

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR

CRIMINAL PETITION No.6286 OF 2020

Dated:30-11-2020

Aluka Sandra Orewa @ Benny vs. State of Karnataka

ORDER

This is a petition under section 439 Cr.P.C. Initially the respondent police registered an FIR in Cr.No.49/2020 for the offences under Sections 66C and 66D of the Information Technology Act (for short referred to as 'I.T Act') and Section 420 of Indian Penal Code (for short referred to as 'IPC'). In the charge sheet, the respondent invoked the offences punishable under Sections 66(C) and 66(D) of I.T.Act only.

2. The background is :

On 25.2.2020, a woman by name Pavithra D, made a report to the respondent police that in between 21.58 and 22.05 hours on 24.2.2020, she received messages to her mobile phone about withdrawal of Rs.10,000/- nine times from her bank account. Having found totally an amount of Rs.90,000/- being withdrawn from her bank account, she went to the bank on 25.2.2020 and made an enquiry. She learnt that an amount of Rs.90,000/- had

been withdrawn from her bank account at an ATM counter by somebody.

3. The Sessions Court rejected the bail application of the petitioner mainly on the ground that the offence under Section 420 of IPC is non bailable and that the petitioner is found to have involved in as many as 60 similar offences.

4. The main thrust of argument of Sri Hasmath Pasha, the learned Senior Counsel appearing for the petitioner is that the offences under I.T.Act are bailable, for this reason the petitioner is entitled to be released on bail as a matter of right; and that the contents of FIR do not constitute an offence under Section 420 of IPC. Delving on these points, he further submitted that the allegations against the petitioner are that she collected data of the ATM card of the first informant by fixing a device called skimmer to ATM, prepared a forged ATM card and withdrew money from the first informant's bank account. These allegations do not constitute an offence of cheating, for there was no dishonest inducement of the first informant by the petitioner; therefore only offences that can be invoked are Sections 66C and 66D of I.T.Act, and they are bailable. He submitted that the petitioner is a foreigner and staying in

Bengaluru on a student Visa; the police have seized her passport and Visa, and for this reason there cannot be any apprehension that she will fly away to her native country. She is ready to cooperate with the police for completing the investigation; and therefore by imposing stringent conditions, bail may be granted.

5. The Government Pleader submits that the petitioner is involved in about 60 cases of similar nature. FIRs have been registered against her and other accused at various police stations for the same offence. She is a habitual offender and if bail is granted she will resort to committing the same offence once again and hence there are no grounds for granting bail. He also submits that there are materials indicating that the offences either under section 420 or section 468 of IPC can be invoked to the present set of circumstances. In this regard, he submitted that collection of data from the ATM cards deceptively by fixing a device to the teller machine is nothing but cheating, the offences of this nature affect the banking system. He pleaded for dismissal of the petition.

6. It is alleged against the petitioner that she withdrew an amount of Rs.90,000/- from the bank account of the first informant by using a forged ATM card. She made use of a device called 'SKIMMER' and a camera for perpetrating the crime. The police have seized a camera, a

skimmer and other materials from the petitioner.

7. Skimmer is used for collecting the data stored in an ATM card and the camera, for capturing the password, when the account holder operates the teller machine using his card. The data then collected is used for forging the cards to be used for withdrawing the money from the accounts of the customers of the bank without their knowledge. Perpetration of crime in this manner fits into ingredients of Section 468 of IPC, for the genuine card holder operates the machine under the belief that his transaction is fully secured; but without his knowledge, the data in the card is captured by the skimmer; this *modus operandi* is nothing but dishonestly inducing the ATM card holder to operate a teller machine which is tampered. In a crime of this type, though all the necessary ingredients for the offence of Section 468 of IPC are present, after coming into force of I.T.Act, the essential ingredients of offences under Sections 420 and 468 of IPC are immanent in Sections 66C and 66D of I.T.Act, which are bailable and this is the reason for forceful argument of Sri Hasmath Pasha that the petitioner is entitled to bail. Be that as it may, there is another important aspect to be dealt with here.

