Gurcharan Singh and Others

Vs

State (Delhi Administration)

Criminal Appeal No. 456 of 1977

Raj Kumar Sharma and Others

Vs

State (Delhi Administration)

Criminal Appeal No. 457 of 1977

(P. K. Goswami, V. D. Tulzapurkar JJ)

06.12.1977

JUDGMENT

GOSWAMI, J. -

1. These two appeals by Special Leave are directed against the judgement and order of the Delhi High Court cancelling the orders of bail of each of the appellants passed by the learned Sessions Judge, Delhi. They were all arrested in pursuance of the First Information Report lodged by the Superintendent of Police, CBI on June 10, 1977 in what is now described as the "Sunder Murder Case". The report at the stage did not disclose names of accused persons and referred to be involvement of "some Delhi Police personnel". Sunder was said to be a notorious dacoit who was wanted in several cases of murder and dacoit alleged to have been committed by him in Delhi elsewhere. It is stated that by May, 1976 Sunder became a "security risk for Mr. Sanjay Gandhi". It appears Sunder was arrested at Jaipur on August 31, 1976 and was in police custody in Delhi between November 2, 1976 and November 26, 1976 under the orders of the Court of the Additional Chief Metropolitan Magistrate, Shahdara, Delhi.

2. It is alleged that the appellants ranging from the Deputy Inspector General of Police and the Superintendent of Police at the top down to some police constables were a party to a criminal conspiracy to kill Sunder and caused his death by drowning him in the Yamuna in pursuance of the conspiracy. According to the prosecution, the alleged murder took place on the night of November 24, 1976.

3. The appellants were arrested in connection with the above case between June 10, 1977 and July 12, 1977 and the Magistrate declined to release them on bail. Thereafter, they approached the learned Sessions Judge under Section 439(2) [sic (1)], Criminal Procedure Code, 1973 (briefly the new Code) and secured release on bail of the four appellants, namely, Gurcharan Singh (Superintendent of Police), P. S. Bhinder (D.I.G. of Police), Amarjit Singh (Inspector) and Constable Paras Ram on August 1, 1977 and of the eight other police personnel on August 11, 1977.

4. Charge-sheet was submitted on August 9, 1977 against 13 accused including all the appellants under Section 120B read with Section 302, IPC and under other sections. The thirteenth accused who was also a policeman has been evading arrest.

5. The Delhi Administration moved the High Court under Section 439(2), Cr. P.C. against the orders of the learned Sessions Judge for cancellation of the bail. On September 19, 1977 the High Court set aside the orders of the Sessions Judge dated August 1, 1977 and August 11, 1977 and the bail bonds furnished by the appellants were cancelled and they were ordered to be taken into custody forthwith. Hence these appeals by Special Leave which were argued together and will be disposed of by this judgement.

6. In order to appreciate the submissions, on behalf of the appellants, of Mr. Mulla followed by Mr. Mukherjee it will be appropriate to briefly advert to certain relevant facts.

7. On the allegations, this is principally a case of criminal conspiracy to murder a person in police custody be he a bandit. The police personnel from the Deputy Inspector General of Police to police constables are said to be involved as accused.

8. Before the FIR was lodged on June 10, 1977, there had been a preliminary inquiry conducted by the CBI between April 6, 1977 and June 9, 1977 bearing upon the death of Sunder. Fifty-three witness were examined in that inquiry and six of them were said to be eye-witnesses. These eye-witnesses were all police personnel. During this preliminary inquiry, all the six alleged eye-witnesses did not support the prosecution case, but gave statement in favour of the accused. However, as stated earlier, the FIR was lodged on June 10, 1977 and investigation proceeded in which statement of witnesses were recorded under Section 161, Cr. P.C. The appellants were also arrested and suspended during the period between June 10, 1977 and July 12, 1977. During the course of the investigation, seven witnesses including six persons already examined during the preliminary inquiry, gave statements implicating the appellants in support of the theory of prosecution. The witnesses were also forwarded to the Magistrate for recording their statements under Section 164 Cr. P.C. All the seven witnesses, it is stated, continued to support the prosecution case in their statements on oath recorded under Section 164, Cr. P.C. Six eye-witness who made such discrepant statements and had supported the defence version at one stage, explained that some of the accused, namely, D.S.P. R. K. Sharma and Inspector Harkesh had exercised pressure on them to make such statement in favour of the defence. The seventh eye-witness A.S.I. Gopal Das, who had not been examined earlier, made statements under Section 164 Cr. P.C. in favour of the prosecution.

