

(2014) 07 GUJ CK 0014
In the Gujarat High Court

Case No : Criminal Misc. Application (for Cancellation of Bail) No. 1248 of 2014

Balubhai Chhotubhai Vasava

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 17-07-2014

Acts Referred:

Arms Act, 1959 — Section 25(1)(a)

Constitution of India, 1950 — Article 21

Criminal Procedure Code, 1973 (CrPC) — Section 437, 437(1)(i), 439, 439(2)

Penal Code, 1860 (IPC) — Section 120(B), 120B, 143, 147, 148

Citation : (2014) 3 GLR 2301

Hon'ble Judges : S.G. Shah, J

Bench : Single Bench

Advocate : M.M. Saiyed, Advocate for the Appellant; Nikhil S. Kariel, Advocate and Jirga Jhaveri, APP, Advocate for the Respondent

Judgement

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S.G. Shah, J.—The applicant herein is original complainant of F.I.R. No. I-09/2009 dated 15.01.2009 registered with Jhagadiya Police Station. In the said complaint, it is stated that the complainant is residing at village: Vasana, Taluka: Jhagadiya, District: Bharuch, where his agriculture land is situated and he is doing agriculture work and he has been working as Acting President of Jhagadiya Taluka Congress Committee since last two years. He has three daughters namely; Bhunikaben, Sandhyaben and Ankitaben. Bhunikaben is studying in college, youngest Ankitaben is studying in school and his wife Basantiben as well as daughter Sandhyaben are doing house hold work. He has further stated in the complaint that on 15.01.2009 when he had started his journey to come to Jhagadiya in his Tata Sumo Car which was driven by Ramanbhai and when they reached Jhagadiya Chokdi at about 9.30 A.M. and at that time Grishbhai Umeshbhai Vasava of Talodra village met him and stated that Sarpanch of Talodra village Mohanbhai Devjibhai has received a notice from the Mamlatdar regarding cutting of the trees in gauchar land. As the said Sarpanch Mohanbhai

has to tender the reply of the said notice, he told me to come at Talodara and therefore, they have to go to Talodra. Thereafter, complainant Grishbhai after finishing some work at Jhagadiya Crossing started for Talodra at about 10.30 A.M. and reached at the house of Girishbhai Vasava and called Mohanbhai, Sarpanch of Talodra, at his residence and they were discussing the issue. It is further stated in the complaint that at about 12 o'clock when his car was parked outside the house of said Girishbhai, few persons known to him viz. Rustamkhan, son of Shakurkhan Pathan, Sherkhan Shakurkhan Pathan as well as Ismile Ishaq Ravat of village Koth and Rameshbhai Karsanbhai Patel of Juna Borbhada, came there to meet him and when they all were sitting together, Grishbhai went in the village to bring some cold drink. At that time, at about 12.30 P.M., all of a sudden two Scorpio cars reached at that place, which were belonged to Ramesh Bhana of Valia and Kishorbhai Chhotubhai Vasava. Suddenly, Kishorbhai Chhotubhai Vasava, Mahesh Chhotu Vasava, Dilip Chhotu Vasava and Shanya Vasava of village Haripura and Ramesh Bhana and Kishor Vasava of village Vagal Padi and Fatehsinh Vasava of village Dharoli along with five more persons which he can identify, came out from the cars. It is further stated that they all have attacked the complainant and other persons sitting with him viz. Rustamkhan, Sherkhan, Ismile and Ramesh Patel. It is further stated that amongst them Chhotubhai Vasava and Dilip Vasava were having a revolver in their hands whereas Mahesh Vasava was having Hockey Stick, Shanya was having sword, whereas rest of them having sticks and Codgel and they all have started abusing and threatening him to kill. It is further stated that initially petitioner was working with said Chhotubhai Vasava who was M.L.A. but because his intention was not good, petitioner left him and started working with congress party and for such reason, there was enmity between them for which petitioner has filed affidavit in the Court also.

