

(2002) 07 AHC CK 0075

Allahabad High Court

Case No: Criminal Miscellaneous Bail Cancellation Application No. 78419 of 2001, in Cri.
Appeal No. 282 of 1991

Raj Pal Singh and
others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: July 17, 2002

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 386, 389, 439

Hon'ble Judges: Binod Kumar Roy, J and R.C.Deepak, J

Final Decision: Allowed

Judgement

1. This order disposes of Criminal Misc. Bail Cancellation Application No. 78419 of 2001 which involves adjudication of following questions :

(i) Whether in the peculiar facts and circumstances we will be justified, instead of disposing of this application, in taking up hearing of Criminal Appeal No. 282 of 1991, which stood listed at Serial No. 182 of our list out of turn in preference to Criminal Appeals of the year 1981 ?

(ii) Whether the High Court has jurisdiction to cancel the bails which were granted to the appellants at the time of admission of their Criminal Appeal No. 282 of 1991 ? and

(iii) Whether, if the answer to question No. (ii) is in the affirmative, in the peculiar facts and circumstances we should exercise that jurisdiction ?

2. Firstly the facts : Through this application, filed on 2082001, the informant Rakesh Pal Singh of Sessions Trial No. 358 of 2001 of the Court of Session Aligarh, who is uncle of the Informant of the case giving rise to the Criminal Appeal, has come up with a prayer to cancel the bails granted to the appellants and send them to jail asserting, inter alia, to the following effect :

(i) His own elder brother Amrit Pal Singh was brutally murdered in broad day light on 17/1/1989 by Appellant Nos. 1 to 5 Raj Pal, Bhojraj alias Pappu, Rishi Pal, Jagannath Kahar and Ashok Kumar respectively which was witnessed by his own son Sushil Kumar alias Pintoo, then aged 11 years (PW 4), and his nephew Satendra Pal Singh (PW 3), who was Informant, Vijendra Pal Singh (PW 6). By the Judgment and Order dated 21/2/1991 passed by Sri Pradumn Kumar, Special Judge (E.C. Act) Aligarh the Appellants were found guilty and convicted and sentenced to undergo imprisonment for life under Sections 302/149, I.P.C., Rigorous Imprisonment for 5 years under Sections 307/149, I.P.C. and Rigorous Imprisonment for 2 years under Section 148, I.P.C. directing the sentences to run concurrently.

(ii) The appellants preferred Criminal Appeal No. 282 of 1991, which was admitted and they were granted bail.

(iii) Thereafter on several occasions the appellants threatened the applicant and his son Sushil Kumar alias Pintoo for dire consequences pressurising them not to do pairvies in this appeal. Sushil Kumar alias Pintoo was shifted to Agra where he completed his studies. The appellant orally requested the Station Officer P.S. Hathras Junction but no First Information Report was lodged by him. An Application dated 27/4/2001 (as contained in Annexure 1) was also filed for expediting the final hearing of the Criminal Appeal by Satendra Pal Singh PW 3 (the son of the deceased Amrit Pal Singh) and Hon"ble the Chief Justice realizing the gravity of the matter was pleased to expedite the hearing of the Criminal Appeal.

(iv) On 19/7/2001 Sushil Kumar alias Pintoo (PW 4) who was doing pairvi in the appeal and was an eyewitness came to village from Agra and was murdered by Appellant Nos. 1 to 3 and 5 in broad day light and a First Information Report dated 19/7/2001 (as contained in Annexure 2) was lodged against them.

(v) Appellant Nos. 1 to 5 are hardened criminals who have formed a criminal gang in the village and threatened the applicant and his family members on several occasions as a result of which the applicant and the members of his family had restricted their movement.

(vi) The applicant after the murder started doing pairvi in this Criminal Appeal and the other murder case and apprehends another murder.

(vii) Since the appellants have misused their bail, thus, it would be expedient in the interest of justice that their bail be cancelled forthwith.

