State By The Superintendent Of Police ... vs Mehboob Batcha And Others on 30 September, 1997

Equivalent citations: 1999CRILJ5040

ORDER

1. The Petition in Crl.M.P. No. 4571/97 in Crl. Appeal No. 677/97 is filed by the State, who is the complainant in the Sessions Case No. 99193, under Sections 439(2) and 482 of Cr.P.C. to cancel the bail granted to the accused/respondents in Crl. M. P. No. 4472197 on 11-9-1997. The accused have filed a counter to this petition.

2. The Petition in Crl.M.P. No. 4544/97 in Cri. Appeal No. 680/97 is filed by the petitioners, who are accused 1 and 2 in the Sessions Case No. 99/93, under Section 389(1) of Cr.P.C. to enlarge them on bail by suspending the sentences imposed by the learned Principal Sessions Judge, Cuddalore in Sesssions Case No. 99/93 on 4-9-1997.

3. Both these petitions have been taken up together and since identical question of facts and law were involved in both these petitions, a common order is pronounced in both these petitions.

4. An order granting bail under Section 389(1) of Cr.P.C. by suspending the execution of sentence imposed by the trial Court does not preclude an application for cancellation of bail on a later occasion under Section 439(5) of Cr.P.C. giving more materials, further developments and different consideration. An order releasing a person on bail is an interlocutory order, and an interim direction is not a conclusive adjudication, and updated reconsideration is not overturning an earlier order of bail. One cannot accede to the faint plea that the Courts are barred from second consideration at a later stage. So there cannot be any legal impediment to reconsider the grant of a bail to the petitioners in Crl.M.P. No. 4472 of 1997 in Criminal Appeal No. 680/97.

5. One of the contentions raised on behalf of the prosecution is that while ordering the suspension of sentence and directing the release of the accused Nos. 3, 6, 8 and 10 on bail in Crl.M.P. No. 4472 of 1997 in Crl. Appeal No. 677/97, this Court did not state any reason, which is mandatory under Section 389(1) of Cr.P.C. and the granting of bail to the petitioners A3, A6, A8 and A10 in Crl.M.P. No. 4472/97 without stating any reason is not justified. In other words the contention of the prosecution seems to be that there should be a speaking order setting out the reasons to grant bail. In support of the said contention the learned State Public Prosecutor Mr. R. Shanmugasundaram cited the decision of Allahabad High Court reported in Shambu v. State, , wherein it is observed as follows :-

> "The second point arises out of the provisions of Section 426(1) by which the Court of appeal is authorised to allow bail to a convicted person for the pendency of his appeal. But and this is the condition of vital importance it can do so only for reasons to be recorded by it in writing." The Allahabad High Court has only said that the

> appellate Court can do so only for reasons to be recorded by it in writing. It did not say that it is incumbent and mandatory for the appellate Court to give the reasons while granting bail at the time of suspending the sentence.

6. This contention of the prosecution is directly answered by the Supreme Court in the decision reported in Jivaji v. State of Maharashtra, , wherein it was held that the order granting bail or refusing bail need not necessarily be speaking order. In another decision of the Supreme Court reported in Niranjan Singh v. Prabhakar Rajaram, it was laid down as follows :-

> "Detailed examination of the evidence and elaborate documentation of the merits should be avoided while passing orders on bail applications. No party should have the impression that his case has been prejudiced."

There is a direct decision on this point and it is the Judgment of Rajasthan High Court reported in Beguram v. Jaipur Udhyog Limited, 1988 Cri LJ 452 at page 1453 and in para 5, wherein it was stated as follows "The word "may" used in Section 389(1) of Cr.P.C. could not be interpreted as containing a mandatory provision".

In view of the dictum laid down by the Supreme court as mentioned above and the principle laid down by the Rajasthan High Court there need not be any reason to be set out while ordering bail or refusing bail under Section 389(1) of Cr.P.C. much less an exhaustive exploration of the merits of the case in the bail order itself.

7. Even forgetting for a moment the dictum of the Supreme Court and the decision of Rajasthan High Court mentioned earlier, Section 389(1) of Cr.P.C. states as follows :-

> "Pending any appeal by a convicted person the appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and also if he is in confinement, that he be released on bail or on his own bond."

