
(1991) 11 GUJ CK 0007
In the Gujarat High Court

Haji Abdulla Haji Ibrahim Mandhra and Another	APPELLANT
Vs	
Supdt. of Customs and Others	RESPONDENT

Date of Decision : 22-11-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 389, 397, 439
Customs Act, 1962 — Section 135, 135

Citation : (1992) 1 GLR 144

Hon'ble Judges : B.J. Shethna, J

Bench : Single Bench

Judgement

B.J. Shethna, J.—The petitioners have filed this Revision Application before this Court against the impugned order passed by the learned Sessions Judge, Kutch at Bhuj on 24-9-1991 in Cri. Revn. Appln. No. 64 of 1991. The learned Sessions Judge allowed the Revision Application filed by the respondent No. 1-Superintendent of Customs against the order passed by the learned Chief Judicial Magistrate, Kutch at Bhuj on 3-9-1991 releasing the petitioners on bail in connection with the offence committed by them u/s 135 of the Customs Act (hereinafter referred to as "the Act").

2. Mr. Kapadia, learned Advocate for the petitioners submitted that except the retracted statement of the co-accused there is no other evidence to involve the petitioners for the offence u/s 135 of the Act for smuggling silver worth more than Rs. 6/- crores. Such evidence is no evidence in the eye of law and on such evidence, no Court can convict the petitioners, therefore, the petitioners should be released on bail.

Merely because the statement of the co-accused recorded u/s 108 of the Act is retracted subsequently by the accused, it cannot be said that it is no evidence. Conviction can be based by the Court even on the sole retracted statement of the co-accused recorded u/s 108 of the Act, provided that the Court is satisfied that the said retracted statement of the co-accused is otherwise reliable and trustworthy, after considering the attending circumstances of the case. At the

most it can be said that it would be risky to base conviction on the sole retracted statement of the co-accused; but it can never be said that no conviction can be based on the retracted statement of the co-accused. If the accused cannot be convicted on the basis of the retracted statement of the co-accused, then the accused would try his best to see that his co-accused retracted his statement which he has made u/s 108 of the Act and in that case, the whole purpose and object behind Section 108 of the Act will become nugatory. Thus, there is no merit and substance in the above submission made by Mr. Kapadia, therefore, it fails and is rejected.

Even if I had to hold that there is insufficient material against the accused in the nature of retracted statement of the co-accused while considering the question of grant of bail on this material, the bail should be refused in view of the fact that offences under the Customs Act are economic offences which are against the Nation and if it is not seriously viewed, it will ruin the economy of our country. I am supported in my view by the judgment of the Supreme Court in the case of *State Vs. Jaspal Singh Gill*, . It was a case under the Official Secrets Act; but the same principle which is enunciated by the Supreme Court will squarely apply in this case also. Therefore, also the above submission raised by Mr. Kapadia is required to be rejected.

3. Mr. Kapadia next contended that after considering the fact that both the co-accused have retracted their statements from the Jail, within two days and thereafter even a criminal complaint was filed by each co-accused before the Court of learned Chief Judicial Magistrate at Bhuj against the Police personnel and Custom Officials alleging that the co-accused were threatened and beaten and therefore, this Court (Coram: V.H. Bhairavia, J.) in this order of granting anticipatory bail in Cri. Revision Application No. 944 of 1991 held that the statements of the co-accused were recorded under threats and coercion. Therefore, he has submitted that it was not open to the learned Sessions Judge to arrive at a different finding and to take a different view while considering the regular bail application and to set aside the order passed by the learned Chief Judicial Magistrate releasing the petitioners on bail. He also submitted that even I am bound by the order passed by my learned brother V.H. Bhairavia, J. and I also cannot take a different view than the one which is taken by my learned brother V.H. Bhairavia. J.