3. On 3/4/2002 the appellants filed their Counter Affidavit and Supplementary Counter Affidavit along with a request for condonation of delay occurred in its filing, asserting inter alia, to the effect that they have been falsely implicated, since the hearing of the appeal has been expedited and even though it was listed a number of times for hearing but could not be taken up and thus under that impression no Counter Affidavit was filed by them; all

the appellants, except appellant Raj Pal Singh, who is aged 75 years, have been implicated in a case under the Gangster Act and they have not been released on bail till date; it has been wrongly stated that they have threatened the informant's side; 4 out of them have been implicated in regard to murder of Sushil Kumar alias Pintoo in which they have been granted bail by this Court, a false case has been cooked up just to get their bails cancelled although they have never misused the privilege of the bail granted to them; and that the application has no force and is liable to be rejected.

4. The applicant filed a Rejoinder to the Counter Affidavit highlighting, inter alia, that the expedite application was moved on 27/4/2001 and soon thereafter on 19/7/2001 Sushil Kumar Singh alias Pintoo was brutally murdered by Appellant Nos. 1, 2, 3 and 5 which was witnessed by Virendra Singh alias Vintoo, a true copy of his statement is appended as Annexure R.A. 1; the appellants have misused the privilege of bail by committing murder and in that case a charge sheet was submitted on 30/8/2001 (copy appended as Annexure R.A. 2) and the trial, numbered as Sessions Trial No. 3578 of 2001 was committed to the Court of Session by order dated 12/9/2001 (copy appended as Annexure R.A. 3); and that the appellants are trying to linger the same and their acts being deliberate the reason for ignoring the delay in filing of the counter is not sustainable in law.

5. The Criminal Appeal was listed before us on 14/2/2002 and was placed at serial No. 182 of the list. Our Board also was preoccupied with "Fresh Criminal Writs and Writ Petitions for the year 1996 for Orders, Admission and Hearing including Bunch Cases and Old Criminal Appeals".

5.1 On that day a motion was made by Sri Gopal S. Chaturvedi, learned Senior Counsel for the appellant, to take up this application on the ground that since there is no chance of taking up the hearing of this Criminal Appeal and hence for the facts and circumstances mentioned in the affidavit accompanying this application, to which no Counter Affidavit was filed since then, the bail granted to the appellants be cancelled.

5.2 On 24/2/2002 Sri V.P. Srivastava, learned counsel appearing on behalf of the appellants, had prayed for adjournment on the ground that a Counter Affidavit has been prepared and presented before the Oath Commissioner for its swearing. The further hearing was adjourned to 3/4/2002

5.3 The application was further heard on 3/4/2002 and on 11/4/2002 and order were reserved.

The Submissions :

6. Sri Gopal S. Chaturvedi learned Senior Counsel appearing on behalf of the applicant with reference to various statements made in the affidavit accompanying the expedite application, this application and the rejoinder to the Counter Affidavit, contended that since the action of the appellants has resulted in abuse of the Court it is a fit case in

which the bails granted to the appellants should be cancelled to prevent the abuse of the process of this Court and to secure the ends of justice since they have abused the privilege of bail. He emphasized that the relevant allegations made in the Expedite application were not denied till its disposal by Hon"ble the Chief Justice on 382001 and the statements made in the Counter Affidavit of this application, which was filed after its hearing, are lame excuses. It cannot be denied that one of the most important witness of the Prosecution has been murdered during the pendency of the Expedite application in which chargesheet has been submitted.

7. Sri V.P. Srivastava, learned counsel appearing on behalf of the appellants, on the other hand, contended that the instant application is not maintainable under Section 439(2) of the Code of Criminal Procedure since that provision is not applicable; that instead of taking up this application on its merit it will be in the ends of justice to take up the hearing of the Criminal Appeal itself for its disposal on its merit; and if it is held alternatively that the instant application is maintainable, then it be dismissed as sufficient grounds justifying cancellation of bails have not been made out.

8. The learned Additional Government Advocate supported the arguments of Shri Chaturvedi, who in reply contended that this application is maintainable under Section 439(2) Code of Criminal Procedure or in any view of the matter under the inherent powers of the Court.

Our Findings :

ReQuestion No. (i)

9. This Criminal Appeal was listed first before a Division Bench comprising G.P. Mathur and R.P. Misra, JJ. The said Bench, however, passed the following order on 422000:

"This is a Criminal Appeal of the year 1991, which has been expedited by the orders of Hon"ble the Chief Justice dated 382001. Learned counsel has submitted that the appellants have committed some more murders and consequently the application for cancellation of bail and also the appeal be heard finally. This Court is hearing fresh matters in writ petitions relating to recovery, land acquisition mines, minerals and service writ petitions relating to judicial officers. Nearly 160 writ petitions are being listed every day for admission and hearing. It is therefore, not possible for us to hear the criminal appeal in the near future. It is, accordingly, directed that the appeal may be listed before the regular Bench hearing criminal appeals in the next cause list. The appeal shall not be treated as tied up to this bench."