It was urged on behalf of the prosecution that the word "may" in Section 389(1) of Cr.P.C. is followed by a comma and after the words "for the reasons to be recorded in writing" there is another comma and it is only qualified, which means that it is mandatory to give reasons while ordering bail at the time of suspending the sentence. This view is untenable for the simple reason that the entire Section 389(1) of Cr.P.C. must be read as a whole in a harmonious manner and it should not be read disjunctively but conjunctively. One cannot pick out the words "for reasons to be recorded in writing" with the preceding comma and with the following comma and say that it is mandatory to give reasons while ordering bail under Section 389(1) of Cr.P.C. In the same section viz., Section 389 we find the two words employed by the Legislature, and in Section 389(1) we find the word "may" and in Section 389(3) of Cr.P.C. we find the word "shall". Where in the same Section the Legislature has used the two words, the word "may" must be taken as discretionary or directory and the word "shall" must be taken as mandatory. The use of the word "may" in the first part and of the word "shall" in the second firmly establishes the difference (Vide). Nobody can go into the subjective

satisfaction of the Court to grant bail or not to grant bail, Therefore in my view it is not mandatory to give reasons while granting bail under Section 389(1) of Cr.P.C.

8. The word "may" occurring in Section 389(3) of Cr.P. will only indicate that it is directory to give reasons or not to give reasons while granting bail or refusing bail. I was not pointed out any other contra decision to the effect that the word "may" appearing in Section 389(3) of Cr.P.C. can only be taken as "shall" and it can only mean that it is mandatory on the part of the Judge to give the reasons to grant bail under Section 389(1) of Cr.P.C. While that being the settled principle of law as laid down by the Supreme Court and Rajasthan High Court, the contention of the prosecution on this aspect, is not entitled to any credence. Whenever an order of bail is granted, the Judge is not bound to state the reasons.

9. The learned Public Prosecutor Mr. R. Shanmugasundaram argued that the trial Court found the accused guilty of the offence under Section 376 of I.P.C. and other offences, and there appears to be reasonable grounds to believe that they have committed the offence which is punishable with life sentence, and the allegation in this case, which is a rape in police custody, is a matter which shocks the conscience of the public, and this Court must consider whether there are materials to establish ultimately the innocence of the accused, and there is a presumption arising against the accused under Section 114-A of the Evidence Act, and there is no possibility of the appeal of the accused being allowed by this Court, and therefore the accused, who were custodians of the victim, do not deserve to be released on bail, and so the bail already granted in Crl.M.P. No. 4472 of 1997 in Criminal Appeal No. 677 of 1997 for the accused Nos. 3, 6, 8 and 10 should be cancelled, and the bail should not be granted for the accused 1 and 2 as prayed for in Crl.M.P. No. 4544 of 1977 in Criminal Appeal No. 680/97.

10. In support of the above contentions the learned Public Prosecutor Mr. R. Shanmugasundaram also placed reliance on the following two decisions of the Supreme Court. In the decision reported in Director of Enforcement v. P. V. Prabhakar Rao, it was held that it was not at all proper exercise of the discretion by favouring the accused with an order of bail, when there are materials which are capable of stretching the accused fingers against him. The other decision relied on by the learned Public Prosecutor is the one reported in Court on its Own Motion v. Vishnu Pandit, 1993 Cri LJ 2025 (Delhi), wherein it was laid down that the crime against women is on the increase and the Courts have to be circumspect in granting bail to the persons accused of having committed heinous offence against women.

11. The learned counsel for the accused repudiated the above arguments of the prosecution by stating further that the trial Court erred in convicting the accused on the sole testimony of P. W. 1 whose evidence bristles with material contradictions with her earlier five statements, which will show the fabrication of the story of rape and the material evidence of the doctors examined as P.W. 6 and P.W. 18 did not support the prosecution version, and the witnesses could not identify some of the accused during the identification parade, which was held after a long lapse of time which itself is fatal to the prosecution case, and the accused were on bail during investigation as well during trial, and the accused have got fair chance of success in the criminal appeals, and now since the Criminal Appeals are pending, it is not correct to state on behalf of the prosecution that there are reasonable

grounds for believing that the accused have been guilty of the offences raising the presumption under Section 114-A of the Evidence Act, and more than anything else there is no likelihood of disposing the Criminal Appeals in the near future, and in those circumstances the bail already granted in Crl.M.P. No. 4472 of 1997 in Criminal Appeal No. 677 of 1997 for the accused Nos. 3, 6, 8 and 10 should not be cancelled, and further the suspension of sentence and the bail sought for by the accused Nos. 1 and 2 in Crl.M.P. No. 4544 of 1997 in Crl. Appeal No. 680 of 1997 should be granted.

