

HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION No.2646 OF 2018

ORDER:

The present petition is filed by the State through SHO, Chandrayangutta PS, under Section 439(2) Cr.P.C. in seeking cancellation of the bail order granted to the accused.

2. The respondent to the bail cancellation petition is accused No.1 of crime No.49 of 2017 of Chandrayangutta Police Station, Hyderabad, registered for the offences punishable under Sections 366, 376, 506 r/w 34 IPC. The respondent-A.1 was granted regular bail by the learned VII Additional Metropolitan Sessions Judge, Hyderabad, on 27.04.2017 in CrI.M.P.No.1332 of 2017 with an observation that Section 164 Cr.P.C. statement of the victim is recorded and the test identification parade of the accused was also conducted and there is a change of circumstances from the earlier order, hence he was released on bail on his executing personal bond for Rs.10,000/- with two sureties for the like sum each to the satisfaction of the learned Chief Metropolitan Magistrate, Hyderabad, he shall attend before the concerned SHO on every Sunday between 10.00 AM and 05.00 PM till filing of charge sheet and he shall not tamper with the evidence, he shall not interfere with the investigation and he shall be available for investigation before the IO as and when required.

3. In the application for cancellation of the regular bail granted supra, the averments of the Inspector of Police, Chandrayangutta P.S., Hyderabad are that the victim LW-1 is the daughter of LWs.2 & 3 and she is studying Intermediate 1st year and she is now aged 17 years, the accused A-1, A-2 and BJ-1 and BJ-2 are friends and on 20.02.2017 afternoon, they started on two wheelers, A-1 was riding his Activa Scooter No.TS-11-EC-5336, while BJ1 Habeeb Ahmed Alkaf, accompanied him as pillion rider, while the other motor cycle Hero Honda Passion plus bearing No.AP-11-S-3285 was driven by A-2 Mr. Sawood Ebees, and BJ2 Mohd. Irfan was sitting as pillion rider, while they were roaming in the area near pochamma temple, Harijan basthi, the accused A-1 noticed one girl speaking to a guy, he had suspected her to be call girl, immediately he discussed with A-2 and decided to have lust with the girl with common intention, the accused approached the girl and A-1 spoke to her, but she resisted to come with A-1, as such A-1 forcibly caught hold of her and made her to sit on his Activa scooter and took her to old Hukkah parlour at Harijan Basthi, Bandlaguda and A-2, BJ1 and BJ2 followed A-1 on the motor cycle of A-2, when the A-1 entered into the gate of compound of Hookah parlour, the A-2 and BJ1 and BJ2 latched the gate from outside and accused A-1 took the victim LW-1 inside the hut and threatened her on the point of knife and committed rape on her twice and also A-1 threatened the victim not to reveal anything to anyone

and gave her Rs.2,000/-, but victim did not accept money and requested to drop her at her area and A-1 knocked the gate on which A-2 and BJ1 and BJ2 who were waiting outside had opened the gate and A-1 took her on his active scooter and dropped her at some distance, from there she gone by walk. On that, the above crime was registered vide Cr.No.49/2017, under Sections 363, 376, 506 r/w 34 IPC & Sec.5(h)(j)(l) r/w 6 of POCSO Act of Chandrayangutta P.S.

4. It is further averred that during the course of investigation, accused A-1 & A-2 were arrested on 22.02.2017. The accused No.1 filed bail petition vide Crl.M.P.No.1332/2017 in Cr.No.49/2017 before VII Additional Metropolitan Sessions Judge, Hyderabad and the bail was granted on 27.04.2017 with above conditions. It is also averred that after completion of investigation, charge sheet was filed on 30.06.2017 before I Additional Metropolitan Sessions Judge, Hyderabad and the case was numbered as S.C.PCS.No.80/2017. Further the accused No.1 filed a petition under Section 439(1)(b) Cr.P.C to relax the condition to appear before the Station House Officer, Chandrayangutta P.S., on every Sunday between 10.00 A.M. and 5.00 P.M., imposed in Crl.M.P.No.1332/2017 and the same was allowed on 06.07.2017 by relaxing the condition to appear before the SHO Chandrayangutta P.S once in a month i.e., on every first Sunday, till filing of charge sheet.