2. However, so far as actual incident is concerned, it is the say of the complainant that Kishorbhai and Dilip Vasava had shoot out few rounds in air and beaten him on his hand, whereas Maheshbhai has beaten with hockey which resulted into fracture, whereas Ramesh Bhana, Shanya Vasava and Fatesingh Vasava beaten him with stick on his right leg which has also resulted into multiple fracture. It is also alleged that other people have beaten him with sticks on his right hand. It is further stated that as the other people sitting with the complainant namely; Rustambhai, Sherubhai, Ramesh Patel and Ismile etc. had tried to help the complainant, the said Chhotubhai and Kishorbhai with Mahesh, Chhotu etc. had also beaten Rustamkhan, Sherubhai and Ismilebhai and they also received injuries. It is further stated that the intention of all those people was to kill me and that they have broke down the glasses of the vehicle. Their attack resulted into grievous injuries to the complainant and people sitting with him and that those people had given threat also. Considering the incident and injuries caused to the complainant and other peoples, ambulance was called for and all were taken to Patel Welfare Hospital at Bharuch and at the time of lodging complaint, he was admitted in emergency ward of Patel Welfare Hospital.

3. Thus, the complainant in his complaint, gave all details, but the basic allegation is regarding attack by group of people with further allegation of using fire arms. However, so far as fire arm is concerned, there is admission in the complaint that it was not used against any person and the fire was in air, therefore, prima facie, it becomes clear that allegation of fire arms are probably with a view to see that other side may not get bail and there may serious consideration during the trial because of the injuries and charges under the Arms Act. For the purpose, papers of investigation are material to show that whether any fire arms were recovered from any one or not.

4. At present, we are concerned with the impugned order dated 02.01.2014 passed by 2nd Additional Sessions Judge of Ankleshwar in Criminal Misc. Application No. 105 of 2013 by which Kishorbhai Chhotubhai Vasava was granted anticipatory bail.

5. If we peruse the impugned judgment, it becomes clear that the offence is registered under Sections 143, 147, 148, 149, 307, 427, 120(B) of the Indian Penal Code and under Sections 25(1)(a), (b), (d) of the Arms Act, 1959. If we further peruse the impugned judgment, in para 5 of the impugned judgment, the learned Sessions Judge has, after referring rival contentions and documents, recorded that charge-sheet is filed against other co-accused. So far as the charges against respondent No. 2 - Kishorbhai Chhotubhai Vasava is concerned, it appears that the only allegation is regarding beating the complainant and firing in air and there was political rivalry between the parties. Though there was an allegation of using a firearm in air, no blank cartridges were found out from the place of incident. Though there is warrant under Section 70 and though respondent No. 2 is residing at Maljipura, Taluka - Jhagadiya, District - Bharuch, police has never bothered to serve such warrant upon the accused since year 2009 and when the accused came to know about such warrant, they have filed an application for anticipatory bail. It is further observed that all other accused have been granted bail and there is no criminal antecedent of the present accused and only because of pendency of some cases against accused, anticipatory bail cannot be refused when all other accused are granted bail and they all are local residents and ready to abide by all terms and conditions that may be imposed. Therefore, considering the fact that trial may take long time and non-granting of bail may result into pre-trial punishment and infringement of Article 21 of the Indian constitution, the trial Court is of the opinion that he has to exercise the wisdom for granting anticipatory bail to respondent No. 2 - Kishorbhai Chhotubhai Vasava and, therefore, the anticipatory bail with certain conditions was granted.

6. Unfortunately, the learned Sessions Judge has failed to consider the fact that the offence is of the year 2009 and respondent No. 2 - Kishorbhai Chhotubhai Vasava has been shown as absconder. There are as many as nine FIRs against said Kishorbhai Chhotubhai Vasava, out of which, at least two FIRs are under the Arms Act. Details of all such FIRs are disclosed by the Investigating Officer with

his affidavit.