12. The learned counsel for the accused has drawn my attention to the decisions of the Supreme Court reported in Kashmirasingh v. State of Punjab, and Babu Singh v. State of Uttar Pradesh, , wherein it was stated as follows :-

> "It would indeed be a travesty of justice to keep a person in jail for a period of five to six years for an offence which may ultimately be found not to have been committed by him. So long as the Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where leave has been granted to the accused to appeal against his conviction and sentence."

13. I have carefully considered the rival sub-missions made by the counsel on all sides. It is but necessary for me to extract the dates of arrest, remand and bail granted earlier in this case for better appreciation of these petitions. The particulars of arrest, remand and release on bail before the lower Court as culled out from the Judgment of lower Court are as follows :-

> ---------- Date of Arrest Date of Surrender/or Date of release remand on bail before lower Court. ---------- A.1 18-7-1992 19-7-1992 15-4-1993 A.2 " " " A.3 " " " A.6 5-9-1992 5-9-1992 " A.8 - 7-10-1992 " A.10 - 21-10-1992 " ----------
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> Thus they have been on bail ever since 15-4-1993 till the date of Judgment of the trial Court on 4-9-1997 i.e. for the last 41/2 years. Besides the accused 1 and 2 were enlarged on bail after Judgment by the trial Court itself on 4-9-1997 by suspending the sentence till 3-11-1997 and so the accused 1 and 2 are on bail even after the Judgment on 4-9-1997. It is not as though the High Court alone granted bail by suspending the sentence in the Criminal Appeal No. 677 of 1997. The accused were on bail right from 15-4-1993 onwards till 4-9-1997 for a period of nearly 41/2 years.

14. There are totally 11 accused in this Sessions Case No. 99 of 1993. Regarding the commission of rape under Section 376 of I.P.C. A3, A6, A8 and A.10 alone were found guilty and the rest of the accused charged thereunder viz., A1 and A2 are not found guilty under Section 376 of I.P.C. by the lower Court. There is no State Appeal preferred as against A1 and A2 for the commission of rape under Section 376 of I.P.C.

15. Regarding the commission of offence of outraging modesty under Section 354 of I.P.C. A3, A6, A8 and A10 alone were found guilty and A1 was not found guilty under Section 354 of I.P.C.

16. Regarding wrongful confinement and causing hurt for extorting confession, A1 and A2 are found guilty under Section 343 read with Section 109 of I.P.C. and A3 and A8 were found guilty under Section 343 of I.P.C. and A1, A3, A6 and A8 were found guilty under Section 220 of I.P.C. and A4, A7, A9 and A11 are not found guilty under Sections 343 and 220 of I.P.C., and A1, A2, A3 and A8 were found guilty under Section 348 of I.P.C. and A4, A5, A7, A9 and A11 are not found guilty under Section 348 of I.P.C. and Section 330 of I.P.C. and A1, A3, A6 and A8 were found guilty under Section 330 of I.P.C. and A4, A7, A9 and A11 are not found guilty under Section 330 of I.P.C.

17. Regarding the commission of offence of causing hurt to Nandagopal under Section 324 of I.P.C. A1, A3, and A6 are found not guilty they are found guilty under Section 323 of I.P.C. and A4, A7, A8 and A9 and A11 are not found guilty under Sections 324 and 323 of I.P.C. The accused, who were charged under charge Nos. 6 to 25, 27 and 28, were found not guilty of those charges.

18. The net result is that A11 is acquitted of all the charges, whereas the other accused were convicted for one offence or other and acquitted of some other offences. The main offence complained of is the offence of rape against A1, A2, A3, A6, A8 and A10. While A3, A6, A8 and A10 alone were convicted for the offence of rape, A1 and A2 were acquitted of the charge for the offence of rape, even though it is stated on behalf of the prosecution that it is a gang rape committed by A1 to A6, A8 and A10. The date of the Judgment of the trial Court is 4-9-1997.

19. Bearing these factual position let us consider the rival contentions of both the parties.

20. It cannot be said that once a person is convicted, he must be found to be guilty of commission of an offence and that would be sufficient to dismiss the plea of bail, in which case a motion for bail would be a mere formality. It may not be Possible to exhaust the different factors that may be of relevance in assessing the question whether bail could be granted or not in a given case. The nature and gravity of the circumstances in which the offence is committed, the position and status of the accused with reference to the victim and the likelihood of the accused fleeing from justice are some of the matters, which have nexus to the consideration of the bail application.