5. It is further averred coming to the core of the present petition prayer that while so on 02.09.2017 at about 10.00 P.M., at the instigation of Shaik Sayeed Bin Abdul Rahaman Bawazeer (A-1), Sawood Bin Ebees (A-2) and four others came to the victim's father - Mohd. Ghouse Shareef (defacto-complainant in this case) and they tried to attack him by abusing in filthy language and threatened him with dire consequences and on that, a case was registered vide Cr.No.248/2017, under Sections 506 IPC of Chandrayangutta P.S. It is further averred that the victim and her father are having threat from the accused persons, the Station House Officer, Chandrayangutta P.S., had filed Crl.M.P.No.1664 of 2017 under Section 439(2) Cr.P.C to cancel the bail granted to the accused A-1 in Cr.No.49/2017 before the learned I Additional Metropolitan Sessions Judge and the same was dismissed on 23.12.2017 without proper consideration and hence to allow this petition by cancelling the regular bail granted to A.1 in Crl.M.P.No.1332 of 2017.

6. The counter affidavit of respondent-A.1 is by denying the averments made in the cancellation of bail application of on his alleged instigation, A.2 and others allegedly threatened the father of victim and tried to attack him and in saying there is no whisper in crime No.248 of 2017 of his involvement in the crime and he has not violated any of the bail conditions and he is attending before the police regularly. The police however from the date of his release harassing him

for attending before them and issued Section 41-A Cr.P.C. notices to attend without stating his involvement in crime No.248 of 2017, in which he was not at all involved and sought for dismissal of the bail cancellation petition.

7. Heard learned Public Prosecutor representing the State and learned counsel for the respondent/A.1 in supporting the bail order granted to A.1 and perused the material on record.

8. Now the point for consideration is, whether there are any grounds for cancellation of the bail order granted to A.1 and if so as to any supervening and subsequent circumstances or otherwise for ends of justice to subserve?

9. Section 439(2) Cr.P.C. says the High Court or the Court of Session may direct that any person who has been released on bail under this chapter may arrest him and commit him to custody. Thereby it may be from any supervening and subsequent circumstances to the date of order or otherwise to sub-serve the ends of justice including from any un-sustainability of the very bail order.

10. As referred supra the application for cancellation of bail under Section 439(2) Cr.P.C. herein is with the prayer of threats and interference with the witnesses by the accused persons subsequent to the order granting the bail concession to A1 and therefrom there is apprehension to the defacto complainant and witnesses including to the victim from the accused.

11. The latest expression of the Apex Court in its three Judge Bench in **Ms. X Vs. State of Telangana**¹, speaks that - as per the expression of the Apex Court in **Kanwar Singh Vs. State of Rajasthan**² the discretion granted to the High Court and Court of Session under Section 439 Cr.P.C. to grant or refuse bail from the considerations of gravity of crime, character of the evidence, position and status of the accused with reference to the victim and witnesses, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of his tampering with the witnesses and obstructing the course of justice among other particularly this peculiar to case on hand to consider and as per another expression in **Neeru Yadav Vs. State of UP**³ it is the duty of the Court to take into consideration in grant of bail as to the nature of accusation and the severity of punishment in the event of conviction with supporting evidence and reasonable apprehension of tampering with the witnesses and threat to the complainant and prima facie satisfaction of the Court in support of the charge and as per **State of Bihar Vs. Rajballav Prasad**⁴ liberty of the subject is an important consideration, the public interest in the proper administration of criminal justice is equally important and the Courts have to adopt a liberal approach; however, if it is found that there is a possibility of interdicting fair trial by the accused if

¹ 2018 (2) ALT (Crl.) 273 SC

² 2012 12 SCC 180

³ 2016 (1) ALT (Crl.) 210 SC

⁴ 2017 (2) ALT (Crl.) 133

released on bail, this public interest of fair trial would outweigh the personal interest of the accused. Where the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. **It is this need for larger public interest to ensure that criminal justice delivery system works efficiently, smoothly and in a fair manner that has to be given prime importance in such situations. It is pointed out the distinction between rejection of bail for non-bailable offence at initial stage and cancellation of bail after its grant. It also referred to Doltaram Vs. State of Haryana⁵ where it is said overwhelming circumstances are necessary for an order directing cancellation of the bail already granted, like interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner from the subjective satisfaction of the Court, besides possibility of the accused absconding in all those to justify the cancellation or otherwise it cannot be in a mechanical manner without considering in supervening circumstances rendered in conducive to fair trial to allow the accused to retain his freedom during the trial.**

⁵ 1995 1 SCC 349

12. In **Neeru Yadav supra**, a reference was made to the earlier judgment of the Supreme Court in, **Ram Govind Upadhyay v. Sudarshan Singh**⁶, wherein, it has been clearly laid down that the grant of bail though involves exercise of discretionary power of the Court, such exercise of discretion has to be made in a judicious manner and not as a matter of course. **The heinous nature of crimes warrants more caution as there is a greater chance of rejection of bail though, however, dependent on the factual matrix of the matter.** In the said case, reference was made to **Prahlad Singh bhati v. NCT of Delhi**⁷, and thereafter the court proceeded to state the following principles:-

- (a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.
- (b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.
- (c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.
- (d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

⁶ 2002 3 SCC 598

⁷ AIR 2001 SC 1444

13. In **Chaman Lal v. State of U.P.**⁸ it is held that it is a well-settled principle of law that, while dealing with an application for grant of bail, it is the duty of the Court to take into consideration certain factors and they basically are:

- (i) the nature of accusation and the severity of punishment in cases of conviction and the nature of supporting evidence,
- (ii) reasonable apprehension of tampering with the witnesses for apprehension of threat to the complainant &
- (iii) Prima facie satisfaction of the court in support of the charge.

