

P.V.KUNHIKRISHNAN, J.

Crl.M.A.No.1 of 2020
in
B.A.No.2449 of 2020

Dated this the 3rd day of June, 2020

ORDER

This is an application filed under Section 482 read with Section 439(2) of the Criminal Procedure Code to recall the order dated 12.5.2020 in B.A.No.2449 of 2020. When this matter came up on 1.6.2020, this Court passed a detailed interim order which is extracted herein below:

"The above application is filed to re-call the order dated 12.05.2020 in B.A. No.2449 of 2020.

2. The above order was passed by this Court on 12.05.2020 releasing the accused in Crime No.23 of 2020 of the Ernakulam Central Police Station.

3. The case was registered against the accused under Sections

364, 366A, 376, 370 and 302 of the Indian Penal Code and Sections 5,6,7 of the Protection of Children from Sexual Offences Act. The petitioner was arrested on 08.01.2020 and he was in custody.

4. When the above Bail Application came up for consideration, the Counsel for the petitioner submitted that the final report is not filed and therefore, he is entitled statutory bail under Section 167 Cr.P.C. The learned Public Prosecutor also submitted that no charge sheet is filed as on that date and it is also a fact that, 90 days are over after the arrest of the accused. Hence, this Court passed the following order:

"4. The learned counsel for the petitioner submitted that, the petitioner was arrested on 08.01.2020 and he is in custody from that date onwards. He submitted that final report has not been filed in this case.

5. The learned Public

Prosecutor submitted, that final report has not been filed in this case and the petitioner was arrested on 08.01.2020; now 90 days over. 6. I have considered the contentions raised by the learned counsel for the petitioner as well as the learned Public Prosecutor. I am constrained to say that, in a serious case like this, the Investigating Officer was not able to complete the investigation within the statutory period of 90 days. A minor girl was kidnapped and brutally raped and murdered by the accused, is the allegation. Even in such a case the Investigating Officer was not able to complete the investigation within 90 days. 7. Admittedly, the petitioner is in custody from 08.01.2020; now 90 days over. The petitioner is entitled to statutory bail under Section 167 of the Code of Criminal Procedure....."

5. The present petition is filed by the Senior Public Prosecutor Sri.Suman Chakravarthy stating that, the submission of the Public Prosecutor was an inadvertent mistake. Actually, the

final report was filed on 01.04.2020 ie. on the 84th day of the arrest of the petitioner/accused.

6. Today, this petition came up for consideration at 1.45 p.m.

7. Heard Sri. Suman Chakravarthy, the learned Senior Public Prosecutor and Advocate Aravind T.H., the counsel who appeared in the Bail Application for the accused. Advocate Aravind T.H. submitted that he has no instruction to appear in this petition because he was not able to contact his client.

8. Therefore, the Station House Officer, Central Police Station, Kochi City can be directed to inform the petitioner in B.A. No. 2449 of 2020 to the effect that the petition for re-calling the order is posted for final hearing.

9. It is an admitted fact that

the charge sheet in this case was filed on 01.04.2020 ie. On the 84th day on which the petitioner was arrested. Therefore, the petitioner is not entitled statutory bail under Section 167 Cr.P.C. A reading of the order dated 12.05.2020 itself, it is clear that, this Court was not inclined to grant bail and the bail was granted only because he is entitled statutory bail. Now, this petition to re-call the order can be disposed of finally only after hearing the petitioner/accused.

10. It is prima facie clear that, the petitioner/accused in B.A. No. 2449 of 2020 mislead this Court and obtained the above bail order. Hence, prima facie, it is clear that, he committed fraud on Court. The Hon'ble Supreme Court in Pradeep Ram v. State of Jharkhand and Anr. [AIR 2019 SC 3193]

observed that, even without cancelling the bail, this Court under Section 439(2) of the Code of Criminal Procedure can arrest the accused and commit him to custody. The relevant portion of the said judgment is extracted hereunder:

"The power under Sections 437(5) and 439(2) are wide powers granted to the court by the legislature under which Court can permit an accused to be arrested and commit him to custody without even cancelling the bail with regard to earlier offences. Sections 437(5) and 439(2) cannot be read into restricted manner that order for arresting the accused and commit him to custody can only be passed by the Court after cancelling the earlier bail."