It is true that my learned brother V.H. Bhairavia at the time of passing of the order granting anticipatory bail did observe that the statements of the co-accused were recorded under threats and coercion. However, with greatest respect to my learned brother V.H. Bhairavia, J., I cannot agree with the same. In my view, it is too early at this stage for any Court to arrive at a finding that the statements were recorded under threats and coercion. That finding can only be given at the conclusion of the trial after the evidence is led before the Court and the witnesses are duly cross-examined before the Court. At this stage of the matter, the Court has to proceed upon the assumption that the statements of the

co-accused were voluntary. Merely because the co-accused have retracted their statements from the Jail within two days after they were sent to judicial custody and filed criminal complaints against the Police personnel and Customs officials, within few days thereafter, can never be considered as the evidence by the Court at this stage to hold that the statements were recorded under threats and coercion. However, as Mr. Kapadia insisted that I should give reasons at this stage as to how it cannot be said that the statements were recorded under threats and coercion? Therefore, I am compelled to deal with the same. I have gone through the three statements of each co-accused recorded on three different dates, i.e., on 20th, 21st and 23rd May, 1991. If I discuss the same here, it may prejudice the accused during the trial, therefore, I have refrained myself from setting out the reasons in detail. But prima facie, it appears to me that the facts disclosed in the statements by both the co-accused and the fact that when both of them were produced on 23-5-1991 after their third and last statement was recorded by the customs authorities before the learned Chief Judicial Magistrate, they were asked about the ill-treatment, if any, meted out to them by the customs officials by the learned Magistrate but they have not made any complaint about such ill-treatment. They have not stated that their statements have been recorded by the customs authorities under threats and coercion. Therefore, at this stage, prima facie it can be, said that the statements were voluntary.

4. It appears that the learned Chief Judicial Magistrate was swayed away with the observations made by this Court (Coram: V.H. Bhairavia, J.) While granting anticipatory bail to the petitioners, that except the statements of the co-accused, which are retracted one, there is no independent evidence against the petitioners and said statements were recorded under threats and coercion and the action of the customs authorities was arbitrary. In addition to the above finding, the learned Chief Judicial Magistrate was more impressed with the argument advanced on behalf of the petitioners that they are socio-politically leading persons. He also observed that there is no reason to believe that the petitioners will not be available at the time of trial, if they are released on bail. Therefore, the learned Magistrate released the petitioners on bail on certain conditions.

The learned Sessions Judge in the Revision Application filed by the customs department set aside the above order passed by the learned Magistrate and cancelled the bail. The learned Sessions Judge has considered the fact that even though anticipatory bail was granted by the High Court of Gujarat (Coram: V.H. Bhairavia, J.) in that very order, it has been made clear by the Court that the Competent Court will dispose it of in accordance with law having regard to all the attendant circumstances and the material available at the relevant time uninfluenced by the fact that anticipatory bail was granted. The learned Sessions Judge therefore, held that the learned Magistrate was influenced by the order passed by the High Court granting anticipatory bail to the petitioners and without considering the attendant circumstances and relevant material on record, has ordered to release the petitioners on bail. The learned Sessions Judge considered

the attendant circumstances which were not considered by the learned Chief Judicial Magistrate, viz., (1) The D.S.P., Kutch at Bhuj received an information on 6-5-1991 that silver is going to be smuggled in Kutch. Patrolling was intensified; but inspite of that, silver worth more than Rs. 6/- crores was brought to Kutch and said information was received on 16-5-1991. Both the informations revealed that the petitioners are connected with smuggling said silver. The police recovered 248 silver bars worth more than Rs. 6/- crores and the same was subsequently seized by the customs department. (2) On 20-5-1991, first statement of both the co-accused were recorded and on their information, three more silver bars worth more than lacs of rupees were recovered. Thereafter, on 21st and 23rd of May 1991, again their statements were recorded and all three statements clearly involved both the petitioners. (3) The D.S.P., Kutch and Assistant Collector, Customs refuted the allegations made by the petitioners against them that the statements of the co-accused were recorded under threats and coercion and filed an affidavit to that effect stating that false complaints have been filed by the co-accused and the statements of the co-accused were voluntary.