14. In **Prasanta Kumar Sarkar v. Ashis Chatterjee**⁹ it was held as to what are the factors to be borne in mind while considering an application for bail:

- (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
- (ii) nature and gravity of the accusation;
- (iii) severity of the punishment in the event of conviction;
- (iv) danger of the accused absconding or fleeing, if released on bail;
- (v) character, behaviour, means, position and standing of the accused;
- (vi) likelihood of the offence being repeated;
- (vii) reasonable apprehension of the witnesses being influenced; and
- (viii) danger, of course, of justice being thwarted by grant of bail. (Emphasis supplied).

⁸ (2004) 7 SCC 525

⁹ 2010 14 SCC 496

15. Finally, the Supreme Court in **Neeru Yadav supra** concluded that, **this being the position of law, it is clear as cloudless sky that the High Court has totally ignored the criminal antecedents of the accused. What has weighed with the High Court is the doctrine of parity. A history-sheeter involved in the nature of crimes which we have reproduced hereinabove, are not minor offences so that he is not to be retained in custody, but the crimes are of heinous nature and such crimes, by no stretch of imagination, can be regarded as jejune. Such cases do create a thunder and lightening having the effect potentiality of torrential rain in an analytical mind. The law expects the judiciary to be alert while admitting these kind of accused persons to be at large and, therefore, the emphasis is on exercise of discretion judiciously and not in a whimsical manner.**

16. In **State of Bihar v. Rajballav Prasad**¹⁰, the Apex Court by scanning the law and dealt with the concept of fair trial not only for the accused but also for victim, observed that:

“We would like to reproduce following discussion from the judgment in the case of Kanwar Singh Meena v. State of Rajasthan & Anr.[6]: “10...While cancelling bail under Section 439(2) of the Code, the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice. But, that is not all. The High Court or the Sessions Court can

¹⁰ 2017 2 SCC 178

cancel bail even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the court granting bail ignores relevant materials indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such orders are against the well recognized principles underlying the power to grant bail. Such orders are legally infirm and vulnerable leading to miscarriage of justice and absence of supervening circumstances such as the propensity of the accused to tamper with the evidence, to flee from justice, etc. would not deter the court from cancelling the bail. The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society. Needless to say that though the powers of this court are much wider, this court is equally guided by the above principles in the matter of grant or cancellation of bail.

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18. Taking an overall view of the matter, we are of the opinion that in the interest of justice, the impugned order granting bail to the accused deserves to be quashed and a direction needs to be given to the police to take the accused in custody..." As indicated by us in the beginning, prime consideration before us is to protect the fair trial and ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully and this Court is convinced that in the present case, that can be ensured only if the respondent is not enlarged on bail. This importance of fair trial was emphasised in Panchanan Mishra v. Digambar Mishra & Ors.[7] while setting aside the order of the High Court granting bail in the following terms:

"13. We have given our careful consideration to the rival submissions made by the counsel appearing on either side. The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime and if there is delay in such a case the underlying object of cancellation of bail practically loses all its purpose and significance to the greatest prejudice and the interest of the

prosecution. It hardly requires to be stated that once a person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent, the accused in order to get away from the clutches of the same indulge in various activities like tampering with the prosecution witnesses, threatening the family members of the deceased victim and also create problems of law and order situation.” Such sentiments were expressed much earlier as well by the Court in *Talab Haji Hussain v. Madhukar Purshottam Mondkar & Ors.*[8] in the following manner:

“6...There can be no more important requirement of the ends of justice than the uninterrupted progress of a fair trial; and it is for the continuance of such a fair trial that the inherent powers of the High Courts are sought to be invoked by the prosecution in cases where it is alleged that accused persons, either by suborning or intimidating witnesses, are obstructing the smooth progress of a fair trial. Similarly, if an accused person who is released on bail jumps bail and attempts to run to a foreign country to escape the trial, that again would be a case where the exercise of the inherent power would be justified in order to compel the accused to submit to a fair trial and not to escape its consequences by taking advantage of the fact that he has been released on bail and by absconding to another country. In other words, if the conduct of the accused person subsequent to his release on bail puts in jeopardy the progress of a fair trial itself and if there is no other remedy which can be effectively used against the accused person, in such a case the inherent power of the High Court can be legitimately invoked...” We are conscious of the fact that the respondent is only an under-trial and his liberty is also a relevant consideration. However, equally important consideration is the interest of the society and fair trial of the case. Thus, undoubtedly the courts have to adopt a liberal approach while considering bail applications of accused persons. However, in a given case, if it is found that there is a possibility of interdicting fair trial by the accused if released on bail, this public interest of fair trial would outweigh the personal interest of the accused while undertaking the task of balancing the liberty of the accused on the one hand and interest of the society to have a fair trial on the other hand. When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is

this need for larger public interest to ensure that criminal justice delivery system works efficiently, smoothly and in a fair manner that has to be given prime importance in such situations. After all, if there is a threat to fair trial because of intimidation of witnesses etc., that would happen because of wrongdoing of the accused himself, and the consequences thereof, he has to suffer. This is so beautifully captured by this Court in *Masroor v. State of Uttar Pradesh & Anr.*[9] in the following words:

“15. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned. In this context, the following observations of this Court in *Shahzad Hasan Khan v. Ishtiaq Hasan Khan* [(1987) 2 SCC 684] are quite apposite: (SCC p. 691, para 6) “6... Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution.”” This very aspect of balancing of two interests has again been discussed lucidly in *Neeru Yadav v. State of Uttar Pradesh & Anr.*[10] in the following words:

“16. The issue that is presented before us is whether this Court can annul the order passed by the High Court and curtail the liberty of the second respondent? We are not oblivious of the fact that liberty is a priceless treasure for a human being. It is founded on the bedrock of the constitutional right and accentuated further on the human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilised society. It is a cardinal value on which the civilisation rests. It cannot be allowed to be paralysed and immobilised. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to the rule of

law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. Society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law.

17. Coming to the case at hand, it is found that when a stand was taken that the second respondent was a history-sheeter, it was imperative on the part of the High Court to scrutinise every aspect and not capriciously record that the second respondent is entitled to be admitted to bail on the ground of parity. It can be stated with absolute certitude that it was not a case of parity and, therefore, the impugned order [Mitthan Yadav v. State of U.P., Criminal Misc. Bail Application No. 31078 of 2014, decided on 22-9- 2014 (All)] clearly exposes the non-application of mind. That apart, as a matter of fact it has been brought on record that the second respondent has been charge-sheeted in respect of number of other heinous offences. The High Court has failed to take note of the same. Therefore, the order has to pave the path of extinction, for its approval by this Court would tantamount to travesty of justice, and accordingly we set it aside.” In Ramesh & Ors. v. State of Haryana[11], which was decided only two days ago i.e. on 22.11.2016, this Court discussed the problem of witnesses turning hostile, and if that is for wrong reasons, observed that it affects the very fabric of criminal justice delivery system. We would like to reproduce following passages therefrom:

“40. On the analysis of various cases, following reasons can be discerned which make witnesses retracting their statements before the Court and turning hostile:

“(i) Threat/intimidation.

(ii) Inducement by various means.

- (iii) Use of muscle and money power by the accused.
- (iv) Use of Stock Witnesses.
- (v) Protracted Trials.
- (vi) Hassles faced by the witnesses during investigation and trial.
- (vii) Non-existence of any clear-cut legislation to check hostility of witness.”

41. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said: “witnesses are the eyes and ears of justice”. When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in Zahira Habibullah's case as well.

42. Justifying the measures to be taken for witness protection to enable the witnesses to depose truthfully and without fear, Justice Malimath Committee Report on Reforms of Criminal Justice System, 2003 has remarked as under:

“11.3 Another major problem is about safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise...Time has come for a comprehensive law being enacted for protection of the witness and members of his family.”

43. Almost to similar effect are the observations of Law Commission of India in its 198th Report (Report on 'witness identity protection and witness protection programmes'), as can be seen from the following discussion therein:

“The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Indian Penal code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Indian Penal Code, 1860. It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several general statutes in other countries provide for victim and witness protection.” No doubt, the prosecutrix has already been examined. However, few other material witnesses, including father and sister of the prosecutrix, have yet to be examined. As per the records, threats were extended to the prosecutrix as well as her family members. Therefore, we feel that the High Court should not have granted bail to the respondent ignoring all the material and substantial aspects pointed out by us, which were the relevant considerations.

