

(2008) 02 GUJ CK 0120
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 15144 of 2007

Jigar Mayurbhai Shah

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 05-02-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437(6)
Information Technology Act, 2000 — Section 65
Penal Code, 1860 (IPC) — Section 120, 420, 465, 468, 471
Wireless Telegraphy Act, 1933 — Section 3, 6

Citation : (2008) CriLJ 2750 : (2008) 2 GLR 1134

Hon'ble Judges : Dhirubhai Naranbhai Patel, J

Bench : Single Bench

Advocate : Mitul R. Desai, for the Appellant; Mita Panchal, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

D.N. Patel, J.—Rule. Learned Additional Public Prosecutor waives service of notice of Rule on behalf of the respondent State.

2. The present application has been filed mainly under Sub-section (6) of Section 437 of the Code of Criminal Procedure for bail in connection with the offence bearing Cr. No. I-4 of 2006 registered with DCB crime branch police station, Ahmedabad for the offences punishable under Sections 420 465 468 471 120(b) of the Indian Penal Code, Sections 3 and 6 of the Indian Wireless Telegraph Act and Section 65 of the Information Technology Act, as the trial has not been completed after fixing the date of taking evidence of witnesses.

3. Thrice the matter is called out in three different rounds of calling. The learned advocate for the applicant is absent on all the three occasions. Neither the matter is mentioned nor the learned advocate for the applicant is present. Hence, I have heard the learned Additional Public Prosecutor for the State.

4. Having heard the learned Additional Public Prosecutor for the State and looking to the facts of the case, it appears that this application is filed mainly under Sub-section (6) of Section 437 of the Code of Criminal Procedure for getting bail as the trial has not been completed within 60 days after fixing the date of taking evidence of the witnesses. Sub-section (6) of Section 437 of the Code of Criminal Procedure reads as under:

437. : When bail may be taken in case of non-bailable offence-(1) When any person accused or, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Sessions, he may be released on bail, but-

(1) xxx xxx

(2) xxx xxx

(3) xxx xxx

(4) xxx xxx

(5) xxx xxx

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate unless for reasons to be recorded in writing, the Magistrate otherwise direct.

It appears that as many as 13 witnesses have already been examined by the trial court. The offences alleged against the applicant is under Sections 420 465 468 471 120(b) of the Indian Penal Code, Sections 4 20, 20(a) and 25 of the Indian Telephone Act and Sections 3 and 6 of the Indian Wireless Telegraph Act and Section 65 of the Information Technology Act. It appears that the present applicant is involved in the offence pertaining to a separate telephone exchange network created by him. Telephone calls to foreign countries were being made by his customers without recording any telephone bills. Several items have been found out during the course of investigation, which are as under:

(1) Cisco-2600 router (2) D link switch (3) PRI Modem (4) IPBX (5) UPS Power unit (6) Computer system (7) One telephone Instrument and 150 mtr. long cable wire.

It also appears from the facts of the case that the bail application of the present applicant prior to filing of charge-sheet and subsequent to filing of charge-sheet has not been allowed by the trial court as well as by this Court and therefore, one more attempt has been made to prefer an application under Sub-section (6) of Section 437 of the Code of Criminal Procedure. It appears that the case against the present applicant has already been started before the trial court.

Looking to the gravity of the offence, quantum of punishment and the manner in which the present applicant is involved in committing the offence as alleged by the prosecution, I see no reason to enlarge the applicant on bail. The trial court has recorded the reasons for not to enlarge the applicant on bail under Sub-section (6) of Section 437 of the Code of Criminal Procedure. These reasons are true, correct and genuine for not to enlarge the applicant on bail. Private telephone exchange has been set up by the present applicant. Several foreign calls have been diverted and thereby has caused loss of crores of rupees to B.S.N.L. and/or to the telephone department, of Union of India.

5. It has been held by the Orissa High Court in the case of Chhabi v. State of Orissa reported in 1995(2) Cri 2773, especially in para-3 thereof as under:

3. A Magistrate, while dealing with a case under Sub-section (6) of Section 437 of the Code has to record reasons for making an exception. The said provision deals with cases where the trial of a person accused of any non-bailable offence is not concluded within a period of a sixty days from the first day fixed for taking evidence in the case, and it provides that such person shall, if he is in custody during the whole of the said period be released on bail unless for reasons to be recorded in writing the Magistrate otherwise directs. It is the right of an accused person to demand that the charge against him should be tried without any unreasonable delay and such delay entitles the accused to get bail. That right is statutorily recognised and puts a time limit. In a case falling under this sub-section if the Magistrate for reasons to be recorded, holds that the accused shall not be released, then the accused will not be released on bail. It is stated that merits of the case should not be considered at that stage. There is no force in this place. An overall view cannot be equated with prejudging the case. The Court is not precluded from considering the nature of allegations, while dealing with a case under Sub-section (6) of Section 437 of the Code. Taking totality of the circumstances, I find nothing wrong in the orders passed by the courts below to warrant interference. However, any observation made while dealing with the case should not weigh when the matter is taken up for trial. Learned Counsel for petitioner states that in case trial is not expeditiously finalised, learned Magistrate shall be moved for bail. Needless to say that an effort should be made by learned Magistrate to dispose of the proceeding as early as practicable. If any application for bail is filed, the same shall be considered on its own merits.

Looking to the order passed by the learned Metropolitan Magistrate, Ahmedabad, especially as per paragraphs 3, 4 and 5 thereof, there are justifiable reasons for refusing the bail to the present applicant. Satisfaction arrived at by the trial court is true and correct.

6. It has been also held by this Court in the order dated 5.5.2007 in Criminal Miscellaneous Application No. 945 of 2005 that there is an inbuilt exception in Section 437(6) of the Code of Criminal Procedure, 1973. Relevant part of para 3(iv) of the aforesaid judgment are as under:

(iv)...If the provisions of Section 437(6) of the Code of Criminal Procedure, 1973 are closely perused, it appears that enough care has been taken by the Legislature. There is an inbuilt exception. The words "unless for the reasons to be recorded in writing", carves out exception to the rule which is referred in Section 437(6) of the Code of Criminal Procedure, 1973. It is obligatory on the part of the Magistrate to record reasons in writing for the accused not being released on bail....

Thus, it is not mandatory or obligatory on the part of the Magistrate that once period of sixty days from the first date fixed for taking evidence is over, the applicant must be enlarged on bail. There is no such mathematical consequence. All that depends upon the facts and circumstances of the case, gravity of the offence, quantum of punishment and the manner in which the present applicant is involved in the offence as alleged by the prosecution. Looking to these circumstances, if the trial court is satisfied that the applicant is not to be enlarged on bail, despite period of sixty days is over, from the first date of fixing for taking evidence, the applicant cannot be enlarged on bail. The reasons ought to be recorded by the concerned trial court if the bail is not to be given u/s 437(6) of the Criminal Procedure Code.

7. In the facts of the present case, as stated hereinabove, the learned Metropolitan Magistrate, Court No. 11, Ahmedabad vide his order dated 19th February, 2007 below exh. 33 in Criminal Miscellaneous Application No. 42 of 2006 has given detailed reasons in paragraphs 3,4, 5 and 6. Looking to this satisfaction and looking to the facts of the case and the manner in which the present applicant is involved in the offence, I am not inclined to enlarge the applicant on bail. There is no substance in this application. Hence, the same is hereby dismissed. Rule is discharged.