9.1 Thereafter this Criminal Appeal was listed at Serial No. 182 of our List dated 142002. Several Criminal Appeals of the year 1981, i.e. to say 10 years older, were listed above the instant appeal. As per the roster fixed by Hon"ble the Chief Justice we are required to take up the criminal appeals for their hearing from 3.00 p.m. Our list is so heavy that many cases listed every day are not taken up to 3.00 p.m. As our working hours are only

up to 3.45 p.m. thus we get only 45 minutes time for hearing a Criminal Appeal.

9.2 Hon"ble the Chief Justice broke our Bench with effect from Monday dated 22/4/2002

9.3 Summer Vacation of the Court commenced from 27/5/2002 and the Court reopened on 17/2/2002

9.4 Thus, the prayer made by Sri V.P. Srivastava that we should not dispose of this application rather we should take up the hearing of the Criminal Appeal itself cannot be accepted. Question No. (i) is answered against the appellants.

ReQuestion No. (ii)

10. Relevant sections for our consideration are Sections 389(1) and (2), 439 and 482 of the Code of Criminal Procedure, which read as follows :

"389. Suspension of sentence pending the appeal; release of appellant on bail. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto....."

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439. Special powers of High Court or Court of Session regarding bail. (1) A High Court or Court of Session may direct

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

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

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

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody....."

"482. Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

11. Following order was passed at the time of admission of the Criminal Appeal :

"Heard.

Admit.

Issue Notice.

The appellants Rajpal, Bhoj Raj alias, Pappu, Rishipal, Jagan Nath Kalar and Ashok Kumar convicted in S.T. No. 519 of 1989 State v. Rajpal and others under Sections 147, 148, 307 and 302, I.P.C., P.S. Hathras Junction, District Aligarh are released on bail on each of them furnishing a personal bond and two sureties each in the like amount to the satisfaction of the C.J.M. Aligarh. Sd/ Surya Prasad, J."

11.1 Surya Prasad, J. had retired long time back.

11.2 The order granting bail to the appellants at the time of admission of the Criminal Appeal shows that this Court had exercised its jurisdiction to grant bail to the appellants vested under subsections (1) and (2) of Section 389 of the Code of Criminal Procedure which falls under Chapter XXIX of the Code of Criminal Procedure. We remind ourselves of a decision of the Hon"ble Supreme Court in Ramji Prasad v. Rattan Kumar Jaiswal (2000) 29 All Cri R 1891 (AIR 2000 SC 3564) (SC), when a learned single Judge of our High Court granted bail to an appellant without recording any reason who was found guilty of the offence under Section 302, I.P.C. by the trial Court, while setting aside that order of the learned single Judge, it was observed and held as follows (Para 3)

"Absolutely no reason is shown by the learned single Judge for adopting this exceptional course in a case where an accused was found guilty by the trial Court under Section 302 of the Indian Penal Code. The normal practice in such cases is not to suspend the sentence and it is only in exceptional cases that the benefit of suspension of sentence can be granted."

11.3 Section 439 of the Code of Criminal Procedure which vests special powers in this Court regarding bail occurs in Chapter XXXIII of the Code of Criminal Procedure. Clause (2) of Section 439 aforementioned vests powers in this Court to arrest a person who has been released on bail under Chapter XXXIII and commit him to custody.

11.4 Thus, in our humble view Section 439(2) of the Code of Criminal Procedure cannot be invoked for cancellation of bail to a convicted appellant who has been granted bail in his Criminal Appeal under Section 389(1) of the Code of Criminal Procedure.

11.5 However, Section 482 of the Code of Criminal Procedure recognizes existence of inherent powers of the High Court to be exercised in this regard in order to prevent abuse of the process of the Court or otherwise to secure ends of justice.

