

(1995) 10 P&H CK 0015

High Court Of Punjab And Haryana At Chandigarh**Case No:** Criminal Miscellaneous No. 16630-M of 1994

Masook Ali

APPELLANT

Vs

State of Punjab and Others

RESPONDENT

Date of Decision: Oct. 13, 1995**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 107, 151, 167(2), 437, 437(1)
- Penal Code, 1860 (IPC) - Section 302, 307, 325, 34

Citation: (1996) CriLJ 784 : (1996) 1 RCR(Criminal) 109**Hon'ble Judges:** P.K. Jain, J**Bench:** Single Bench**Advocate:** Mohinderjit Singh Sethi and Amit Singh, for the Appellant; Jagdish Marwaha and H.S. Sidhu, AAG, for the Respondent**Final Decision:** Allowed

Judgement

@JUDGMENTTAG-ORDER

P.K. Jain, J.

This petition has been filed u/s 439(2) of the Code of Criminal Procedure (for short to be referred to as "the Code") for cancellation of bail granted under Section 167(2) of the Code of the accused persons Amarjeet Singh and Ranjit Singh respondents Nos. 2 and 3 herein.

2. The facts, in brief, are that according to the prosecution on May 15, 1993 at about 8.30 p.m. in the area of village Kaunk Kalan the respondents Amarjeet Singh and Ranjit Singh committed murder of one Pasa alias Asak Ali son of Fateh Mohammad and caused serious injuries to Raj Bibi and Barkati PWs on account of a dispute regarding the passage. Case FIR No. 47 dated 16-5-1993 for the offences under Sections 302/307/325/34, Indian Penal Code, was registered against both these respondents on the statement of Mst. Raj Bibi at Police Station, Jagraon. Both the respondents-accused were arrested in the case on May 28, 1993. Since the police did

not file the challan within the statutory period of 90 days, both the respondents-accused were admitted to bail by order dated September I. 1993. Admittedly, charges have already been framed against both the respondents and certain prosecution witnesses have also been examined but the main witnesses i.e. eye injured witnesses have not appeared before the trial Court so far except that Raj Bibi has appeared on the last date of hearing and her examination-in-chief was recorded, and cross-examination deferred.

3. Shri Masook Ali, brother of deceased, has approached this Court by way of this petition for cancellation of the bail on the ground that the accused persons managed with the police to delay the filing of the challan and as such obtained bail u/s 167(2) of the Code; that after the release on bail the accused persons started threatening the prosecution witnesses and specifically warned them that if they would appear against them in the said murder case, they would also be killed and suffer dire consequences. The matter was reported to the police vide report dated 16-2-1994 (Annexure P. 1). The petitioner also approached the D.I.G. with an application to direct the prosecution for moving the Sessions Judge for cancellation of the bail. Accordingly, the Public Prosecutor moved an application for cancellation of the bail of the accused persons but the same was dismissed by the Additional Sessions Judge, Ludhiana, vide order dated 11-4-1994 (Annexure P. 2). It is further stated that there is a solitary family of Mohamdans living in the said village and both the accused are threatening the eyewitnesses with dire consequences if they would not compromise with them and if they appeared in the trial. Sworn affidavits of Resham Singh. Mashook Ali petitioner, Mst. Raj Bibi. Mst. Barkat Bibi have been placed on the record. It is even stated that if the accused are allowed to remain on bail, there is every likelihood that the lives of all the prosecution witnesses would be in peril.

4. Notice of motion to the respondent was issued. In its reply the State has admitted the registration of the case and the fact that the challan was not filed within a stipulated period of 90 days. It has been explained that the investigation of the case was entrusted to A.S.I. Om Parkash who absented from duty for a period of four months without handing over the case file under investigation with him to any other police officer; that the file of this case along with other files remained with him without any action and in the meantime the stipulated period of 90 days expired and the accused were admitted to bail. It is further stated that departmental proceedings were initiated against" ASI Om Parkash by the department by serving a show-cause notice upon him who faced the enquiry and ultimately he has been dismissed from service for his negligence. It is also stated that the local police initiated security proceedings against the accused persons.

5. In their separate reply the respondents-accused have denied the allegations contained in the petition. It is stated that the deceased Pasa alias Ashak Ali was having his enemies in the area and he was attacked by those persons and the

accused were having no dispute with the deceased and they have been falsely implicated; that these respondents have no connection with the police and when they were in the judicial custody, the question of their being in league with the Investigating Officer could not have arisen. It is further stated that once bail has been granted u/s 167(2) of the Code, the same can be cancelled for strong reasons as recognised from time to time by various precedents including the judgment of the apex Court rendered in [Aslam Babalal Desai Vs. State of Maharashtra](#). It is further stated that the security proceedings initiated against the respondents were dropped by the Executive Magistrate. It is further stated that these respondents have never extended any threat as alleged to any the prosecution witnesses and the allegations levelled by the petitioner are false. It is thus stated that there is no legal ground for cancellation of the bail granted to these respondents by the Additional Sessions Judge.

