

(1996) 06 GUJ CK 0010
In the Gujarat High Court

Harivallabh Parikh

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 17-06-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 104, 115, 96
Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 438, 439
Penal Code, 1860 (IPC) — Section 114, 376
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 18, 3(1)(XII)

Citation : (1997) 1 GLR 638

Hon'ble Judges : N.N. Mathur, J

Bench : Single Bench

Judgement

N.N. Mathur, J.—The petitioner-Harivallabh Parikh, apprehending the arrest in Cr.R. No. I-110 of 1996 at Chhota Udaipur police station for offences under Sections 376, 114 of I.P.C. and Section 3(1)(XII) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, has approached this Court by way of Special Criminal Application under Article 226 of the Constitution of India, seeking direction not to arrest him. The say of the petitioner is that he is a well-known social worker and has rendered services to the tribal people for five decades. It is stated that he established the Anand Niketan Ashram, at Rangpur in Baroda district in the year 1948 and its activities covers 3,296 villages spread in 20,000 kms. having a population of approximately 25 lakhs. The Institution imparts vocational education in several disciplines for the upliftment of Scheduled Castes, Scheduled Tribes and other down-trodden people. The petitioner says that National Citizenship Award was presented to him for his selfless services in the field of social work by spreading the concept and implementing the system of open Courts, co-operatives, adult education and awakening awareness among women. It is further stated that a false case has been concocted against him by his political rivals to settle the score with him. According to the petitioner, the immediate cause of annoyance is that he blessed

Shri Ramsing Rathwa, who contested election from Chhota Udaipur Constituency on the Ticket of Congress (Tiwari). This was not liked by Shri Narayanbhai Rathwa, the Sitting Member of the Parliament. The case has been fabricated with the help of Manjuben, a mid-wife in the hospital, who is none else but the wife of Shri Narayanbhai Rathwa. The allegation against the petitioner is that he committed rape on a girl named Geeta, who was a student of the said Ashram. Geeta belongs to Tribal community and as such, in addition to offence under Sections 376, 114-I.P.C., the petitioner is also charged for offence u/s 3(1)(XII) of the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "the Act of 1989").

2. Shri H.D. Kharat, Circle Inspector, Chhota Udaipur has filed an affidavit-in-reply and has submitted that the prosecutrix Geetaben was subjected to rape many times by the petitioner, while she was staying in the Ashram managed by the accused-applicant. It is stated that she was undergoing the training of sewing/ tailoring. The allegation of political bias has been denied.

3. The prosecutrix-Geetaben has filed two affidavits through her Counsel Shri K.B. Pande. She has disclosed her age as 20 years. A preliminary objection has been raised with respect to the maintainability of this petition under Article 226 of the Constitution of India. On the merits of the case, it is submitted that the petitioner is highly influential person and false statement has been recorded by the police in order to create contradictions between the private complaint and the statement recorded by the police. She has stated that a false name of Rameshbhai has been introduced. She never gave the name of either Ramesh or Raimal. She has given details as to how the rape was committed on her and other inmates of the Ashram. Second affidavit has been filed on 11-6-1996. Alongwith the said affidavit, certain papers have been produced to throw light on the criminal conduct of the petitioner during the period 1966 to 1994. The learned A.P.P. has produced the original record. It contains opinion of some police officers time to time about the character of the petitioner.

4. The sequence of events as culled out from the petition, various affidavits and the police papers, appears to be that the victim Geetaben (who will be hereinafter referred to as "V") had gone to attend the marriage ceremony on May 14, 1996 in village Khadakwada alongwith other friends. She was carrying an advance pregnancy She developed labour pain of which she appraised the accused-petitioner, who gave her two tablets. On the early morning of May 15, 1996, she boarded a truck alongwith her sister and friends, but the pain became severe and as such, her other girl friends asked the driver to stop the vehicle. They got down at a Petrol Pump, at Chhota Udaipur. She delivered a dead female child on road. It does not appear as to who informed the hospital authorities, but it appears from the statement of Niranjانبhai, ambulance driver, that Manjulaben Narayanbhai Rathwa asked him on telephone to immediately proceed to the petrol pump where a girl is in a serious condition, as she has delivered a child. "V" was brought to the hospital at Chhota Udaipur alongwith the dead