21. The graver the offence the heavier the punishment. A person having been convicted with severe punishment may have an incentive to jump bail unlike a person who has been accused of a crime and whose trial is not completed. The panic which might prompt the accused to jump the gauntlet of justice is more having suffered imprisonment in the trial Court. This is particularly so when the accused have been convicted for a grave offence and with heavier punishment. The question of tampering the witnesses may not arise' at this appellate stage.

22. In the case before the Supreme Court in Gudikanti Narasimhalu v. Public Prosecutor, it was said that they are concerned with the penultimate stage, and the principal rule to guide release on bail should be to secure the presence of the applicant, who seeks to be liberated, to take Judgment and serve sentence in the event of the Court punishing him with imprisonment. Justice Krishna Iyer, J.

in Babu Singh v. State of U.P., referred to another circumstance which would tip the scales of justice in favour of releasing on bail pendente lite. The thought expressed by Justice Bhagwati, J. on this question in Kashmirasingh v. State of Punjab, was noticed by the learned Judge in that context. Justice Bhagwati, J. referring to the practice in regard to the bail in grave offences found that there may be circumstances which justify departure from the practice and one such circumstance was that of the appellate Court being unable to dispose of the appeal within a reasonable time.

23. Thus however, there is no warrant for any dogmatic approach that when one a person accused of an offence for murder or for rape has been convicted and punished with heavier sentence, the appellate Court is not to enlarge the accused on bail pendente lite. To state the proposition in such categorical terms would be to self-impose a restriction on the exercise of power by the appellate Court under Section 389 read with Section 439(1) of Cr. P.C. There is no rule or unwritten convention that a person convicted for an offence like murder or rape should not be released for a minimum period of 2 years or till the disposal of the appeal. That will be to read into the power of the High Court a limitation not warranted by the provisions of the Criminal Procedure Code.

24. Merely because the appeal is against a conviction, there should not be a presumption that the accused has committed the offence, as that would be to foreclose on the plea of the accused that on the materials available, there is no justification to refuse bail. The statement that a presumption of existence of reasonable grounds for believing that the accused has been guilty of an offence with death or imprisonment would arise by reason of a conviction is not a correct statement of the law. This was the view taken by a Full Bench of Kerala High Court in the decision reported in Uthaman v. State of Kerala, 1983 Cri LJ 74 at page 78.

25. The learned Public Prosecutor argued further that the suspension of sentence and the consequent order of bail under Section 389(1) of Cr.P.C. are quite different from the grant of regular bail under Section 439(1) of Cr.P.C. of 1973, and general guidance is laid down in Section 437 of Cr.P.C. for the grant of bail by Courts other than the High Court and Court of Session, and in an application to cancel the bail granted by the High Court under Section 389(1) of Cr.P.C. there must be a finding after testing the materials and after analysing the evidence about the substantial doubt regarding the conviction or sentence and in the present case the evidence of the victim woman examined as P.W. 1 alone is sufficient to come to the conclusion that there is no doubt about the prosecution case and about the resultant conviction. He further contended that in the present case it is a custodial rape, and this is more aggracated form of rape, and there is only degree of certainty for confirming the conviction, and this is not a fit case for suspension of sentence and release on bail and so the bail already granted to A3, A6, A8 and A10 should be cancelled and the bail prayed for A1 and A2 should not be granted.

26. In support of his contentions the learned Public Prosecutor brought to my notice the decisions ; ; ; AIR 1978 SC 179 : (1978 Cri LJ 1297); ; and (1957) 1 Mad LJ (Cri) 799.

27. Per contra the learned counsel for the accused contended that the evidence of P.W. 1 is unworthy of credence and even the lower Court has doubted her testimony in paras 50, 52 and 54 of the judgment of the lower Court, as follows :

In para 50 of the lower Court's Judgment it is observed as follows :-

> "True it is that there are five statements of P.W. 1 made through Exs. P. 1 to P. 4 and D7 on 3rd, 5th, 7th of June 1992 and October, 1992. Since the theory of condom was not at all spoken to on earlier possible occasions, the same cannot be believed."

Again in the beginning of para 52 of the lower Court's Judgment the trial Judge stated as follows :-

> "It may be true that the external agencies including Balakrishnan and Jhansi Rani might have meddled with the victim in projecting her just cause ....."

Moreover the lower Court has given a definite finding in the middle of para 54 as follows :-

> "These are few and a careful perusal of those documents would clearly show a development or 'exaggeration made by P.W. 1 at every stage. They only show the external advice given to P.W. 1 in portraying a believable picture of the gang rape."

