

(2006) 12 BOM CK 0107

In the Bombay High Court

Case No : Criminal Application No's. 3347 to 3349 and 3458 of 2006

Kamlesh Gandhi

APPELLANT

Vs

State of Maharashtra and another

RESPONDENT

Date of Decision : 07-12-2006

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 438, 439, 482
Penal Code, 1860 (IPC) — Section 406, 408, 409, 471

Citation : (2007) 5 RCR(Criminal) 669

Hon'ble Judges : B.R. Gavai, J

Bench : Single Bench

Advocate : V.D. Sapkal and Amol S. Sawant, permitted to assist app In Cri. appln. Nos. 3347 to 3349 of 2006, N.K. Kakade in Cri. appln. No. 3458 of 2006, for the Appellant; N.H. Borade, Additional Public Prosecutor (In all criminal applications), for the Respondent

Judgement

B.R. Gavai, J.—By the Order dated 17-11-2006, this Court had rejected the above criminal applications for the reasons to be recorded separately. The reasons thereof are as under :

2. All these criminal applications are seeking the release of the applicants on bail in the event of their arrest in connection with Crime Nos. 143, 144 and 145 of 2006 registered with Azadnagar Police Station, Dhule, for the offences punishable under sections 406, 408, 409 and 471 of the Indian Penal Code.

3. It is the allegations of the prosecution that the Directors of Swargawasi Kanhaiyyalaji Maharaj Nagari Sahakari Patpedhi, Dhule, (for short, hereinafter referred to as "Patpedhi" in this order) had sanctioned huge loans either in their names or in the names of their close relatives or friends. These loans were allegedly sanctioned in utter disregard to the provisions of the Maharashtra Cooperative Societies Act, 1960, Rules framed thereunder and the byelaws of the Patpedhi. It is alleged that the said Directors had committed breach of trust,

misappropriation and cheating. The first information report was registered on the basis of the complaint lodged by the Special Auditor. During the course of investigation, the other persons like the employees of Patpedhi and the persons who were benefited by taking the loans were also implicated and made accused in the crime.

4. The applicant in Criminal Application Nos. 3347, 3348 and 3349 of 2006 is the Director of Patpedhi. The applicant in Criminal Application No. 3458 of 2006 is alleged to have borrowed an amount of Rs. 70,00,000/- (Seventy Lakhs).

5. It is not in dispute that all the applicants had earlier approached this Court by way of applications for anticipatory bail. However, the said applications were either rejected or after hearing, they were withdrawn.

6. A preliminary objection is raised by the learned Additional Public Prosecutor so also by the learned Advocate assisting the prosecution on behalf of the complainant that since earlier applications of the applicants were either rejected or withdrawn, the present applications on the same set of facts are not maintainable. On the contrary, Shri V. D. Sapkal, learned Advocate appearing for the applicants, submits that in his case the applications were only withdrawn and therefore, withdrawal of the said applications would not come in the way of entertaining the present applications. In any event, he submits that even the rejection of the earlier application would not come in the way of filing successive applications.

7. Shri V. D. Sapkal, learned Advocate appearing on behalf of the applicants, submits that the Apex Court in the case of Kalyan Chandra Sarkar etc. Vs. Rajesh Ranjan @ Pappu Yadav and Another, has held that the principle of res judicata is not applicable to the criminal jurisprudence. He submits that if there is any change in the facts situation or in law which requires earlier view being re-considered successive bail applications are tenable in law. He submits that the Apex Court in Kalyan Sarkar's case (cited supra) has taken a view to that effect while interpreting the provisions of section 439 of the Code of Criminal Procedure. He submits that the provisions of sections 438 and 439 of the Code are almost analogous. The only distinction is that the powers u/s 439 are to be exercised after a person is arrested, whereas, the powers u/s 438 are to be exercised prior to the arrest of an accused. He also relies on the decision of the Full Bench of Rajasthan High Court in Ganesh Raj Vs. State of Rajasthan and Others, wherein it is held that successive application for grant of anticipatory bail is tenable when there is a change in the facts situation or in law or where the earlier finding has become obsolete. He further relies on various other judgments of the High Courts wherein it is held that withdrawal of the earlier applications would not come in the way of Court in entertaining subsequent applications since there is no decision on merits on the first bail application. However, in view of the view that I have taken, I do not find it necessary to refer to these judgments.