11. According to me , prima facie, I am convinced that the petitioner/accused in B.A. No.2449 of 2020 obtained bail order by committing fraud on Court. In such a situation, I think, the petitioner/

accused should be arrested forthwith and commit him into the custody immediately and then only this application needs to be considered. The Counsel who appeared for the petitioner/accused in the Bail Application submitted an unconditional apology before this Court for the wrong submission. He submitted that, he has got an experience of only three years as a lawyer and it is due to a communication gap, he submitted like that. He requested the Court not to proceed against him. This can be considered at the time of final hearing of this petition.

12. The Apex court in United India Insurance Co.Ltd v. Rajendra Singh and Others [(2000) 3 SCC 581] observed like this:

"Fraud and justice never dwell together" (fraus et jus nunquam cohabitant) is a pristine maxim which has never

lost its temper over all these centuries. Lord Denning observed in a language without equivocation that "no judgment of a court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for, fraud unravels everything" (Lazarus Estates Ltd.v.Beasley.

13. In this case, prima facie, I am of the opinion that, it is a clear case of fraud committed on Court. In such circumstances, the only remedy is to re-call the order. For that purpose, natural justice demands that, a hearing is to be given to the petitioner/accused. But the petitioner/ accused should be arrested and taken into the custody under Section 439(2) of the Cr.P.C. in the light of the judgment of the Hon'ble Supreme Court in Pradeep Ram's case (supra).

Therefore, the following interim directions are issued:

(i) The petitioner/accused in

B.A. No.2449 of 2020 should be arrested forthwith and commit him to custody in accordance to law;

(ii) The Arresting Officer will serve a copy of Crl.M.A.No.1 of 2020 in B.A. No.2449 of 2020 to the petitioner/accused in B.A. No.2449 of 2020 and inform him that the above petition is posted for final hearing on 03.06.2020.

Post this application on 03.06.2020."

2. Today when this application came up for consideration, Advocate Aravind.T.H. submitted that he is instructed to appear for the respondent/accused in this petition.

3. Heard the learned Senior Public Prosecutor Sri.Suman Chakravarthy for the petitioner in this application and Sri.Aravind.T.H. for the respondent in this application.

4. The learned Senior Public Prosecutor submitted

that, the order dated 1.6.2020 directing to arrest the accused is complied. The learned Senior Public Prosecutor also submitted that the submission of Sri.C.K.Prasad, who appeared for the State in the Bail Application on 12.5.2020 is an inadvertent mistake. I requested the learned Senior Public Prosecutor to explain what is the 'inadvertent mistake' committed by the Public Prosecutor. The learned Senior Public Prosecutor submitted that there was complete lock down in the State during period in which Bail Application was considered by this Court. It was very difficult to get instructions from the police officers. Every day there were several Bail Applications posted for consideration. Two Public Prosecutors were appearing in the video conferencing, in which Bail Applications are considered. Even though the vacation court was only on Tuesdays and Fridays, on several occasions, because of the number of Bail Applications, there was sitting on almost all days during the vacation. So there was some communication gap between the office of the

prosecution and the police station concerned. Hence the Public Prosecutor Sri.C.K.Prasad committed an inadvertent mistake by submitting that, the final report in this case is not submitted. Sri.Suman Chakravarthy, the learned Senior Public Prosecutor also submitted that, the investigating officer in this case immediately after knowing about the order, contacted the office of the DGP and submitted that, the final report was submitted on the 84th day from the date of remand of the accused in this case. The learned Senior Public Prosecutor also submitted that, Sri.C.K.Prasad, the Public Prosecutor represented before this Court on 13.5.2020 itself that the submission was a mistake and he will take immediate steps to file a petition to cancel the bail order. The learned Senior Public Prosecutor submitted that, the office of the prosecution was working with minimum number of staff. There was only five days working in a week. Several officers were not attending the office. Therefore, after collecting the materials, the Public