7. Moreover, when FIR was registered in the year 2009 one application for anticipatory bail was already preferred by the petitioner on 03.02.2012 being Criminal Misc. Application No. 50 of 2012. However, the same learned Sessions Judge has, after reasoned order, refused to grant the anticipatory bail on 15.02.2012. Thereafter, present Criminal Misc. Application No. 105 of 2013 was filed on 20.12.2013 and the anticipatory bail is granted by order dated 02.01.2014, whereby the glaring fact has come out that though the incident is stated to be taken place on 15.01.2009, respondent No. 2 herein could not be arrested till 2012 and till the charge-sheet is filed. In the meanwhile, an application for anticipatory bail was filed in 2012 and rejected on 15.02.2012, even though he was not arrested and no charge-sheet is filed against him. Thereafter, once again respondent No. 2 applied on 20.12.2013 for anticipatory bail which was granted by the impugned order. Surprisingly, though Investigating Officer has filed a detailed affidavit in both the bail applications being Criminal Misc. Application No. 50 of 2012 and Criminal Misc. Application No. 105 of 2013 disclosing same details, probably in verbatim and when both the affidavits categorically confirm that respondent No. 2 herein namely; Kishorbhai Chhotubhai Vasava was yet to be arrested and when such affidavits also stated that injury certificate issued by doctor confirms the injuries of the victim and even though the learned Sessions Judge has relied upon such fact in first order dated 15.02.2012, the same learned Sessions Judge has taken the contradictory view in order dated 02.01.2014 and granted anticipatory bail which was, otherwise refused by the same Judge in first application.

8. It cannot be ignored that in both the affidavits, the investigating agency described the nature of the incident. Investigating Agency carried out the investigation which confirms the injuries and weapon used by concerned person as well as the fact that Kishorbhai Chhotubhai Vasava was yet not arrested, and considering the fact that warrant under Sections 70 and 82 which issued against said Kishorbhai Chhotubhai Vasava and fact that fire arms were used at the place of incident. Thereby considering the over all circumstances and non availability of respondent No. 2 - Kishorbhai Chhotubhai Vasava for more that 4 years and when he is wanted in 8 other offences, this is not a case where anticipatory bail can be granted to such an accused even after considering the observations in the case of Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others, .

9. If we peruse the application dated 20.12.2013, the sum and substance of the application, which is only in one page is to the effect that since accused is the member of the political party and since he is fighting for the rights against injustice and torture against Scheduled Tribe People, false complaint is filed against him to brake down his fight and after narrating the brief facts of the place of incident, it is only stated that there is no other allegation except using fire arm by him in the air and there is no allegation that he has injured any witness and that he recently came to know about such fact that Jhagadiya Police

may harass him if arrested and, therefore, anticipatory bail is prayed for. With due respect, the application shows that the accused was probably sure that irrespective of what is stated in application, the same is going to be allowed. It cannot be ignored that petitioner has already filed one similar application in the year 2012 wherein he disclosed all relevant details and in such previous Criminal Misc. Application No. 50 of 2012, the same learned Sessions Judge has passed a detailed order on 15.02.2012 disclosing all relevant information including pendency of the other cases against the accused. It cannot be ignored that in that application also Investigating Officer has filed detailed affidavit with list of all 9 FIRs pending against said respondent and, therefore, statement of the respondent accused in present application is much more material when he does not disclose that as to why he absconded for all these years.

10. Thereby, this is a fit case wherein it can certain be said that the trial Court granted the bail without taking into consideration material facts and circumstances of the case and, therefore, on merits of the order itself, it can be said that it is a decision without following settled legal principles and, therefore, deserves to be interfered by cancelling the order of anticipatory bail, whereby respondent No. 2 has to surrender before the Police which can arrest him in all 9 pending cases, some of which are pending for more than a decade. It cannot be ignored that even if it is argued that there is no substance in the allegation regarding presence or use of fire arms, this is not the only FIR where charges under Arms Act are levelled against the accused, and there is charges under Sections 120B also and that the incident was initiated by the present accused and, therefore, he was master mind of the incident and when he has allowed the co-accused who was brought at the place by him, in his own vehicle to cause grievous injuries to the victim and, therefore, he cannot escape from the graveness of the incident.