9. It is in the above background that the Delhi Administration moved the High Court for cancellation of the bail granted by the Sessions Judge alleging that there was grave apprehension of the witnessed being tampered with by the accused persons on account of their position and influence which they wielded over the witness. The learned Sessions Judge adverting to this aspect had, while granting bail, observed as follows :

> The argument of the learned Public Prosecutor that if released on bail, the petitioner will misuse their freedom to tamper with the witnesses is not quite convincing. After all, there is little to gain by tampering with the witnesses who have, themselves, already tampered with their evidence by making contradictory statements in respect of the same transaction.

10. The learned Sessions Judge ended his long discussion as follows :

> To sum up, after reviewing the entire material including the inquest proceedings held by the Sub-Divisional Magistrate, statements recorded by the CBI during the preliminary enquiry and under section 161 Cr. P.C. and the statements recorded under Section 164, Cr. P.C. and having regard to the inordinate delay in registering this case and to the circumstances that there is little probability of the petitioners flying from justice or tampering with the witnesses, and also having regard to the character of evidence, I am inclined to grant bail to the petitioners.

11. The High Court, on the other hand, set aside the orders of the Sessions Judge observing as follows :

> Considering the nature of the offence, character of the evidence including the fact that some of the witnesses during preliminary inquiry did not fully support the prosecution case; the reasonable apprehension of witnesses being tampered with and all other factors relevant for consideration, while considering the application for grant or refusal of bail in a non-bailable offence punishable with death or imprisonment for life, I have no option but to cancel the bail. I am of the considered view that the learned Sessions Judge did not exercise his judicial discretion or relevant well-recognised principles and factors which ought to have been considered by him.

12. Section 437 of the new Code corresponds to Section 497 of the Code of Criminal Procedure, 1898 (briefly the old Code) and Section 439 of the new Code corresponds to Section 498 of the old Code. Since there is no direct authority of this Court with regard to Section 439, Cr. P.C. of the new Code, Counsel for both sides drew our attention to various decisions of the High Courts under Section 498, Cr. P.C. of the old Code.

13. Mr. Mulla drew our particular attention to some change in the language of Section 437(1), Cr. P.C. (new Code) compared with Section 497(1) of the old Code. Mr. Mulla points out that while Section 497(1), Cr. P.C. of the old Code, in terms, refers to an accused being "brought before a Court", Section 437(1), Cr. P.C. uses the expression "brought before a Court other than the High Court or a Court of Session". From this, Mr. Mulla submits that limitations with regard to the granting of bail laid down under Section 497(1) to the effect that the accused "shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life" are not in the way of the High Court or the Court of Session in dealing with bail under Section 439 of the new Code. It is, however, difficult to appreciate how the change in the language under Section 437(1) affects the true legal position. Under the new as well as the old Code an accused after being arrested is produced before the Court of a Magistrate. There is no provision in the Code whereby the accused is for the first time produced after initial arrest before the Court of Session or before the High Court. Section 437(1), Cr. P.C., therefore, takes care of the situation arising out of an accused being arrested by the police and produced before a Magistrate. What has been the rule of production of accused person after arrest by the police under the old Code has been made explicitly clear in Section 437(1) of the new Code by excluding the High Court or the Court of Session.