8. On the contrary, the learned Additional Public Prosecutor and Shri Amol

Sawant, learned Advocate assisting the prosecution, submit that the basis of an application for anticipatory bail is the "accusations" of having committed a non-bailable offence and since the accusations do not change after rejection of first application, the subsequent application would not be tenable in law. They rely on the judgment of the Full Bench of Calcutta High Court in *Maya Rani Guin and etc. Vs. State of West Bengal*, .

9. In view of the rival submissions, the preliminary issue which needs to be decided is whether the successive applications would be tenable for grant of anticipatory bail after withdrawal or rejection of the earlier application.

10. The provision for grant of anticipatory bail was introduced for the first time in the Code of Criminal Procedure, 1973. Under the old Code, there was no such provisions. There were divergent views as to whether bail could be granted to an accused against whom report or offence was registered even though he was neither arrested nor detained. Most of the High Courts took the view that the High Court did not have the inherent powers to grant anticipatory bail by invoking the provisions of section 561 of old Code (corresponding to section 482 of the Code of 1973). The Law Commission in its 41st Report advocated the need to provide for express powers for grant of anticipatory bail on the superior Courts. The Law Commission in its 48th Report endorsed the said view. Clause 447 of Draft Bill of the Code of Criminal Procedure, 1973, introducing the provision of anticipatory bail reads as under :

As recommended by the Commission new provision is being made enabling the Superior Courts to grant anticipatory bail i.e. a direction to release a person on bail issued even before the person is arrested with a view to avoid the possibility of the person hampering the investigation special provision is being made that the Court granting anticipatory bail may impose such conditions as it thinks fit. These conditions may be that a person shall make himself available to the Investigating Officer as and when required and shall not do anything to hamper investigation.

The Law Commission in para 31 of its 48th Report has further observed :

The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the Court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the order as well as of the final

orders will be given to the Superintendent of Police forthwith.

11. After the Joint Committee of Parliament recommended certain suggestions, the provision of section 438 came to be incorporated in the Code of Criminal Procedure, 1973.

12. The Constitution Bench of the Apex Court in the case of *Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab*, examined the amplitude of the discretion given by section 438 of the Code. The Apex Court expressed the view that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of section 438 especially when not imposed by the Legislature. It was further observed that an over-generous infusion of constraints and conditions which are not to be found in section 438 can make the said provision constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. It was observed that the beneficent provision contained in section 438 must be saved, not jettisoned. However, it was observed that the plea of the applicant that he cannot be arrested must be founded on reasonable grounds. It was observed that a belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. It was further observed that a blanket order which was bound to cause serious interference in the functions of the police was not contemplated by section 438 of the Code.

13. The Full Bench of Calcutta High Court in *Maya Rani's case* (cited *supra*), after considering the rival submissions, was of the view that since the accusations remain unchanged, entertaining second application for anticipatory bail would amount to review or re-consideration of the earlier order passed by the Court. In paras 20 and 21, the Full Bench observed thus :

20. We have heard the learned advocates for the respective parties. We have also gone through the judgments referred to above. We find sufficient merit in the submission of Mr. Kazi Saifullah, Ld. Public Prosecutor and Mr. Moitra, learned Additional Public Prosecutor. We do not find any reason to differ from views of the earlier Division Benches in the case of *Kalidas Mitra*, (1989) 3 Crimes 652, *Ekkari Ghosh*, 1994 Cal Cri L R (Cal) 218 and the case of *Pawan Kumar Beriwal*, 1998(1) Cal L.J. 470 and are in respectful agreement with the views expressed therein. We are of the view that entertaining a second application or anticipatory bail would amount to review or reconsideration of the earlier order passed by a Division Bench having co-ordinate jurisdiction, as the accusation remains unchanged. We also find merit in the submission of Mr. Moitra that the "accusation" being the *sine qua non* and which remains the same, there cannot be revival of "reasons to believe" or apprehension of arrest which was considered by the Court in the earlier application for anticipatory bail.

