

(2024) 11 GUJ CK 0038

In the Gujarat High Court

Case No : Criminal Miscellaneous Application (For Successive Regular Bail After Chargesheet) No. 11615 of 2024

Kaushikbhai Ramswaroop Soni Versus

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 29-11-2024

Acts Referred:

Code of Criminal Procedure, 1973 — Section 439
Indian Penal Code, 1860 — Section 34, 114, 120B, 302, 342, 364, 380, 384, 406, 420, 454, 457
Prohibition of Dowry Act, 1961 — Section 65AE, 66B, 81, 98(2), 116B
Gujarat Police Act, 1951 — Section 135

Citation : (2024) 11 GUJ CK 0038

Hon'ble Judges : Niral R. Mehta, J

Bench : Single Bench

Advocate : Janak D Vardey, Himanshu Patel

Final Decision : Dismissed

Judgement

Niral R. Mehta, J

1. Rule returnable forthwith. Learned Additional Public Prosecutor Mr.Himanshu Patel waives service of notice of Rule on behalf of respondent – State.
2. By way of this third successive bail application under Section 439 of the Code of Criminal Procedure, 1973, the applicant has approached this Court for releasing him on bail in connection with FIR bearing CR No.11195050210611 of 2021 lodged before the Tharad Police Station for the offences punishable under Sections 302, 364, 384, 342, 34 and 120B of the Indian Penal Code.
3. Earlier, the applicant had approached this Court by way of Criminal Misc. Application No.430 of 2022 which was heard in detail and since the Court was not inclined to grant regular bail to the applicant, the permission was sought to withdraw the said application and accordingly, said application was disposed of as withdrawn on 17.2.2022, however, with a liberty to the applicant to approach the

concerned Sessions Court if in the event the trial does not commence within a period of 8 months.

4. Thereafter, again, the applicant had approached this Court by way of second successive bail application being Criminal Misc. Application No.11114 of 2023. The said application was also withdrawn vide order dated 27.10.2023, however, with a liberty to the applicant to approach this Court in the event if the trial is not concluded within a period of six months.

5. As the trial could not be concluded within the period of six months, the applicant approached the learned Sessions Judge by way of Criminal Misc. Application No.163 of 2024, which came to be rejected by the learned Sessions Judge vide order dated 24.5.2024.

6. Being aggrieved and dissatisfied by the aforesaid, the applicant has approached this Court by way of this third successive application under Section 439 of the Cr.P.C. for releasing him on regular bail.

7. The translated version of the FIR is produced herein-after, for ready reference.

"Complaint

Date: 26/05/2021

I, Hasmukhbhai Chhanabhai Prajapati, aged 65 years, Occupation: Driver, having permanent address at Haridham Society, Chotila, Taluka Chotila, District Surendranagar, at present residing at Aman Flats, India Colony, Hathijan Circle, Ahmedabad, Mobile No. 7096892042.

Being present here, I dictate my complaint that, I have been living with my family at the above mentioned address and work as a driver. I am a father to a son and three daughters. Ritaben is my eldest daughter, Poonamben is younger than her and Pujaben is younger than Poonamben. My son Yashbhai is the youngest. As all the three daughters have married, they live at their respective matrimonial houses, whereas my son is unmarried and lives with me.

On 13/03/2021, at about half past one in the afternoon, when I was at my house, I received a phone call from Tharad police Station. The caller asked me as to how I was related to Yash. I replied that he is my son. At that time, the caller said that, "his dead body has been found from the Narmada Canal near Sandhar Del Bridge. You may come over." Pursuant to that, I and my family members went to the Tharad Referral Hospital from my house. My son's dead body was lying in the P.M. Room. On the same day, I informed my son's death to Tharad Police Station vide Accidental Death No. 04/2021. During the time when the investigation therein was in progress, about two days before today, my son Yashbhai's friend Amitbhai Jayantilal Khatri, residing at R.T.O. Road, Vastral, Ahmedabad met me at Ahmedabad, who stated to me, "I had an occasion to meet Kaushik Ramswarup Soni, a native of Diodar and at present residing at Chandlodiya, Ahmedabad and Divyesh Ishwarbhai Patel, having permanent