For the foregoing reasons, we allow this appeal thereby setting aside the order of the High Court. In case the respondent is already released, he shall surrender and/or taken into custody forthwith. In case he is still in jail, he will continue to remain in jail as a consequence of this judgment.

Before we part with, we make it clear that this Court has not expressed any observations on the merits of the case. Whether the respondent is guilty or not, of the charges framed against him, will be decided by the trial court on its own merits after analysing the evidence that surfaces on record during the trial.”

17. In **Central Bureau of Investigation, Hyderabad Vs. Subramani Gopalakrishnan**¹¹ and more recently in **Dataram Singh Vs. State of Uttar Pradesh**¹² it is observed that overwhelming circumstances are necessary for an order directing the cancellation of bail already granted like interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concessions granted to the accused in any manner including as to possibility of absconding of accused if any.

18. It is from that concluded by the latest three judge bench in **Ms. X supra** of no grounds to cancel bail however the quantum of bond as part of the modification of the conditions of the bail already granted enhanced.

19. In fact in **Aslam Babalal Desai supra** it was held by the Apex Court three Judge Bench clearly way back that bail granted under Section 437(1) & (2) and 439(1) Cr.P.C. can be cancelled under Section 437(5) or 439(2) where accused misused his liberty by indulging in similar criminal activity, interference with the course of investigation, attempts to tamper with evidence or witnesses, threatens witnesses or indulges in similar activities which would hamper smooth investigation, likelihood of his fleeing to another country, attempts to

¹¹ 2012 (1) ALT (Crl.) 214 (SC)

¹² 2018 (3) SCC 22=(2) Scale 285

make himself scarce by going underground or becoming unavailable to the investigating agency, attempts to place himself beyond the reach of his surety, etc., for rejection of bail stands on one footing or whereas cancellation of bail is a harsh order which interferes with the liberty already granted with concession of bail.

20. No doubt in **State through CBI Vs. Amarmani Tripathi**¹³ it was observed that so far as cancellation of bail concerned, it is conduct subsequent to release on bail relevant for not an appeal against grant of bail to take consideration of all aspects that are relevant like nature and seriousness of the offence, likelihood of accused fleeing from justice, tampering with the prosecution evidence, circumstances peculiar to the accused under larger interest of society. In **Amarmani Tripathi supra** referring to **Kalyan Chandra Sarkar Vs. Rajesh Ranjan**¹⁴ it was observed at Para 8 that the object underlying cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the accused who is staying at abroad at the bail order from tampering with the evidence or the like. **Referring to Kalyan Chandra Sarkar(supra) where the bail orders granted were cancelled one from order is not sustainable on merits and seriousness of the crime and the other from the seriousness of the crime and subsequent**

¹³ AIR 2005 SC 3490=2005 8 SCC 143

¹⁴ 2004 7 SCC 528=2005(2) SCC 42

conduct, at para-8 of Amarmani Tripathy(supra) it was observed that **the object underlying cancellation of bail is to protect the fair trial and secure justice to being done to the society by preventing the accused who is set at liberty by the bail order from tampering with evidence or the like----** It hardly requires to be stated that, once a person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent the accused in order to get away from the clutches of the same, indulged in various activities in tampering with witnesses, threatened family members or victim and creates problems of law and order situation.

21. In **Kalyan Chandra Sarkar(supra)** it was observed that, **any detention of the accused in the commission of a non bailable offence during pendency of the trial cannot be questioned as violation of Article 21 of the Constitution of India since the same is authorised by statute of law, unless they are granted bail from any entitlement on coming to conclusion of prosecution failed to make out prima facie case or Court be satisfied by recording the reasons in this regard that in spite of existence of prima facie case, there is need to release such persons on bail where fact situations require it to do so.** It was observed that while deciding the cases with reference to the facts, more so in criminal cases the Court should bear in mind each case must rest on its own

facts and the similarity of facts in one case cannot be used to bear in mind the conclusion of fact in another case as a case is only an authority from what it actually decides and what not logically fallows from it.

22. In **Sunil F Shaw Vs. Union of India**¹⁵ the Apex Court held that release of accused on bail from internment through Court would still retained constructive control over him through the sureties through conditions of the bond given by the accused and the sureties, to intercept the liberty wherever required.