6. I have heard the learned counsel for the parties.

7. Shri Mohinderjeet Singh Sethi, Sr. Advocate, learned counsel for the petitioner, has argued that the accused-respondents colluded with the Investigating Officer-ASI Om Parkash and got delayed the filing of the charge-sheet within the stipulated period and as such they procured bail by deceitful means. It is further argued that immediately after the release the respondent-accused have been threatening the prosecution witnesses with dire consequences if they would depose against these accused at the trial. It is also pointed out by the learned counsel that security proceedings were also initiated against the accused persons but the same were dropped on account of the inaction of the police. It is clarified by the learned counsel that the petitioner and the eyewitnesses belong to a minority community in the village and on account of the threat extended by the accused persons, they are unable to appear in the Court to depose at the trial.

8. The learned State counsel has adopted the arguments of Mr. M.J.S. Sethi. Sr. Advocate, and supported the petitioner for cancellation of the bail of the accused persons.

9. Shri Jagdish Marwaha, Advocate, counsel for the respondent-accused has argued that once the bail has been granted u/s 167(2) of the Code, the same can be cancelled only on the grounds contained in Section 437 or 439 of the Code and not otherwise. While placing reliance upon Aslam Babalal Desai's case (supra), it has been contended that none of the grounds as envisaged by their lordships of the apex Court in the said judgment is made out in the present case for cancellation of the bail. It is explained that if there was any negligence on the part of the Police Officer, he was to be proceeded against departmentally and he has been so punished by the Department as admitted by the State in its reply. It is further pointed out that the petitioner's family is not the only Mohamdan family in the village but there are several other Mohamdan families as per the electoral roll of the village, photo-copy of which has been placed on the record. It is also argued that

the security proceedings were dropped as there was no evidence in support of the allegations made therein and that one of the eyewitnesses has appeared in the trial Court and her examination-in-chief has been recorded. Thus, it is urged that there is no ground made out to cancel the bail granted to these respondents.

10. I have given careful thought to the respective arguments advanced at the Bar. 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 already granted in such a case because cancellation of bail interfered with the liberty already secured by the accused either on the exercise of the discretion by the Court or by the thrust of law.

The power to take back in custody an accused who has been enlarged on bail has to be exercised with great circumspection. But that does not mean that the power, though extraordinary in character, must not be exercised even if the ends of justice so demand.

11. Section 437(5) of the Code empowers the Court, which has released the person on bail, under Sub-section (1) or (2) to cause his arrest and commit him to custody, if it considers it necessary to do so. Section 439 empowers a High Court or a Court of Session to release any person accused of an offence and in custody on bail. Sub-section (2) then provides that a High Court or a Court of Session may direct that any person who has been released on bail under Chapter XXXIII be arrested and commit him to custody. It will thus be seen that while powers have been conferred on Courts for grant of bail, power has also been conferred for cancellation of bail in fit cases. It may also be noted that the language of the proviso to Sub-section (2) of Section 167 specifically states that when an accused person is released on bail for failure to complete the investigation within the time prescribed, every person so released on bail shall be deemed to be so released under the provisions of Chapter XXXIII of the Code.

12. The question as to whether bail granted under the proviso of Sub-section (2) of Section 167 of the Code for failure to complete the investigation within the period prescribed thereunder can be cancelled on the mere presentation of the challan at any time thereafter, has been considered and finally answered by the apex Court in Aslam Babalal Desai's case (supra). After reviewing all the earlier judgments on the point, his lordship Hon'ble Mr. Justice A.M. Ahmadi (at present Hon'ble the Chief Justice of India), was pleased to observe as under at page 11; of AIR:-

"... When the legislature made it obligatory that the accused shall be released on bail if the charge-sheet is not filed within the outer limit provided by proviso (a), it manifested concern for individual liberty notwithstanding the gravity of the allegation" against the accused. It would not be permissible to interfere with the legislative mandate on imaginary apprehensions, e.g., an obliging investigation officer deliberately not filing the charge-sheet in time, as such misconduct can be

dealt with departmentally. To permit the prosecution to have the bail cancelled on the mere filing of the charge-sheet is to permit the police to trifle with individual liberty at its sweet will and set at naught the purpose and object of the legislative mandate. The paramount consideration must be to balance the need to safeguard individual liberty and to protect the interest of administration of justice so as to prevent its failure."

