

(2002) 07 CAL CK 0050

Calcutta High Court**Case No:** Criminal Miscellaneous Jurisdiction B.R.M. No. 553 of 1998

Rashbehari Karmakar

APPELLANT

Vs

Indrajit Mukherjee and Another

RESPONDENT

Date of Decision: July 12, 2002**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 437(1), 437(2), 437(5), 439(2), 482
- Penal Code, 1860 (IPC) - Section 120B, 201, 307, 326

Citation: (2003) 2 CALLT 293 : (2002) CriLJ 4250**Hon'ble Judges:** Sujit Barman Roy, J; Pradip Kumar Biswas, J**Bench:** Division Bench**Advocate:** Sekhar Kr. Basu and Debasish Roy, for the Appellant; Sudipto Moitra and Ashim Roy, for the Respondent**Final Decision:** Dismissed

Judgement

P.K. Biswas, J.

This is an application u/s 439(2) read with Section 482 of the Criminal Procedure Code praying for cancellation of the Bail granted by the learned Sessions Judge, Burdwan in Criminal Miscellaneous Case No. 3097 of 1997 confirming an interim bail dated 23.12.97 granted earlier by the learned Sessions Judge, Burdwan to the opposite party No. 1, Sri Indrajit Mukherjee in connection with Kalna P.S. Case No. 145 of 1995 corresponding to G.R. Case No. 294 of 1994 pending before learned SDJM, Kalna, Burdwan under Sections 326/307/120B/ 201 of the Indian Penal Code.

2. The facts leading to the filing of the present application may be summarised as follows:

3. Sri Gurudas Halder, an active member of the State Government Employees' Federation, West Bengal was having a dispute with his landlord. S.I., Sri Tapan Choubey attached to the Kalna P.S., sided with the aforesaid landlord and in order to teach a lesson to Sri Balder, he was taken into custody and was placed in the lock up

during the evening of 09.08.1994, and while detained in the lock up, Sri Gurudas Halder was brutally assaulted by Sri Tapan Choubey and he was compelled to sign on a non-judicial stamp paper wherein it was stated that he has relinquished his tenancy in favour of his landlord quite voluntarily on a date mentioned in such paper.

4. Aforesaid Gurudas Halder being a leader of the State Government Employees' Federation was quite popular in his locality and upon hearing the news that he was illegally detained and assaulted by Sri Tapan Choubey, S.I., Kalna P.S., there were resentment amongst the members of Federation and on the next day, Gurudas was released from the lock up in an injured condition and was sent to the local hospital for his treatment.

5. On 9.9.94, members of the aforesaid Federation including the present petitioner namely, Rash Behari Karmakar started an agitation against the aforesaid police officer and they organised a "pen-down strike" in their offices and demanded that Sri Tapan Choubey must tender a public apology to Gurudas Halder and as a result of such agitation, finally on 29.10.94 at the instance of the District Magistrate, Burdwan, Superintendent of Police, Sub-Divisional Officer and Deputy Collector, Kalna, a meeting was held at the office of the SDO, Kalna, where said S.I., Tapan Choubey tendered public apology to Sri Gurudas Halder.

6. After tendering public apology to Gurudas Halder, Tapan Choubey decided to vent his anger to the present petitioner namely, Rash Behari Karmakar, who was an active participant in the said agitation against S.I., Tapan Choubey.

7. S.I., Tapan Choubey with the intention of subjecting the petitioner Rash Behari Karmakar to physical incarceration and torture falsely implicated Sri Karmakar in a criminal case being Kalna P.S, Case No. 141 / 94 lodged at Kalna P.S. on 30.10.94 u/s 376 of the Indian Penal Code.

8. S.I., Tapan Choubey thereafter arrested Sri Karmakar from Kalna Sub-Divisional Hospital at 16.25 hrs. on 31.10.94 where Sri Karmakar was admitted for suffering an accident on and from 24.10.94,

9. S.I., Tapan Choubey took Sri Karmakar from the Hospital bed, Dragged him and put him into a police jeep and took him to Kalna Police Station and while taking Sri Karmakar to the P.S., Sri Choubey abused Sri Karmakar in filthy languages and Sri Karmakar was subjected to physical assault by said Tapan Choubey and his associates.

