

Present

Mr. Justice Md. Badruzzaman

Criminal Revision No. 2487 of 2019.

Dated: 17.09.2019.

Mr. Md. Jahangir Alam, Advocate

.....for the convict petitioners

At the instance of Md. Selim and another this application under section 439 read with section 435 of the Code of Criminal Procedure has been filed challenging the judgment and order dated 20.11.2018 passed by the learned Additional Sessions Judge, Chapai Nawabgonj in Criminal Appeal No. 27 of 2018 dismissing the appeal and thereby affirming the judgment and order of conviction and sentence dated 11.01.2018 passed by the learned Chief Judicial Magistrate, Chapai Nawabgonj in C.R Case No. 360 of 2016 (Nabaganj) convicting the petitioners under section 406 of the Penal Code and sentencing them there under to suffer imprisonment for 01(one) year and to pay fine of Tk. 500/- in default, to suffer simple imprisonment for 15(fifteen) days and also convicting the petitioners under section 420 of the Penal Code and sentencing them there under to suffer imprisonment for 02(two) years and to pay a fine of Tk. 1,000/- in default, to suffer simple imprisonment for 06(six) days and both the sentences would run consecutively.

This application under section 439 read with section 435 of the Cr.P.C had come up before me on 15.9.2019 for motion hearing. At the time of hearing, it has been detected that after disposal of the appeal, the convict petitioners have been arrested by police on 26.07.2019 and they have been taken into custody. Thereafter, an application for bail has been filed on behalf of the convict petitioners on 31.07.2019 before the learned Chief Judicial Magistrate, Chapainawabgonj and after hearing, the learned Chief Judicial

Magistrate vide order dated 31.07.2019 enlarged them on bail for a period of 01(one) month with a view to giving them an opportunity to prefer an appeal before the High Court Division. Thereafter, the period of bail has been further extended by the same Magistrate vide order dated 29.08.2019 fixing the next date on 29.10.2019. It was further detected that Mr. Md. Mostafa Kamal, learned Chief Judicial Magistrate, Chapainawabgonj while granting the petitioners on bail did not consider that as per section 426(2A) of the Code of Criminal Procedure he has got no such jurisdiction of granting bail after disposal of an appeal by the Higher Court. In that view of the matter, I have passed an order on 15.09.2019 directing Mr. Md. Mostafa Kamal, learned Chief Judicial Magistrate, Chapai Nawabgonj to appear before this Court today at 10.30 a.m and to explain his position under what authority he has enlarged the convict petitioners on bail.

Today, as per said order dated 15.09.2019, Mr. Md. Mostafa Kamal has appeared personally before me and tries to impress me that in the application for bail of the petitioners filed before him it has been stated that they were convicted and sentenced for one year and they were willing to prefer appeal before the High Court Division against the judgment and order of conviction and sentence of the trial Court and considering the statements made in the bail application and on *bonafide* belief he enlarged the petitioners on bail with a view to giving them an opportunity to prefer an appeal. When confronted to the question under what authority he has granted bail to the convict petitioners after confirmation of the judgment and order of conviction and sentence of the trial Court by the appellate Court, learned Magistrate frankly concedes that he was not aware of the judgment of the appellate Court. Again confronted with the question as to whether he had perused the records of the case before granting such bail, learned Magistrate surprisingly says that without

consulting the records but believing statements of the bail application he enlarged the petitioners on bail and in support of his statement he tries to show me the said bail application. But at last learned Magistrate that understands he committed gross mistake and offers unconditional apology and undertakes that in future, he will be cautious in passing judicial orders.

Mr. Md. Jahangir Alam, learned Advocate appearing for the convict petitioners also could not show any authority as to how a Magistrate can grant bail of an accused whose sentence has been affirmed by the appellate Court.

Power of granting bail after conviction and sentence of an accused has been provided in section 426 of the Code of Criminal Procedure. Sub-sections (1) and (2) of section 426 of Cr.P.C authorizes the appellate Court to grant bail during pendency of the appeal; while sub-section (2A) of said section provides power upon convicting Court to grant the convict ad-interim bail. Sub-section (2A) enjoins that where the court by which a convicted person is convicted and sentenced to imprisonment for a term not exceeding one year and an appeal lies from that sentence, the court may if the convicted person satisfies that he intends to present an appeal, may enlarge the convicted person on bail for such period as will afford sufficient time to present the appeal and obtains the order of the appellate court for his release on bail. This section provides power of granting bail to a convicted person upon the trial court who, passed the judgment provided that the sentence awarded is not exceeds one year. No inferior court has got jurisdiction to grant such bail. For example, if the sentence is passed by a Court of Sessions, the Magistrates shall have no jurisdiction to entertain a bail application of the convicted person.