11. For coming to such conclusion, this Court has relied upon following decisions:

(A) In the case between Subodh Kumar Yadav Vs. State of Bihar and Another, , the Apex Court has confirmed the cancellation of bail which was granted for the offences committed u/Ss. 498(A), 384, 307 and 406 of IPC considering that all such application cannot be considered as an application for cancellation of bail for breach of any condition of bail when original order granting bail has been challenged on its propensity and more particularly, when it is found that while granting the bail, the trial Court has taken into consideration totally irrelevant documents and exhibited undue haste in deciding the application for bail and the judicial discretion was also not exercised properly. The Apex Court has considered that observations in several reported judgments which are referred in this cited case were not entitled to restrict the power of the superior Court to cancel the bail in appropriate cases on grounds other than breach of condition of bail order. It is further stated that if a superior Court finds that the Court granting bail had acted in irrelevant material and if there was nonapplication of mind or failure to take note of any statutory bar to grant bail, or if there was manifest

impropriety e.g. failure to hear the Public Prosecutor/Complainant where required, an order of cancellation of bail can be made. For arriving at such conclusion, the Apex Court has relied upon several previous decisions also.

(B) In *Guria, Swayam Sevi Sansthan Vs. State of U.P. and Others*, , the Apex Court has reconfirmed the above view that granting of bail should be considered having regard to the gravity of the offence for which the accused had been charged and with reference to the case of *Puran v. Rambilas and Anr. (Supra)*, it is reconfirmed that one of the grounds for cancellation of bail would be whether material evidence brought on record have been ignored and that too without any reason.

(C) In *Lokesh Singh Vs. State of U.P. and Another*, , the Apex Court has though carved out following factors for consideration while dealing with the application for bail, order of bail was set aside when bail was granted without assigning reasons in the case where accused was charged of criminal conspiracy to murder. The relevant Paragraphs need to be reproduced hereunder:

8. While dealing with an application for bail, there is a need to indicate in the order, reasons for prima facie concluding why bail was being granted particularly where an accused was charged of having committed a serious offence. It is necessary for the courts dealing with application for bail to consider among other circumstances, the following factors also before granting bail, they are:

1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;

2. Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

3. Prima facie satisfaction of the Court in support of the charge;

9. Any order dehors such reasons suffers from non-application of mind as was noted by this Court, in *Ram Govind Upadhyay Vs. Sudarshan Singh and Others*, , *Puran Vs. Rambilas and Another* etc. etc., and in *Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another*, .

10. Though a conclusive finding in regard to the points urged by the parties is not expected of the Court considering the bail application, yet giving reasons is different from discussing merits or demerits. As noted above, at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. But that does not mean that while granting bail some reasons for prima facie concluding why bail was being granted is not required to be indicated. 11. In *Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another*, . In para 11 it was noted as follows:

11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of

evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay Vs. Sudarshan Singh and Others, and Puran Vs. Rambilas and Another etc. etc., .

12. It was also noted in the said case that the conditions laid down under Section 437(1)(i) are sine qua non for granting bail even under Section 439 of the Code.

13. In Puran Vs. Rambilas and Another etc. etc., it was noted as follows:

11. Further, it is to be kept in mind that the concept of setting aside the unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in Gurcharan Singh v. State (Delhi Admn.). In that case the Court observed as under: (SCC p. 124, para 16) "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 existing, 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-à-vis the High Court.

Above being the position, we are of the view that the High Court was not justified in granting bail to respondent No. 2. The order granting bail is set aside. The respondent No. 2 who was released on bail shall surrender to custody forthwith. We make it clear that we have not expressed any opinion on merits of the case...

(D) In most of the citations, case of Puran Vs. Rambilas and Another etc. etc., has been relied upon and therefore it would be appropriate to scrutinize said judgment. In such reported case, when Sessions Court has granted bail to the accused and when High Court has cancelled such bail, the Apex Court has

confirmed the cancellation of bail u/S. 437 read with Section 439 of Cr. P.C. holding that concept of setting aside order of bail is different from concept of cancelling order of bail on the ground that accused has misconducted himself or because of the fact that new facts have been arisen. It is also made clear that it is not necessary to go into merits or demerits of the matter and only prima facie evidence is to be looked into. This decision is followed in Deepak Singchi Vs. State of Rajasthan and Another, as well as Bhuvaneshwar Yadav Vs. State of Bihar and Others, . The material part of the judgment would be necessary to reproduce, which reads as under:

8. The High Court has correctly not gone into merits or demerits of the matter. The High Court has noted that evidence prima facie indicated demand of dowry. The High Court has briefly indicated the evidence on record and what was found at the scene of the offence. The High Court has indicated that evidence prima facie indicated that a demand for Rs. 1 lac was made just a month prior to the incident in question. The High Court has stated that the material on record suggested that the offences under Sections 498A and 304A were prima facie disclosed. The High Court has concluded that the material on record, the nature of injuries, demand for Rs. 1 lac and the other circumstances were such that this was not a fit case granting bail. Thus the High Court has given very cogent reasons why bail should not have been granted and why this unjustified erroneous Order granting bail should be cancelled.

