

R]ITEM No.1I
(For Judgment)

Court No.3

SECTION IIA

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

CRIMINAL APPEAL NO. 829

OF 2009 @ SLP(Crl.)No. 9410/2008

Ram Babu Tiwari

Appellant (s)

VERSUS

State of M.P. & Anr.

Respondent (s)

Date :24/04/2009 This Petition was called on for judgment today.

For Appellant (s) Mr. P.Gaur,Adv.

For Respondent(s)

Hon'ble Dr. Justice Arijit Pasayat pronounced
Judgment of the Bench comprising His Lordship and Hon'ble
Mr. Justice Asok Kumar Ganguly.

Leave granted.

The appeal is disposed of in terms of the signed
judgment.

(Suman Wadhwa)
Court Master

(Shashi Bala Vij)
Court Master

Signed Reportable judgment is placed on the file.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 829 OF 2009
(Arising out of S.L.P. (Crl.) No.9410 of 2008)

Ram Babu Tiwari

..Appellant

Versus

State of M.P. & Anr.

..Respondents

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Madhya Pradesh High Court, Jabalpur Bench, directing cancellation of bail granted to the appellant.

3. Background facts are as follows:

The present appellant along with two others was arrested in connection with Crime no.149/2008 registered at Kotwali Sehore, for alleged commission of offence punishable under Sections 307 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC').

Appellant prayed for bail in terms of Section 439 of the Code of Criminal Procedure, 1973 (in short 'the Code'), which was allowed by order dated 27.5.2008 passed by learned 1st Additional Sessions Judge, Sihore. An application for cancellation for bail was filed by the present respondent no.2.

Prosecution version is that in the wake of a property dispute present appellant had hired with the assistance of one Deepak Harnath Singh, respondent nos. 2 and 3 for killing Shyam Tiwari who is his real brother. The shot fired by the present appellant hit one Ravi @ Rinku in his neck.

The cancellation was prayed on the following grounds:

- (a) There is specific allegation against appellant that it was he who had fired the shot.
- (b) The respondent nos. 2 and 3 have consistent criminal antecedent.
- (c) After being released on bail, appellant by making a telephonic call to Nikhlesh Tiwari, nephew of Shyam Tiwari, had threatened to kill him in case he does not resile from his case diary statement.
- (d) Co-accused Deepak Harnath Singh is still absconding.

Accordingly, the High Court cancelled the bail granted. It was noted that since the other co-accused have not opposed the prayer for cancellation of bail that was also a factor so far as the appellant is concerned.

4. Learned counsel for the appellant submitted that no reason has been indicated to cancel the bail. The parameters for grant of bail and for cancellation of bail operate in different fields. Therefore, the High Court on the irrelevant reason that co-accused did not oppose the prayer should not have cancelled the bail granted to the appellant.

5. Learned counsel for the respondent no.2, on the other hand, supported the order.

6. The parameters for grant of bail and cancellation of bail are different. There is no dispute to this position. But the question is if the trial Court while granting bail acts on irrelevant materials or takes into account irrelevant materials whether bail can be cancelled. Under the scheme of the Code the application for cancellation of bail can be filed before the Court granting the bail if it is a Court of Sessions, or the High Court.

7. This Court in *Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Anr.* (2004 (7) SCC 528), in para 11 noted as follows:

"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

- (a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
- (b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.
- (c) Prima facie satisfaction of the court in support of the charge. (See *Ram Govind Upadhyay v. Sudarshan Singh* (2002 (3) SC 598) and *Puran v. Rambilas* (2001 (6) SCC 338).

8. It was also noted in the said case that the conditions laid down under Section 437 (1)(i) are sine qua non for granting bail even under Section 439 of the Code.

9. In para 14 it was noted as follows:

"14. We have already noticed from the arguments of learned counsel for the appellant that the present accused had earlier made seven applications for grant of bail which were rejected by the High Court and some such rejections have been affirmed by this Court also. It is seen from the records that when the fifth application for grant of bail was allowed by the High Court, the same was challenged before this Court and this Court accepted the said challenge by allowing the appeal filed by the Union of India and another and cancelled the bail granted by the High Court as per the order of this Court made in Criminal Appeal No. 745 of 2001 dated 25-7-2001. While cancelling the said bail this Court specifically held that the fact that the present accused was in custody for more than one year (at that time) and the further fact that while rejecting an earlier application, the High Court had given liberty to renew the bail application in future, were not grounds envisaged under Section 437(1)(i) of the Code. This Court also in specific terms held that the condition laid down under Section 437(1)(i) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail."

10. Even though the re-appreciation of the evidence as done by the Court granting bail is to be avoided, the Court dealing with an application for cancellation of bail under Section 439(2) can consider whether irrelevant materials were taken into consideration. That is so because it is not known as to what extent the irrelevant materials weighed with the Court for accepting the prayer for bail.

11. In *Puran v. Rambilas and Anr.* (2001 (6) SCC 338) it was noted as follows:

"11. Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in *Gurcharan Singh v. State (Delhi Admn.)*. In that case the Court observed as under: (SCC p. 124, para 16)

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

12. The perversity as highlighted in Puran's case (supra) can also flow from the fact that as noted above, irrelevant materials have been taken into consideration adding vulnerability to the order granting bail. The irrelevant materials should be of a substantial nature and not of a trivial nature. It is nature of the acts which are to be considered. By way of illustration, it can be said that the accused cannot take a plea while applying for bail that the person whom he killed was a hardened criminal. That certainly is not a factor which can be taken into account.

13. The order of the High Court is very sketchy. The High Court has not considered the relevant aspect in detail. Only because the co-accused did not actually oppose the prayer for cancellation of bail, that could not have been a ground to cancel bail granted to the appellant.

14. In the circumstances we set aside the impugned judgment and remit the matter to the High Court for fresh consideration. We make it clear that we have not expressed any opinion on the merits of the case. The High Court shall examine the matter afresh keeping in view the parameters indicated above. The appeal is accordingly disposed of.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(ASOK KUMAR GANGULY)

New Delhi,
April 24, 2009