(1989) 12 MP CK 0019

Madhya Pradesh High Court

Case No: Misc Criminal case No. 2481 of 1989

Chain Singh Dhakad		APPELLANT
	Vs	
Hargovind and Others		RESPONDENT

Date of Decision: Dec. 14, 1989

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 437, 438, 439, 439(1), 439(2)
- Evidence Act, 1872 - Section 113B
- Penal Code, 1860 (IPC) - Section 304B, 306

Citation: (1991) CriLJ 33 : (1992) ILR (MP) 700

Hon'ble Judges: Gulab C. Gupta, J

Bench: Single Bench

Advocate: N. Tandon, for the Appellant; B.P. Sharma, U.K. Sharma, Government Advocate, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Gulab C. Gupta, J.
This is complainant''s application under 439(2) 439(2) Cr. P.C. for cancellation of anticipatory bail granted to the non-applicants by Shri K. A. Sisodiya, Second Additional Sessions Judge, Raisen on 7-8-89 and 8-8-1989 in bail application Nos. 546/89 and 636/89 respectively.

2. It appears that Vinita, Daughter of the applicant was married to non-applicant Hargovind on 7-5-1987. She died on 7-7-1989 apparently because of pois439(2)oning. Facts in the case diary reveal that she had become pregnant and aborted a child at Jabalpur in June 1989. Facts in case diary also reveal that on 8-7-1989 at 1.45 A. M. intimation was received through Mahesh, ward boy of Government Hospital Udaypura, district Raisen that Vinita was brought to the hospital by non-applicant Hargovind and his father Kanhaiyalal for treatment but on examination she was found already dead. The

intimation was given by Dr. S. N. Singh on 7-7-1989 at 10.10 p.m. On receipt of this intimation "Marg" was recorded and two constables sent to hospital for inquiry. The inquiry from the non-applicant Hargovind revealed that Vinita had started feeling headache at about 4 p.m. On 7-7-1989 and had slept. There after between 5 and 5.30 p.m. she started vomiting and passing loose motions. The non-applicant informed the police authorities that he had taken Vinita to Deori on his tractor for treatment and that she had fainted on reaching Deori. He had then informed his father-in-law Chain Singh who immediately came with a jeep. By then Vinita"s condition had deteriorated and therefore it was decided to take her to Bhopal. While proceeding to Bhopal, it was decided to get her treated at Udaipura hospital. That is why they sent to Udaipura hospital where Vinit a was examined by the Doctor only to find that she was dead. The case diary reveals that on 8-7-89 at about 7 a.m. Panchanama of the dead body was prepared when it was suspected that Vinita had died of poisoning. It was therefore decided to get the post-mortem done, and the body was sent for the purpose immediately thereafter. Statements of Harisingh, Dhiraj Singh and Kanhaiyalal were also recorded. Chain Singh, the father of the deceased could not give his statement as he was mentally disturbed. The inquiry, however, continued on 9-7-89. Applicant Chain Singh alleged that the non-applicants Hargovind Kanhaiya Lal and Smt. Kalabai had been treating Vinita with cruelty to obtain Rs. 50,000/- as dowry and that was the cause of her death. It appears that the death had caused lot of problems in the area, as it was suspected that Vinita bai had been killed by administering poison. President and Members of Kirar Samaj sent an application to the S. D. O. (Police) Bareli for proper action. It appears that the entire kirar community was agitated creating serious law and order problem. The case diary reveals that the investigation continued and eventually offences under Sections 304B/306 IPC registered. At this stage the non-applicants made an application for grant of anticipatory bail before the learned Addl. Sessions Judge which was granted on a finding that from the evidence appearing in the case diary the offence appears to be u/s 306IPC. In spite of it, nothing what-so-ever was stated about the offence u/s 304B. I.P.C. The learned Judge was of the opinion, that no seizure was to be effected from the non-applicant and hence their presence was not required. He, therefore granted anticipatory bail.

3. The order dated 7-8-89 indicates that the non-applicants were represented by Shri Vijay Dhakad, Advocate and the State was represented by Shri J. P. Shukla, Advocate. On 8-8-1989, however, the State was represented by Shri P. R. Dhakad, father of Shri Vijay Dhakad, Advocate appearing for non-applicants on 7-8-1989. The order dated 3-8-1989 records that Shri P. R. Dhakad did not submit anything special to contradict the allegations made by non-applicant Kanhaiyalal Both the orders do not take into consideration, the allegation relating to offence punishable u/s 304B I.P.C. nor do they indicate that the respondent state had submitted that there was likelihood of investigation being influenced.

