
(2011) 10 BOM CK 0170

In the Bombay High Court

Case No : Criminal Application No. 1087 of 2011 in Criminal Appeal No. 315 of 2007

Farooq Abdul Gani Surve

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-10-2011

Acts Referred:

Arms Act, 1959 — Section 25(1)
Constitution of India, 1950 — Article 126, 21
Criminal Procedure Code, 1973 (CrPC) — Section 378, 390, 427, 437A, 441
Information Technology Act, 2000 — Section 74
Penal Code, 1860 (IPC) — Section 120B, 121, 121A, 34, 465

Citation : (2012) BomCR(Cri) 85

Hon'ble Judges : Thipsay A.M., J; Kanade V.M., J

Bench : Division Bench

Advocate : Nitin Sejpal with Ms. Pooja Bhojane, for the Appellant; F.R. Shaikh, Assistant Public Prosecutor, for State, for the Respondent

Judgement

Kanade V.M., J.—This is an application for bail. Brief facts are that the petitioner, alongwith other accused, was tried by the trial Court for the offences punishable under sections 465, 468, 121, 121A, 120B read with section 34 of the Indian Penal Code and also u/s 25(1) of the Arms Act and section 74 of the Indian Information and Technology Act. The learned Ad hoc Additional District and Sessions Judge, Thane was pleased to acquit the petitioner for the offences with which he was charged by the judgment and order dated 22/12/2004. The State preferred an appeal against acquittal vide Criminal Appeal No. 315 of 2007 in this Court and while admitting the appeal, this Court directed that action be taken u/s 390 of the Criminal Procedure Code. Thereafter, the matter was adjourned from time to time for compliance of action u/s 390 of the Criminal Procedure Code.

2. Since the petitioner was not found at his earlier address, a non-bailable warrant was issued against him by this Court by order dated 18/7/2011.

According to the petitioner, he was informed by his neighbours who were residing at the earlier address that the non-bailable warrant had been issued and, therefore, after taking legal advice, he has filed this application in this Court for granting stay to the execution of the non-bailable warrant and for grant of his release on bail, pending the hearing and final disposal of the appeal.

3. The learned Counsel appearing on behalf of the petitioner submitted that the petitioner had changed his residence and was residing at his native place near Ratnagiri alongwith his family members and he was not aware about admission of appeal filed by the State in this Court. He submitted that in order to prove that he was residing at Ratnagiri he has relied upon the copy of his and also his wife's election card and also the ration card, Unique Identification Card of his family, Birth Certificate issued by Ratnagiri Municipal Council in respect of his son and his Permanent Account Number Card.

4. The learned A.P.P. appearing on behalf of the State, after verification of the said documents, submitted that the said documents are genuine and, therefore, it is apparent that the petitioner was not deliberately absconding after non-bailable warrant was issued against him. In view of this, by order dated 29/8/2011, this Court was pleased to cancel the non-bailable warrant which was issued by this Court and released him on bail on his executing P.R. Bond in the sum of Rs. 5,000/- before the trial Court.

5. During the course of arguments, the learned Counsel appearing on behalf of the petitioner made a grievance that in large number of cases though the accused is acquitted by the trial Court, after action is directed to be taken u/s 390 and after he is arrested he continues to languish in jail. He submitted that, in the past also, this Court in the year 2004 and 2009 had given suitable directions to the trial Court to ensure that accused who are acquitted by the trial Court should not continue to languish in jail as it clearly amounted to violation of Article 21 of the Constitution of India. He also submitted that in view of recent amendment to the Cr.P.C. and introduction of section 437A, trial courts are insisting on execution of P.R. Bond with sureties and, as a result, even after the accused is acquitted, he continues to languish in jail. In support of his submissions, he relied upon the following judgments.

1. (State of Maharashtra Vs. Bapu Pandu Maili)¹, reported in 2009(3) Bom. C.R. (Cri.) 528:2010 All. M.R.(Cri.) 120.
2. State of U.P. Vs. Poosu and Another, .
3. (Shaik Mullapalli Shamshad Begum & ors. Vs. Public Prosecutor, High Court of Andhra Pradesh)³, reported in (2004)11 D.M.C. 105(D.B.).
4. State of Punjab Vs. Bachittar Singh Lal Singh and Others, Full Bench.
6. We have heard the learned Counsel appearing on behalf of the petitioner and the learned APP appearing on behalf of the State.