11.6 This conclusion of ours stands well by following eight decisions of the Hon^{ble} Supreme Court :

(i) In *Talab Haji Hussain v. M.P. Mondkar*, AIR 1958 SC 376 it was held, after affirming three decisions of our own High Court in *Mirza Mohammad Ibrahim v. Emperor*, AIR 1932 All 534, *Seoti v. Rex* AIR 1948 All 366 (FB) and *Bachchu Lal v. State*, AIR 1951 All 836, to the effect that the High Court has inherent powers to cancel bail even in bailable offences in a proper case and in the interest of justice and the tests specified in Section 561A of the Code of Criminal Procedure, 1898.

(ii) In *Pampapathy v. State of Mysore*, AIR 1967 SC 286 it was laid down that the High Court has inherent power to cancel an order of suspension of sentence and grant of bail to an appellant made under Section 426 of the Code of Criminal Procedure if the allegation against him *prima facie* indicates that he is misusing liberty granted to him and indulging in acts of violence to prevent abuse of process of the Court.

(iii) In *Ratilal Bhanji Mithani v. Asstt. Collector of Customs, Bombay*, AIR 1967 SC 1639 it was laid down to the effect that if any accused of a bailable offence is found (a) intimidating, or (b) bribing, or (c) tampering with the prosecution witnesses or (d) is attempting to abscond, the High Court has inherent powers to cause him to be arrested by cancelling his bail which jurisdiction springs, from its over riding inherent powers.

(iv) In *Dolat Ram v. State of Haryana* (1995) 1 SCC 349, it was laid down that following principles are required to be considered by a Court while cancelling bail already granted :

"Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the Bail already granted. Generally speaking, the grounds for cancellation of Bail broadly (illustrative and not exhaustive) are 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. The satisfaction of the Court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of Bail. However, Bail once granted should not be cancelled in a mechanical manner without considering whether any supervising circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of Bail during the trial."

(v) In *Subhendu Mishra v. Subrat Kumar Mishra*, AIR 1999 SC 3026, it was observed that the principles laid down in *Dolat Ram*'s case ought not to have been ignored by the High Court.

(vi) In *R. Rathinam v. State*, AIR 2000 SC 1851 it was held as follows (Paras 7 and 8):

"The frame of subsection (2) of Section 439 indicates that it is a power conferred on the said courts. Exercise of that power is not banned on the premise that Bail was earlier granted by the High Court on judicial consideration. In fact the power can be exercised only in respect of a person who was released on Bail by an order already passed. There is nothing to indicate that the said power can be exercised only if the State or investigating agency or even a Public Prosecutor moves for it by a petition. The power so vested in the High Court can be invoked either by the State or by any aggrieved party. The said power can also be exercised suo motu by the High Court. If so, any member of the public, whether he belongs to any particular profession or otherwise, who has a concern in the matter can move the High Court to remind it of the need to invoke the said power suo motu. There is no barrier either in Section 439 of the Code or in any other law which inhibits a person from moving the High Court to have such powers exercised suo motu. If the High Court considers that there is no need to cancel the Bail for the reasons stated in such petition, after making such considerations it is open to the High Court to dismiss the petition. If that is the position, it is also open to the High Court to cancel the bail if the High Court feels that the reasons stated in the petition are sufficient enough for doing so. It is, therefore, improper to refuse to look into the matter on the premise that such a petition is not maintainable in law. (Para 8)."

(vii) In *Puran v. Ram Bilas*, AIR 2001 SC 2023 it was observed as follows :

"Generally speaking, the grounds for cancellation of Bail are 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. However, these instances are merely illustrative and not exhaustive."

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"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."

(viii) Very recently in *Ram Govind Upadhyay v. Sudharshan Singh* (2002) 3 SCC 598 : (2000 All LJ 961) it was observed and held as follows :

"8. While it is true that availability of overwhelming circumstances is necessary for an order as regards the cancellation of a bail order, the basic criterion, however, being interference or even an attempt to interfere with the due course of administration of

justice and/or any abuse of the indulgence/privilege granted to the accused.

9. Undoubtedly, considerations applicable to the grant of bail and considerations for cancellation of such an order of bail are independent and do not overlap each other, but in the event of nonconsideration 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. The subsequent FIR is on record and incorporated therein are the charges under Sections 323 and 504, IPC in which the charge sheets have already been issued the Court ought to take note of the facts on records rather than ignoring them. In any event, the discretion to be used shall always have to be strictly in accordance with law and not de hors the same. The High Court thought it fit not to record any reason, far less any cogent reasons, as to why there should be a departure when in fact such a petition was dismissed earlier not very long ago."