So according to the learned counsel for the accused there is not only considerable doubt about the prosecution case but also there is every definiteness about the fabrication of the story of rape, and notwithstanding these findings of the lower Court narrated above the accused have been convicted, and the evidence of P.W. 1 is unworthy of any acceptance as it is false. The learned counsel for the accused took strong objection to the averment in para 7 of the affidavit of the Police Officer filed in support of the application to cancel the bail, as if this Court is going to confirm the conviction, by stating as follows :-

> "..... and there is no possibility of their appeal being allowed by this Honourable Court." The learned counsel for the accused submitted that it would take at least 8 to 9 years for final disposal of these two appeals, and it would be travesty of justice to keep them in jail till the disposal of the appeals as the accused were released earlier on bail during the course of trial till the date of judgment for 41/2 years, and neither the Investigating agency nor the victim woman had taken any steps to cancel the hail after the filing of the charge-sheet, and there are only two paramount considerations to cancel the bail, and they are the likelihood of the accused fleeing from justice and his tampering with the prosecution witnesses, and the tampering of the prosecution witnesses will not arise during this appellate stage, and the accused have got roots in the society, and they were available to receive the sentence imposed by the trial Court, and so the accused will not abscond and hence the bail already granted to A3, A6, A8 and A10 should not be cancelled and the bail should be granted to A1 and A2 also.

28. The learned counsel for the accused placed reliance on the decisions ; ; (FB); 1978 Cri LJ 129 at page 136 : AIR 1978 SC 179; 1951 Mad WN (Cri) 199 : (1952 Cri LJ 213); .

29. Let us consider the decisions relied on by the learned Public Prosecutor in the first instance. The decision of the Supreme Court reported in Director of Enforcement v. P. V. Prabhakar Rao, is the decision rendered in respect of grant of anticipatory bail under Section 438 of Cr.P.C. As pointed out by another decision of the very same Supreme Court in the decision reported in Pokar Ram v. State of Rajasthan, , the relevant considerations governing the Court's decision in granting anticipatory bail under Section 438 of Cr.P.C. are materially different from those when an application for bail by a person, who is arrested in the course of investigation, as also by a person who is convicted and his appeal is pending before the higher Court and bail is sought during the pendency of the appeal. In the light of the decision of the Supreme Court in 1985 Cri LJ 1175 the principle laid down by the Supreme Court for the grant of anticipatory bail in the decision will have no application to the facts of the present case where the persons have been already convicted and when their appeals are pending adjudication before the High Court.

30. Then one another decision cited by the learned Public Prosecutory is the decision of the Delhi High Court reported in Court on its own Motion v. Vishnu Pandit, 1993 Cri LJ 2025.The Delhi High Court has stated in the said decision that the offences against women are on increase and the Courts should be circumspect in granting bail. That is only the general principle stated by the Delhi High Court. Having stated so, the Delhi High Court in para 32 of its Judgment has stated that the accused will be at liberty to move fresh bail application seeking their release on bail if the circumstances so demand. Further the case before the Delhi High Court relates to the grant of bail during investigation. But here is a case where we have to consider the grant of bail or the cancellation of bail during the pendency of an appeal against conviction. In such Circumstances the decision of the Delhi High Court reported in 1993 Cri LJ 2025 will not be of any help to the prosecution.

31. In the decision of the Supreme Court reported in State of Haryana v. Prem Chand, it was held that the character or reputation of the victim has no bearing or relevance either in the matter of adjudging the guilt of the accused or imposing punishment under Section 376 of I.P.C. Nobody has stated anything about the character or reputation of the victim for bail consideration in these petitions. Therefore the principle laid down by the Supreme Court in the decision are irrelevant and not germane to the bail consideration during the pendency of the criminal Appeals in this case.

32. In the decision of the Supreme Court reported in State v. Captain Jagjit Singh, it was laid down as follows :-

> "Among other considerations, which a court has to take into account in deciding whether bail should be granted in a non-bailable offence, is the nature of the offence; and if the offence is of a kind in which bail should not be granted considering its seriousness, the Court should refuse bail even though it has very wide powers under Section 498 of the Code of Criminal Procedure."

33. In one another decision of the Supreme Court reported in Gurcharan Singh v. State (Delhi Administration), AIR 1978 SC 179 at pages 185 and 186 : (1978 Cri LJ 129 at pp. 135 and 136) and in paras 21 and 24 it was held as follows :-

> "..... after submission of charge-sheet or during trial for such an offence the Court has an opportunity to form somewhat clear opinion as to whether there are reasonable grounds for believing that the accused is not guilty of such an offence. At that stage the degree of certainty of opinion in that behalf is more after the trial is over and judgment is deferred than at a pre-trial stage even after the charge-sheet "..... The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1) of Cr.P.C. are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood of the accused fleeing from justice; of repeting the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many variable factors, cannot be exhaustively set out."