9. It is, however, to be noted that this Court has clarified that these instances are merely illustrative and not exhaustive. One such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of this nature and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the Society. Therefore, an arbitrary and wrong exercise of discretion by the trial Court has to be corrected.

10. Further, it is to be kept in mind that the concept of setting aside the unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that accused has misconducted himself or because of some new facts requiring such cancellation...

(E) Recently, in the case of Kanwar Singh Meena Vs. State of Rajasthan and Another, , the Apex Court has reconfirmed that Court has not to undertake meticulous example while granting or refusing bail. However, when statement of witnesses before the Police confirms the prima facie involvement of the accused in crime and when brother of the accused, an IPS Officer, bail granted to accused was cancelled by the Apex Court considering that propensity of accused to tamper with evidence and to interfere with the due course of justice and to flee from justice are not only the considerations to cancel the bail but it can be cancelled even if order of granting bail is legally infirm leading to miscarriage of

justice.

(F) Even in the latest judgment between Ranjit Singh v. State of M.P. And Ors. in Criminal Appeal no. 1545 of 2013 on 27.9.2013, the Apex Court has reconfirmed the above position of law. After referring several previous judgments, the Apex Court has held as under:

... 21. In Chaman Lal v. State of U.P., this Court, while dealing with an application for bail, has stated that certain factors are to be borne in mind and they are:

.... (i) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence, (ii) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant, and (iii) prima facie satisfaction of the court in support of the charge.

(G) In Prasanta Kumar Sarkar v. Ashis Chatterjee, this Court, while emphasizing on the exercise of discretionary power generally has to be done in strict compliance with the basic principles laid down in plethora of decisions of this Court, has observed as follows:

9... among other circumstances, the factors which are to be borne in mind while considering an application for bail are:

(i) whether there is any prima facie or reasonable ground to be believed that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behavior, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail."

(H) The said principles have been reiterated in Ash Mohammad v. Shiv Raj Singh alias Lalla Babu and another .

I) In this context, we may refer with profit to the recent pronouncement in Central Bureau of Investigation v. V. Vijay Sai Reddy wherein the learned Judges have expressed thus:

28. While granting bail, the court has to keep in mind the nature of accusation, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the

accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

We repeat at the cost of repetition that the aforesaid aspects have not been kept in view by the learned Additional Sessions judge and, therefore, we are obliged in law to set aside the order passed by him and we so do. In view of the extinction of the order granting bail, the appellant shall surrender forthwith to custody failing which he shall be taken to custody as per law. Liberty is granted to the appellant to move an application for grant of regular bail. Needless to say, on such application being moved, the same shall be considered on its own merits regard being had to the parameters which have been laid down in afore-stated authorities...

Thereby the Apex Court has cancelled the bail.

12. In view of the foregoing facts, circumstances and discussion, the application is allowed. Thereby, the order dated 02.01.2014 of granting bail to respondent No. 2 - Kishorbhai Chhotubhai Vasava in Criminal Misc. Application No. 105/2013, passed by the 2nd Additional Sessions Judge of Ankleshwar is hereby quashed and set aside, not for misusing the order of bail after its grant, but on the ground that order of bail itself was improper and illegal. Thereby, the application is allowed as aforesaid. Rule is made absolute.

13. Considering the fact that respondent is on bail, it would be appropriate to grant him sufficient time to surrender. Respondent has to surrender before the Investigating Officer within three weeks from today. If respondent fails to surrender before such period, the Sessions Court shall issue necessary warrant against him.

14. Consider the fact that respondent will be under trial prisoner, Sessions Court is directed to conduct the trial on day to day basis. For the purpose investigating agency is directed to keep all the witnesses available before the Court on dates fixed by the trial Court for their evidences.

15. It is made clear that observations in this order are made purely for adjudicating present application only and trial Court shall not influence by any observations made in this order.