Nilu and ors. Vs. the State

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Court : Orissa

Decided On : Jul-11-1983

Reported in : 56(1983)CLT123; 1983CriLJ1590

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

Appellant : Nilu and ors.

Respondent : The State

Judgement :

B.K. Behera, J.

1. The petitioners, accused of offences punishable under Sections 120-B, 147, 148 and 302 read with Section 149 of the Indian Penal Code, besides other offences, in the court of the Subdivisional Judicial Magistrate, Chatrapur, in the district of Ganjam, for having formed an unlawful assembly being armed with dangerous weapons and committed the murder of Pratap Swain in furtherance of their common intention after a criminal conspiracy, assail the order under Section 439(2) of the Cr. P.C. (for short, the 'Code') passed by the learned Sessions Judge, Ganjam-Boudh, Berhampur, cancelling the bail granted to them by the learned Subdivisional Judicial Magistrate under the proviso to Section 167(2) of the Code, as the investigation was not completed within a period of ninety days. Each of the petitioners had been released on a bail of Rs. 5,000/-with two sureties each for the like amount subject to the conditions that (i) the petitioners would not

leave the jurisdiction of the court without obtaining prior permission from his court; (ii) they would not commit any offence or any act of violence leading to breach of the peace; (iii) they would not do any act leading to tampering with the prosecution evidence, and (iv) they would report themselves at the Chatrapur Police Station once in a week, i.e. on each Sunday before 4 p.m. till the submission of the final form by the investigating agency. Later on the same day a charge-sheet was placed against the petitioners and a number of other accused persons and the prosecution moved an application before the learned Subdivisional Judicial Magistrate for recalling his previous order admitting the petitioners to bail and for cancelling the bail on the ground that the charge-sheet had been made ready in time but could not be filed as it had been misplaced. The learned Magistrate, on the basis of the principles laid down by this Court in Ramesh Chandra Sahuv. State (1982) 53 Cut LT 345 : 1982 Cri LJ NOC 117, refused to recall his order and cancel the bail and held that no case had been made out for cancellation of bail under Section 437(5) of the Code. It has been submitted at the Bar that the State unsuccessfully moved an application in revision before the learned Sessions Judge against that order.

2. On July 3, 1982, the learned Public Prosecutor made an application in the court of the learned Sessions Judge under Section 438(2) of the Code for cancellation of bail granted to the petitioners on the grounds that they had, by taking law into their own hands, flouted the conditions imposed on them by the learned Subdivisional Judicial Magistrate while admitting them to bail and on June 22, 1982, at 6 p.m. the respondents (petitioners herein) attacked Sudhakar Sahu of Berhampur and threatened him by saying that he would be killed if he would depose against them as a witness in the case of murder. Sudhakar Sahu lodged a report at the Berhampur Town Police Station and Police Station Case No. 308 of 1982 under Sections 143, 341, 294 and 506 of the Penal Code was registered and investigated into. The investigation was in progress when the application for cancellation of bail was made. The petitioners, it was alleged, in violation of the conditions imposed on them, had been staying at Berhampur and while so staying, had been committing offences outside the jurisdiction of the Court of the Subdivisional Judicial Magistrate, Chatrapur. The learned Sessions Judge, after perusing the papers placed before him and hearing both the sides, allowed the

application. It is thus that the matter has come to this Court in revision.

3. Mr. Palit has urged on behalf of the petitioners that the petitioners have not flouted the conditions imposed on them by the learned Subdivisional Judicial Magistrate and the grounds for cancellation of bail are false and unfounded which have designedly been made without just and reasonable cause and only for the purpose of cancellation of bail granted to the petitioners. The learned Additional Government Advocate has contended before us that an order cancelling bail is an interlocutory one and therefore, the application under Section 397 read with Section 401 of the Code would not lie. It has been submitted on behalf of the State that there were just and reasonable grounds to cancel bail granted to the petitioners and if they continue on bail, they would tamper with the prosecution evidence and suborn the Witness and such high-handed acts on their part would seriously affect the course of justice.

4. As provided in Section 397(2) of the Code, the powers of revision conferred by Sub-section (1) shall not be exercised in-relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding. The expression 'interlocutory order' has not been defined in the Code and has been the subject-matter; of judicial interpretation in a large-number of reported cases. In the case of Khirod v. State of Orissa (1983) 1 Crimes 357 : 1982 East LR 5S3 : 1983 Cri LJ NOC 51, this Court, referring: to and relying on a number of reported cases of the Supreme Court, has indicated as to which orders are interlocutory ones and which are not. In that case, the question arose as to whether an order framing a charge would be are interlocutory order and it was held that it was not. In (1983) 55 Cut LT 129 1983 Cri LJ NOC150 Durga Prasad Sao v. State of Orissa, this Court was called upon to decide the question as to whether an order granting bail would be an interlocutory one within the meaning of Section 397(2) of the Code and: it was answered in the affirmative placing reliance on the observation made by the Supreme Court in Amar Nath v. State of Haryana : 1977 CriLJ1891 to the effect that passing orders for bail, calling for records, summoning witnesses, adjourning cases and such other steps in aid of pending proceedings would amount to interlocutory orders against which no revision would lie under Section 397(2) of the Code and the decision of the Supreme Court in the following matters arising out of

