own hand delving into the merits of the case and trying to find out as to whether the statements of the witnesses could be relied upon in view of the conflicting versions in the statements made under sections 161 and 164 of the, Code, went to the length of considering the developments in the statements of the witnesses filing stage to stage, came to the finding that the divergent opinions did not support that death had occurred owing to piercing of a needle into the navel of the deceased attributed to the opposite party, found that the materials placed before him by the learned defence

counsel seemed to be extremely weak and had been made by aggrieved persons who had been arrested by the opposite party in a case of dacoity and taking into consideration the fact that the Circle Inspector of Police had been released on anticipatory bail by the learned Sessions Judge, ordered release of the opposite party on bail.

3. It has been brought to our notice that the widow of the deceased had made an application before the learned Sessions Judge, Berhampur, for cancellation of bail on the grounds that the opposite party had, by abusing his liberty while on bail, on September 4, 1983 and September 10, 1983, attempted to tamper with the prosecution evidence by offering money and also by threat and the learned Sessions Judge, by a reasoned order, negated the contentions raised before him for cancellation of bail. The same grounds have been taken before us in a supplementary affidavit filed on January 11, 1984 and not in the original application for cancellation of bail made on October 25, 1983. In these circumstances, we are not inclined to cancel bail on the same grounds.

4. The opposite party is accused both of bailable and non-bailable offences. Certain provisions and principles relating to the grant and cancellation of bail may be kept in mind.

5. Bail is a matter of right if the offence is bailable. In the case of a non-bailable offence, bail is a matter of judicial discretion. Bail shall not be granted by the Magistrate if the offence is punishable with death or imprisonment for life if he is of the view that there appear reasonable grounds for believing that the person concerned accused or suspected of the commission of the offence has been guilty of the offence, provided that he may, in his discretion, grant bail to a woman or a minor under the age of sixteen years or a sick or infirm person. In a case involving a non-bailable offence, a court may impose reasonable conditions besides fixing of the bail amount for the attendance of the accused.

The High Court and the Court of Session have a wider discretion in granting bail even in respect of offences punishable with death or imprisonment for life. Section 439 of the Code reads:

'Special powers of High Court or Court of Session regarding bail :-(1) A High Court or Court of Session may direct-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that subsection ;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified :

Provided that the High Court or the Court of Session-shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.(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 committed to custody.'

Giving a notice of the application for bail to the Public Prosecutor unless the court is of the view, for the reasons to be recorded in writing, that it is not practicable to do so is mandatory and in the instant case, it had been done! But a reasonable submission made by the learned Public Prosecutor to call for the case diary should not be refused in a case involving serious and heinous offences. What is contained in the proviso to sub-section (1) cannot be construed to be an empty formality. A reasonable opportunity should be afforded to the Public Prosecutor of presenting his case and of being heard.

In AIR 1978 Supreme Court 179 Gurcharan Singh and Ors. v. State (Delhi Administration), it has been laid down :

'Section 439(1), Cr.P.C. of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1) Cr. P. C. against granting of bail by the High Court or the Court of Session to persons accused of an

offence punishable with death or imprisonment for life-It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances indicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in bail under Section 439(1), Cr. P. C. or the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1) Cr. P.C. of the new Code are the nature and gravity of the circumstances in which the offence is committed, the position and the status of the accused with reference to the victim and the witnesses, the likelihood of . the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; or tampering with witnesses, the history of the case as well as of its investigation and other relevant grounds which, in view of so many variable factors, cannot be exhaustively set out.'

It has been held in this case that there is no provision in the new Code excluding the jurisdiction of the High Court in dealing with an application under section 439(2) of the Code to cancel bail after the Sessions Judge had Keen moved end an order had been passed by him granting bail. The High Court has undoubtedly jurisdiction to entertain an application under section 438(2) of the Code for cancellation of bail notwithstanding that the Sessions Judge had earlier admitted the accused person to bail.

Dealing with the scope of section 439(2) of the Code, the Supreme Court has held in AIR 1978 Supreme Court 961. The State through the Delhi Administration v. Sanjay Gandhi :

'Rejection, of bail when bail is applied for is one thing, cancelation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow V accused to retain his freedom during the trial...'