14. From the above change of language it is difficult to reach a conclusion that the Sessions Judge of the High Court need not even bear in mind the guidelines which the Magistrate has necessarily to

follow in considering bail of an accused. It is not possible to hold that the Sessions Judge or the High Court, certainly enjoying wide powers, will be oblivious of the considerations of the likelihood of the accused being guilty of an offence punishable with death or imprisonment for life. Since the Sessions Judge of the High Court will be approached by an accused only after refusal of bail by the Magistrate, it is not possible to hold that the mandate of the law of bail under Section 437, Cr. P.C. for the Magistrate will be ignored by the High Court or by the Sessions Judge.

15. It is submitted by Mr. Mukherjee that under Section 439(2), Cr. P.C. of the new Code, the High Court could not entertain the application for cancellation of bail and it was only the Court of Session that was competent to deal with the matter.

16. Section 439 of the new Code confers special powers on High Court or Court of Session regarding bail. This was the position under Section 498 Cr. P.C. of the old Code. That is to say, even if a Magistrate refuses to grant bail to an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases. Similarly under Section 439(2) of the new Code, the High Court or the Court of Session may direct any person who has been released on bail to be arrested and committed to custody. In the old Code, Section 498(2) was worded in somewhat different language when it said that a High Court or Court of Session may cause any person who has been admitted to bail under sub-section (1) to be arrested and may commit him to custody. In other words, under Section 498(2) of the old Code, a person who had been admitted to bail by the High Court could be committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This restriction upon the power to entertainment of an application for committing a person already admitted to bail, to custody, is lifted in the new Code under Section 439(2). Under Section 439(2) of the new Code a High Court may commit a person released on bail under Chapter XXXIII by any Court including the Court of Session to custody, if it thinks appropriate to do so. It must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the High Court. 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 existed, 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-a-vis the High Court.

17. It is significant to note that under Section 397, Cr. P.C. of the new Code while the High Court and the Sessions Judge have the concurrent powers of revision, it is expressly provided under sub-section (3) of that section that when an application under that section has been made by any person to the High Court of to the Sessions Judge, no further application by the same person shall be entertained by the other of them. This is the position explicitly made clear under the new Code with regard to revision when the authorities have concurrent powers. Similar was the position under Section 435(1), Cr. P.C. of the old Code with regard to concurrent revision powers of the Sessions Judge and the District Magistrate. Although under Section 435(1), Cr. P.C. of the old Code the High Court, a Sessions Judge or a District Magistrate had concurrent power of revision, the High Court's jurisdiction in revision was left untouched. There is no provision in the new Code excluding the jurisdiction of the High Court in dealing with an application under Section 439(2), Cr. P.C. to cancel

bail after the Sessions Judge had been moved and an order had been passed by him granting bail. The High Court has undoubtedly jurisdiction to entertain the application under Section 439(2), Cr. P.C. for cancellation of bail notwithstanding that the Sessions Judge had earlier admitted the appellants to bail. There is, therefore, no force in the submission of Mr. Mukherjee to the contrary.

18. Chapter XXXIII of the new Code contains provisions in respect of bail bonds. Section 436, Cr. P.C., with which this Chapter opens makes an invariable rule for bail in case of bailable offences subject to the specified exception under sub-section (2) of that section. Section 437, Cr. P.C. provides as to when bail may be taken in case of non-bailable offences. Sub-section (1) of Section 437, Cr. P.C. makes a dichotomy in dealing with non-bailable offences. The first category relates to offences punishable with death or imprisonment for life and the rest are all other non-bailable offences. With regard to the first category, Section 437(1), Cr. P.C. imposes a bar to grant of bail by the Court or the officer incharge of a police station to a person accused of or suspected of the commission of an offence punishable with death or imprisonment for life, if there appear reasonable grounds for believing the he has been so guilty. Naturally, therefore, at the stage of investigation unless there are some materials to justify an officer or the Court to believe that there are no reasonable grounds for believing that the person accused of or suspected of the commission of such an offence has been guilty of the same, there is a ban imposed under Section 437(1), Cr. P.C. against granting of bail. On the other hand, if to either the officer incharge of the police station or to the Court there appear to be reasonable grounds to believe that the accused has been guilty of such an offence there will be no question of the Court or the officer granting bail to him. In all other non-bailable cases judicial discretion will always be exercised by the Court in favour of granting bail subject to sub-section (3) of Section 437, Cr. P.C. with regard to imposition of conditions, if necessary. Under sub-section (4) of Section 437, Cr. P.C. an officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) of that section is required to record in writing his or its reasons for so doing. That is to say, law requires that in non-bailable offences punishable with death or imprisonment for life, reasons have to be recorded for releasing a person on bail, clearly disclosing how discretion has been exercised in that behalf.

