

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL MISCELLANEOUS JURISDICTION)

CRIMINAL MISCELLANEOUS CASE NO. 38948 of 2022

IN THE MATTER OF:

An application for bail under section 498 of the Code of Criminal Procedure.

-AND-

IN THE MATTER OF :

Md. Rahman

...Accused-Petitioner

-Versus-

The State

... Opposite party

Mr. M. Sayed Ahmed, Senior Advocate with

Md. Azizur Rahman Dulu, Advocate

Mr. Sayed Erfan, Advocate

... For the Petitioner

Mr. Sujit Chatterjee, D.A.G with

Mr. Apurba Kumar Bhattacharjee, D.A.G with

Mr. Md. Mizanur Rahman, A.A.G

..... For the Opposite party

Heard on: 18.05.2023

Judgment on: 25.05.2023

Present:

Mr. Justice Md. Badruzzaman

and

Mr. Justice S M Masud Hossain Dolon

Md. Badruzzaman, J

Upon an application under section 498 of the Code Criminal Procedure, this Rule was issued calling upon the opposite party to show cause as to why the accused-petitioner should not be enlarged on bail in Sessions Case No. 179 of 2022 arising out of Tetulia Police Station Case No. 19 dated 19.06.2021 corresponding

to G.R. No. 85 of 2021 under sections 143/323/325/302/506(2)/34 of the Penal Code, now pending in the Court of learned Sessions Judge, Panchagar.

At the time of issuance of Rule, this Court vide *ad-interim* order dated 08.08.2022 enlarged the accused-petitioner on ad-interim bail for a period of 06(six) months.

The prosecution case, in brief, is that one Md. Aslam as informant lodged an FIR with Tetulia Police Station on 19.06.2021 implicating the accused-petitioner and 11 others along with 8-10 unknown persons alleging, *inter alia*, that while the victim Chand Mia was standing in front of his house at 5.30 pm on 14.06.2021 the accused persons equipped with deadly country made weapons attacked the victim while accused No. 1 Md. Liton inflicted a blow by sped upon the head of the victim causing fracture of his scalp and the brain matter came out there from and while the victim fell down on the earth the accused-petitioner made another blow at the same place of the head by a sped causing bleeding injury while accused No.3 Md. Sohel made another blow upon the victim by another sped which caused cut injury under the throat of the victim and other accused persons hit the body of the victim indiscriminately by rod and other weapons and left the place of occurrence. Then the victim was taken to Tetulia Health Complex for treatment but the doctor referred him to Dinajpur Medical College Hospital and while he was receiving treatment therein died on 16.06.2021 at 3.30 pm.

The accused-petitioner was arrested by police on 05.07.2021 and he was produced before the Magistrate on 07.07.2021 with a prayer for remand who granted one day police remand and the police took the accused-petitioner on remand on 11.08.2021 and he was again produced before the concerned Magistrate on 12.08.2021 and the learned Magistrate sent him to the jail custody. The accused-petitioner prayed for bail before the learned Sessions Judge who, upon hearing, vide order dated 14.11.2021 granted him on *ad-interim* bail. The police, after investigation, submitted charge sheet on 27.12.2021 under section 302 along with other sections of the Penal Code against the accused petitioner and others and after submission of charge sheet, learned Magistrate vide order dated 27.01.2022 cancelled his bail and took him to custody. Thereafter, the accused-petitioner moved the learned Sessions Judge for bail who, refused the prayer vide order dated 08.02.2022 and then the accused-petitioner moved this application under section 498 of the Code of Criminal Procedure and obtained Rule and *ad-interim* bail on 08.08.2022, as stated above and he has been released from the custody.

Challenging the order of *ad-interim* bail granted by this Court, the State preferred Criminal Miscellaneous Petition No. 1033 of 2022 before the Appellate Division and the Hon'ble Judge-in-Chamber passed no order on 10.08.2022. The State then preferred Criminal Petition for Leave to Appeal No. 1063 of 2022 which was dismissed for non-prosecution vide order dated 22.03.2023.