In para 11 of the judgment his lordship was pleased to state the law asunder (at page 10 of AIR) :-

". . . The deeming fiction of correlating the release on bail under Sub-section (2) of Section 167 with Chapter XXXIII, i.e., Section 437 and 439 of the Code, was to treat the order as one passed under the latter provisions. Once the order of release is by fiction of law an order passed u/s 437(1) or (2) or 439(1) it follows as a natural consequence that the said order can be cancelled under Sub-section (5) of Section 437 or Sub-section (2) of Section 439 on considerations relevant for cancellation of an order thereunder. As stated in [Raghubir Singh and Others Vs. State of Bihar](#), the grounds for cancellation under Sections 437(5) and 439(2) are identical, namely, bail granted u/s 437(1) or (2) or 439(1) can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation (iii) attempts to tamper with evidence or witnesses, (i v) threatens witnesses or indulges in similar activities "which would hamper smooth investigation, (v) there is likelihood of his fleeing 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 his surety, etc. These grounds are illustrative and not exhaustive. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to."

Learned counsel appearing on behalf of the petitioner as well as the accused-respondents and the State have relied upon the aforesaid judgment in support of their respective contentions.

13. From a bare perusal of the law laid down by the apex Court in the aforesaid judgment, it becomes clear that the bail once granted cannot be cancelled unless there are very cogent and overwhelming circumstances to do so. It may be stated that certain grounds for cancellation of bail mentioned by their lordship, as reproduced above, are merely illustrative and not exhaustive. There can be other grounds which may compel the Court to cancel the bail of an accused during the pendency of the trial.

14. In the present case, the bail was granted to the accused persons (respondents Nos. 2 and 3) on account of a default on the part of the prosecution in not filing the challan (charge-sheet) within the stipulated period of 90 days from the day when

these accused were first remanded to judicial custody by the Magistrate. The allegation of the petitioner who is the brother of the deceased is that this bail was procured by these two accused by deceitful means in collusion with the Investigating Officer-ASI Om Parkash. This allegation becomes a reality in view of the admissions made by the State in its reply on affidavit sworn by Shri Sakattar Singh, S.H.O. of Police Station, Jagraon. In para 4 of this reply it is categorically stated that the investigation of this case was entrusted to ASI Om Parkash who absented from his duty for a period of about 4 months without handing over the case files under investigation to any other police officer and as such the challan could not be filed within the stipulated period and the accused persons were granted bail. It is further state that this ASI Om Parkash was charge-sheeted in a departmental enquiry and dismissed from service for his said negligence. Thus, it cannot be said that there is any imaginary apprehension on the part of the petitioner but it is a reality that the bail in this case has been procured by the accused persons by deceitful means colluding with ASI Om Parkash, the Investigating Officer, whatever the consideration may be. It is well-settled that fraud, contrivance or covine of any description would vitiate the most solemn proceedings of the courts of Justice and nullifies all judicial acts. Therefore, in the present case it can be said without hesitation that the bail to the accused persons has not been granted but procured by them.

15. There is merit in the contention raised by Shri M.J.S. Sethi, Sr. Advocate, that the complainant party forms part of a minority community in the village and all the eye-witnesses are under real and genuine apprehension on account of the threat extended by the accused persons not to appear at the trial as prosecution witnesses. For the last more than 1 1/2 years these witnesses could not dare to appear before the trial Court to give evidence. Admittedly, the complainat party approached the higher police authorities and expressed their apprehension on which proceedings under Sections 107/151 of the Code were initiated but the same were dropped on account of inaction on the part of the police. The learned counsel for the accused-respondents has placed a copy of the electoral roll relating to the year 1993 of the village concerned. Even this document supports the version of the complainant party that out of about 169 families residing in the village, there are only five families of the community to which the petitioner belongs, including their own family. It is a matter of common knowledge that even today, in spite of all the efforts made by the Central Government or the State Government, minority communities in the rural areas are the victims of the majority community in the respective villages. This circumstance definitely reveals a genuine apprehension on the part of the complainant party that if the accused would remain on bail, they are unable to appear and depose at the trial.

16. In the above context, Mr. M.J.S. Sethi, Sr. Advocate, has also made a fair submission to the effect that let the bail of the accused persons be cancelled for two months and let the statements of the eye-witnesses be recorded and thereafter the

question of releasing the accused persons may again be considered. It is not disputed that almost all other prosecution witnesses have already been examined besides the eye-witnesses. This offer again compels this Court to believe the version of the complainant party that they are under a threat from the accused persons and are prevented from appearing as prosecution witnesses at the trial against them.

17. For the above reasons, the present application is allowed. Bail granted to the accused - Amarjeet Singh and Ranjit Singh, respondents Nos. 2 and 3, is hereby cancelled. They be taken into custody. The trial Court shall examine the eyewitnesses and would proceed with the trial of the case on priority basis.