4. The submission of the applicants, in this Court is that the order granting anticipatory bail is not bona fide and has been obtained from the learned Judge by influencing him. It

is also submitted that Shri Dhakad the prosecutor had been instrumental in this process as his son Vijay Dhakad had been engaged on behalf of the non-applicants. It is also submitted that the learned Judge had intentionally not noticed allegations relating to offence u/s 304B IPC and the decision in Supreme Court that bail should not be granted in cases of dowry death.

5. Section 438Cr. P.C. confers discretion on the Sessions Judge to grant anticipatory bail to a person who has reason to believe that he may be arrested for a non cognizable offence. In Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, the Supreme Court considered the ambit and scope of this power and held that it did not suffer from any limitation much less from the limitations mentioned in Section 437Cr. P.C. In spite of it, it clarified that before the Court exercises this power it must be satisfied that "it thinks fit" to grant bail. The question whether bail should be granted or not depends upon variety of circumstances, the cumulative effect which must enter into a judicial verdict. Though such circumstances are too numerous to be stated the Supreme Court made the following observations in this regard:

"In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and equally, that anticipatory bail must be granted if there is not fear that the applicant will abscond. There are several other consideration, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant"s presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind, while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in The State Vs. Captain Jagjit Singh, which, though, was a case under the old Section 498 which corresponds to the present Section 439of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail."

(para 31)

In the final analysis the Supreme Court held that "the matter has been left to the Court which is expected to exercise jurisdiction by a wise and careful use of their discretion which, by their long training and experience they are ideally suited to do."

(para 38)

No other decision of the Supreme Court has been brought to the notice of this Court which has the effect of reducing the force of aforesaid decision or laying down any different law. In spite of it, the Supreme Court in Union of India (UOI) and Others Vs. Arun Kumar Roy, expressed its displeasure on the High Court granting anticipatory bail in dowry death cases. The Supreme Court observed that "we are of the opinion that the High Court should not have exercised its jurisdiction to release the accused on anticipatory bail in disregard of the magnitude and seriousness of the matter. The matter regarding the unnatural death of the daughter-in-law at the house of her father-in-law was still under investigation and the appropriate course to adopt was to allow the concerned Magistrate to deal with the same on the basis of the material before the Court at the point of time of their arrest in case they were arrested. It was neither prudent nor proper for High Court to have granted anticipatory bail which order was very likely to occasion prejudice by its very nature and timing." Reading the two decisions together it may appear that though the matter of grant of anticipatory bail is within the "judicial discretion" of the Court, the said "discretion" is not to be exercised in favour of the accused in dowry death cases where a daughter-in-law meets at the house of her father-in-law any unnatural death.

6. It may, therefore be examined if the allegations of Additional Sessions Judge being influenced have some substance. There appears to be three reasons on record providing justification for this criticism. Those are viz., ignoring the fact; that offence was also registered u/s 304B I.P.C. which disentitled the non-applicants to anticipatory bail on the basis of Supreme Court decision in Samunder Singh Vs. State of Rajasthan and Others, (ii) ignoring the available fact; that entire Kirar Samaj was agitated on this incident and situation had become such that the S. D. O. (Police) Bareli Shri M. K. Mugdal and S.P., Raisen had to be on their toes to watch the situation. It also ignores the statement of Chain Singh as also discrepancies discovered by the police which according to them, reasonably point to the involvement of the non-applicants, and (iii) the fact that Shri Dhakad, Advocate, who admittedly is the son of the Govt. Pleader was engaged by the non-applicants. As regards Section 304 IPC, the provision was inserted by Dowry Prohibition (Amendment Act, 1986) and provides for punishment with imprisonment for a term which shall not be less than 7 years but which may, extend to imprisonment for life. This Act has also introduced Section 113B in the Evidence Act which provides that when the question is whether a person has committed dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person with cruelty and harassment for or in connection with any demand for dowry, the court shall, presume that such person had caused the dowry death. It is not possible to believe that the learned Additional Sessions Judge would not be aware of these provisions. Indeed, lack