The learned Sessions Judge also considered various judgments of the Supreme Court, this Court and other High Courts and mainly relying upon the judgment of the Supreme Court in the case of Jaspal Singh Gill (supra) held that the petitioners are involved in smuggling of silver worth more than Rs. 61- crores which is a serious economic offence against the Nation. Therefore, the learned Sessions Judge found that the order releasing the petitioners on bail passed by the learned Chief Judicial Magistrate is improper, if not illegal or incorrect. Therefore, he allowed the Revision Application and set aside the order passed by the learned Chief Judicial Magistrate releasing the petitioners on bail.

5. In my view, even though this Court (Coram: V.H. Bhairavia, J.) has observed that the statements of the co-accused were recorded under threats and coercion, still it was open to the learned Sessions Judge to consider the entire material on record and attendant circumstances of the case and come to a different conclusion while considering the Revision Application filed by the customs department against the order passed by the learned Chief Judicial Magistrate releasing the petitioners on bail. The order passed by the learned Chief Judicial Magistrate releasing the petitioners on bail was based on totally irrelevant considerations, therefore the learned Sessions Judge was fully justified in setting aside the order passed by the learned Magistrate in Revision. As stated earlier, even this Court (Coram: V.H. Bhairavia, J.) has also made it clear in the operative part of the order that competent Court while deciding the regular bail application should consider the attendant circumstances and the material available without being influenced by the fact that anticipatory bail was granted. Thus, there is no substance in the above contention raised by Mr. Kapadia and therefore, it fails and is rejected.

6. Mr. Kapadia next contended that the learned Sessions Judge was exercising his

revisional powers u/s 397 of Cr. P.C. merely because he has come to the conclusion that the order passed by the learned Magistrate was improper, he could not have set aside the order passed by the learned Chief Judicial Magistrate.

I have already discussed above that the learned Chief Judicial Magistrate has committed an error in releasing the petitioners on bail on totally irrelevant considerations, therefore, the learned Sessions Judge was fully justified in exercising his revisional jurisdiction u/s 397 of Cr. P.C. and setting aside the said order. In substance, it was a bail application and bail can be granted or refused by the learned Sessions Judge u/s 439 of Cr. P.C. In the peculiar facts and circumstances of the case, if the learned Sessions Judge had not exercised his Revisional powers u/s 397 of Cr. P.C. then perhaps, it could have been said that he had failed to exercise his powers. However, fortunately the learned Sessions Judge by giving very good reasons on sound principle of law considering the entire material on record of the case has set aside the order passed by the learned Chief Judicial Magistrate releasing the petitioners on bail. Therefore, the above contention raised by Mr. Kapadia also has no merit and the same is rejected.

7. Mr. Kapadia next contended that the petitioners are socio-politically leading persons and the petitioner No. 1 is the Vice-President of Janta Dal (G) and is also the Chairman of Fisheries Board of the State of Gujarat, therefore, both the petitioners should be released on bail. If both the petitioners cannot be released on bail, at least petitioner No. 1 should be released on bail. Mr. Kapadia further submitted that the learned Chief Judicial Magistrate has also rightly considered the same and released the petitioners on bail.

In my view, when it is alleged against the petitioners that they are involved in the offence under the Customs Act for smuggling silver worth more than Rs. 61-crores and when the learned Sessions Judge found that the offence is a serious economic offence which will ultimately ruin the economy and break the back bone of our country, then merely because the petitioners or petitioner No. 1 particularly, is a leading political personality, would not be a ground for the Court to release him and/or them on bail. In the eye of law, all the accused persons are the same either they are rich or poor or having high status in society or in politics. The Nation is greater than the individual who is having high status either in society or in politics. When such individual is alleged to have been involved in a serious offence which is against the Nation, then he cannot be released on bail.

The learned Sessions Judge has rightly relied upon the judgment of the Supreme Court in case of Jaspal Singh Gill (supra) and has held that the nature of the offence has to be considered at the time of considering the question of grant of bail. I am also bound by the judgment of the Supreme Court in Jaspal Singh Gill's case (supra) and I am in complete agreement with the order passed by the learned Sessions Judge of cancelling the bail granted to the petitioners by the learned Chief Judicial Magistrate. Thus, there is no substance in the above

contention raised by Mr. Kapadia and therefore, it fails and is rejected.