residence at Modhera, Mahesana and at present residing at Vatva, Ahmedabad. At that time, Kaushik had told me that, Yash had viraled his photographs with his lover which caused a quarrel at his home. Moreover, Yash also got him arrested by the police in connection with a cheating case registered with Satellite Police Station which caused a lot of expense to Kaushik. Therefore, Kaushik contacted Divyesh Patel and brought Yash to Chanasma in his Honda City car with Divyesh. At Chanasma, from the place situated near Harsiddhi Mata Temple, accompanied by Bharatbhai Takhatram Vyas, a resident of Diodar and Hirenbbhai Thakor, a resident of village Mulakpur, Taluka Diodar, Kaushik kidnapped Yash and took him to his farm-house situated at Ludra, where he kept Yash confined in a room for two days, made Yash's father remit Rs.50,000/-through an Angadiya (Courier service) at Ahmedabad in name of Yash because it was Yash who had caused him a lot of expenses. At about two in the night, Kaushik and Divyesh took Yash to the Narmada Canal, where they made him stand on the bank of the canal and then pushed him into the canal. Thereafter, Kaushik and Divyeshbbhai came to Ahmedabad in the Honda City Car of Yash and then they went to Rajasthan. At the time of returning from Rajasthan, they abandoned the car at Raniwada." As this Amitbbhai Khatri stated to me that Kaushik said to him, "I have avenged the treachery committed by Yash to me", I informed the whole incident to my wife and relatives who asked me to give a complaint, because my son has been murdered by these persons. As these persons have made me remit Rs.50,000/-through a Courier Service (Aangadiya) for releasing my son whom they had kidnapped and as they have murdered my son, it is my complaint to take legal actions against them.

Such are the facts of my complaint which are true to the best of my knowledge and belief."

8. Heard learned advocate Mr.J.D. Vardey for the applicant and learned Additional Public Prosecutor Mr.Himanshu Patel for the respondent- State.

9. Learned advocate Mr.Vardey for the applicant has made the following submissions for consideration of this application.

(1) Learned advocate Mr.Vardey for the applicant has vehemently submitted that the present applicant is behind the bar since 28.5.2021 and thereby, more than 3 and 1/2 years passed by-now and the trial has not progressed much. He further submitted that there is a huge delay caused and yet, the trial is not likely to be over in near future and, therefore, he urged this Court that the applicant may be enlarged on bail on this ground alone, as it is a gross violation of the fundamental rights of the applicant under Article 21 of the Constitution of India. To substantiate the aforesaid contention, Mr.Vardey has placed heavy reliance on the decisions of the Apex Court; (i) Nikhilbbhai Balubhai Thorat v. State of Gujarat, SLP (Cri.) No.15437 of 2023 and (ii) Manishaben v. State of Gujarat, SLP (Cri.) No.7391 of 2024 (iii) Gulam Nabi Shaikh v. State of Maharashtra, Criminal Appeal No.2787 of 2024 and (iv) Manish Sisodia v. Directorate of Enforcement, SLP (Cri.) No.8781 of 2024.

(2) Learned advocate Mr.Vardey for the applicant submitted that all the other co-accused persons are granted bail by this Court and thereby, considering the same, more particularly the role of the accused No.2 which is equally the same as that of the applicant, the principle of parity would come into play. Accordingly, Mr.Vardey submitted that the present applicant may be enlarged on bail on the ground of parity.

(3) Learned advocate Mr.Vardey for the applicant submitted that merely because one of the co-accused, who has been released on bail and has misused his liberty i.e. accused No.2, the present applicant cannot be held liable for the conduct of the co-accused and thereby, the application of the applicant herein may be considered independently from the conduct of the accused No.2 and, therefore, he requested this Court to enlarge the applicant on bail.

(4) Learned advocate Mr.Vardey for the applicant submitted that the temporary bail was granted to the applicant and within the extended period of the temporary bail, the applicant has surrendered and thereby, the applicant has already shown his bona fide and respect to the Court proceedings and, therefore, on that ground also, the applicant deserves to be enlarged on regular bail.