Prosecutor filed this petition on 27.5.2020. Even though the petition was filed on 27.5.2020, the application was listed before this Court only on 1.6.2020. Considering the above facts, the learned Senior Public Prosecutor submitted that there is no intentional act on the part of the Public Prosecutor concerned and therefore, in the light of the subsequent materials submitted in the application, this Court may kindly recall the order dated 12.5.2020 in B.A.No.2449 of 2020.

5. Advocate Aravind T.H. who is appearing for the respondent submitted that he is a young budding lawyer having only three years experience. He submitted an unconditional apology for making a wrong submission before this Court regarding the submission of final report. He submitted that, he may be exonerated from any further action in this case. He also submitted that, in the light of the facts stated in the petition, he has no objection in recalling the order.

6. I considered the contentions of the learned Public Prosecutor and the counsel who is appearing for the respondent/accused. I obtained the recorded video conferencing of Bail Applications on 12.5.2020 and 13.5.2020 from the Computer Cell. I heard the recorded video conferencing of Bail Applications, once again. B.A.No.2449 of 2020 was item No.4 in the cause list. It is a fact to be noted that, when Bail Application No.2449 of 2020 came up for consideration on 12.5.2020, this Court was not inclined to grant bail to the petitioner. But, the learned Public Prosecutor submitted that, final report is not filed and 90 days over after the remand of the accused. But, even then, it is to be noted that, the learned Public Prosecutor Sri.C.K.Prasad was continuously opposing the Bail Application stating that, it is a serious offence and therefore, this Court may not entertain the Bail Application, even if the accused is entitled statutory bail. The learned counsel appearing for the accused submitted that, he is

entitled statutory bail under Section 167 Cr.P.C. In such circumstances, when the accused has got a statutory right under Section 167 Cr.P.C., this Court allowed the Bail Application as per the order dated 12.5.2020. But, this Court in paragraph 6 of the order, specifically made certain observations against the investigating officer for not taking steps to file final report in a serious case like this. The order was signed and uploaded in the website on the same day itself. There was vacation sitting on 13.5.2020 also, because of the number of Bail Applications pending. On that day also, it was video conferencing. Immediately after the Bail Applications were called, the learned Public Prosecutor Sri.C.K.Prasad submitted to the Court through video conferencing that, his submission on 12.5.2020 is a mistake. Actually the final report is already filed in this case before 90 days from the date of remand of the accused. The learned Public Prosecutor submitted that, if the order is not signed, it may be re-posted for further hearing. This Court observed

that, the order is already signed and uploaded in the website and the only remedy is to file a petition to cancel the bail order and this Court directed the Court Officer to give instructions to the Registry to post any application filed in this Bail Application before the Bench immediately. Thereafter, the present petition was filed on 27.5.2020. All these are there in the recorded video conference. From the facts stated above, I cannot say that, there is any serious dereliction of duty from the part of the Public Prosecutor. Of course it is a fact that, an accused in a serious matter, was released by this Court, because of an inadvertent mistake committed by the Public Prosecutor. But, immediately when the mistake is identified, the Prosecutor brought to the notice of this Court about his mistake. Therefore, I drop further proceedings against the Public Prosecutor in this case.