8. Lastly Mr. Kapadia submitted that only on two grounds the order passed by the learned Chief Judicial Magistrate could have been cancelled by the learned Sessions Judge in Revision in exercise of his revisional powers, that (1) if the petitioners are released on bail, they will jump the bail and (2) if they are released on bail then they may tamper with the prosecution evidence. In support of his submission he has relied upon the judgment of the Supreme Court in the case of Bhagirathsinh Judeja Vs. State of Gujarat, . He pointed out to me that the learned Sessions Judge has not at all found in his impugned order that if the petitioners are released on bail, either they will jump the bail or they will tamper with the prosecution evidence, therefore, the order passed by the learned Sessions Judge is required to be set aside.

It is true that nowhere in his order the learned Sessions Judge has found that the petitioners, if released on bail, they will jump the bail or tamper with the prosecution evidence. It is equally true that the petitioners remained on bail upto 7-10-1991 till they themselves surrendered to judicial custody. But this Court can certainly consider that whether the accused are likely to jump the bail or not? if they are released on bail. Though, no specific finding is given by the learned Sessions Judge to the above effect, the learned Sessions Judge did take into consideration the fact that as soon as the goods were seized, both the petitioners disappeared. Several attempts were made by the customs department to serve them with the summons to remain present before them for interrogation; but they evaded the service of summons. When the anticipatory bail application was moved before him, though directed by him, the petitioners did not remain present before the Court. The petitioners appeared before the learned Chief Judicial Magistrate only after the High Court granted anticipatory bail. This conduct of the petitioners shows that if they are released on bail, they are likely to jump the bail. I must state that after the learned Sessions Judge allowed the Revision Application and set aside the order passed by the learned Chief Judicial Magistrate releasing the petitioners on bail on 24-9-1991, on an application submitted by the petitioners, he himself granted ten days' time to enable the petitioners to obtain necessary orders from this Court. It is interesting to note that though the certified copy of the order was received by them well in time, this Revision Application was filed on 3-10-1991 and moved before me on 4-10-1991. On 4-10-1991 the matter was heard from 2-45 p.m. to 7-00 p.m. at length by me and further hearing was kept on 5-10-1991. The request to suspend the order passed by the learned Sessions Judge cancelling the bail or to grant interim bail during the pendency and final disposal of this Revision Application was specifically turned down by me. But to my utter surprise, I was told on 5-10-1991 by Mr. Naik, learned Advocate for the Customs Department that on 4-10-1991 the petitioners approached the learned Sessions Judge through their Advocate and prayed for extending the period to surrender, by 30 days by suspending the operation of the order passed by the learned Sessions Judge on 24-9-1991, on the ground that though the Revision Application is filed

in the High Court on 3-10-1991, the same is not likely to reach for hearing before the High Court. The learned Sessions Judge has further extended the time upto 6-10-1991. In that view of the matter, by my order dt. 5-10-1991, I called for the report of the learned Sessions Judge that after having filed a Revision Application before this Court, under what powers and under what circumstances, he has extended the time, for two days. Said order was communicated to the learned Sessions Judge on 5-10-1991 itself, telephonically by the Additional Registrar of this Court. The learned Sessions Judge submitted his report. In his report he has stated that he was given to understand that the Revision Application filed before the High Court is not likely to reach for a couple of days and therefore, in the interest of justice only he has granted two days' time and extended the order upto 6-10-1991. Thus the modus operandi of the petitioners has become clear that here are the persons who can try their best to see that they did not surrender and for that even the learned Sessions Judge was also misled by them. Not only that when the matter was kept for further hearing on 9-10-1991 by me, again I was told by Mr. Naik, learned Advocate for the Customs that on 7-10-1991 another attempt was made by the petitioners before the learned Sessions Judge by submitting an application to further extend the time. Obviously, in view of my order passed on 5-10-1991 that application was rejected by the learned Sessions Judge. If my order was not communicated to the learned Sessions Judge on 5-10-1991, perhaps the learned Sessions Judge might have extended the time. It appears that realising the fact that if they will not surrender, then the allegation of the customs department can easily be accepted by this Court that if the petitioners are released on bail, then they are likely to jump the bail, therefore, they produced themselves before the learned Chief Judicial Magistrate on 7-10-1991 and thereafter they were taken in judicial custody. In view of these facts, in all probability if the petitioners are released on bail, then they might jump the bail and they will not make themselves available during the trial.