The Supreme Court has only stated about the degree of certainty of opinion as to whether there are reasonable grounds for believing that the accused is not guilty of an offence after the submission of charge-sheet. But here is the case where the charge-sheet was filed and the trial was completed and the Judgment of conviction was pronounced and the criminal appeal is pending. Therefore the observation of the Supreme Court in para 21 and at page 185 will have no application to the facts of the present case. However the principle laid down by the Supreme Court in the above decision found in para 24 will have bearing to the application for the grant of bail or to cancel the bail.

34. In the decision of the Supreme Court reported in D. K. Basu v. State of West Bengal, it was observed as follows :-

> "The Courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the guilty should not escape so that the victim of the crime has the satisfaction that ultimately the majesty of law has prevailed .....
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> It needs no emphasis to say that when the crime goes unpunished, the criminals are encouraged and the society suffers. The victim of crime or his kith and kin become frustrated and contempt for law develops."

35. In the decision of the Supreme Court reported in Bodhisattwa Gautam v. Subhra Chakraborty, it was held as follows "Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer-will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is therefore the most hated crime."

36. In yet another decision of the Supreme Court reported in Ratilal Bhanji v. Assistant Customs Collector, Bombay, AIR 1967 SC 1639 : (1967 Cri LJ 1576) it was held that cancellation of bail already granted by the High Court was not violative of Article 21 of the Constitution of India.

37. In the last decision of the Supreme Court cited by the learned Public Prosecutor and reported in T. S. Krishnamurthy In re (1957) 1 Mad LJ (Cri) 799 it was laid down as follows :-

> "Normally an appellate Court will not grant bail to an accused after conviction unless it is satisfied on a perusal of the Judgment that there are prima facie grounds for doubting the conviction or sentence. The principle is that bail should be granted only where it is uncertain as whether the accused is guilty or not of the offence charged. The discretion of the Court will be exercised according to the circumstances of each case and the burden is on the accused to show error in the conviction".

38. As against these decisions relied on by the learned Public Prosecutor, the learned counsel for the accused submitted the following decisions.

39. In the decision of the Supreme Court reported in Kashmira Singh v. State of Punjab, it was laid down by their Lordships Justice P. N. Bhagwati and A.C. Gupta, JJ. as follows (Para 2) :-

> "The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keen a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. The very fact that this Court has granted to the appellant special leave to appeal against his conviction shows that in the opinion of this Court, he has prima facie a good case to consider and in the circumstances it would be highly unjust to detain him in jail any longer during the hearing of the appeal".

40. The very same principle laid down by the Supreme Court in were followed and reiterated in the subsequent decision of the Supreme Court reported in Babu Singh v. State of U.P., .

41. One another decision that was brought to my notice by the learned counsel for the accused is the Full Bench decision of Patna High Court reported in Anurag Baitha v. State, : AIR 1987 Patna 274 : (1987 Cri LJ 2037) (FB) wherein it was held as follows :-

> "The issue of delay occasioned by the High Court's own inability to hear the substantive appeals expeditiously enters directly and materially for consideration in the grant of bail to the convicts. This is a factor independent and dehors the individual merits of each case. It is moreso in the expanded concept of liberty under Article 21 and now universally accepted right of a speedy trial thereunder. If the High Court is not in a position to hear the appeal of an accused within a reasonable period of time, it must ordinarily (unless there are cogent grounds for acting otherwise) release the accused on bail in cases of substantive appeals on capital charges pending before it."

42. The next decision relied on by the learned counsel for the accused is the one reported in Pampapathy v. State of Mysore, wherein it was stated that the High Court, has inherent power to cancel the order of suspension of sentence and grant of bail to the appellants made under Section 426 of Cr.P.C. of 1898 and to direct him to be rearrested and committed to judicial custody but there must be allegations against the appellant prima facie indicating that he was misusing the liberty granted to him by the appellate Court and indulging in acts of violence, and the High Court is entitled to cancel the bail to prevent the abuse of process of the Court.