23. However in the subsequent three judge Bench expression of the Apex Court in **Narendra K.Amin(Dr.) Vs. State of Gujarat**¹⁶ it was held that the cancellation of bail parameters are different to the grant of bail, though it is loosely observed as appeal against a bail order, practically under Cr.P.C. even there is no appeal remedy against grant of bail for cancellation but for invoking section 439(2) Cr.P.C. and observed at para-16 that the Court in entertaining the application cannot re-appreciate the evidence generally, but for to consider any perversity of the order in question. It was also observed that against the order granting bail even a superior Court can be moved for cancellation. ***It was observed further at para-23 of Narendra K.Amin supra that the Court dealing with an application for cancellation of bail invariably under Section 439(2) of***

¹⁵ (2003 SCC 409)

¹⁶ 2008(13) SCC 584

Cr.P.C. can consider by the re-appreciation of the material to the extent whether irrelevant material was taken into consideration or relevant material was not taken into consideration in granting bail. It was observed in para-21 in Narendra K.Amin supra referring to Kalyan Chandra Sarkar supra that though elaborate appreciation of the merits of the matter need not be undertaken, there is a need to indicate for reasons in the order about prima facie conclusion for grant or refusal or for cancellation of bail. It was also observed in para-24 of Narendra K.Amin supra referring to Koran Vs. Rama Vilas¹⁷ that concept of setting aside unjustified or perverse order granting bail is different from cancellation of bail on the misconduct of accused after grant of bail concession. Having regard to the subsequent conduct of the accused relevant concerned is only if the bail order seeking cancellation sought for from any interference with witnesses or possibility of fleeing away from justice or tampering of prosecution evidence, but not where the very order granting bail is impugned and found unjust either by non-consideration of relevant material and the provisions or by consideration of irrelevant material and provisions that prone to cancellation.

¹⁷1978(1) SCC 118

24. In **Dolat Ram vs. State of Haryana**¹⁸, it was observed that one of the grounds for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime and that too without giving any reasons. Such an order would be against the principles of law and, interest of justice would require that such a perverse order be set aside and bail be cancelled. The court found that inasmuch as the Sessions Court had ignored vital materials while granting bail, the High Court had rightly cancelled the bail. It was further observed that such orders passed in heinous crimes would have serious impact on the society and an arbitrary and wrong exercise of discretion by the trial court has to be corrected by the Superior Courts.

25. The Supreme Court in **Abdul Basit alias Raju vs. Mohd. Abdul Kadir Chaudhary and another**¹⁹ and in **Jagmohan Bahl vs. State (NCT of Delhi)**²⁰ drew the distinction between review/recall/quashment of bail order for cancellation and observed that filing of successive bail applications without any changed circumstances and obtaining pre-arrest bail from the in-charge officer would amount to bench haunting. The expressions referred the earlier law including the Constitution Bench of the Apex Court in **Aslam Babalal Desai supra** and **Narendra K. Amin**

¹⁸(1995)1 SCC 349

¹⁹ 2014 (10) SCC 754)

²⁰ JT 2014 (14) SC 363

supra, where it was laid down certain parameters for cancellation of bail. The Apex Court stated that, Section 439(2) of the Code of Criminal Procedure confers jurisdiction on the High Court or Court of Sessions 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 that has been enlarged on bail has to be exercised with care and circumspection. But the power, though of an extra-ordinary 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.

26. Moreover, in **Narendra K. Amin supra**, while reiterating the judgments of various High Courts including **Kalyan Chandra Sarkar supra**, the Apex Court concluded that, **once it is found that bail was granted on untenable grounds, same can be cancelled. The stand that there was no supervening circumstance has no relevance in such case.** This view is fortified by the judgment in **Puran v. Rambilas & Anr**²¹, wherein, the Apex Court after reviewing the entire law laid down by the Supreme Court in **Niranjan**

²¹ AIR 2001 SC 2023; 2001 Cr LJ 2566; 2001 AIR SCW 1935

Singh vs. Prabhakar Rajaram Kharote²² , Dolatram supra and Gurcharan Singh v. State (Delhi Administration)²³ was of the view that, if, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-à-vis the High Court. In **R. Rathinam v. State by DSP, District Crime Branch, Madurai District²⁴**, the Supreme Court reiterated the same principles.

27. In Puran supra, the Apex Court succinctly observed at para 11 as follows:

"11. Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in **Gurcharan Singh v.**

²² AIR 1980 SC 785

²³ 1978 1 SCC 118

²⁴ (2000) 2 SCC 391

State (Delhi Admn.). In that case the Court observed as under: (SCC p. 124, para 16) "If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that court. The State may as well approach the High Court being the superior court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-à-vis the High Court."

28. Thus, if the order suffers from any perversity or on consideration of any extraneous material, the Higher Court can set-aside or annul or quash the order of regular bail or pre-arrest bail as the case may be by exercising the power under Section 439(2) Cr.P.C. subject to any circumstances justifying cancellation.