an order passed by this. Court rejecting bail. Petition for Leave to Appeal (Criminal) Nos. 2120-21 off 1982 had been made in the Supreme Court against an order passed by tins Court on August 10, 1982, refusing bail in Criminal Miscellaneous Case Not 509 of 1982 of this Court. These matters were heard with applications for tail and Criminal Miscellaneous 'Petitions Nos. 3705 and 3708 of 1982. Their Lordships of the Supreme Court dismissed the petitions by making the following observation:

Special Leave Petitions are dismissed as these are directed againstinterlocutory order of the High Court refusing bail. There will be liberty to thepetitioners to renew applications for bail before the High Court.' Thus the view of the Supreme Court is that the order refusing bail is an interlocutory one.

5. The learned Additional Government Advocate has invited our attention to a decision of the Andhra Pradesh High Court reported in 1977 Cri LJ 471, Thakur V. Hariprasad v. State of A.P. In that case, the bail granted by the trial Magistrate had been cancelled by the Sessions Judge under Section 439(2) of the Code. The question as to whether an order cancelling bail would or would not be an interlocutory one came up for consideration before Madhusudan Rap, J. After an elaborate discussion and keeping in mind the scope and import of the provisions made in Sections 397(2) and 439(2) of the Code and referring to a number of reported cases of the Privy Council and the Supreme Court, the learned Judge has held that the impugned order of the Sessions Judge cancelling bail is an interlocutory order which does not determine the guilt or innocence of the accused-petitioner and does not terminate the trial of the petitioner on the merits of the case and therefore, no revision lies against the order in view of the prohibition in Section 397(2) of the Code.

6. Applications for bail or cancellation of bail are made at the stage of investigation or trial. Successive applications for bail lie. Orders granting, refusing or cancelling bail are passed at interlocutory stages during the pendency of the main case against an accused person. We would adopt the view taken by this Court in (1983) 55 Cut LT 129 : 1983 Cri LJ NOC 150 and with respect, agree with the learned Judge of the Andhra Pradesh High Court and hold that an order cancelling bail is

an interlocutory order. It follows that the present revision is not competent in view of the statutory bar contained in Section 397(2) of the Code. We are of the view that orders granting, refusing or cancelling bail are interlocutory orders which cannot be revised by the superior courts in view of the statutory bar.

7. As has been held by the Supreme Court in Madhu Limaye v. State of Maharashtra : 1978 CriLJ165 , if a situation arises calling for exercise of inherent jurisdiction of this Court under Section 482 of the Code to prevent an abuse of the process of the Court, Section 397(2) of the Code cannot be a bar to exercise such jurisdiction for the ends of justice in fit and appropriate cases although this power should be exercised sparingly and in exceptional circumstances. Notwithstanding the statutory bar contained in Section 397(2) of the Code, this Court can exercise jurisdiction under Section 482 of the Code in exceptional circumstances to prevent an abuse of the process of the Court.

8. Corning to the facts of the case, we find, for the reasons to follow, that the case does not call for interference by us as the impugned order is well grounded. This is not a case where this Court should exercise its inherent jurisdiction under Section 482 of the Code.

9. The principles to be kept in mind while considering an application made by the State for cancellation of bail granted to an accused person have been laid down by the Supreme Court in : 1978 CriLJ952 State through the Delhi Administration v. Sanjay Gandhi. Their Lordships observed and held (Para 13):

Rejection of bail when bail is applied for is one thing,cancellation of bail already granted is quite another. It is easier to rejecta bail application in a non bailable case than to cancel a bail granted insuch a case. Cancellation of bail necessarily involves the review of adecision already made and can by and large be permitted only if, by reason ofsupervening circumstances, it would be no longer conducive to a fair trial toallow the accused to retain his freedom during the trial....

As laid down by the Supreme Court, in an application for cancellation ofbail, it is not necessary for the prosecution to prove by a mathematicalcertainty or beyond reasonable doubt the grounds on which it seeks cancellationof bail. The Supreme

Court held (Para 14):.Indeed, proof of facts by preponderance of probabilities as in a civil case is not foreign to criminal jurisprudence because, in cases where the statute raises a presumption of guilt as, for example the Prevention of Corruption Act, the accused is entitled to rebut that presumption by proving his defence by a balance of probabilities. He does not have to establish his case beyond reasonable doubt. The same standard of proof as in a civil case applies to proof of incidental issues involved in a criminal trial like the cancellation of bail of an accused. The prosecution, therefore, can establish its case in an application for cancellation of bail by showing on a preponderance of probabilities that the accused has attempted to tamper or has tampered with its witnesses. Proving by the test of balance of probabilities that the accused has abused his liberty or that there is a reasonable apprehention that he will interfere with the course of justice is all that is necessary for the prosecution to do in order to succeed in an application for cancellation of bail.