In the meantime, the G.R case was transferred to the learned Sessions Judge, Panchagarh and re-numbered as Sessions Case No. 179 of 2022 and charge was framed against the accused-petitioner and others under section 302 along with other provisions of Penal Code and the accused-petitioner and others, who were present during framing of charge, pleaded not guilty and claimed to be tried and thereafter, P.W.1 was examined who was cross-examined by the defense and his deposition was closed on 08.05.2023 and the case is now fixed for further evidence of the prosecution.

Two counter-affidavits are submitted on behalf of the State opposing the Rule and bail granted by this Court stating that after getting bail from this Court the accused-petitioner misused the privilege of bail in that he threatened the wife of the victim on 28.08.22 following which she lodged General Diary No. 1157 on 28.08.22 with Tetulia Police Station and after obtaining permission from the Court, Sub-Inspector of Tetulia Police Station investigated into the G.D and being found *prima facie* case submitted Non-FIR Prosecution Report No. 42 of 2022 on 30.08.2022 under section 506(2) of the Penal Code and said case is pending before the learned Magistrate as N.G.R. No. 240 of 2022. Moreover, the accused-petitioner and 7 others on 18.10.2022 again threatened the informant and asked him not to proceed with the case in default, they would kill him. Consequently the informant lodged General Diary No.793 on 19.10.2022 and after getting permission, the same Sub-Inspector investigated into the allegation and being found *prima facie* case submitted Non-FIR Prosecution Report No.

49 of 2022 on 28.10.2022 under section 506(2) of the Penal Code and said Non-FIR case is now pending for disposal before the learned Judicial Magistrate as N.G.R. 232 of 2022.

Mr. M. Sayed Ahmed, learned Advocate appearing for the accused-petitioner submits that after perusing the records and merit of the case the High Court Division enlarged the accused-petitioner on ad-interim bail which was upheld by the Appellate Division and as such his bail should be continued till disposal of the Sessions Case. Learned Advocate submits that once bail is granted to an accused the same cannot be cancelled on the allegation of misuse without proving by evidence and in the present case though two Non-FIR Prosecution Cases have been started on the allegation of making threat to the informant party by the accused but the informant party mentioned two common witnesses in the General Diaries who are father-in-law and brother-in-law of the informant and reside 25-30 kilometer away from the place of occurrence which clearly suggest that the allegation made out in the General Diaries are concocted and false and those allegations are subject to proof by evidence during trial of those two NGR cases and at this stage there is no scope under law to cancel the bail of the accused-petitioner.

In support of his contention learned Advocate has referred to the case of Dolat Ram and others vs State of Haryana, reported in (1995) 1 SCC 349.

Mr. Sujit Chatterjee, learned Deputy Attorney General appearing for the State submits that after obtaining bail from this

Court the accused-petitioner has been constantly threatening the informant party asking him not to proceed with the case and they are very influential persons in the locality and if his bail is not cancelled it would be difficult on the part the prosecution to adduce witness in the case to prove the charge against the accused-petitioner.

In support of his contention learned D.A.G has referred to the cases of Durnity Daman Commission vs Syed Md. Hossain Imam Faruk and another reported in 27 BLC 686 and the case of Hasina Akhtar vs Md. Raihan and another reported in 66 DLR 298.

We have heard the learned Advocates and perused the application, the FIR, inquest report, post mortem report, charge sheet, deposition of P.W.1, two General Diaries, non-FIR prosecution reports and other materials available on record.

It appears that the FIR was lodged after 5 (five) days of the date of occurrence implicating the accused-petitioner and 11 others along with 8-10 unknown persons wherein the informant stated that there was a land dispute between the parties and the mother of the informant filed Petition Case No. 279 of 2021 20.05.2021. It also appears that the inquest of the victim was held on 16.06.2021 and post mortem of the victim was held on 17.06.2021 and the FIR has been lodged on 19.06.2021. In the post mortem report the doctor found "sharp cutting like wound 6.1 inch in size on left temporal and left parietal area with six(6) stitch extending from upper part of the left parietal bone to ela of the left nose and brain

matter came out from the vault of scalp". The doctor did not find any other injury upon the head of the victim.

