

Khagendra Nath Bayan and anr. Vs. the State of Assam

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Court : Guwahati

Decided On : Jun-07-1982

Reported in : 1982CriLJ2109

Judge : K.N. Saikia, J.

Appellant : Khagendra Nath Bayan and anr.

Respondent : The State of Assam

Judgement :

ORDER

K.N. Saikia, J.

1. The two accused-petitioners in this application under Section 482/439 of the Code of Criminal Procedure impugn the Sessions Judge's order dated 21-4-82 cancelling their bail.

2. Upon an ejahar lodged by one Mohan Chandra Das to the effect that death was caused to his niece, Bhatima Bora, by Durgeswar Bayan and the two petitioners on 21-3-82, the Patacharkuchi P.S. Case No. 67/82 under Section 302/34 I.P.C. was registered and all the three accused were arrested and produced before the Magistrate on 22-3-82. On 23-3-82 on a bail petition the learned Magistrate granted bail to the petitioners observing that Rajat was too old and Khagendra was sick, and refused bail to Durgeswar. Mohan Chandra Das, the complainant, moved

the Sessions Judge, Gauhati, who after notice to show cause, cancelled the petitioners' bail holding that granting of bail with such promptitude definitely gave a scope to the accused to interfere with the investigation of the case if possible; that Section 437 Cr. P.C. provided an exception for sick and infirm person and not for old age; that the sickness should always be real and established and not an imaginary one; and that the police report having not mentioned anything of the kind, the Magistrate did not proceed according to the law and exceeded his jurisdiction in granting bail. Hence this petition.

3. Mr. D. Deka, the learned Counsel for the petitioners, submits, inter alia, that Durgeswar is the son of Khagendra (petitioner No. 1), who is son of Rajat (Petitioner No. 2) who is the grandfather of Durgeswar and too old and infirm a person. The learned Magistrate having seen him observed that he was too old. As regards Khagendra he submits that he was sick and the learned Magistrate saw him and his medical certificate, which the learned Sessions Judge has not referred.

4. The learned Public Prosecutor demurs submitting that the impugned order suffers from no infirmity as the learned Sessions Judge rightly held that the Magistrate had no jurisdiction to grant bail to the petitioner under Section 437 Cr. P.C. their cases having not been covered by the first proviso to Sub-section (1) of that section. He, however, fairly states that he may have no objection if this Court exercises its powers under Section 439 Cr. P.C.

5. The relevant considerations in granting bail have been succinctly indicated in *Gurcharan Singh v. State Delhi Administration* AIR 1978 SC 179 : 1978 Cri LJ 129. When a police officer arrests a person on a reasonable suspicion of commission of an offence punishable with death or imprisonment for life and forwards him to a Magistrate, the Magistrate, at that stage will have no reasons to hold that there are no reasonable grounds for believing that he has not been guilty of such an offence. At that stage, unless the facts enable the Magistrate to act under the first proviso to Sub-section (1) of Section 437, bail appears to be out of question. The only limited inquiry may then relate to materials for the suspicion about commission of the offence by the person. The position will change as

investigation proceeds and more facts and circumstances come to light. Sub-section (1) of Section 439, on the other hand, confers special powers on the Court of Session and the High Court in respect of bail and there is no limitation imposed against granting of bail by these two courts to persons accused of an offence punishable with death or imprisonment for life. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1), Cr. P.C. The overriding considerations in granting bail which are common both in the case of Section 437(1) and Section 439(1), Cr. P.C. 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; of tampering with witnesses; the history of the case as well as of its investigation and other relevant variable grounds which cannot be exhaustively set out. 'The two paramount considerations, viz. likelihood of the accused fleeing from justice and his tampering with prosecution evidence relate to ensuring a fair trial of the case in a court of justice. It is essential that due and proper weight should be bestowed on these two factors apart from others'.