foetus. The foetus was buried by the peon of the hospital under the instructions of the hospital authorities. As it was a medico-legal case, they had constable available in the hospital who recorded the statement of "V". She stated that she was having love affairs with one Rameshbhai Tadvī for the last two years and she was conceived by him. By the evening, the mother of the "V" viz. Kamliben also arrived. In the morning of May 16, 1996, "V" left the hospital alongwith the mother Kamli without informing the hospital authorities. The police recorded the statement of the mother and father of the "V" on May 19, 1996. It reveals from their statements that the "V" passed the SSC Examination in the year 1992. She was admitted in December 1994 for taking the tailoring vocational training in the Ashram of the petitioner. She had undergone a training of 1 1/2 years and for that, she stayed in the Ashram upto March 1996. The parents also stated that "V" disclosed that she was being conceived by one Rameshbhai Tadvī. The statement of "V" was again recorded on May 19, 1996 while she was at her residence in village Nani-Sankal. She repeated the name of Rameshbhai and further stated that she did not go for abortion as she was to be married with him. She also stated that Rameshbhai is employed in Narmada Canals. The statements of some other witnesses were also recorded. The police also procured a School Leaving Certificate which indicates the date of birth of the "V" as 01-06-1976. There was some news report with regard to the incident which, according to the "V", was incorrect and as such, "V" alongwith her mother Kamli went to Chhota Udaipur and consulted Advocate Mr. Chandubhai. The "V" complained to the Advocate that the police is working under the influence of Harivallabh Parikh, who is the real accused of the case and they are making a false case to hush up the matter and to give bad name to her. The Counsel advised them to file a private complaint. A private complaint was preferred under the instructions of "V" and was filed in the Court of the J.M.F.C. Chhota Udaipur on May 21, 1996. In the said complaint, she had stated that she alongwith other 40 other students stayed in the Ashram for taking vocational training of tailoring. She also stated that the accused Harivallabh used to call the girls in his bed-room through watchman Chandubhai for leg-massage. She has further stated that, after some time of her admission, she was called to the bed-room of the accused. She was being raped by the accused on account of which she became pregnant. She disclosed this fact to the petitioner, on which he advised her to go for abortion and for that, he would pay the sum, but the accused neither arranged the abortion nor paid the sum.

5. Learned Magistrate, considering the facts of the case, keeping in view that the complaint was filed against the Ashram Sanchalak, a well-known figure in the public life and the local police was not investigating the matter in effective manner, directed the further investigation to be carried out by the Special I.G.P., C.I.D. (Crimes) Ahmedabad u/s 156(3) of the Cr.P.C. Learned Magistrate observed that, such direction is necessary for trustworthy, effective, responsible and careful investigation of the case. The case was registered as Inquiry Case No. 9 of 1996.

6. After this order, the local police, instead of transferring the matter to the I.G.P., as directed by the learned Magistrate, registered a fresh case on the basis of the alleged oral report of the "V". The said case has been registered as Cr.P.C. Case No. I-110 of 1996.