7. Now I turned to the counsel who appeared in the Bail Application. In the Bail Application filed by the counsel

on behalf of the accused, it is specifically averred that "the information received from the police station is that charge sheet was filed on 1.4.2020". In the memo filed under Section 8 of the High Court Act also, the counsel stated that "final report has already been filed and hence custody of the petitioner is not necessary". Thereafter, the counsel submitted before the Court that the final report has not filed and the accused is entitled statutory bail. The counsel Sri.Aravind.T.H. submitted that, he submitted like that, based on the submission of the learned Public Prosecutor. He was only taking advantage of the submission of the learned Public Prosecutor and there is no intentional act on his part to mislead this Court. He submitted an unconditional apology for making such a submission before this Court. In Crl.M.A.No.1 of 2020, the Public Prosecutor produced Annexure B E-Mail. It is an E-Mail sent from the Additional District and Sessions Court for the trial of cases relating to Atrocities and sexual violence against Women and Children,

Ernakulam on 7.4.2020 to the counsel Aravind.T.H. informing that "charge sheet is filed on 1.4.2020. So the accused is not entitled for statutory bail. Hence the permission is declined". This Mail was sent from the court to the counsel, when the counsel requested to file a Bail Application before the Sessions Court. After getting this E-Mail, the counsel filed the present petition for bail before this Court. In the Bail Application and in the memo filed under Section 8 of the High Court Act, it is specifically stated by the counsel that charge sheet is already submitted. Thereafter, when the case came up for consideration and when the learned Public Prosecutor submitted that, charge is not submitted, the counsel relied the statement of the Public Prosecutor. It is a fact that the counsel who appeared in Bail Application No.2449 of 2020 is a young budding lawyer who started practice only three years back. I don't want to trouble him in this case by making any further observation. I accept his apology.

8. The relationship between Bench and the Bar is important in justice delivery system. The court is acting based on the submission of the lawyers. Every lawyer is bound to submit true facts before the Court. If the lawyers are coming before the Court and twisting facts, the Court will be helpless. The burden of the Court will increase. Mutual trust is important. I leave it there.

9. On merit of this case, it is an admitted fact, that the charge sheet in Crime No.23 of 2020 was filed on 1.4.2020 before the jurisdictional court. It is also an admitted fact that the charge sheet was submitted before the expiry of 90 days from the date of remand of the accused in this case. This Court passed the order dated 12.5.2020 in Bail Application No.2449 of 2020 based on the submission of the prosecutor that the charge sheet is not filed even after 90 days from the date of remand of the accused in this case. Now the learned Public Prosecutor brought to the notice of this Court that, the charge has

already been filed before the completion of 90 days of the remand of the accused. Therefore, the petitioner/accused is not entitled statutory bail.

10. It is a case in which, the allegation is that, the accused kidnapped a minor girl aged 17 years and committed rape on her and thereafter murdered her. According to the prosecution, the victim at the time of her death was pregnant. The postmortem report shows that, victim suffered 40 antimortem injuries and cause of death according to the postmortem certificate was due to incised penetrating wounds sustained to the neck and chest. In the light of the above facts, the accused is not entitled bail in this case. The prosecutor filed the application under Section 482 read with Section 439(2) of Cr.P.C. Section 439(2) Cr.P.C. says that 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. As I stated in my order dated 1.6.2020, the powers under

Section 437(5) and under Section 439(2) of Cr.P.C. cannot be read into restricted manner that order of arresting the accused and committing him to custody can be passed by the court only after cancelling the earlier bail. In such circumstances, this Court issued a direction to arrest the accused forthwith and commit him to custody in accordance with law. Now the learned Senior Public Prosecutor submitted that the accused is already arrested and he is produced before the court concerned and now he is in remand. Therefore, the accused already arrested and committed to custody. In the light of the subsequent development, the continuation of the order dated 12.5.2020 in B.A.No.2449 of 2020 is not necessary.

11. Hence Crl.M.A.No.1 of 2020 in B.A.No.2449 of 2020 is allowed. The bail order dated 12.5.2020 in B.A.No.2449 of 2020 is cancelled invoking the powers under Section 439(2) Cr.P.C. The Bail Application will stand dismissed.

A copy of the recorded video conference of Bail Applications dated 12.5.2020 and 13.5.2020 will be part of this petition. The Registry, in consultation with the Computer Cell, will get a copy of the same and keep it along with this file.

**P.V.KUNHIKRISHNAN
JUDGE**

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