Dealing with the scope of Section 439(2) of the Code, it was laid down (Para 24):

Section 439(2) of the Criminal P.C. confers jurisdiction on the High Court or Court of Session to direct that any person who has been released on bail under Chapter XXXIII be arrested and committed to custody. The power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection. But the power, though of an extraordinary nature, is meant to be exercised in appropriate cases when, by a preponderance of probabilities, it is clear that the accused is interfering with the course of justice by tampering with witnesses. Refusal to exercise that wholesome power in such cases, few though they may be, will reduce it to a dead letter and will suffer the Courts to be silent spectators to the subversion of the judicial process. We might as well wind up the Courts and bolt their doors against all than permit a few to ensure that justice shall not be done.

10. While exercising his power under Section 439(2) of the Code, the learned Sessions Judge has taken into consideration the fact that in violation of the terms and conditions on which they were admitted to bail by the learned Sub-divisional Judicial Magistrate under the proviso to Section 167(2) of the Code, the petitioners

had left the jurisdiction of that court and had been staying at Berhampur and while so staying, they had threatened Sudhakar Sahu one of the witnesses for the prosecution, that he would be killed in case he would depose against them in the case for which a case had been registered, to which reference has already been made by us. The allegations made by Sudhakar Sahu in the first information report had been supported by two witnesses, namely, Pratap Chandra Panigrahi and Ramakrishna Satpathy, who were present at the scene and whose statements had been recorded under Section 164 of the Code in the course of investigation of that case. The learned Sessions Judge had rightly taken note of another report made by Sudhakar Sahu at the Police Station against these petitioners, besides others, under Sections 384 and 506 read with Section 34 of the Penal Code alleging that he had been threatened to be killed and had been forced to sign on a blank piece of paper. On the basis of this report, another case had been registered at the Berhampur Town Police Station. Besides, Suresh Kukar Pattanaik of Berhampur had reported a case of assault, wrongful restraint and criminal intimidation against two of the petitioners, namely, Gorakali and Prafulla Samal, relating to the occurrence which had taken place at the Berhampur bus-stand on July 17, 1982. This occurrence, as submitted by the learned Counsel for the petitioners, may be unconnected with the case in which the petitioners are involved, but this would show that two of the petitioners had flouted the conditions of their bail and had committed offences at Berhampur while they had been released on bail.

11. Mr. Palit has brought to our notice that Sudhakar Sahu, who had lodged reports on the basis of which cases had been registered, had sworn in an affidavit before the Chief Judicial Magistrate, Berhampur, stating therein that what had been stated by him in his reports was not true and that he had made the reports at the instance of the police authorities. One of the petitioners, namely, Prasanta Kumar Patjoshi alias Nilu, has averred in an affidavit filed in this Court that a relation of one of the petitioners had given out that Sudhakar Sahu, under the pressure of the police authorities, had to agree to lodge a report against them and on the advice of his well-wishers, Sudhakar Sahu had sworn in an affidavit stating the circumstances which led him to make the report. It is not understood as to how the affidavit purported to be that of Sudhakar Sahu came into the possession of the petitioners or any one of them even assuming that the affidavit filed in this

Court purported to be that of Sudhakar Sahu, is a real one. If the affidavit is that of Sudhakar Sahu, this would bear additional circumstance, in our view, against the conduct of the petitioners showing as to how serious attempts were being made to tamper with the prosecution evidence.

12. We thus find that on a careful consideration of the materials placed before him and after proper application of mind to the facts of the case and accepting the serious apprehension of the prosecuting authorities that the petitioners, if enlarged on bail, would tamper with the prosecution evidence and would commit offences violating- the conditions of their release on bail, the learned Sessions Judge has properly and judicially exercised his discretion and cancelled the bail granted to the petitioners in exercise of the power vested in him under Section 439(2) of the Code. Keeping in mind the principles laid down by the Supreme Court in : 1978 CriLJ952 (supra), we find that the prosecution had established its case for cancellation of bail and no interference is called for.

13. In the result, therefore, the revision fails and is dismissed.

14 As noticed by us, the charge-sheet has been placed in this case as far back as in June, 1982. We direct the learned Subdivisional Judicial Magistrate to take appropriate steps for the apprehension of the accused persons. The trial by the Court of Session, if, and after a commitment, is made, be expedited.

R. C. Patna1k, J.

I agree.