29. Therefore, it is clear from the long line of perspective pronouncements that a bail can be cancelled, set-aside or annulled or quashed by the Superior Court when the Court found that it is impregnable or perverse, unjustified and contrary to the principles of law and the bar under Section 362 Cr.P.C has no application to such petition filed before Superior Courts filed challenging order passed by Subordinate Court, i.e. Sessions Court in the present case.

30. The grounds for cancellation of bail or setting-aside the bail are almost on same parameters is well laid down by

the Apex Court in **Usha Devi v. The State of Bihar** as follows:

“17. It is well settled that the grounds for cancellation of bail under Section 437(5) and 439(2) of the Code are identical, namely, bail granted under Section 437(1) or 439(1) of the Code can be cancelled broadly when one or more of the following conditions are fulfilled:

- (i) The accused misuses his liberty by indulging in similar activity,
- (ii) Interferes with the Course of investigation,
- (iii) Attempts to tamper with the evidence,
- (iv) Threaten witnesses or indulges in similar activities which would hamper smooth investigation,
- (v) There is likelihood of the accused fleeing away to another country.
- (vi) Attempts to make himself scarce by going underground or becoming unavailable to the Investigating Agency,
- (vii) Attempts to place himself beyond the reach of the surety,
- (viii) Bail has been granted by an inferior Court in a case involving serious offence shocking to the conscience of the superior Courts,
- (ix) After investigation the facts disclose commission of graver offence.

31. In **State of Tamil Nadu v. S.A.Raja**²⁵ the Apex Court held in paragraphs 8 & 9 that when a learned Single Judge of the same Court had denied bail to the respondent for certain reasons and that order was unsuccessfully challenged before the appellate forum, without there being

²⁵ AIR 2005 SC 4462

any major change of circumstances, another fresh application should not have been dealt with within a short span of time unless there were valid grounds giving rise to a tenable case for bail. Of course, the principles of res judicata are not applicable to bail applications, but the repeated filing of the bail applications without there being any change of circumstances would lead to bad precedents.

32. In **Dinesh M.N. (S.P) v. State of Gujarat**²⁶, the three Judge Bench of the Apex Court held that **where the Court admits the Accused to bail by taking into consideration irrelevant materials and keeping out of consideration the relevant materials the order becomes vulnerable and such vulnerability warrants annulment of the order.**

33. In **Gajanand Agarwal v State of Orissa**²⁷, the Apex Court adverted to the order passed by the High Court and when no reason has been indicated by the High Court for granting bail except stating that in the peculiar facts and circumstances of the case the bail was being granted because the accused is in custody for ten months, same is held illegal in its cancellation with the observations that; even on a cursory perusal the High Court's order shows complete non-application of mind. Though detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the Court while passing orders on

²⁶ (2008) 5 SCC 66

²⁷ AIR 2006 SC 3248

bail applications, yet a court dealing with the bail application should be satisfied as to whether there is a prima facie case, but exhaustive exploration of the merits of the case is not necessary. The court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course. There is a need to indicate in the order, reasons for prima facie concluding why bail was being granted particularly where an accused was charged of having committed a serious offence.

34. In **Ram Govind Upadhyay supra**, the Apex Court held that for grant of pre-arrest bail, considerations for cancellation of such an order of bail are independent and do not overlap each other, but in the event of non consideration of considerations relevant for the purpose of grant of bail and in the event an earlier order of rejection available on the records, it is a duty incumbent on the High Court to explicitly state the reasons as to why the sudden departure in the order of grant as against the rejection just about a month ago.

35. The Apex Court even in **Siddharam Satlingappa Mhetre Vs. State of Maharashtra**²⁸ held referring to the constitutional Bench expression of the Apex Court in **Gurubaksh Singh Sibbia Vs. State**²⁹ that the Courts are equally empowered like in granting or refusal of bail also in cancellation of bail by exercising the judicial discretion vested statutory. **In fact, the grant or refusal or even**

²⁸ (AIR 2011 SC 312=2011(1) SC 694

²⁹ (1980) 2 SCC 565

cancellation of bail is the judicial discretion to be exercised with circumspection but for to say blanket orders should not be passed and orders won't sustain without reasons. It was also observed the considerations in this regard from the crime is against society that:-

“3. The society has a vital interest in grant of refusal of bail because every criminal offence is the offence against the State. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society. The law of bails dovetails two conflicting interests namely, on the one hand, the requirements of shielding the society from the hazards of those committing crimes and potentiality of repeating the same crime while on bail and on the other hand absolute adherence of the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty. Just as the Liberty is precious to an individual, so is the society's interest in maintenance of peace, law and order, Both are equally important.....

103. It is settled legal position that the Court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the public prosecutor or the complainant on finding new material or circumstances at any point of time.