21. Accordingly, the first question under the first reference is answered in the

negative. We are of the view that the second application for anticipatory bail, even if new circumstances develop after rejection or disposal of the earlier application, is not maintainable.

14. The Apex Court in Kalyan Chandra Sarkar's case (cited supra) had an occasion to consider the ambit of Article 21 of the Constitution of India and the eventuality in which the successive applications u/s 438 of the Code are tenable. In paras 18, 19 and 20, the Apex Court observed thus:

18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But, even persons accused of non-bailable offences are entitled for bail if the Court concerned comes to the conclusion that the prosecution has failed to establish a *prima facie* case against him and/or if the Court is satisfied for reasons to be recorded that in spite of the existence of *prima facie* case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the Courts can do so.

19. The principles of *res judicata* and such analogous principles although are not applicable in a criminal proceeding, still the Courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher Court or a coordinate bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the Courts must give due weight to the grounds which weighed with the former or higher Court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be re-agitated on the same grounds, as the same it would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting.

20. The decisions given by a superior forum, undoubtedly, is binding on the subordinate fora on the same issue even in bail matters unless of course, there is a material change in the fact situation calling for a different view being taken. Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is

the limited area in which an accused who has been denied bail earlier, can move a subsequent application. Therefore, we are not in agreement with the argument of learned counsel for the accused that in view of the guarantee conferred on a person under Article 21 of the Constitution of India, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by Courts earlier including the Apex Court of the country.

15. Thus, the Apex Court observed that under our criminal laws a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial. Such a detention would not be violative of Article 21 of the Constitution since deprivation of personal liberty would be by procedure established by law. The Apex Court further found that even a person accused of non-bailable offence would be entitled to bail if the Court comes to the conclusion that the prosecution has failed to establish a *prima facie* case against him and/or if the Court is satisfied for the reasons to be recorded that in spite of the existence of *prima facie* case there is need to release such persons on bail where fact situations require it to do so. The Apex Court further found that if there is a change in the fact situation after rejection of the earlier bail application, the rejection of the earlier application would not come in the way of grant of bail when the Court finds that the circumstances prevailing require that such a person be released on bail. However, the Apex Court gave a word of caution that though the principle of *res judicata* and analogous principles are not applicable in criminal proceedings still the Courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The Apex Court also found that while considering the subsequent application the Court must give due weight to the findings of the higher Court or Co-ordinate Bench. The Apex Court, therefore, held that successive bail applications can be entertained even after rejection of the earlier application if there is a change in the fact situations and/or law which requires earlier view to be interfered or where the earlier finding has become obsolete. It was held that this is a limited area in which an accused who has been denied bail earlier can move a subsequent application. However, the Apex Court in unequivocal terms rejected the argument that in view of the guarantee enshrined under Article 21 of the Constitution it was also permissible to make successive applications even on the ground on which earlier applications were rejected.

16. The Full Bench of Rajasthan High Court in Ganesh Raj's case (cited *supra*), disagreed with the view taken by the Single Bench of said Court in Suresh Chand vs. State of Rajasthan, 2001 (2) Raj LR 757, wherein it was held that fresh application for grant of anticipatory bail cannot be entertained after it was rejected and that the fact situation in respect of accusations would only change after filing of the final report and that once final report is filed there is no need of seeking anticipatory bail because the Investigating Officer may release the accused on his executing a personal bond with or without sureties. In para 22 it was observed :

22. The above observations appear to have been made in reposing utmost faith in the Investigating Agency. But this eventuality escaped attention as to what would happen if the Investigating Officer despite change in fact situation does not file final report. Possibility of causing needless inconvenience, harassment and humiliation to the accused by the police in such a situation cannot be ruled out. Again coming to Gurbaksh Singh vs. State of Punjab (supra) we notice that the Supreme Court narrated the situation and contingencies for invoking power u/s 438. In para 8 of the judgment it was indicated thus:-