of their knowledge would disentitle the learned Additional Sessions Judge to hold the office. Then the case diary mentions that the offence has been registered u/s 304 IPC also. How is that the learned Judge has ignored the objection of Chain Singh raised before him in spite of taking note of it? Similarly there was available in the case diary a report that the non-applicants were obstructing impartial investigation. That such an application was also filed before the learned Judge is not in dispute and even otherwise a certified copy of the same is produced before this Court. These facts give rise to a reasonable inference that the learned Additional Sessions Judge has not honestly exercised the "judicial discretion". Then engagement of Shri Vijay Dhakad, Advocate, by the non-applicants when his father was working as Govt. pleader speaks volume about involvement of the Govt. Pleader in the matter. It also explains why Shri Dhakad, Govt. Pleader did not submit anything to contradict allegations of the non-applicants on 8-8-1989. It is true that Shri Dhakad withdrew from the case on 7-8-89 to appear again on 8-8-1989 but that does not provide any justification to his conduct. He had apparently done so to facilitate his son"s success in obtaining bail. Possibility of his being involved in favour of applicants cannot therefore be ruled out. The state should take lesson from this case and start appointing a person of honesty and integrity in important positions like Govt. Pleaders. They would add to their prestige by taking suitable action against Shri P. R. Dhakad, Govt. Pleader for facilitating success of his son on 7-8-1989 and not making any submission to rebut the allegations of non-applicant Kanhiyalal on 8-8-89. The cumulative effect of these circumstances is that the anticipatory bail has been granted in the matter like it by ignoring the decision of the Supreme Court, by not taking note of important events and allegations and by influencing Govt. Pleader. Such order, in the opinion of this Court, brings no credit to the independent judiciary of which Shri K.A. Sisodiya, Second Additional Sessions Judge, Raisen is an integral part. Since there are reasonable grounds to doubt his honesty in the matter a copy of this judgment shall be sent to Hon"ble the Chief Justice for such suitable necessary action as may be considered fit and proper.

7. Can the anticipatory bail granted as aforesaid be cancelled because of the aforesaid illegality? It is true that considerations for granting and cancelling bail are different; yet there are authorities to indicate that whenever the Sessions Judge has granted anticipatory bail under circumstances which may amount to illegal and unjust exercise of "judicial discretion", the bail can be cancelled. In Gurcharan Singh and Others Vs. State (Delhi Administration), the Supreme Court considered a case where senior police officials involved in a criminal conspiracy to kill a person, had been granted bail by the Sessions Judge without considering gravity of the offence, influence which the accused persons wielded over the witnesses and the status of the accused. High Court cancelled the bail taking the view that it was not proper exercise of "judicial discretion : The Supreme Court approved the view of the High Court and refused to interfere with the order in so doing. The Supreme Court observed that, "in considering the question of bail justice to both sides governs the judicious exercise of the court"s judicial discretion." (para 25). In State (Delhi Administration) Vs. Sanjay Gandhi, the Supreme Court again considered the ambit

and scope of Section 439(2)(2) Cr. P.C. and held that "rejection of bail when bail is applied for is one thing, cancellation of bail already granted is quite another -- Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial." The following observations of the Court being of importance deserve notice:

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

(Para 24)

It is well-known that the Supreme Court had in this case after examining facts and circumstances concluded that attempt is made to tamper with the evidence and therefore to cancel the bail of those person against whom a reasonable belief existed that they were involved in it. In reaching this conclusion the Court applied the test of "balance of probabilities" that the accused has misused his liberty or that he will interfere with the course of justice. In the opinion of the Supreme Court this was not required to be proved prosecution by a mathematical certainty or even beyond a reasonable doubt. It is, therefore, plain that it is the duty of the Court to cancel bail already granted where there is a reasonable apprehension that the accused persons will interfere with the course of justice.

8. This Court cannot also ignore the fact that the challan has been filed by the prosecution on 5-9-89, indicating that the police had full opportunity of investigating the complaint and collecting evidence. At the stage when anticipatory bail is granted, this material is usually not available and hence considerations remain different. There may be cases where at the stage of grant of anticipatory bail it may appear to be a case of false involvement of the accused persons. But at the stage of filing the charge-sheet there may be no reason to doubt the same. In such a situation, it would be necessary to consider whether a case for releasing the applicants on bail u/s 439(1)(1) Cr. P.C. exists. Simply because a person had been granted anticipatory bail at the thereshold of the investigation, it would not be proper to continue the bail if he is not entitled to be enlarged on bail u/s 439(1)(1) Cr. P.C.