10. At the P.S., Sri Karmakar was put into the police lock up where he was also physically assaulted by Sri Tapan Choubey and his companions.

11. The petitioner, Sri Karmakar was also interrogated by Circle Inspector, Kalna and SDPO, Kalna and in their presence, S.I. Tapan Choubey, Indrajit Mukherjee, Officer-in-Charge of Kalna P.S., i.e., opposite party No. 1 and Sri B. Maity. S.I. of

Police attached to Kalna P.S., abused and physically assaulted Sri Karmakar after giving reference to the role in the agitation against S.I. Tapan Choubey and after that the petitioner was again sent back to the police lock up.

12. During the night, Sri Karmakar was again taken out of the police lock up by Swapan Dutta, NVF, and thereafter, Sri Karmakar was mercilessly beaten up by the police personnel under the leadership of Tapan Choubey and S.I. Tapan Choubey decided to castrate Sri Karmakar in order to teach him proper lesson. Pursuant to such decision, Tapan Choubey brought out a big knife like weapon from police station Malkhana and S.I. Choubey started assaulting Sri Karmakar with the intention of castrating him. Sri Indrajit Mukherjee, O.C. of Kalna Police, B. Maity and Swapan Dutta caught hold of Sri Karmakar for assisting Sri Choubey actively and S.I., Choubey actually castrated him.

13. Thus, having received such brutal assault, Sri Karmakar started bleeding profusely and lost his sense and regained his sense on the next day i.e., on 01.11.94 at the Kalna Hospital. And subsequently, on enquiry he came to learn that at about 3.15 a.m. on 01.11.94, he was admitted to the said hospital in castrated condition and an emergency operation had to be performed immediately.

14. Sri Karmakar was taken to P.G. Hospital, Calcutta on 08.12.94, subsequently for further treatment, but due to lack of accommodation, his admission was refused and he was again re-admitted to Kalna Hospital on 09.12.94, and subsequently, between 12.12.94 and 26.12.94, Sri Karmakar was transferred to Burdwan Medical College & Hospital for further treatment.

15. Sri Karmakar thereafter on 08.12.95 filed a petition of complaint before the learned Chief Judicial Magistrate, Burdwan against the said S.I., Tapan Choubey, Indrajit Mukherjee, opposite party No. 1. B. Maity and Swapan Dutta being Case No. Cr-53/95 under Sections 307/326/34 of IPC in respect of the criminal and violent acts of torture and physical assault and castration of the petitioner by the aforesaid police officers of Kalna P.S., during the night of 31.10.94 in the Kalna P.S. lock up. The police in turn to save their skin and to cover up and/or protect the actual offenders, started another false criminal case in respect of aforesaid incident alleging that the injury on the petitioner was inflicted in the police lock up at the behest of some unknown persons and the said case was registered on the basis of a written complaint submitted by the opposite party No. 1 and was registered as Kalna Police Station Case No. 145/94 dated 12.9.94 u/s 326 of the Indian Penal Code. The investigation of the aforesaid case was taken up by the CID, West Bengal. On conclusion of the investigation, a charge-sheet being No. 165/97 dated 14.11.97 under Sections 326/307/201/120B of IPC was submitted before the learned SDJM, Kalna, Burdwan against the opposite party No. 1, Indrajit Mukherjee and Julu Sk., Uttam Halder, Kena Sk., NVF, Swapan Dutta and ASI Surya Kanta Mondal.

16. In the charge-sheet, as aforesaid, it was highlighted that there was enough circumstantial evidence to show a series of inaction and/or willful omissions on the part of the opposite party No. 1, ASI Surya Kanta Mondal, NVF, Swapan Kumar Dutta who connived with the other accused persons and, thereby, committed offences punishable under Sections 326/307/ 120B/201 of IPC, and in the charge-sheet prayer was made for issuance of Warrant of Arrest against the opposite party No. 1. The petitioner, however, has alleged that the aforesaid charge sheet is a product of perfunctory investigation and a clever attempt of protecting the actual assailants in the instant case as the said charge-sheet did not include S.I., Tapan Choubey and B. Maity. However, pursuant to the prayer of the I.O., Warrant of Arrest was issued against the opposite party No. 1.