6. Under Sub-section (5) of Section 437 any Court which has released a person on bail under Sub-section (1) or (2) of that section, may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody. Under Section 439(2) Cr. P.C. a High Court or Court of Session may direct that any person who has been released on bail under Chapter 33 of the Code be arrested, and commit him to custody. In Gurcharan Singh's case (supra) it has been held that the question of cancellation of bail under Section 439(2) is different from admission to bail under Section 439(1) Cr. P.C.

7. In the State through the Delhi Administration v. Sanjay Gandhi : 1978 CriLJ952 it has similarly been held

Rejection of bail when bail is applied for is one thing, cancellation 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 the accused to retain his freedom during the trial....

What precisely is the nature of the burden which rests on the prosecution in an application for cancellation of bail? Is it necessary for the prosecution to prove by a mathematical certainty or even beyond a reasonable doubt that the witnesses have been tampered or have turned hostile because they have been won over by the accused? Such strict proof is not necessary. The prosecution can establish its case by showing on a preponderance of probabilities that the accused has abused his liberty and/or has attempted to tamper or has tampered with its witnesses. That the accused has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice is all, that is necessary for the prosecution to prove by the test of balance of probabilities in order to succeed in an application for cancellation of bail. The Court, before the cancellation of bail, is to determine whether the prosecution has succeeded in proving its case by the above standard that the accused has tampered with its witnesses and that there is a reasonable apprehension that he will continue to indulge in such course of conduct if he is allowed to remain at large.

8. In *Gokul Das v. State of Assam* 1981 Cri LJ 229 (Gau) it was observed (Pr. 17). It does not require any elaboration that the considerations for cancellation of bail are slightly different from those for granting bail. Once an order for bail is passed, law immediately puts protective ring around it, so that it will not be cancelled without giving an opportunity to the person for whose benefit it was made'.

9. In *Kamal K. Chadha v. B.S. Subhedar* 1981 Cri LJ 1799 (Bom) where there was no supervening circumstances brought forth by the prosecution before that Court to maintain the order of cancellation of bail, the Court felt that it would not be proper to curtail the liberty of the petitioner accused any further as there was nothing except the bare allegation that the prosecution apprehended that the petitioner accused would tamper with the evidence in that he would alert the absconding accused in that case; and held that it was an error on the part of the

learned Sessions Judge to have cancelled the bail.

10. It should be remembered that the power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection 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. The Court has to strike a balance between two necessities, namely, necessity of not allowing the course of justice to be deflected and that of allowing liberty to the accused until he is found guilty.

11. In the instant case we do not find any supervening circumstances like abusing the liberty or tampering with the evidence or influencing witnesses. The learned Sessions Judge's observation that 'admittedly the granting of bail in the instant case with such promptitude definitely gave a scope to the accused to interfere with the investigation of the case if possible' does not appear to have been based on any specific allegation. Mr. Deka states that the petitioners have never indulged in any such tampering and that no supervening circumstances have at all been brought to notice of the court by the prosecution.

12. The proviso to Section 437(1) speaks of 'any sick or infirm person'. 'Infirm', according to the Concise Oxford Dictionary means 'physically weak, specially through age'. According to Webster's New Twentieth Century Dictionary, 'infirm' means weak, not strong; not firm or sound physically; feeble. Infirmary is naturally concomitant with old age. When the learned Magistrate used the expression 'too old' it could not, therefore, be said that the case did not fall under the proviso. The sickness envisaged is such as results in infirmity of the person. The sickness suffered by Khagendra was supported by a medical certificate. The learned Sessions Judge correctly observed that sickness should be real and not imaginary. No reference, however, was made to the medical certificate. In the impugned order there is no discussion about any supervening circumstances like abuse of liberty, tampering with witnesses, absconding etc. Under the circumstances it cannot be said that the learned Sessions Judge acted in accordance with the guidelines given by their Lordships of the Supreme Court. The impugned order of cancellation of bail is accordingly set aside, and the

petitioners are allowed to remain on bail as granted by the learned Magistrate. If their earlier bail bonds are cancelled, they will execute fresh bonds.

13. The petition is allowed and the Rule made absolute.

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