(5) Learned advocate Mr.Vardey for the applicant further submitted that as per the prosecution, one of the witnesses, namely, Amit Kharti is the prime witness. However, during the course of trial, said Amit Khatri has turned hostile and, therefore, chances of conviction of the applicant are very bleak and hence, at this stage, the applicant be enlarged on bail.

(6) Learned advocate Mr.Vardey for the applicant further submitted that the Post-mortem report as well as the Inquest Panchanama are in contradiction of each other and that raised suspicion against the allegation of abduction, forceful confinement and forcefully throwing the deceased in the canal. Learned advocate submitted that in that view of the matter, the applicant is entitled to be released on regular bail. 9.1 By making above submissions, learned advocate for the applicant urged this Court to allow the present application, by enlarging the applicant on regular bail.

10. Per contra, learned Additional Public Prosecutor Mr.Himanshu Patel, while opposing the present application, has made the following submissions :

(1) Learned Additional Public Prosecutor Mr.Himanshu Patel, at the outset, submitted that the present application is admittedly the third successive bail application, without much change in circumstances. He submitted that as the law laid down by the Apex Court in case of Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu Yadav reported in 2005(2) GLR 92, the scope and ambit of the successive bail application is very narrow. Thus, Mr.Patel submitted that the present application deserves to be rejected.

(2) Learned Additional Public Prosecutor Mr.Himanshu Patel submitted that the present application deserves to be dismissed on the ground of non-disclosure of

material facts. Mr.Patel further submitted that the applicant was earlier released on temporary bail from 21.5.2022 to 30.5.2022. However, the applicant did not surrender in time and remained absconding for a period of 99 days and was arrested by the Crime Branch, Ahmedabad on 7.9.2022. Thus, the applicant has misused the liberty. Mr.Patel, therefore, submitted that at present, the trial is at advance stage inasmuch as 16 witnesses out of 43 are examined. Therefore, the present applicant may not be released on bail, more particularly when there is no major change of circumstance.

(3) Learned Additional Public Prosecutor Mr.Himanshu Patel submitted that one of the co-accused i.e. accused No.2, namely, Divyesh Patel was released on regular bail. He further submitted that accused No.2 after having released on bail, absconded and not attending the trial. Mr.Patel further submitted that on one hand, the accused No.2 is absconding and on other hand, one of the witnesses i.e. Amit Khatri, who had not attended the trial for quite a long time and now, turned hostile, which creates doubt that said co-accused No.2 - Divyesh Patel has influenced the said witness – Amit Khatri. In that event, according to Mr.Patel, it would be a very risky proposition if the applicant, who is the main accused, is released on bail, then the trial is likely to be hampered and/or tampered. Thus, Mr.Patel vehemently opposing the bail application, urged this Court not to exercise the discretion in favour of the applicant.

(4) Learned Additional Public Prosecutor Mr.Himanshu Patel submitted that the present applicant is having the criminal antecedents inasmuch as in past, four offences have been registered against the present applicant. The details thereof are as under :

(i) Panthawada Police Station (Banaskantha) CR No.9 of 2014 under Sections 65AE, 66B and 116B.

(ii) Panthawada Police Station (Banaskantha) CR No.212 of 2018 under Sections 65AE, 98(2), 81.

(iii) Umra Police Station (Surat) CR No.2 of 2016 under Sections 454, 457 and 380.

(iv) Satellite Police Station (Ahmedabad) CR No.103 of 2019 under Sections 406, 420 and 114.

Learned APP Mr.Patel further submitted that the said facts are also not disclosed by the applicant in his memo of application and thereby, there is concealment of material facts. Thus, this Court may not exercise the discretion in favour of the applicant.

(5) Learned Additional Public Prosecutor Mr.Himanshu Patel submitted that the present applicant is the main accused who has orchestrated the entire offence and who has the motive to kill the deceased. So far as the motive aspect is concerned, the statement of one witness, namely, Komalben Patel is relevant and the said witness is yet to be examined by the trial court. The another aspect with

respect to motive is one FIR was lodged with Satellite Police Station bearing I-CR No.103 of 2019 for the offences punishable under Sections 406, 420 and 114 of the IPC. The present applicant was having grudge that the said FIR was lodged at the instance of deceased and thereby, a strong motive can be inferred at this stage. Mr.Patel further submitted that even the electronic evidence in form of CDR clearly shows that the present applicant was in constant touch with the co-accused – Divyesh Patel and the said Divyesh Patel was in touch with the deceased. The location of the present applicant was found at the scene of offence with deceased at the time of incident. Thus, the principle of parity vis-à-vis with some other co-accused is not applicable in the facts of the present case and thereby, the application deserves to be rejected.