43. Then the learned counsel for the accused took me through the decision of our Madras High Court reported in Public Prosecutor v. George Williams, 1951 Mad WN (Cri) 199 at page 201 : (1952 Cri LJ 213) wherein a single Judge of Madras High Court Justice Panchapakesa Ayyar, J. catalogued five instances where bail can be cancelled and they are (1) during the period of bail a person on bail commits the very same offence, (2) the accused hampers the investigation, (3) the accused tampers with the evidence, (4) the accused goes underground or runs away to a foreign country and (5) the accused commits act of violence. In those circumstances only the bail already granted can be cancelled according to the learned counsel for the accused.

44. The learned counsel for the accused also relied on the decision of the Supreme Court, which was already cited by the learned Public Prosecutor, and that was the decision reported in Gurcharan Singh v. State (Delhi Administration) AIR 1978 SC 179 at page 187 : (1978 Cri LJ 129 at p. 137) and in para 29, wherein it was stated that the two paramount considerations viz., the likelihood of the accused fleeing from justice and his tampering with the prosecution evidence relate to ensuring the fair trial of the case, and it is essential that due and proper weight should be bestowed on these two factors apart from others, and there cannot be an inexorable formula in the matter of granting bail, and the facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail. It follows from the above observation of the Supreme Court in para 29 of the decision reported in AIR 1978 SC 179 at page 187 : (1978 Cri LJ 129 at p. 137) that fleeing from justice and tampering with the witnesses are not the only consideration, or the sole consideration to cancel the bail, and the other factors must also be considered for granting bail as well as for the cancellation of bail.

45. Applying the legal principles enunciated in the decisions cited on both sides, we have to consider the question as to whether the bail granted to the accused Nos. 3, 6, 8 and 10 can be cancelled and as to whether the accused Nos. 1 and 2 can be enlarged on bail in this case.

46. The following facts and circumstances emerge in this case :- All the 11 accused in the Sessions case were on bail throughout during the course of investigation and trial till the date of the Judgment of the trial Court from 15-4-1993 till 4-9-1997 for 41/2 years. None has raised their little finger, much less the Investigating Officer or the victim woman or the champions of the cause of women, protesting against the grant of anticipatory bail by the trial Court, even though they evinced keen interest to cancel the bail granted by the High Court. It does not stand to reason as to why the Investigating Officer or the victim woman were mute spectators to the continuation of the grant of bail even after the filing of the charge-sheet. It is baffling as to why the Investigating Officer or the victim woman did not take any steps to cancel the bail granted by the Sessions Court after the filing of the charge sheet even though the very same materials now available were available for the Sessions Court to cancel the bail.

47. It is still more perplexing as to why the Investigating Officer or the victim woman did not voice their protest when the Sessions Court at Cuddalore after Judgment suspended the sentence and granted bail to A1 and A2 even though Section 389(3) of Cr.P.C. states that the trial Court can refuse bail if there are special reasons. It cannot be said that A1 and A2 were convicted for a lesser offence of wrongful confinement and A3, A6, A8 and A10 were convicted for a major offence of rape, for the simple reason that the wrongful confinement of the victim woman Padmini is the first step which led to the commission of rape on her as the second step. The prime accused A1 and A2 are still at large notwithstanding a Judgment of conviction and sentence was handed down to them, even though they were charged for the offence of rape but acquitted of the said charge.

48. Till date neither the State nor the victim woman has preferred any Appeal or Revision questioning the acquittal of A1 and A2 for the offence of rape.

49. The degree of certainty of the prosecution case was brought down by the Sessions Court itself to the degree or probability by acquitting A11 of all the charges and by acquitting A1 and A2 for the offence of rape. The legal pandits and Police Officers can forecast the result of the criminal appeals in this case as stated at the end of para 7 of the affidavit of the Police Officer filed in Cri.M.P. No. 4571 of 1997 to the effect that there is no possibility of the appeal of the accused being allowed by this Court and indulge in such astrological calculations. But Judges cannot prejudge the issue in controversy and predict the outcome of the criminal appeal during bail proceedings without fully hearing the appeals. As a matter of fact in the decision of the Supreme Court the Judgment of the trial Court was reversed by the High Court. While that being so, there is no definiteness or certainty about the result of the criminal appeals and as to whether they will end in conviction or acquittal. The Judgment of lower Court is under challenge, and it is sub-judice, and no finality is reached as on this date in this case, and no one can foretell or prophecy about the outcome of the criminal appeals in this case.