7. The present petition case up before this Court for admission on June 4, 1996. this Court, while issuing the notice to the Public Prosecutor, directed not to arrest the petitioner. The matter again came up before this Court on June 7, 1996. On June 7, 1996, Mr. K.B. Pande, learned Counsel filed an affidavit of the "V" before this Court. A complaint was made by the learned Counsel Mr. Pande that, inspite of the fact that the learned Magistrate, by his order dated May 21, 1996, directed that investigation be conducted by the Special I.G.P., C.I.D. (Crimes), Ahmedabad, the investigation has not yet been transferred and on the contrary, the local police has registered a fresh complaint on the basis of the alleged oral report of "V" on May 25, 1996. On the other hand, the learned Counsel for the petitioner complained that the petitioner has been falsely implicated at the instance of disgruntled political leaders of Chhota Udaipur. The "V" a 20 year old girl has been set against him by those politicians in order to give a bad name to the Ashram. Their entire purpose is to get the petitioner arrested, to insult and humiliate him and further lower down his dignity in the eyes of people, particularly the tribals. Thus, considering the peculiar facts of this case, this Court by order dated June 7, 1996 directed that, as ordered by the learned Magistrate, the investigation be forthwith handed over to the Special I.G.P., C.I.D. (Crime), Ahmedabad on the 7th June itself. The petitioner was also directed to appear before the Special I.G.P. on June 8, 1996 at 10.00 a.m. for interogation. A direction was also given that, if the investigating agency so desires, may get the petitioner medically examined by a Board consisting of not less than three doctors.

8. In pursuance of the order passed by this Court, the petitioner appeared before the Investigating Officer and the accused-petitioner has also been examined by the Panel of Doctors. It appears that the Deputy Superintendent of Police (Crime) visited the Ashram. He also recorded the statement of the "V". I have read the statement of "V" as recorded on June 9, 1996.

9. The "V" stated that she joined vocational training course of tailoring run by the Ashram in the month of December 1994. After about 15 days of her joining, one Noori approached her and said that she was being summoned by "BHAI" (Harivallabh Parikh petitioner). Noori took her to the room of BHAI. She was asked to sit on the cot of BHAI. He talked with her very affectionately and apprised her about the free accommodation, education, lodging facilities etc., being provided in the Ashram. BHAI also put to her some indecent questions as to whether she was having illicit relations with somebody else, which was denied by her. She was thereafter allowed to go. After two-three days, again she was called through watchman Chandubhai. She was told to do leg-massage of BHAI. She became tired and got slept. At about 1.00 a.m., BHAI awakened her and

asked to put off her clothes. She refused to do so. However, BHAI put off her clothes and committed rape on her against her will. On account of the intercourse, she got profuse bleeding. In the morning, Noori took her to the hospital at Chhota Udaipur. She was being given treatment for five days. After few days, she was again called by BHAI and she was being raped. Thereafter, he used to frequently call her on interval of four-five days and commit rape on her. On one occasion, she was asked to accompany BHAI in the car to Dhangadhra. While returning, they stayed in a hotel. There was one more girl with them (in order to give annonymative (sic.) of victim, the name of the another girl is not given and she is described as "V-2" hereinafter). BHAI committed rape on "V" and "V-2" in the hotel. Thereafter, they stayed at Baroda at the house of BHAI. She had also gone to Mandavgadh alongwith BHAI. There also, he committed rape on her as well as on "V-2". She denied any sexual relations with anybody else other than BHAI. She reported about her pregnancy to BHAI. He advised her for abortion. She has also stated that the BHAI used to show her Blue Films in his bed-room. In one of the Blue Films, she saw that, on account of abortion, one lady died and therefore, she became afraid of the abortion. She further stated that, she had gone to attend the marriage of her friend in village Khadakwada. At about 10.00 p.m., she developed labour pain and thus, she told to BHAI. He gave her two tablets. In the morning, she boarded a truck for going to Chhota Udaipur. She also stated that she had given the earlier statements under the pressure of BHAI. she also stated that now she was not giving the statement under the pressure of anyone. It is her mother who took her to the Advocate Shri Chandubhai, whom she narrated the entire incident and as per his advice, the private complaint was filed. The accused-petitioner has been examined by a Panel of four doctors consisting of Physician, Eurologist, Neurologist and Psychiatric. I have perused the medical report. The necessary blood sample has also been taken. The police has exhumed the dead foeitus. It is noted on the Panchanama that "No blood could be taken". The investigation is still in progress.