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"10..... Tampering with the evidence and threatening of the witnesses are two basic grounds for cancellation of bail both these two factors stand alleged and by reason of subsequent filing of the charge sheet therein....."

12. It is well settled that labelling a wrong section will not oust the jurisdiction of the Court, if it can be traced. We, thus, hold that even though this application has been filed under Section 439(2) of the Code of Criminal Procedure it is maintainable under the inherent powers of this Court which stands recognised by the Legislature vide Section 482 of the Code of Criminal Procedure, 1973.

13. We thus over rule the preliminary objection raised by Sri V. P. Srivastava in regard to non maintainability of the instant application and proceed to adjudicate it on its merits. Question No. (ii) is answered accordingly.

14. ReQuestion No. (iii)

Amrit Pal Singh, who was the own brother of the applicant Raksha Pal Singh, was murdered on 17/1/1989, Sessions Trial No. 519 of 1989 State v. Raj Pal and others under Sections 147, 148, 307 and 302, I.P.C. related to the murder of Amrit Pal Singh in which Sushil Kumar alias Pintoo, the son of the applicant Raksha Pal Singh, was PW 4 the child eye witness. On the basis of the testimony of Sushil Kumar alias Pintoo and other witnesses the appellants were convicted by the judgment and order under appeal.

15. It was on 26/4/2001 that Satendra Pal Singh, son of the deceased Amrit Pal Singh, had moved an Expedite Application No. 339853 of 2001 for expediting the final hearing of the Criminal Appeal.

15.1 Paragraph 3 of the Affidavit accompanying the Expedite Application reads as follows :

"That, the aforesaid appellant hardened criminal and they are continuously threatening the applicant complainant and his family members and cause to loss to the life and property of the complainant by assaulting and making criminal attempt over the appellant."

15.2 No Counter was filed by the appellants to the aforesaid Affidavit.

15.3 Undisputedly during pendency of the expedite application Sushil Kumar alias Pinto PW 4 was murdered on 1972001 and a First Information Report was lodged on that very date. True it is that the appellants against whom the allegation of his murder was made were granted bail by this Court but nevertheless it is equally true that a charge sheet was submitted against them on 1382001 and the trial has been committed to the Court of Session on 1292001 registered as Sessions Trial No. 358 of 2001

15.4 The hearing of the Criminal Appeal was directed to be expedited vide Order dated 382001 of the Hon"ble Chief Justice.

15.5 Thus we accept the correctness of the stand of the Applicant that considering the aforesaid facts Hon"ble the Chief Justice had passed an order expediting the hearing of the Criminal Appeal.

15.6 It is equally true that except appellant No. 1 Raj Pal Singh all other appellants are involved in a Gangster Act case and are allegedly in Jail.

15.7 The aforementioned facts and circumstances prima facie prove that the appellants have misused the privilege of bail granted to them.

15.8 We also hold that the explanation in regard to non filing of the Counter Affidavit earlier rather only on the second day of hearing of this application does not appear to be convicting.

15.9 Having reminded ourselves of the tests laid down by the Hon"ble Supreme Court we hold that the applicant has succeeded in making out case that in order to prevent abuse of the process of the Court and secure the ends of justice the bail bonds of appellants are liable to be cancelled under the inherent powers of the Court.

15.10 Accordingly, in the result without expressing our opinion on merits of the accusations made against the appellants that they had committed the murder of PW 4 or that they are Gangsters within the meaning of the Gangster Act, we cancel the bails granted to them pursuant to the Court's order dated 2221991, forfeit the bail bonds and discharge the sureties furnished.

16. Question No. (iii) is answered accordingly.

17. We clarify that if they are in jail in connection with any criminal case, then they shall remain therein during pendency of their Criminal Appeal No. 282 of 1991 in this Court, or if they have been granted bail, then they shall be taken into custody and sent to jail.

18. This application is allowed.

19. Let a copy of this order be sent forthwith by the office to the Chief Judicial Magistrate, Hathras to ensure compliance of our directions by him and all concerned.