No one can accuse the police of possessing a healing touch nor indeed does anyone have misgivings in regard to constraints consequent upon confinement in police custody. But, society has come to accept and acquiesce in all that follows upon a police arrest with a certain amount of sang-froid, insofar as the ordinary rule of criminal investigation is concerned. It is the normal day-to-day business of the police to investigate into charges brought before them and broadly and generally, they have nothing to gain, not favours at any rate, by subjecting ordinary criminals to needless harassment. But the crimes, the criminals and even the complainants can occasionally possess extraordinary features. When the even flow of the life becomes turbid, the police can be called upon to inquire into charges arising out of political antagonism. The powerful processes of criminal law can then be perverted for achieving extraneous ends. Attendant upon such investigations, when the police, are not free agents within their sphere of duty, is a great amount of inconvenience, harassment and humiliation. That can even take the form of the parading of a respectable person in handcuffs, apparently on way to a Court of justice. The foul deed is done when an adversary, is exposed to social ridicule and obloquy, no matter when and whether a conviction is secured or is at all possible. It is in order to meet such situations, though not limited to these contingencies, that the power to grant anticipatory bail was introduced into the Code of 1973.

17. Finally, seeking support from the judgment of the Apex Court in Kalyan Chandra Sarkar's case (supra), the Full Bench of Rajasthan High Court in para 25 observed thus:-

25. In the ultimate analysis, placing reliance on the ratio indicated in Kalyan Chandra Sarkar's case (supra), "we hold that second or subsequent bail application u/s 438, Criminal Procedure Code can be filed if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application. Second or subsequent anticipatory bail application shall not be entertained on the ground of new circumstances, further developments, different considerations, some more details, new documents or illness of the accused.

18. From the perusal of provisions of sections 438 and 439 of the Code of Criminal Procedure, it can be seen that both the provisions are almost analogous. Section 439 empowers the High Court or the Court of Session to release on bail

an accused of non-bailable offence when he is in custody. The provisions of section 438 enable the superior Courts to direct release of a person who has reasonable belief that he may be arrested on an accusation of having committed a non-bailable offence. It can be further seen that there is nothing in section 439 which precludes entertaining a subsequent application after rejection of the earlier application. The liberty of the citizen is guaranteed under Article 21 of the Constitution. In order to curtail this fundamental right, the procedure which prescribes departure from it must be fair, just and reasonable. The provision of section 438 is incorporated in order to grant a safe-guard to a citizen who is entitled to the benefit of presumption of innocence. The provision is incorporated so as to avoid abuse of powers by the investigating agency and to avoid arrest of citizens at the whims and caprice of the Investigating Officers and avoid unnecessary harassment and humiliation.

19. In my view, therefore, the provision of section 438 cannot be interpreted in such a manner, which would impose unnecessary restrictions on the said power. The Apex Court in Gurubaksh Singh's case (supra) has held that denial of bail amounts to deprivation of personal liberty and the Court should lean against imposition of unnecessary restrictions on the scope of section 438 especially when not imposed by the Legislature. It was further observed thus :

Since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of section 438, especially when when not imposed by the legislature. An over-generous infusion of constraints and conditions which are not to be found in section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in section 438 must be saved, not jettisoned.

20. As already discussed hereinabove, it is well settled that insofar as the application u/s 439 of the Code is concerned, successive application on new fact situations or change in law could be entertained. As already discussed above, the provisions of sections 438 and 439 of the Code are almost analogous. The Constitution Bench of the Supreme Court in Gurubaksh Singh's case has held that since denial of bail amounts to deprivation of personal liberty the Court should lean against imposition of unnecessary restrictions on the scope of section 438 of the Code especially when not imposed by the legislature, I am, therefore, inclined to hold that successive applications for anticipatory bail, after rejection of earlier application, would be tenable in law. However, as held in Kalyan Chandra Sarkar's case the said application is tenable only when there is a change in the facts situation or law which requires earlier view being interfered with or where the earlier view has become obsolete. In that view of the matter, the present applications are tenable in law.

21. The only ground on which the present applications are filed, after rejection or withdrawal of earlier applications, is that the charge-sheet is filed and that other

accused are already released on bail. I am of the view that there is no change in the facts situation which existed on the date of withdrawal or rejection of earlier applications and as on today since the material which was available against the present applicants today is the same as was available on earlier occasion. I find that merely because other accused are released on bail it cannot be a ground to entertain subsequent application for grant of anticipatory bail.