19. Section 437, Cr. P.C. deals, inter alia with two stages during the initial period of the investigation of a non-bailable offence. Even the officer incharge of the police station may, by recording his reasons in writing, release a person accused of or suspected of the commission of any non-bailable offence provided there are no reasonable grounds for believing that the accused has committed a non-bailable offence. Quick arrests by the police may be necessary when there are sufficient materials for the accusation or even for suspicion. When there are sufficient materials for the accusation or even for suspicion. When such an accused is produced before the Court, the Court has a discretion to grant bail in all non-bailable cases except those punishable with death or imprisonment for life if there appear to be reasons to believe that he has been guilty of such offences. The Courts over-see the action of the police and exercise judicial discretion in granting bail always bearing in mind that the liberty of an individual is not unnecessarily and unduly abridged and at the same time the cause of justice does not suffer. After the Court releases a person on bail under sub-section (1) or sub-section (2) of Section 437, Cr. P.C. it may direct him to be arrested again when it consider necessary so to do. This will be also in exercise of its judicial discretion on valid grounds.

20. Under the first proviso to Section 167(2) no Magistrate shall authorise the detention of an accused in custody under that section for a total period exceeding 60 days on the expiry of which the accused shall be released on bail if he is prepared to furnish the same. This type of release under the proviso shall be deemed to be a release under the provisions of Chapter XXXIII relating to bail.

This proviso is an innovation in the new Code and is intended to speed up investigation by the police so that a person does not have to languish unnecessarily in prison facing a trial. There is a similar provision under sub-section (6) of Section 437, Cr. P.C. which corresponds to Section 497(3A) of the old Code. This provision is again intended to speed up trial without unnecessarily detaining a person as an undertrial prisoner, unless for reasons to be recorded in writing, the Magistrate otherwise directs. We may also notice in this connection sub-section (7) of Section 437 which provides that if at any time after the conclusion of a trial of any person accused of non-bailable offence and before the judgement is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of such an offence, it shall release the accused, if he is in custody, on the execution of him of a bond without sureties for his appearance to hear the judgment. The principle underlying Section 437 is, therefore, towards granting for believing that the accused has been guilty of an offence punishable with death or imprisonment for life and also when there are other valid reasons to justify the refusal of bail.

21. Section 437. Cr. P.C. is concerned only with the Court of Magistrate. It expressly excludes the High Court and the Court of Session. The language of Section 437(1) may be contrasted with Section 437(7) to which we have already made a reference. While under sub-section (1) of Section 437, Cr. P.C. the words are : "If there appear to reasonable grounds for believing that he has been guilty", sub-section (7) says : "that there are reasonable grounds for believing that the accused is not guilty of such an offence". This difference in language occurs on account of the stage at which the two sub-sections operate. During the initial investigation of a case in order to confine a person in detention, there should only appear reasonable grounds for believing that he has been quality of an offence punishable with death or imprisonment for life. Whereas 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 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. There is a noticeable trend in the above provisions of law that even in case of such non-bailable offences a person need not be detained in custody for any period more than it is absolutely necessary, if there are no reasonable grounds for believing that he is guilty of such an offence. There will be, however, certain overriding considerations to which we shall refer hereafter. Whenever a person is arrested by the police for such an offence. There will be, however, certain overriding considerations to which we shall refer hereafter. Whenever a person is arrested by the police for such an offence, there should be materials produced before the Court to come to a conclusion as to the nature of the case he is involved in or he is suspected of. If at that stage from the materials available there appear reasonable grounds for believing that the person has been guilty of an offence punishable with death or imprisonment for life, the Court has no other option than to commit him to custody. At that stage, the Court is concerned with the existence of the materials against the accused and not as to whether those materials are credible or not on the merits.