36. The Apex Court in **Masroor Vs. State of Uttar Pradesh**³⁰ observed that the grant of bail without recording reasons is impermissible equally in failure to consider the relevant factors for such granting that deserves cancellation of bail undoubtedly under Section 439(2) of Cr.P.C.

37. In **Padmakar Tukaram Bhavnagare Vs. State of Maharashtra**³¹ two judge bench expression of the Apex Court held that grounds for cancellation of bail are no doubt interference with due course of justice against the concession of bail but to cancel such bail order it must be perverse outcome without application of mind and without consideration of the relevant material.

38. Thus, from the above propositions of law it is clear on the permissibility of cancellation of bail from the impugned order granting bail if the order is found unjust. Therefrom, application under Section 439(2) of Cr.P.C. for cancellation of the bail can be maintained if said order is unjust. Even otherwise, once it comes within the four corners of Section 482 of Cr.P.C., same can be entertained, from the inherent powers inhere in this Court to meet ends of justice. It is also well laid down by the five judge Bench expression of the Apex Court way back in **Ratilal Bhanji Mithani Vs. Assistant Collector of Customs, Bombay**³² referring to the three judge bench

³⁰ (2009) 14 SCC 286

³¹ 2012(13) SCC 720

³² AIR 1967 SC 1639

expression in **Talab Haji Hussain Vs. Madhukar Purshottam Mondkar**³³ that *the High Court is having the inherent power under Section 561-A(old) 482(new) Cr.P.C. to cancel bail granted to a person, where such an order is necessary to secure the end of justice or to prevent abuse of process of Court as this power is always preserved to the High Court under the Code. It was also observed that the inherent power of the High Court is not conferred by Cr.P.C. but for to say the power which inheres in the High Court no way limited or effected for its exercise by High Court by the provisions of Cr.P.C.*

39. In **Narendra K Amin supra** it is held clearly by the three Judge Bench that even the parameters for grant or refusal are different to those for cancellation of bail under Section 439(2) Cr.P.C., **Court dealing with cancellation application can find whether irrelevant material of substantial nature was taken into account or relevant material omitted for consideration while granting bail and such order of bail whether perverse justifying its cancellation.** From **Narendra K Amin supra** if the bail granted was without consideration of the material, same can be cancelled by the High Court under Section 439(2) Cr.P.C.

40. Said **Narendra K Amin supra** and **Talab Haji Hussain supra** of equal three Judge Bench expressions, besides larger Bench expressions earlier of the Apex Court

³³ AIR 1958 SC 376

including of the five Judge Bench expression in **Ratilal Bhanji Mithani supra** were not brought to the notice and not came for consideration in the recent three Judge Bench expression in **Ms. X vs. State of Telangana supra**.

41. Therefore, this Court can exercise power under Section 482 Cr.P.C or under Section 439(2) Cr.P.C to quash or set-aside or annul the order passed by the Sessions Judge, subject to availability of grounds to exercise such power. The sum and substance of the above expressions are crystal clear that there is power of cancellation not only where accused interferes or influences or threatens any of the witnesses or the like, but also where the order passed either by the subordinate court or same court is perverse or otherwise not sustainable from non consideration of relevant material or consideration of irrelevant material or no reasons given and parameters for grant of bail not considered by any cryptic order from the flow of administration of justice, for interest of the society also, if not equal, one of the important considerations to balance with the personal liberty not only in granting but also in cancellation, though it cannot be in a mechanical or casual manner without positive material, in showing either granted mechanically or after bail order and release, accused abused the concession.

42. From this now coming to the facts, the main allegation on which cancellation of bail sought for is that on instigation of respondent-A.1, A.2 and four others came to the

father of the victim and tried to attack him by abusing in filthy language and threatened him with dire consequences and there is life threat to the victim and her father, on which crime No.248 of 2017 was registered by the selfsame police station and after investigation, charge sheet filed and learned Magistrate has taken cognizance for the offences and allotted CC.No.392 of 2017. No doubt, the same was not considered by the lower Court earlier in Crl.M.P.No.1664 of 2017 dated 23.12.2017 and even the bail order granted to A.1 was without any sound reasons, but for simply stating Section 164 Cr.P.C. statement of the victim is recorded and the test identification parade of the accused also conducted and there is change of circumstances from the earlier dismissal order.

43. Having regard to the above, this Criminal Petition is allowed and the bail order granted to A.1 is cancelled in directing him to surrender forthwith before the learned trial Judge otherwise the learned trial Judge is directed to issue non-bailable arrest warrant and therefrom remand him to judicial custody as under trial prisoner in the larger interest of society and to sub-serve the ends of justice and for fair trial to accused and victim equally.

Miscellaneous petitions, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 28.09.2018
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