Mr. Kapadia pointed out that though they remained on bail, they have not misused the bail by tampering with the evidence of prosecution witnesses. However, Mr. Naik, learned Advocate submitted before me that the fact that after both the co-accused gave three statements when they were sent to judicial custody, within two days thereof, they retracted their statements and within few days thereafter they have also even filed false criminal complaints against the Police personnel and Customs officials, therefore, a reasonable inference can be drawn that it was done at the instance of the petitioners only. Thus, the very fact that even prior to obtaining anticipatory bail, they have managed to see that the co-accused retract their statements. In the circumstances, if the petitioners are released on bail, they will definitely try to tamper with the evidence which is against them, because they are involved in a serious offence under the Customs Act for smuggling of silver worth more than Rs. 61- crores. Mr. D.K. Trivedi, learned P.P. for the State also fully supported Mr. Naik and seriously opposed this application of the petitioners for releasing them on bail. In my view there is

much force in the submission made by Mr. Naik and Mr. Trivedi that if the petitioners are released on bail, they are likely to tamper with the prosecution evidence. Therefore, the petitioners cannot be released on bail.

9. At the fag end of the arguments, Mr. Kapadia faintly submitted that the petitioner No. 1 is falsely involved in this case by the customs department. In fact there is no material against the petitioner No. 1, therefore, when a proposal was made by the customs department to detain him under Cofeposa, the State Government has turned down the same. Therefore, this Court must hold that there is no material against the petitioners in the criminal case also.

Mr. Naik conceded that the proposal made was turned down by the State Government. However, he submitted that the customs department is contemplating to make a proposal to the Central Government to detain the petitioner No. 1 under Cofeposa.

Be that it may. Merely because the State Government has turned down the proposal to detain the petitioner No. 1 under Cofeposa on the ground that there is no material or the material is insufficient to detain the petitioner No. 1 under Cofeposa can never become a matter of binding nature to this Court to hold that there is no evidence or the evidence is insufficient. As held by me, at this stage there is evidence on which the bail can be refused. Then I do not find any substance or merit in this contention raised by Mr. Kapadia, therefore, it fails and is rejected.

10. As stated by me earlier, learned Sessions Judge after allowing the Revision Application of the customs department and cancelling the order of bail granted by the learned Chief Judicial Magistrate in favour of the present petitioners, stayed the operation of his order upto 4-10-1991 on an application by the accused-petitioners. Thereafter, again on 4-10-1991 the learned Sessions Judge suspended his own order upto 6-10-1991. By my order dt. 5-10-1991 I called for the report of the learned Session? Judge and the learned Sessions Judge in his report dt. 6-10-1991 has stated that he further suspended his own order for two days, because be was misled by the petitioners" Advocate and he was given to understand that though the Revision Application is filed against his order before the High Court on 3-10-1991, it is not likely to reach for hearing for couple of days. Therefore, in the interest of justice, he has suspended his own order for two days only. He has also stated in his report that he suspended his own order applying the anology of Section 389 Criminal Procedure Code.

There is no provision in Criminal Procedure Code under which power is given to the Sessions Court to suspend its own order of cancelling the bail granted by the learned Magistrate to the accused for enabling the accused to approach the High Court, Once the Sessions Court passed an order cancelling the bail, the Sessions Court cannot suspend the operation of its own order even for few days. The Court cancels the bail when there is likely-hood of the accused being jumped the bail and not making himself available during the trial and/or the possibility of the

accused tampering with the evidence of prosecution and also the gravity, seriousness and nature of the offence in which he is involved. Therefore, once the bail is cancelled, there is no question of suspending its own order.