10. It is contended by Mr. N.D. Nanavati, Senior Counsel, that the petitioner is a social worker, aged 72 years of age and has rendered services to the tribal people throughout his life. The entire episode has been fabricated. Some elements are trying to take political mileage. They have planted "V" to malign (sic.) the petitioner. Mr. Nanavati submits that the statement of "V" is false and fabricated. After initially stating that the dead foetus was fathered by one Rameshbhai, she has changed her version under the pressure of certain disgruntled political leaders of Chhota Udaipur falsely implicating the petitioner. It is further submitted that, according to the "V", she was being first raped in December 1994 or January 1995, but she did not make complaint of the rape to anybody, inspite of the fact that she was frequently visiting her parents and was also free to move elsewhere. After finishing her study, she was staying with her parents. This was the period of her advance pregnancy and it cannot be belied that she will not disclose the name of the person to her parents by whom was being conceived. It is also submitted that the fact is that, it came to the notice of

the teachers of the Institution that the conduct of the "V" was not good as she used to frequently leave the Ashram in the name of visiting her parents, but in fact, she was not visiting her parents, but was moving elsewhere. The parents of the "V" were called by the petitioner and were asked to take care of their daughter.

11. On the other hand, it is contended by Mr. Shah, learned A.P.P. and Mr. K.B. Pande, learned Counsel for the "V", that the petitioner is guilty of grossly misusing his position to satisfy his sexual desire. Mr. Pande submits that there is so much terror of the petitioner that nobody can speak out the truth, unless he is arrested, and people can feel that the police is not under his influence. He also submits that provisions of Section 438 of Cr.P.C. should not be invoked in favour of such persons. He also submits that the anticipatory bail would be contrary to provisions of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and the law laid down by the Apex Court in various judgments.

12. He has also raised certain preliminary objections with respect to the maintainability of this petition under Article 226 of the Constitution of India. Firstly, that the prayer in this Special Criminal Application is in the form of anticipatory bail, for which the petitioner has an alternate remedy u/s 438 of the Criminal Procedure Code and as such, this Special Criminal Application under Article 226 is not maintainable; and secondly, this Court will not exercise powers under Article 226 of the Constitution of India to defeat the mandatory provisions of Section 18 of the Act of 1989. Replying to the preliminary objections, Mr. Nanavati submits that the remedy u/s 438 of the Cr.P.C. is not available to the petitioner in view of the provisions of Section 18 of the Act of 1989 and therefore, where the allegations are prima facie mala fide, improbable, false, frivolous and vexatious, the provisions of Section 18 of the Act of 1989 cannot be mechanically applied and the Court, in order to secure the ends of justice, has a power under Article 226 of the Constitution of India to undertake prima facie judicial scrutiny of the fact. Learned Counsel relies on a decision of this Court in Pankaj D. Suthar Vs. State of Gujarat, . In the said case, the Court held that where it is difficult to rule out the probability of the accusation levelled by the complainant against the petitioner having committed the offence under the Atrocities Act being false, vexatious and by way of counter-blast, as stemming from the ulterior motive to humiliate, disgrace and demoralise the petitioner, there cannot be any question of bypassing Section 18 of the Act of 1989 and an application for anticipatory bail can be allowed. The Rajasthan High Court in Rakesh and Ors. v. State of Rajasthan reported in 1995(4) Crimes 562 dealing with the provisions of Section 18 of the Act of 1989 has held that the provisions of the beneficial legislation should not be interpreted so as to deny the anticipatory bail to innocent persons. On the contrary, they should be protected by the abuse and black-mailing at the hands of the wrong persons having oblique motive or wrecking some personal vengeance. The Court has further held thus:

The Act should not be allowed to create a gulf [between non-members and

members of Scheduled Castes and Scheduled Tribes or to create feeling amongst them to think themselves as separate unit insisting on their sentiments as a separate entity requiring separating presentation and preservation. It is also the duty of the Court to see that provisions of the Act are not misused so as to create a confrontation, resentment and segregation between non-members and members of Scheduled Castes and Scheduled Tribes. This can be achieved only if judicial scrutiny is made permissible to find out whether an offence under the Act has been committed by a person before declining him the benefit of pre-arrest bail.