17. In the meantime, Opposite party No. 1, Indrajit Mukherjee and application for anticipatory bail before the learned Sessions Judge, Burdwan, which was turned down by the learned Sessions Judge and, similar prayer for anticipatory bail was also turned down by this Hon"ble Court and the opposite party No. 1 preferred a SLP before the Supreme Court of India and the said SLP was also dismissed as not pressed by the Hon"ble Supreme Court.

18. Finding no other alternative, opposite party No. 1, Indrajit Mukherjee surrendered before the learned SDJM, Kama, Burdwan on 22.12.97 and prayed for granting him bail. But the said prayer was rejected by the learned Magistrate and learned Magistrate remanded the opposite party to jail custody till 5.1.98.

19. The opposite party No. 1 thereafter, preferred an application for bail u/s 439 of the Code of Criminal Procedure before the learned Sessions Judge, Burdwan immediately which was numbered as Miscellaneous Case No. 3097 of 1997 and while making such prayer, there has been certain suppression of material fact i.e. prayer for anticipatory bail was rejected by learned Sessions Judge, Burdwan, Hon"ble High Court and Hon"ble Supreme Court.

20. On the same date, without looking into the case diary in the Instant case by order dated 23.12.97, learned Sessions Judge granted interim bail to opposite party No. 1 and being emboldened by the grant of interim bail, the opposite party No. 1 through various persons started threatening the petitioner and his family members and held out threats that all of them would be put to death if they adduced evidence in Court. The present petitioner went to the Kalna P.S., to lodge a diary in respect of the aforesaid threat on 28.12.97, but the Kalna P.S., refused to accept such diary and this continued for a number of times.

21. The petitioner, thereafter, wrote a letter dated 13.01.98 addressing the same to the D.G. of Police, Lalbazar informing him about the aforesaid threats of death and violence held out by the opposite party No. 1 and/or his men against the petitioner and the inaction of the Kalna Police Station in taking steps with regard to the aforesaid materials. The petitioner, thereafter, filed an application for cancellation of

the interim bail granted to the opposite party No. 1 on 23.12.97 before the learned Sessions Judge, Burdwan and the said application was numbered as Criminal Miscellaneous Case No. 133 of 1998, and the prayer for confirmation for bail granted to the opposite party No. 1 and the application for cancellation of the interim bail of the opposite party No. 1 were taken up for hearing on the self-same date and after the hearing the learned Judge by order dated 04.02.98 was pleased to reject the prayer for cancellation of bail preferred by the petitioner and confirmed the interim bail granted to the opposite party No. 1.

22. Thereafter, on 04.02.98, the petitioner came across with the opposite party No. 1 on the bridge at the railway platform of Burdwan Railway Station, when the opposite party No. 1 threatened the petitioner with dire consequences and even with death. The opposite party No. 1, however, abused the petitioner with filthy language and threatened the petitioner that if he continued with the criminal case he would be forced to leave Kalna. The petitioner, thereafter, went to inform the said incident to the Kama P.S., but the Kalna P.S., refused to record his statement.

23. Threats and/or criminal intimidation to the petitioner and his family members at the behest of the opposite party No. 1 through his henchmen were continuing unabated and the petitioner tried to inform the local police and informed those facts to the Superintendent of Police, Burdwan by writing letters but even then no improvement was noticed.

24. The petitioner, ultimately, came before this Court with a prayer for cancellation of bail granted in favour of the opposite party No. 1 although the other accused persons of this case have been remanded to custody for a considerable period of time and has alleged that the learned Sessions Judge acted hastily and in an improper manner in granting the interim bail to the opposite party No. 1 on 23.12.1997 without proper appreciation of the materials in the C.D.