7. It has been brought to our notice that, in large number of cases, though accused are acquitted by the trial Court, they continue to languish in jail during pendency of the appeal against acquittal filed by the State on account of direction given by this Court u/s 390 of the Criminal Procedure Code. Secondly, it is also brought to our notice that the provisions of section 437A are not properly interpreted and on account of likelihood of the victim filing appeal against acquittal, the acquitted accused are directed to furnish P.R. Bond alongwith sureties and, as a result, even after acquittal, those accused who are unable to furnish sureties, continue to languish in jail and, in some cases, on erroneous interpretation of section 437A bail is granted by the Sessions Court to the accused who are convicted on/or before pronouncement of judgment of conviction. Under these circumstances, therefore, though the petitioner is released on bail by our order dated 29/8/2011, it has become necessary to lay down certain guidelines on this issue.

8. Section 390 of the Criminal Procedure Code reads as under:-

390. Arrest of accused in appeal from acquittal.- When an appeal is presented u/s 378, the High Court may issue a warrant directing that the accused be arrested and brought before it or any Subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail.

On the plain reading of the said provision, it is quite apparent that discretion is vested in the High Court to issue warrant directing the arrest of the accused and his production before it or before any subordinate Court who may then commit him to prison, pending disposal of the appeal or admit him to bail. The obvious purpose of giving this power to the High Court is to ensure that the accused who is acquitted by the trial Court is made available during pendency of the appeal against acquittal and, to that extent, his status as accused revives and, at the same time, it has to be borne in mind that principle that accused is presumed to be innocent is confirmed by virtue of the order of acquittal by the trial Court and, therefore, he is no longer an accused and, therefore, under normal circumstances, he is entitled to avail of his liberty during pendency of the appeal. Therefore, if the relevant documents are tendered regarding proof of his permanent residence and ownership of the property then, in such cases, he is entitled to be released on bail as a matter of rule. It has to be also remembered that Mr. Justice Krishna Iyer in his famous judgment has coined a phrase that bail is a rule and jail is an exception. Therefore, Sessions Court should remember that there is all the more reason to immediately release the accused after he is produced before it and his further detention would certainly be viewed as a breach of his fundamental right under Article 21.

9. The Apex Court in State of U.P. Vs. Poosu and Another, has traced the background and the circumstances under which the said provision was inserted in the Cr.P.C. In the said case, the question which fell for consideration before the Supreme Court was : whether the Supreme Court, while granting special leave to

appeal under Article 126 of the Constitution against an order of acquittal passed by the High Court, can pass similar order as is passed by the High Court u/s 390. While answering this question in the affirmative, the Apex Court has traced the historical background of the exercise of such power and also has observed that it does not offend Article 21. The Apex Court has referred to section 427 of the Cr.P.C., 1898 which was re-enacted as section 390 of a new Code of 1973 and has noted that even before its enactment, the High Court, as a matter of judicial practice, had the power pending appeal against the order of acquittal to secure attendance of the accused/respondent by bailable or non-bailable warrant. In this context, it would be relevant to refer to paragraphs 7 to 10 of the said judgment which read as under:-

7 It may be noted that this provision was for the first time enacted in the Code of 1882. But even before its enactment, the High Court as a matter of judicial practice, had the power, pending the appeal against an order of acquittal to secure the attendance of the accused/respondent by bailable or non-bailable warrants. As pointed out by Panigrahi, C.J. in (State Vs. Badapalli Adi)⁵, ILR 1955 Cut. 589.

What was formerly the judicial practice received statutory recognition in the year 1882 when this provision in section 427, Criminal Procedure Code, was introduced.

In (Empress of India Vs. Mangu), ILR 1879(2) All. 349 (which was decided several years before the addition of this provision in the Code), a Full Bench of Allahabad High Court held, that the High Court has the power to cause the arrest and detention of the accused in prison, pending an appeal against an order of acquittal. To the same effect was the decision of the Calcutta High Court in (Queen Vs. Gobin Tewari)⁷, ILR 1876(1) Cal. 281. Again in (Queen-Empress Vs. Gobardhan)⁸, ILR 1887(9) All. 528, Sir John Edge, Chief justice without laying down any inflexible rule, emphasised that it is not desirable that, pending the appeal against acquittal in a capital case, the prisoner should remain at large while his fate is being discussed by the High Court. The ratio of this decision was followed by a Division Bench of Orissa High Court in State Vs. Badapalli Adi (supra).