13. Mr. Pande referring the decision of the Apex Court in the AIR 1995 1198 (SC) , contends that the controversy has now been settled by the Apex Court, and in view of that, the decision of this Court and that of the Rajasthan High Court are of no assistance to the petitioner. I cannot agree with the submission of the learned Counsel. The Apex Court in the case of State of Madhya Pradesh v. Ramkrishna, has upheld the validity of the provisions of Section 18 of the Act of 1989 and it does not deal with the question which has been raised in the present Special Criminal Application. It cannot be denied that while there is an increasing criminalisation in the country, there is also a growing tendency of false implications. Often, the provisions of TADA, NDPS Act, and the Atrocities Act are being pressed into to falsely implicate innocent persons to achieve some other political, private or business motives. More the stringent provisions are, more the chances of false implications and more the burden on the Courts to undertake judicial scrutiny more meticulously. Thus, I am in complete agreement with the view taken by this Court and the Rajasthan High Court that an application u/s 438 of the Cr.P.C. is maintainable even in cases where there is an allegation with respect to the offence under the Act of 1989 to the extent to undertake judicial scrutiny to ruled out the probability of the accusation levelled by the complainant against the accused having committed an offence under the Atrocities Act being false, vexatious and with an ulterior motive.

14. Having held that an application u/s 438 of the Cr.P.C. is maintainable to the aforesaid extent, a petition under Article 226 of the Constitution of India would not be maintainable. this Court and the Apex Court have repeatedly said that wherever efficacious alternate remedy available, the provisions of Article 226 or 227 of the Constitution of India cannot be evoked. There is a growing tendency of approaching to this Court under Article 226 of the Constitution of India inspite of the fact that there is a remedy available under the CPC or Criminal Procedure Code. If the Court questions with respect to the maintainability of the petition in view of the alternate remedy available under the C.P.C. or Cr.P.C. a casual prayer is made to treat the petition under the alternate provisions available under the C.P.C. or Cr.P.C. Now the time has come that, in order to overcome such casual approach, such prayer should not be entertained just for asking. In Durga Prasad Vs. Naveen Chandra and Others, the Apex Court has noted that when the matter came up for admission, the Court asked the learned Counsel as to how the writ petition is maintainable. As usual, the time was sought to study the matter. On

the adjourned date, the Counsel contended that there are three remedies open to the appellant under the C.P.C., the right of appeal u/s 96 or appeal under Order 43 read with Section 104 or a revision u/s 115 of the C.P.C. It was contended that, as the matter does not fall within the four corners of the three remedies, the appellant was left to no other remedy except to approach the High Court under Article 226 of the Constitution of India. The Court found that the impugned order was not appealable either u/s 96 or under Order 43 read with Section 104 of C.P.C. but still the revision was maintainable and whether order could be revised or not, that is a matter to be considered by the High Court on merits. The Apex Court held that the petition under Article 226 was not maintainable by passing the alternate remedy available u/s 115 of the C.P.C. The bar of Section 18 will not come in the way if the case calls for judicial scrutiny to the limited extent indicated above.