On perusal of the FIR it appears that the informant made specific allegation against accused No. 1 of hitting the victim upon his head causing fracture of the head and the brain matter of the victim came out. This allegation corroborates by the post mortem report. The informant also implicated the accused-petitioner stating that after injury caused by accused No.1 of the FIR the accused-petitioner made another blow upon the head of the victim but during post mortem the doctor did not find other injury. In such situation involvement of the present petitioner in the murder of the victim as alleged by the prosecution becomes doubtful. Moreover, the Appellate Division in Criminal Miscellaneous Petition and Criminal Leave Petition did not interfere with the *ad interim* bail granted by this Division.

Now question arises whether his bail can be cancelled on the allegation that the present-petitioner and others made threat upon the informant party to withdraw the case.

In the case of Hasina Akhtar vs Md. Raihan and another reported in 66 DLR 298 the High Court Division took the view that there are five cases where person granted bail may have the bail cancelled and recommitted to jail as follows:

- i) Where the person on bail during the period of bail commits the very same offence for which he is being tried or has been convicted.
- ii) If he hampers the investigation.

- iii) If he tempers with the evidence.
- iv) If he runs away to a foreign country or goes underground or beyond the control of his sureties and
- v) If he commits acts of violence or revenge.

Out of said five criteria, criteria Nos. 1-4 are not applicable in this case because of the fact that the accused-petitioner did not commit same offence after obtaining bail and after submission of police report question of hampering the investigation and tempering the evidence does not arise at all. Moreover, there is no allegation that the accused-petitioner run away to a foreign country or he went underground or beyond the control of his sureties as, admittedly, the accused-petitioner is appearing before the trial Court on the date fixed by it. The Criteria No. 5 is relevant in this case which states that a bail of an accused can be cancelled if he commits acts of violence or revenge.

On perusal of the Non-FIR Prosecution reports, it appears that the informant party made two General Diaries before the police station on the allegation of making threat or taking revenge against the informant party. In the General Diaries the informant showed two common witnesses of the occurrence who are father-in-law and brother-in-law of the informant and they live 25/30 kilometers away from the alleged place of occurrence. The prosecution reports also suggest that the investigation officer in identical language submitted similar prosecution reports before the learned Magistrate and on the basis of those reports two NGR cases

have started against the accused petitioners and others which are now pending for disposal.

Mere filing of General Diary (GD) against an accused alleging that he made threat to the informant party and starting of NGR case by the Magistrate on the basis of Non-FIR prosecution report submitted by the police against the accused cannot be taken as proven misuse of the privilege of bail unless such allegation is proved by evidence at trial of the NGR case.

On the other hand, during pendency of the Leave Petition before the Appellate Division alleged threat was made but those facts were not drawn to the notice of the Appellate Division. Moreover, the informant party went to the Court of Sessions for deposing as witness on several occasions and the accused party elaborately cross-examined the informant and at the time of recording deposition by the trial Court, the informant did not state any word against the accused party in regards threat or misuse of the privilege of bail. Accordingly, it cannot be concluded that the informant has able to prove that the accused-petitioner has misused the privilege of bail.

In the case of Durnity Daman Commission vs. Syed Md. Hossain Imam Faruk and another reported in 27 BLC 686 the bail order was challenged before the High Court Division which was granted by the Sessions Judge and the High Court Division took the view that if the merit of the case is not taken into consideration in granting bail to an accused his bail may be interfered with by the

High Court Division. This case is not applicable considering the facts and circumstances of this case.

It is to be born in mind that rejection of bail in a non-bailable case at the initial stage and cancellation of bail already granted have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial [Ref: 1995 SCC 349].

In the instant case, it appears that the prosecution could not establish any of the criteria, as stated above, for which the *ad-interim* bail granted to the accused-petitioner can be cancelled.

In that view of the matter, we find no substance in the submission of the learned DAG.

In the result, the Rule is made absolute.

The *ad-interim* bail granted earlier by this Court is hereby confirmed. The accused-petitioner is allowed to remain on bail till conclusion of the trial of the case.

However, the trial Court would be at liberty to cancel his on the ground of proven misuse of the privilege of bail by him.

Communicate a copy of this judgment to the Court below at once.

S M Masud Hossain Dolon, J

I agree