22. In other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to sub-section (3) of Section 437, Cr. P.C. if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment of life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1), Cr. P.C. and in a case where the Magistrate

entertains a reasonable belief on the materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.

23. By an amendment in 1955 in Section 497, Cr. P.C. of the old Code the words "or suspected of the commission of"were for the first time introduced. These words were continued in the new Code in Section 437(1), Cr. P.C. It is difficult to conceive how if a police officer arrests a person on a reasonable suspicion of commission of an offence punishable with death or imprisonment for life (Section 41, Cr. P.C. of the new Code) and forwards him to a Magistrate [Section 167(1), Cr., P.C. of the new Code] the Magistrate at that stage will have reasons to hold that there are no reasonable grounds for believing that he has not been guilty of such an offence. At that stage unless the Magistrate is able to act under the proviso to Section 437(1), Cr. P.C. bail appears to be out of the question. The only limited inquiry may then relate to the materials for the suspicion. The position will naturally change as investigation progress and more facts and circumstances come to light.

24. Section 439(1), Cr. P.C. of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), Cr. P.C. against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment of life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1), Cr. P.C. of the new Code. The over-riding 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), Cr. P.C. of the new Code 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 repeating the offence; of jeopardising his own life being faces with a grim prospect of possible conviction in the case; of tempering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out.

25. The question of cancellation of bail under Section 439(2). Cr. P.C. of the new Code is certainly different from admission to bail under Section 439(1), Cr. P.C. The decisions of the various High Courts cited before us are mainly with regard to the admission to bail by the High Court under Section 498, Cr. P.C. (old). Power of the High Court or of the Sessions Judge to admit persons to bail under Section 498, Cr. P.C. (old) was always held to be wide without any express limitations in law. In considering the question of bail justice both sides governs the judicious exercise of the Court's judicial discretion. The only authority cited before us where this Court cancelled bail granted by the High Court is that of The State v. Captain Jagjit Singh ((1962) 3 SCR 622 : AIR 1962 SC 253 : (1962) 1 Cri LJ 215). The Captain was prosecuted along with other for conspiracy and also under Sections 3 and 5 of the Indian Official Secrets Act, 1923 for passing on official secrets to a foreign agency. This Court found a basic error in the order of the High Court in treating the case as falling under Section 5 of the Official Secrets Act which is a bailable offence when the High Court ought to have proceeded on the assumption that it was under Section 3 of that Act which is a non-bailable offence. It is because of this basic error into which the High Court felt that this Court interfered with the order of bail granted by the High Court.

26. In the present case the Sessions Judge having admitted the appellants to bail by recording his reasons we will have to see whether that order was vitiated by any serious infirmity for which it was

right and proper for the High Court, in the interest of justice, to interfere with his discretion in granting the bail.

27. Ordinarily the High Court will not exercise its discretion to interfere with an order of bail granted by the Sessions Judge in favour of an accused.