25. Opposite party No. 1 has filed affidavit-in-opposition and has denied all the material allegations contained in the application under consideration. It has further been contended that he is not guilty of suppression of the factum of rejection of the prayers of the opposite party for anticipatory bail by the learned Sessions Judge, Burdwan and also by this Hon"ble Court and by the Hon"ble Supreme Court in the application for bail u/s 439 of the Criminal Procedure Code filed by him before the learned Sessions Judge, Burdwan inasmuch as, it is a well settled principles of law that there is a gulf of difference between pre-arrest and post-arrest bail and the relevant consideration for grant or refusal of such bails are also different and such non-mentioning of the anticipatory bail in the aforesaid form may at best be an omission and not a suppression.

26. It has further been stated on his behalf that any Court of law, while considering the prayer for bail, pending the availability of the case diary, may grant interim bail subject to confirmation thereof on a subsequent date on receipt of the case diary

and this is exactly what had happened in the instant case, so no exception can be taken to the grant of interim bail to the opposite party No. 1 in the manner as it has been granted to him and subsequently on hearing both sides and on consideration of the case diary, the said interim bail was confirmed by the learned Sessions Judge, Burdwan.

27. It has further been contended that the petition under consideration is based on false and baseless allegation against the opposite party No. 1.

28. Further, it has been contended that in the absence of any incriminating material appearing against the opposite party No. 1 in the case diary and in the statements of the witnesses of the prosecution recorded u/s 161 and Section 164 of Cr.PC. the prayer for cancellation of bail of the opposite party No. 1 is not at all entertainable and it is only on the very cogent and overwhelming materials and circumstances such cancellation may be made, but regard being had to the materials on record in the instant case, such cogent and overwhelming circumstances are wanting so no order cancelling the bail of the opposite party can be passed by this Hon"ble Court.

29. With all such allegations, opposite party No. 1 has prayed for rejection of the application under consideration.

30. Now although the affidavit-in-opposition was filed on behalf of the opposite party No. 1 in connection with this matter, yet, at the time of hearing, none has appeared on his behalf.

31. In connection with the aforesaid matter, we have heard the learned counsel appearing for the petitioner, as also the learned Additional Public Prosecutor appearing for the State, who in course of his submission has submitted that no doubt that the allegations levelled against this petitioner are grave and severe in nature, yet, after the long lapse of time from the date of grant of this interim bail in favour of this opposite party No. 1 which was granted on 23.12.97 and subsequently is was confirmed on 4.2.98, no fruitful purpose will be served by cancelling the aforesaid bail.

32. It is now well settled position of law by a catena of decisions of the Supreme Court that the power of the Court in granting bail is not to be exercised if the punishment before trial is being imposed. The only material considerations in such situations are: whether the accused would be readily available for his trial or whether he is likely to abuse the discretion granted in his favour by tampering with evidence. But, when there is no prima facie case, there is no question of considering the other circumstances. But even where a prima facie case is established, the approach of the Court in the matter of granting bail should not be that the accused should be detained by way of punishment, but whether the presence of accused would be readily available for trial or that he is likely to abuse the discretion granted in his favour by tampering with the evidence.

33. The question of cancellation of bail u/s 439(2) of Cr.PC stands certainly on a different footing from admission to bail u/s 439(1) of Cr.PC. Rejection of bail when bail is applied for is one thing, cancellation of bail already granted is quite another and once an accused is enlarged on bail, his liberation from custody cannot be lightly interfered with, but this does not, mean that in appropriate case, where ends of justice so demands the Court will refuse to pass orders. Rather in such a situation Court exercise its power to cancel the bail granted earlier to meet the ends of justice.

34. It is now quite well settled 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 and the grounds for cancellation of bail u/s 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, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (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. and of course such grounds are illustrative and not exhaustive. So to succeed the prosecution must show that the activities of the accused come under either one or more of these heads or under the head of a similar nature.

35. Bearing these principles in mind, let us now examine how far the conduct of the opposite party No. 1 invites the cancellation of bail granted to him.

36. In the petition itself it has been highlighted that there is enough circumstantial evidence to show that there were series of inaction and/or willful omission on the part of the opposite party No. 1 and others who connived with the other members of the accused persons of this case and thereby committed this heinous offence punishable under Sections 326, 307, 120(b)/201 of the Indian Penal Code.