The Code of Criminal Procedure does not provide any power upon the appellate court or trial court to grant bail after disposal of

appeal by affirming the sentence of imprisonment of the trial court with a view to give the convicted person an opportunity to prefer revision before the higher forum. Since law does not provide any power to the appellate court or trial court to grant a convicted person on bail after disposal of an appeal, exercising such power by those courts would be without jurisdiction. Only under section 426(2B) of the Code, the High Court Division is authorized to suspend a sentence if it is satisfied that a convicted person has been granted special leave to appeal to the Appellate Division against any sentence which it has imposed or maintained.

In the instant case, the petitioners were convicted and sentenced to suffer two years imprisonment by the learned Chief Judicial Magistrate, Chapainawabgonj and on appeal, the said sentence was affirmed by the learned Additional Sessions Judge, Chapainawabgonj. In that premises the convict-petitioners had no option but to prefer revisional application before the High Court Division and seek bail in the revision but unfortunately, after arrest of the petitioners, learned Advocate of the trial Court sought for their bail before the learned Chief Judicial Magistrate who has got no authority to entertain such bail application and admittedly, the learned Chief Judicial Magistrate (Mr. MD. Mustafa Kamal) without consulting the relevant law or perusing the case records granted them on bail upon considering the statements made in the bail application. On the face of the verbal statements made by the learned Magistrate before me, I become astonished. It is unbelievable as to how a senior judicial officer like him can exercise jurisdiction without consulting the relevant law or case records and as to how he depended on the statements made in the bail application. These types of activities, I am constrained to say, indicate about his judicial incompetency. It will not be out of context to say that the mistakes committed by the learned Magistrate are nothing but a callousness. It seems that the

learned Magistrate needs proper training as to how a judicial order be passed. It should be borne in mind that a judicial order cannot be passed without consulting the relevant laws or without perusing the records.

However, since learned Chief Judicial Magistrate, Chapainawabgonj by appearing before me shows his repentant for his misdeeds and undertakes that he will be more cautious in future in exercising judicial function and sincerely seeks unconditional apology, I am of the view the same should be accepted and accordingly, the apology offered by him is accepted. The learned Magistrate is cautioned that he would be more careful in future in exercising his judicial function.

It has come to our notice in many cases that some of the learned Judges and Magistrates of the lower judiciary having exercising criminal jurisdiction have been granting bail to a convicted person as a trial court when the sentence of imprisonment exceeds one year and even after disposal of appeal they exercise same jurisdiction where the judgment and order of conviction and sentence passed by the trial court has been affirmed by the appellate court and thus committing gross illegalities. These kinds of activities may create judicial anarchy and lower down the image of the judiciary to the public in general. In that view of the matter, a practice direction should be given from this Court upon the Magistrates/Sessions Courts in the following manner:

- (a) The Court of Sessions/ Magistrates are empowered to grant bail to a convicted person against whom such court sentenced to imprisonment for a term not exceeding one year with a view to giving the convicted person an opportunity to prefer appeal to higher forum after fulfilling the requirements under section 426(2A) of the Code of Criminal Procedure.

- (b) The Court of Sessions/ Magistrates have got no jurisdiction to grant bail to a convicted person under section 426(2A) of the Code of Criminal Procedure when the sentence of imprisonment exceeds one year.
- (c) No appellate court or its inferior court is empowered to grant bail to a convicted person whose sentence of imprisonment has been affirmed/modified in appeal by the appellate court with a view to giving the convicted person an opportunity to prefer revision to higher forum.
- (d) No Magistrate shall have jurisdiction to grant a convicted person on bail against whom a sentence of imprisonment has passed by its superior court.

Accordingly, the Registrar General of the Supreme Court is hereby directed to circulate above practice directions upon the learned Judges of Court of Sessions and Judicial Magistrates having exercising criminal jurisdiction immediately.

Since the convict petitioners has been illegally obtained bail from the learned Magistrate, the same is cancelled and they are hereby directed to surrender before the learned Chief Judicial Magistrate, Chapai Nawabgonj within a period of 02(two) weeks from date.

Communicate a copy of the order to the Registrar General for taking necessary steps in view of the direction given above.

Office is also directed to communicate the order to the concern Chief Judicial Magistrate at once.

(Justice Md. Badruzzaman)