28. We have set out above the material portions of the order of the Sessions Judge from which it is seen that he did not take into proper account the grave apprehension of the prosecution that there was a likelihood of the appellants tampering with the prosecution witness. In the peculiar nature of the case revealed from the allegations and the position of the appellants in relation to the eye-witnesses it was incumbent upon the Session Judge to give proper weight to the serious apprehension of the prosecution with regard to tampering with the eye-witnesses, which was urged before him in resisting the application for bail. The matter would have been different if there was absolutely no basis for the apprehension of the prosecution with regard to tampering of the witnesses and the allegation rested only on a bald statement. The manner in which the above plea was disposed of by the Sessions Judge was very casual and even the language in the order is not clear enough to indicate what he meant by observing that "the witnesses .... themselves already tampered with their evidence by making contradictory statements ...". The learned Sessions Judge was not alive to the legal position that there was no substantive evidence yet recorded against the accused until the eye-witnesses were examined in the trial which was to proceed unimpeded by any vicious probability. The witnesses stated on oath under Section 164, Cr. P.C. that they had made the earlier statements due to pressurisation by some of the appellants. Where the truth lies will be determined at the trial. The High Court took note of this serious infirmity of approach of the Sessions Judge as also the unwarranted manner bordering on his prematurely commenting on the merits of the case by observing that "such deposition cannot escape a taint of unreliability in some measure or other". The only question which the Sessions Judge was required to consider at that stage was whether there was prima facie case made out, as alleged, on the statements of the witnesses and on other materials. There appeared at least nothing at that stage against the statement. of ASI Gopal Das who had made no earlier contradictory statement. "The taint of unreliability" could not be attached to his statement even for the reason given by the learned Sessions Judge. Whether his evidence will ultimately be held to be trustworthy will be an issue at the stage of trial. In considering the question of bail of an accused in a non-bailable offence punishable with death or imprisonment for life, it is necessary for the Court to consider whether the evidence discloses a prima facie case to warrant his detention in jail besides the other relevant factors referred to above. As a link in the chain of criminal conspiracy the prosecution is also relying on the conduct of some of the appellants in taking Sunder out of police lockup for making what is called a false discovery and it is but fair that the Panch witness in that behalf be not allowed to be got at.

29. We may repeat the two paramount considerations, viz, likelihood of the accused feeling from justice and his tampering with prosecution evidence relate to ensuring a fair trial of the case in a Court of Justice. It is essential that due and proper weight should be bestowed on these two factors apart from others. There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion granting or cancelling bail.

30. In dealing with the question of bail under Section 498 of the old Code under which the High Court in that case had admitted the accused to bail, this Court in The State v. Captain Jagjit Singh (supra), while setting aside the order of the High Court granting bail, made certain general observations with regard to the principles that should govern in granting bail in a non-bailable case

as follows :

> It (the High Court) should then have taken into account the various considerations, such as, nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State, and similar other considerations, which arise when a Court is asked for bail in a non-bailable offence. It is true that under Section 498 of the Code of Criminal Procedure, the powers of the High Court in the matter of granting bail are very wide wide; even so where the offence is non-bailable, various considerations such as those indicated above have to be taken into account before bail is granted in a non-bailable offence.

We are of the opinion that the above observations equally apply to a case under Section 439 of the new Code and legal position is not different under the new Code.

31. We are satisfied that the High Court has correctly appreciated the entire position and the Sessions Judge did not at the stage the case was before him. We will not, therefore, be justified under Article 136 of the Constitution in interfering with the discretion exercised by the High Court in cancelling the bail of the appellants in this case.

32. Before closing, we should, however, make certain things clear. We find that the case is now before the committing Magistrate. We are also informed that all documents have been furnished to the accused under Section 207, Cr. P.C. of the new code. The Magistrate will, therefore, without loss of further time pass an appropriate order under Section 209, Cr. P.C. The Court of Session will, thereafter, commence trial at an early date and examine all the eye-witnesses first and such other material witnesses thereafter as may be produced by the prosecution as early as possible. Trial should proceed de die in diem as far as practicable at least so far as the eye-witnesses and the above referred to Panch witness are concerned. We have to make this order as both Mr. Mulla and Mr. Mukherjee submitted that trial will take a long time as the witnesses cited in the charge-sheet are more than 200 and it will be a punishment to keep the appellants in detention pending the trial. We have, therefore, thought it fit to make the above observation to which the learned Additional Solicitor General had readily and very fairly agreed. After the statements of the eye-witnesses and the said Panch witness have been recorded, it will be open to the accused to move the Sessions Judge for admitting them to bail, pending further hearing. The appeals are dismissed with the above observations. The stay orders stand vacated.

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