15. There is also growing tendency to approach to the High Court u/s 438 of the Cr.P.C. for anticipatory bail directly without approaching to the Court of Sessions Judge. It is true that the High Court and the Court of Sessions judge have concurrent jurisdiction u/s 438 of the Cr.P.C. for grant of bail to person apprehending the arrest. But considering the convenience, smooth and effective functioning of the Court, it is always desirable that, at the first instance, the application is made to the Court of Sessions Judge, otherwise, if all the applications u/s 438 are filed before the High Court directly, the police papers will have to be summoned from the various parts of the State, putting the entire police machinery only at the disposal of the High Court for consideration of application u/s 438. On the other hand, if the applicant moves to the Court of Sessions Judge within whose jurisdiction the case has been registered, police papers can be quickly made available. The Public Prosecutor and the police will be able to effectively and quickly assist the Court in consideration of an application u/s 438 of the Cr.P.C. In case the bail application is rejected and the matter comes to the High Court, it would be advantageous for the High Court to not only know the full facts but also the views of the Sessions Judge. In view of this, well established practice in almost all the High Courts is that in the matter of application u/s 438 or 439 of Cr.P.C. the party first approach to the Court of the Sessions Judge. Thus, in my view, the practice of filing the bail application u/s 438 or 439 of the Cr.P.C. straightaway to the High Court without resorting to filing of such applications before the Court of Sessions should not be permitted unless there are exceptional and compelling circumstances.

16. So far as the present case is concerned, I am not inclined to oust the petitioner either on the ground that the petition under Article 226 is not maintainable or on the ground even if it is maintainable, the petitioner should first approach to the Court of Sessions Judge for the reasons that I have already undertaken the judicial scrutiny of the facts of the case.

17. In the peculiar facts of the case, considering the allegation of influence of the accused-petitioner, the direction was given by the learned Magistrate and

subsequently by this Court on June 7, 1996 for the transfer of the investigation to Additional Director General of Police (Crimes). On June 9, 1996, in pursuance of the directions of this Court, the Deputy Superintendent of Police (Crime) Ahmedabad recorded the statement of "V". No unfairness can be attributed to the police officer who recorded the statement of the "V". On June 9, 1996, she has given a graphic details of the incidents. It is difficult for me to say at this stage that she could have concocted the entire story or she could have been tutored by someone else. The most shocking part of the entire episode is whosoever is the person responsible for the sexual exploitation, with or without consent, left the poor girl of 20 years old to arrange herself for the delivery of the child. It is horrifying just to imagine how the girl must have faced the insult and humiliation when she had to deliver a child on the road? The evidence on record shows that a big crowd had assembled on the spot and someone informed the hospital on which the ambulance arrived there and took the girl to the hospital. She had complained of the pain while she was in the marriage party. The authorities of the Ashram were also there in the party. Even on the humanitarian ground, they could have made arrangement for dispatching the girl to the hospital and necessary arrangement for the delivery. I don't understand "What sort of social workers they are!" Without expressing any opinion, considering the facts of the case, I am of the view that this is not a fit case which calls for any interference or indulgence by this Court either under Article 226 of the Constitution of India or u/s 438 of the Code of Criminal Procedure.

18. Mr. Pande submits that the "V" has become extremely weak on account of the delivery and thereafter, the rough handling by the police. Now she is being harassed by the media. It is nothing new. This must be correct. In our system, in rape cases, such rough handling is often complained of. It does not end here only, but the victims of the rape much more worst a traumatic experience during the trials. Considering all these aspects, the Apex Court, in *Bodhisattwa Gautam v. Miss Subhra Chakraborty* reported in AIR 1996 SC 922, has indicated broad parameters in assisting the victims of rape.

19. Keeping in view the parameters laid down by the Apex Court, while rejecting this application under Article 226 of the Constitution of India or u/s 438 of the Code of Criminal Procedure, it is directed:

1. That the anonymity of the victim shall be maintained. The media or any other person will not publish the name of the victim or any other victims connected with this matter.
2. The State Government shall pay a sum of Rs. 5,000/- (Rupees five thousand only) to the "V" as an interim maintenance within a period of two weeks from today. The Collector, Baroda will ensure the compliance and report to this Court.
3. The Collector, Baroda will ascertain the desire of the "V" and if she wants any type of medical assistance, the same shall be provided by the State Government free of cost.

4. Learned Sessions Judge, Baroda will take necessary steps for providing the free legal assistance to the "V" during investigation, inquiry and trial.

With the aforesaid observations and directions, this Special Criminal Application is disposed of accordingly.