10.1 By making above submissions, learned Additional Public Prosecutor urged this Court to dismiss the present application.

11. Having considered the submissions made by learned advocates appearing for the respective parties and having gone through the material on record, the question that fall for consideration of this Court is whether the present applicant deserves to be enlarged on bail by way of this third successive bail application?

12. So as to decide the aforesaid question, in my considered opinion, first of all, the law with regard to successive bail application deserves to be taken note of. The Apex Court in case of Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu Yadav (supra) has observed as under :

"17. 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.

18. 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. The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, but 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 entertain-ing 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.

19. 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 be-ing taken. Therefore, even though there is room for filing a subsequent bail application in cases where earlier appli-cations 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 the guaranty 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 in-cluding the Apex Court of the country."

13. Keeping in mind the aforesaid proposition of law, if the facts of the present case are considered, it appears that out of total four accused persons, three are enlarged, except the present applicant. It further appears that one of the co-accused, namely, Divyesh Patel appears to have jumped the bail conditions and is absconding. One of the prime witnesses- Amit Khatri, who was initially not cooperating with the trial, however, later on, attended the trial and turned hostile. This happened after co-accused Divyesh Patel was released on bail. Total 16 witnesses have been examined out of 43. Therefore, despite the fact that one of the co-accused is absconding, the trial is progressing. The applicant had once misused the temporary bail for long 99 days by absconding from the custody. Another main witness – Komalben is yet to be examined. The applicant herein is having criminal history inasmuch 4 FIRs are registered against him for the different offences. The delay in trial can be attributable to the conduct of the applicant and one of the co-accused – Divyesh Patel, to some extent. Because of their conduct of jumping the bail, the trial appears to have prolonged. One of the witnesses, namely, Amit Khatri, who is one of the prime witnesses, also did not cooperate in the trial and, therefore also, the trial was delayed for some time. Further, his presence is secured before the trial court, however, he turned hostile.

14. Keeping in mind the aforesaid facts and the proposition of law with regard to successive bail application, I may deal with the arguments of the applicant, as under :

14.1 So far as the first and foremost contention of learned advocate for the

applicant with regard to delay in trial is concerned, in my considered opinion, it is true that the accused is entitled for speedy trial under Article 21 of the Constitution of India. However, at the same time, in my view, at the time of considering the bail application of the accused of a heinous crime, one has to keep in mind the cause of delay as well as the repercussion on the trial in case of granting bail to the accused. In the instant case, as stated herein-above, the applicant being a prime accused and has strong motive behind committing the alleged offences, more particularly having antecedents and the delay in trial can also be attributable to the applicant as well as accused No.2, who has been enlarged on bail, to some extent. One of the co-accused i.e. accused No.2, who has been enlarged on bail, is not attending the trial and has absconded. During his absconding, one of the witnesses who was not attending the trial, namely, Amit Khatri, turned hostile. In that event, considering the totality of the facts, in my view, if the present applicant is released on bail, there would be serious repercussion on the trial, as other important witnesses are yet to be examined. Thus, at this crucial stage, when 16 witnesses out of total 43 have already been examined, the present application, in my view, does not deserve consideration, merely because the trial was delayed for the reasons recorded herein-above.

14.2 So far as the decision of the Apex Court relied upon by the petitioner in case of Nikhilbhai Balubhai Thorat (Supra), the Apex Court noted the fact therein that the petitioner therein was in incarceration for more than four years and the case rests on circumstantial evidence and more than sixty witnesses remain to be examined. However, in the instant case, although the applicant is in jail since 3 and 1/2 years and also based on circumstantial evidence, but, so far as the examination of witnesses are concerned, 16 witnesses out of 43 are already examined and the trial is under active consideration. Thus, keeping in mind the aforesaid facts, in my view, the trial is likely to be hampered, if, at this stage, the applicant is released on bail.