11. In my view, the analogy of Section 389 Criminal Procedure Code for suspending its own order cannot be applied by the Court. Section 389 Criminal Procedure Code is a distinct provision which deals with the question of continuing the person on bail even after conviction, which cannot be applied by the Court, if the Court cancels the bail granted by the subordinate Court, while deciding regular bail application.

Even on the analogy of Section 389 Criminal Procedure Code the learned Sessions Judge could not have suspended his own order. Section 389(3) Criminal Procedure Code provides that where the convicted person satisfies, the Court by which he is convicted, that he intends to prefer an appeal, the Court shall order that the convicted person be released on bail, where such person was already on bail, is sentence to imprisonment for a term not exceeding 3 years. Thus, where the sentence is upto three years, then only the Court can release the person on bail, if he is on bail during trial. If the punishment is more, then in that case, the Court has no power to release the accused on bail. The present petitioners-accused are involved in offence u/s 135 of the Act and the value of the smuggled goods is more than Rs. 61- crores and the punishment which is provided u/s 135 of the Act is upto seven years. If, in this case, the prosecution is able to prove the case against the accused, then looking to the value of the smuggled goods, no lesser punishment than the punishment of 7 years can be imposed by the trial Court. Therefore, the learned Sessions Judge ought not to have suspended his own order. That apart, even Section 389 Criminal Procedure Code provides that for special reasons, the bail can be refused, even though the accused is on bail. In that view of the matter also the learned Sessions Judge ought not to have suspended his own order.

What would happen if the Sessions Court after cancelling the order of bail granted by the learned Magistrate, does not suspend its own order? The accused will have to be taken in judicial custody and at the most the accused has to remain in judicial custody. The accused can come out if ultimately he is granted bail by the High Court. Thus, till the High Court grants the bail, the accused has to remain in Jail for few days and nothing more will happen in that situation.

But when the Sessions Court cancelled the bail and thereafter if it suspends its own order even for few days, then in all probability the accused who is charged with the offence would be tempted to misuse the same by jumping the bail or tampering with the prosecution evidence. In such situation, the damage which would be done would not be repairable. The very purpose and object of not granting or cancelling the bail might be frustrated in such cases. Therefore, after having cancelled the bail, the Court should not suspend its own order, and the Court must see to it that the accused is taken in judicial custody.

12. In this referred case, on application submitted by the petitioners-accused, the learned Sessions Judge suspended his own order for a further period of two "days even though it was stated before him that against his order, Revision Application is already filed. No, doubt, it is true that the learned Sessions Judge was misled by the petitioners" Advocate by stating that though Criminal Revision, Application is filed on 3-10-1991, it is not likely to reach for hearing and with caution the learned Sessions Judge has suspended his own order for a further period of two days only in the interest of justice as stated by him. The learned Sessions Judge was completely misled by the Advocate for the petitioners. Once it is brought to the notice of the Court that against its own order an application or proceedings is filed before the higher Court, then the Court should at once stay its hands and should not touch that matter further and should refrain itself from passing any order in that matter and should relegate the parties to approach the Higher Court for obtaining appropriate orders. In this case, the learned Sessions Judge has committed an error in suspending his Own order for a period of two days even though it was made known to him that the Revision is already filed against his own order in the High Court, which not proper.

13. In view of the above discussion, there is no merit or substance in any of the contentions raised by Mr. Kapadia in this petition and therefore, this Revision Application is required to be rejected. At this stage, I may state that Mr. Naik and Mr. Kapadia learned Advocates for the respective parties have cited number of authorities and an affidavit is also filed on behalf of customs deptt. Not only that personal affidavits have also been filed by Mr. Kapadia and Mr. Naik. However, in view of the above discussion they are not required to be dealt with, as I am of the opinion that the learned Magistrate has committed an error in releasing the petitioners on bail and the learned Sessions Judge has rightly allowed the Revision Application filed by the customs department and set aside the order passed by the learned Magistrate releasing the petitioners on bail.

In the result, this Revision Application fails and is dismissed.