50. The Judge has to consider the broad probabilities of the case in the bail applications. This does not mean that the Judge should make a roving enquiry into pros and cons of the matter and weigh the evidence of P.W. 1 in this case as if he was conducting a regular hearing of the appeal. The standard of test which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused in the criminal appeal is not exactly to be applied at the stage of deciding

the bail application or the application to cancel the bail. It is not obligatory for the Judge during bail considerations to have a dress rehearsal of the criminal appeal and to consider in detail and weigh the evidence of P.W. 1 on record. Suffice it to say that the trial Court has tested and considered the evidence and materials on record and came to a conclusion. What we have at this stage is much more than the materials collected during investigation. Thus there is a prima facie case in favour of the prosecution.

51. In cases of custodial rape the society suffers and the impact on the society will be much more if the bail already granted is not cancelled. The victim is insulted and her status will suffer and even she can be intimidated, if the accused are set free by an order of bail and her position is more secured if the bail already granted is cancelled.

52. Further the offences complained of in this case are grave in nature.

53. A person having been convicted with severe punishment will be tempted to jump bail and he may not be available to serve the sentence after the final disposal of the appeal.

54. There may be a tendency to harm the victim by the accused in view of the verdict rendered by the trial Court.

55. However there is no immediate prospect of final disposal of the criminal appeals filed by the accused in this case. Now as per the cause list of the High Court of Madras the Criminal Appeals of the year 1988 or 1989 are being listed for final disposal. Senior citizens of this part of the land are waiting in the queue to know the result of their criminal appeals pending in the High Court of Madras. While that being the situation of the pendency of criminal appeals in this Court, it would take atleast 8 to 9 years to know the fate of the criminal appeals filed by these accused in this Sessions Case. In the words of the Supreme Court as stated in the decisions and it would indeed be a travesty of justice to keep these accused in jail for a period of 8 and 9 years for an offence or offences which may ultimately found not to have been committed by them.

56. Taking into consideration of the above facts and circumstances of the case and further developments and more materials I hold that the bail granted to A3, A6, A8 and A10 by this Court by an order dated 11-9-1997 in Cri.M.P. No. 4472 of 1997 is cancelled under Section 439(2) of Cr.P.C., and the petition filed by the prosecution in Cri.M.P. No. 4571 of 1997 in Criminal Appeal No. 677 of 1997 is allowed, and the accused 1 and 2 are not entitled to the relief of suspension of sentence passed against them and consequent order of bail as prayed for by them and so the petition filed by the accused 1 and 2 in Crl.M.P. No. 4544 of 1997 in Criminal Appeal No. 680 of 1997 is dismissed, and by invoking the inherent powers of this court and to secure the ends of justice it is ordered under Section 482 of Cr.P.C. that the Registry is directed to list the Criminal Appeals filed in respect of Sessions Case No. 99 of 1993 on the file of the Principal Sessions Court, Cuddalore for final disposal immediately after getting the typed set of papers ready as expeditiously as possible, and the Registry is further directed to place the papers in this case before my Lord the Chief Justice to post these Criminal Appeals before a Division Bench of this Court for final disposal since substantial questions of law are involved in this case, and I answer the point accordingly.

57. In the result the petition filed by the Prosecution in Crl.M.P. No. 4571 of 1997 in Crl. Appeal No. 677 of 1997 is allowed and the sus-pension of sentence and consequent order of bail granted to A3, A6, A8 and A10 by this Court by an order dated 11-9-1997 in Crl.M.P. No. 4472 of 1997 is cancelled under Section 439(2) of Cr.P.C. The Petition filed by Accused 1 and 2 in Crl.M.P. No. 4544/1997 in Cri. Appeal No. 680 of 1997 is dismissed and the Accused Nos. 1 and 2 are not entitled to the relief of suspension of sentence passed against them and consequent order of bail as prayed for by them. By invoking the inherent powers of this Court and to secure the ends of justice it is ordered under Section 482 of Cr.P.C. that the Registry is directed to list the Criminal Appeals viz., Cri. Appeal Nos. 677/97 and 680/97 and any other connected appeal filed in respect of Sessions Case No. 99 of 1993 on the file of the Principal Sessions Judge, Cuddalore for final disposal immediately after getting the typed-set of papers ready as expeditiously as possible and the Registry is further directed to place the papers in this case before My Lord the Chief Justice to post these Criminal Appeals before a Division Bench of this Court for final disposal at an early date since substantial questions of law are involved in this case. The bail bonds of Accused Nos. 3, 6, 8 and 10 are hereby cancelled. The Principal Sessions Judge, Cuddalore is directed to issue necessary warrants to arrest A3, A6, A8 and A10 and recommit them to custody.

58. Petition allowed.