37. It is also an admitted position that the charge sheet has been filed against the opposite party No. 1 and others, but such allegations even If it was grave and heinous in nature that cannot be taken into consideration at the time of consideration of the prayer regarding cancellation of the bail of the accused/opposite party No. 1.

38. True it is that in the instant case, after the anticipatory bail prayer of the opposite party No. 1 was rejected by Superior Court, the opposite party No. 1, finding no other alternative surrendered before the learned Magistrate praying for his release on bail and his prayer being rejected by the concerned Magistrate, he approached the Sessions Judge by filing application u/s 439 of the Code of Criminal

Procedure and the Sessions Judge on that day, i.e. on 23.12.1997 granted interim bail to the opposite party No. 1 recording therein the prayer for interim bail be allowed since the charge sheet was submitted in connection with this case, presumably, on the consideration that the concerned accused person will be readily available for the trial and there is no scope to abuse discretion granted in his favour by tampering with the evidence inasmuch as the charge sheet has already been laid before the Court.

39. The aforesaid order, as it appears, cannot at all be termed to be *ex facie* illegal as it was within the competence of the Sessions Judge to grant such bail, even in a Sessions trial case on perusal of the materials before him. Furthermore, the orders dated 4.2.1998, passed by the learned Sessions Judge suggest that on the self-same day by one order in Crl. Miscellaneous Case No. 133 of 1998 the learned Sessions Judge has, considered the cancellation prayer, made on behalf of the petitioner with regard to the bail to the opposite party No. 1 and by another order in Crl. Miscellaneous Case No. 3097 of 1997 he has also considered the prayer of the opposite party No. 1 regarding confirmation of the interim bail, granted earlier to him by the learned Sessions Judge.

40. The learned Sessions Judge in his aforesaid orders has considered the entire aspects of the matter regarding alleged suppression of the fact regarding rejection of the anticipatory bail order by the Superior Court, question of evading trial, abscondence and also regarding alleged threat and/or intimation by the O.P. No. 1 to the petitioner in connection with this case and after considering those, he was pleased to confirm the interim bail granted to the opposite party No. 1 and eventually rejected the prayer of the petitioner praying for cancellation of bail.

41. These orders also, to our mind, do not seem to be *ex facie* illegal.

42. In that view of the fact and also in the absence of the some cogent and overwhelming circumstances, the bail order, as has been granted by the learned Sessions Judge, cannot be cancelled. Of course in the present petition, some sort of allegation has been made alleging that after the confirmation of the interim bail threat was hurled against the petitioner by the opposite party No. 1 even with death, yet, such allegations have no direct bearing either with the investigation of this case or with regard to the materials, already collected in connection with this case and the aforesaid allegation simpliciter in the given situation, does not, by itself, prove to be very cogent and overwhelming circumstances for securing an order for cancellation of bail.

43. Moreover, in the instant case the bail was granted to the accused/ opposite party No. 1 as back as on 23.12.1997. Now after a lapse of considerable period of time no effective purpose will be sub-served by cancelling the bail of this accused/opposite party No. 1 in this case.

44. In such eventuality and in view of what has been stated above in the preceding paragraphs, we are of the clear view that this is not a fit case where cancellation of bail should be made, but at the same time, we are not unmindful that larger interest of the State and Community including consideration that parties do not lose faith in the system and take law into their own hands wrecking vengeance by private retribution are certainly relevant factors to be taken into account while considering cancellation of bail.

45. So, keeping the aforesaid consideration in our mind, we issue a word of caution against the aforesaid accused/opposite party No. 1 that if any such future allegation against him for terrorising the petitioner and his witnesses are brought to the notice of the trial Judge, the trial Judge shall be at liberty to cancel the bail of this opposite party No. 1 after giving opportunity to the parties of being heard without any further reference to this Court and/or may pass such other order or orders as may be deemed fit and proper.

The present application for cancellation of bail is thus rejected.

With the aforesaid observations, the petition under consideration stands disposed of accordingly.

Later

Criminal department is directed to supply urgent certified copy of this judgment and order to the petitioner, if applied for, as expeditiously as possible.

S. Barman Roy, J.

46. I agree.