9. Keeping the aforesaid principles in view, the facts of the case may be examined in detail. The case diary reveals that a report had been lodged by Kirar Samaj and the applicant, that the investigation was not properly done. It was even alleged that the postmortem report was being tampered with. Because of the wide spread public discontent, Shri S. S. Gupta police Superintendent, Raisen himself examined the matter to ascertain whether the investigation was being done properly? The S.P. was of the opinion that Vinita was intentionally taken to a private homoeopathy Doctor at Deori. She should have been taken to Udaipura which was at a distance of 7 kms and where medical facilities were duly available. One Doctor Badkul who is related to the non-applicants also lives there. The S.P., therefore, did not appreciate taking Vinita to Deori situated at a distance of about 17 kms and suspected foul play. The learned S.P. found as many as 8 defects in the investigation besides delay. One of the defects is that the statements of neighbours were not recorded and search of the non-applicant Hargovind''s place of residence was not taken. In the opinion of the learned S.P., it was a case u/s 304(B) I.P.C. The S.P. thereafter, gave as many as 23 directions for conducting investigation. It was indeed the investigation by S.P. that caused apprehension in the mind of the non-applicants that they will be arrested and prompted them to apply for anticipatory bail. It is unfortunate that this report of S.P. was not available to the learned Additional Sessions Judge while considering the application u/s 438 Cr. P.C. or else the learned Judge would not have failed to notice that even the S.P. suspected that S.D.O. (Police) Bareli was influenced by the non-applicants which might be the cause of defective investigation. It would have also been noticed that the learned S.P. was of the opinion that grant of anticipatory bail to the non-applicants would not be in the interest of investigation. Statement of Ram Kumari, the mother of the deceased indicates that applicant Hargovind wanted to start his own business and therefore demanded Rupees 50,000/-. She has also stated that Vinita had told her that she was being tortured and harassed for non-payment thereof. Ram Kumari''s statement indicated that a D & C operation was performed on Vinita and for that purpose she was admitted in hospital at 3 p.m. and taken out at 6 p.m. against the Doctor''s advice. Raiesa the friend of Vinita living in neighbourhood also proves that Vinita was being harassed for Rs. 50,000/ -she also stated how she was taken to Jabalpur for D & C operation and dragged out of the hospital against the Doctor''s advice. Usha, wife of Bhagwan Singh also makes these allegation. Post-mortem report indicates that Vinita was healthy. The Doctor, surprisingly, failed to give any definite opinion about the cause of death. Chemical analysis, however, indicates that packets B and C containing viscera from the stomach, lungs, liver and spleen of the dead body of the Vinita contained aluminium phosphite or sulphos. This evidence would prima facie indicate that the deceased Vinita was treated cruelly because she had not been able to pursuade her parents to give Rs. 50,000/- to the non-applicants. That she was not taken to hospital for treatment and that before her death she had been subjected to D &C operation and taken out of the hospital within 3 hrs. against medical advice, when considered in the context of Section 113B of the Evidence Act would entitle the Court to presume that it was a case of dowry death. The investigation has been undertaken apparently because of the applicant''s efforts and thereafter the material has

been collected due to efforts of the S.P. The manner in which the non-applicants engaged Shri Vijay Dhakad the son of the Govt. pleader to obtain benefit of anticipatory bail sufficiently justifies, in the context of other facts, the conclusion that the non-applicant would not permit the trial to be completed promptly and without influencing it. Under the circumstances, there are good reasons to apply the principles of Gurcharan Singh and Others Vs. State (Delhi Administration), and State (Delhi Administration) Vs. Sanjay Gandhi, and cancel the bail of the non-applicants.

10. In spite of it, this court would like to treat the case of Smt. Raja Bai and Smt. Kala Bai differently than others mainly because they are ladies and Smt. Raja Bai is shown to be more than 50 years of age. Cancelling the bail of Non-applicants 1, 2 and 3 would, in the opinion of this Court, create the desired impact and act as deterrent on others. In this view of the matter, bail granted to non-applicants Hargovind, son of Kanhaiyalal, Kanhaiyalal S/o Ram Prasad and Ramgopal son of Kanhaiyalal is hereby cancelled. They shall be arrested and committed to custody. The Judicial Magistrate before whom the challan has been filed will take necessary action, in accordance with law to comply with this order.