8. Viewed in this perspective, it is clear that even before the enactment of this provision, the High Court had the power to cause, in its discretion, the arrest and detention in prison of the accused/respondent or his enlargement on bail, pending disposal of the appeal against his acquittal. This power was ancillary to and necessary for an effective exercise of its jurisdiction in an appeal against an order of acquittal, conferred on the High Court by the Code.

9. As far back as 1824, in the English case, (Bana Vs. Methuen)⁹, [2 Bens 228] Best, J., following an older precedent, enunciated the rule that

When an act of Parliament gives a justice jurisdiction over an offence, it impliedly gives him a power to make out a warrant, and bring before him any person

charged with such offence.

10. This is the rationale of section 427. As soon as the High Court on perusing a petition of appeal against an order of acquittal considers that there is sufficient ground for interfering and issuing process to the respondent, his status as an accused person and the proceedings against him, revive. The question of judging his guilt or innocence in respect of the charge against him, once more become sub-judice

10. The High Court, therefore, has discretion of issuing warrant u/s 390. In our view, the said warrant need not necessarily be non-bailable warrant, though section states that he has to be produced before the trial Court, which would ordinarily mean that the said warrant would be a non-bailable warrant. Secondly, since the power is vested in the High Court, the High Court also would be in a position to direct that the accused when produced before the trial Court may be released on bail on his execution of P.R. Bond with or without sureties. The High Court or trial Court may also release him on execution of the same bond and surety which was offered during pendency of the trial. The High Court would be empowered to do so in view of the language used in section 390 and also, in our view, on account of inherent power vested in it u/s 482 of the Cr.P.C. The Division Bench of this Court in State of Maharashtra Vs. Bapu Pandu Mali, 2009(3) Bom. C.R.(Cri.) 528 : 2010 All. M.R.(Cri.) 120 noticed that though the accused was acquitted by the trial Court he languished in jail for a period of five years. The Division Bench has observed in paras 3, 4, 5 and 6 of its judgment as under:-

3. This is a sorry state of affairs in which not only the prosecuting agency but also the courts are involved. This is a reflection on our own system, which needs to be corrected. A person, who is acquitted of the charges by a Court of law, should not remain in jail even for a day after acquittal, unless the order of acquittal is reversed by an Appellate Court. Even if the acquittal of the respondent were to be set aside by this Court today, even then, we cannot justify his detention after his acquittal by the Sessions Court till date.

4. We have perused section 390 of the Criminal Procedure Code, which section only lays down a mechanism by which it is ensured that an acquitted person does not abscond while an appeal is filed against his acquittal. Therefore, we do not feel that there should be any impediment for the courts to release the persons who are acquitted during the pendency of the appeals against acquittal.

5. After hearing the learned amicus curiae and the learned Additional Public Prosecutor, we give the following directions:-

That in case of warrant u/s 390, the Sessions Judge, on production of the persons, shall immediately offer him bail on conditions which are just and proper, and in appropriate cases, the Sessions Judge may also consider release of such persons on personal bond. However, if he learned Sessions Judges are of the view that the surety is not produced or surety is not sufficient, they would

remand the persons to the prison. In that case, they should inform the High Court immediately that the person has been remanded to the custody in case originally, the warrants are issued by the High Court.

6. We are told that such directions were given in year 2004 also, but the learned Sessions Judges have not been following these directions. Therefore, in case, in future, any Sessions Judge is found not to follow the directions, besides taking departmental action against such learned Sessions Judge, he shall also be liable to contempt of this Court

11. We are, therefore, constrained to issue similar directions to the Sessions Court. We have been told that though orders which are passed by the Supreme Court and this Court are shown to the Sessions Court, without justifiable reasons or recording any reasons in writing, directions given by this Court are not followed. It is, therefore reiterated that, in case, in future, if any Sessions Judge is found not to follow the directions, besides taking administrative action against such learned Sessions Judge, he shall also be liable for contempt of this Court.

12. The presence of accused can also be secured in the following manner: -

(1) Name and address of the accused shall be taken on record at the time of pronouncement of judgment by the trial Court

(ii) The accused should submit his local address where he would reside after Order of acquittal as well as address of his native place.

(iii) Declaration of place of residence should be made and proof of it, if any, may be supplied. No insistence should be made about proof of residence if particulars are given.

(iv) The accused - respondent should furnish the addresses of his near and dear relatives.

(v) The accused be also directed to not to leave India without the prior permission of this Hon"ble Court.