6. We notice that without affording a reasonable opportunity to the learned Public Prosecutor of being heard and without even calling for the case diary, for which an application had been made, which could indicate materials other than those placed before him by the learned counsel for the opposite party, the learned Additional Session Judge, having catalogued the discrepancies in the statements and developments from stage to stage which could more appropriately be gone into at the stage of trial and not at the stage of considering an application for bail, chose to grant bail to the opposite party. This approach is not permissible in view of what has been held by the Supreme Court in AIR 1980, Supreme Court 785 Niranjana Singh and Anr. v. Prabbakar Rajaram Kharote as follows :

"Detailed examination of the evidence and elaborate documentation of the merits should be avoided while passing orders on bail applications. No party should have the impression that his case has been prejudiced. To be satisfied about a prima facie case is needed but it is not the same as an exhaustive exploration of the merits in the order itself."

The learned Judge did not even call for the case diary and the State was denied a reasonable opportunity of being heard. Judicial discretion should be exercised, properly and not capriciously and arbitrarily as had been done in the instant case.

7. But the next important question is as to whether the bail granted to the opposite party should now be cancelled.

8. As indicated in the earlier part of this order, the grounds taken by the widow of the deceased before the learned Sessions Judge, which have now been taken by the State, have been negatived by the learned Judge and he refused to cancel bail granted to the opposite party. Save and except the allegations made against him by the widow of the deceased regarding the attempts by the opposite party and the other co-accused police officers which have not been substantiated, there is no other material to show that the opposite party, after being released on bail, has abused his liberty and has attempted to tamper with the prosecution evidence nor is there any allegation before us that he had at any stage hampered the investigation before its completion.

9. The opposite party has been released on bail more than six months ago. As a long period of pre-trial detention in the course of investigation or on its completion during the trial is a factor taken into consideration while considering an application for bail, it may not be wrong and improper, in our view, to take into consideration, among other matters, the long period intervening between the date of release of an accused person and consideration of an application for cancellation of his bail. The Inspector of Police, who has been involved in the same crime, had been admitted to anticipatory bail. The other coaccused persons are also on bail.

10. On the completion of investigation, a charge-sheet has been placed in August, 1983 against the opposite party and some co-accused persons for offences punishable under sections 302, 330, 343, 218 and 201, against some for an offence punishable under section 302 and in respect of some other offences and against the Inspector of Police for offences punishable under sections 330 and 343 of the Indian Penal Code. After the charge-sheet has been placed, the case has been committed to the Court of Session for trial and the learned Additional Government Advocate has submitted before us that the case has been transferred, by the learned Sessions Judge, Berhampur, to the court of the Additional Sessions Judge, Phulbani, for trial. The learned Judge, who had granted bail, is no more functioning at Phulbani and we are sure, the presiding officer of the Court of Session, who will be trying the opposite party and the co-accused persons, will not, in any manner, be influenced by any observation made by us or by his learned predecessor and will decide the case on merits on the basis of the evidence produced before him. If at any stage prior to or during the trial, any credible attempt is made by the opposite party to suborn, gain over or intimidate the witnesses or he does any act affecting a fair trial, the State may move for cancellation of his bail.

11. A review of the decision already made granting bail to the opposite party may not be made as there are no supervening circumstances indicating that it would no more be conducive to allow the opposite party to continue on bail. Inherent jurisdiction of this Court is to be exercised in rare and exceptional cases and in the interests of justice. In view of the facts and circumstances of the case and in the absence of compelling and substantial reason, we do not feel ourselves called

upon at this stage to cancel the order admitting the opposite party to bail. We would, however, direct the opposite party not to enter the area⁹ of the Raikia Police Station to which the main non-official witnesses belong except for the purpose of his defence and with the leave of the trial court until the completion of the trial.

12. In the result, the application for cancellation of bail is rejected with the direction made above. We would call upon the trial court to take up the trial and dispose of the case as quickly as is reasonably possible. The records of the courts below be sent down at once.

R.C. Patnaik, J.

13. I agree.

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