8. According to prosecution, the petitioner is involved in 60 cases of this type. In the case diary, there is a list of 44 cases, but according to Sri Hasmath Pasha, the petitioner was arrested in connection with four cases only, and that bail was granted to her in two cases. The learned Government Pleader makes it clear that 60 FIRs were registered against unknown accused, and after the arrest of the petitioner, she confessed to have involved in all those cases, but her arrest was only in connection with 4 or 5 cases. It is quite clear that there are at least four cases against her, and that she was enlarged on bail in two cases. That means, she is on bail in two cases; she might have been admitted to bail either under Section 436 or 437 of the Code of Criminal Procedure, but going by the arguments of Sri Hasmath Pasha, the case of the type on hand is bailable absolutely under Section 436 of Cr.P.C. only, for Section 420 of IPC is not applicable. Assuming that Section 436 of Cr.P.C. is applicable, the question to be posited is if a person repeatedly commits bailable offences, does he or she become entitled to bail every time. Section 436(2) of Cr.P.C. envisages that bail granted under Section 436(1) of Cr.P.C. may be cancelled if the person released on bail violates conditions of bail as to time and place of attendance.

9. For further analysis, reference may be made to two decisions of the Supreme Court, namely ***Talab Haji Hussain vs Madhukar Purshottam Mondkar and Another [AIR 1958 SC 376]*** and ***Ratilal Bhanji Mithani vs Assistant Collector of Customs [AIR 1967 SC 1639]***. The conspectus of these decisions shows that the High Court has inherent power to cancel the bail granted to an accused in a bailable case if his conduct subsequent to grant of bail hampers fair trial. The ratio in ***Talab Haji Hussain (supra)*** is affirmed in ***Ratilal Bhanji Mithani (supra)***. The reason for referring to these decisions is not that they are directly applicable to the case on hand, but provides a basis for pondering over perspicacious issue under discussion which is more of noumenal. Bail is not a licence for committing any number of crimes. Though bail is related to liberty of a person, misuse of liberty is not justifiable. And crimes which are not targeted against an individual, but perpetrated against society must be viewed quite differently. It is held by the Supreme Court in ***Ratilal Bhanji (supra)*** that cancellation of bail by the High Court under its inherent power does not deprive the personal liberty of an individual; and likely so, denial of bail to an accused who frequently commits bailable offences, does not violate Article 21 of the Constitution of India.

10. As a concomitant to this analysis, it may be stated that a person being on bail in relation to bailable offence and applies for bail having again committed available offence cannot as a matter of right claim bail. Any attempt to liberally interpret the right in this manner without having idea of far-reaching consequences will have disastrous effect on the society or a system, as for instance how the case on hand may adversely affect the banking system. Therefore, the right to claim bail under section 436 of Cr.P.C becomes circumscribed when an accused repeatedly commits bailable offence/s.

11. If the petitioner's case is examined in the above perspective, she cannot claim bail as a matter of right. There are materials indicating her involvement in the crime. Yet considering the factors that she is a woman, that the instruments and devices are recovered from her, and that her passport and Visa are also seized, she can be admitted to bail. It cannot be said that she is not available for trial. Stringent conditions may be imposed to make her aware that the concession by way of bail is liable to be cancelled at any time if she transgresses these conditions. Hence the following:

ORDER

(a) Petition is allowed.

(b) Petitioner shall be released on bail on obtaining from her a bond for Rs.1,00,000/- and two sureties for the likesum to the satisfaction of the trial court. She is also subjected to the following conditions : -

(i) She shall regularly appear before the trial court till conclusion of trial.

(ii) She shall not tamper with the evidence and threaten the witnesses.

(iii) She shall mark her attendance before the Yelahanka Police Station every week on a Sunday between 9.00 AM and 12 noon, till conclusion of trial.

(iv) She shall furnish her address proof and mobile telephone numbers (if more than one) to the trial Court. In case she changes her residence, new address shall be furnished to the trial Court. Likewise she shall retain the same mobile number till conclusion of trial. When she goes to police station to mark attendance, she shall assure to the police that she has not changed the

mobile telephone numbers.

- (v) If she gets involved in any criminal case in future, and violates any of the above conditions, the bail granted now will stand cancelled automatically and the police can arrest her.