(vi) Under certain circumstances, the accused be directed to furnish the details of his passport and/or passport be deposited with the prosecution agency for a period of six months.

(vii) The accused may also be released on his executing the same P.R. Bond and Surety Bond if the accused were on bail pending trial.

(viii) If the accused is not on bail pending trial then he may be released forthwith on P.R. Bond and time be granted to him to furnish surety to the satisfaction of the trial Court.

(ix) The trial Court may also release the accused on cash bail in appropriate cases and they may be directed to furnish surety within a reasonable period.

13. So far as section 437A of Cr.P.C. is concerned, it was incorporated by virtue

of Amendment Act No. 5 of 2009. The aim and object of the said Amendment Act was to ensure that victims are given certain additional rights of filing appeal in three categories of cases. It is brought to our notice that in certain cases even when the accused is convicted, the Sessions Court has released the accused on bail. In Sessions Case Nos. 912/07, 956/07 and 480/09 the following order was passed by the Sessions Court.

CORAM: HIS HONOUR THE 1ST AD HOC ADDL

SESSIONS JUDGE SHRI S.Y. KULKARNI

A.P.P. Shri Kenjalkar for the State present.

Sr. P.I. Ms. Medha Jaiprakash Kadam attached to Churchgate Railway Police Station is present Accused Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 9 produced from J.C.

Advocate Mr. Passbola for accused No. 1 present

Advocate Mr. Shinde for accused Nos. 2, 7 and 9 present

Advocate Mr. Shetty for accused Nos. 3 and 8 is present

Advocate Mr. Rajput for accused No. 4 is present

Advocate Mr. Kumthekar for accused No. 6 is present

Advocate Mr. Wahab Khan for accused No. 5 is present.

Before pronouncing judgment by invoking provision u/s 437A of Cr.P.C. and as accused No. 3 namely Asaitambi and accused No. 7 Kadirawan, were on bail during the trial and during the pronouncement judgment they were taken in MCR, therefore accused No. 3 Asaitambi @ Langada Statta and accused No. 7 Kadirawan are ordered to be released on P.R. Bond of Rs. 40,000/- and furnishing surety of like amount by each. That bail will be forced for further period of 6 months. Before pronouncing judgment by invoking provision u/s 437A of Cr.P.C. the accused Nos. 5 & 6 are directed to furnish P.R. Bond of Rs. 20,000/- and furnishing surety of like amount, that surety and P.R. Bond will be in force for further period of six months in case any appeal is preferred against the present judgment and order. Accused Nos. 5 and 6 are permitted to furnish surety on or before 19.5.2011.

In this context, therefore, it is necessary to consider the said provision 437-A which reads as under: -

437-A. Bail to require accused to appear before the next Appellate Court.- (1) Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the Higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months.

(2) if such accused fails to appear, the bond stand forfeited and the procedure u/s 446 shall apply.

14. In our view, though the section states that trial Court may direct the accused to execute the P.R. Bond with sureties the said directions of execution of P.R. Bond with sureties will have to be treated as directory order and not mandatory order since the said provision will have to be read alongwith other provisions which are there in the Cr.P.C. viz. Sections 441, 445 and, therefore discretion would vest in the trial Court of directing the accused to execute a P.R. Bond and also ensure that his presence is secured in the manner as stated aforesaid in para 13 above.

15. From the language of section 437A, it is apparent that the said provision is applicable only in cases where the trial Court acquits the accused and it would not be applicable on conviction of the accused. All the Sessions Court are, therefore, directed not to release the convicted accused on bail under this provision. In the case of Hussainara Khatoun and Others Vs. Home Secretary, State of Bihar, Patna, the Supreme Court had expressed its anguish over the shocking state of affairs in regard to administration of justice in the State of Bihar when it noticed that alarmingly large number of men, women and children were behind bars for years, waiting trial in courts of law even in cases where offences with which some of them were charged were trivial and, even if proved, they would not warrant punishment for more than few months or perhaps for a year or two and yet, they were languishing in jail for a period ranging from 3 to 10 years even without trial. It appears that trials and tribulations of the accused are not over even after they are acquitted by the trial Court and merely because appeal against their acquittal is pending in this Court, they continue to languish in jail. The State of Maharashtra is, therefore, directed to find out number of prisoners who fall in this category and who are in jail even after they are acquitted by the trial Court merely because they are not in a position to furnish surety and report to that effect be submitted to this Court within a period of eight weeks. With these directions, application is disposed of.