14.3 So far as the decision of the Apex Court relied upon by the applicant in case of Manishaben (Supra) is concerned, the Apex Court appears to have enlarged the petitioner therein on bail considering the fact that there is a bleak possibility of completion of trial in near future, the period of incarceration in jail and the case of the co-accused, namely, Nikhil Thorat was considered by the Apex Court. However, in the instant case, at the cost of repetition, it is pertinent to keep in mind that one co-accused having enlarged on bail, not cooperating in the trial and absconded and during that period, one of the witnesses – Amit Khatri also turned hostile and thereby, there is a strong suspicion that if the applicant is released on bail, the entire trial would be hampered and/or tampered. Even, the present applicant may also abscond as has been done in the past while he was granted temporary bail, he remained absconding for more than 99 days.

14.4 So far as the decision of the Apex Court relied upon by the applicant in case of Javed Gulam Nabi Shaikh (Supra) is concerned, the facts of the present case as well as the facts of that case are completely different. The facts before the

Apex Court were that the applicant was in jail as under-trial prisoner for 4 years and till his application was decided, the trial court did not even frame the charge and the prosecution was intending to examine not less than eighty witnesses in that highlighted facts, the case of the petitioner therein was considered for bail. However, in the instant case, the trial has/ substantially been progress and 16 witnesses out of total 43 have been examined and thereby, the facts are different and are not applicable to the facts of the present case.

14.5 So far as the decision of the Apex Court relied upon by the applicant in case of Manish Sisodia (Supra) is concerned, the glaring fact appears to have been taken note of by the Apex Court is that the trial not even commenced at the relevant point of time, more particularly when the Apex Court expected to conclude the trial within 6 to 8 months. In that peculiar facts and circumstances, when the trial was not even commenced, the Apex Court, therefore, appears to have enlarged the applicant therein on bail considering the rights infringed under Article 21 of the Constitution of India. However, in the instant case, the cause of delay in trial to some extent can be attributable to the present applicant, accused No.2, who has been enlarged on bail and not attending the trial and one of the prime witnesses – Amit Khatri was also not attending the trial. Thus, in my view, in such peculiar fact, the delay could not have been wholly attributable to the trial court and thereby, in my view, same would not fall within the violation of Article 21 of the Constitution of India. True it is that the accused have their rights under Article 21 of the Constitution of India for the speedy trial. However, at the same time, in my view, to consider Article 21, the cause of delay in trial also to be taken note of. In the instant case, when the cause cannot wholly attributable to the trial court, it cannot be said that there is a violation of Article 21 of the Constitution of India, more particularly when till now, 16 witnesses out of 43 have already been examined and the trial has much progressed. So far as Article 21 is concerned, in my view, Article 21 would not applicable to the accused only, while rights under Article 21 of the accused are considered, it should not be oblivion to the right and apathy of the family members of the deceased. Article 21 should also available to them. There has to be balancing view vis -a-vis accused and the victim. In the instant case, keeping in mind the facts of the present case, my conscience does not permit me to exercise discretionary power under Section 439 of the Cr.P.C. Therefore, at this stage, in my view, mere because there is a delay in trial that would not automatically give right to the applicant to be enlarged on bail, ignoring the other facts and circumstances.

14.6 So far as the contention with regard to parity is concerned, the accused No.3 – Bharat Vyas was not reported at the place of incident as per the statement of Amit Khatri and thereby, his case was considered for bail. So far as accused No.4 - Hiren Thakore is concerned, there was no evidence to connect him directly with the offence of Section 302 of IPC and the only role which was attributed was with regard to collection of some ransom money which was sent by the deceased. So far as the role attributed to accused No.2 – Divyesh Patel is concerned, it is with regard to abduction of the deceased. Keeping in mind the

aforesaid orders releasing the co-accused and keeping in mind the facts of the present case, it clearly transpires that the present applicant is the main accused and had strong motive to commit the offence due to being implicated in the criminal proceedings at the instance of the deceased. Keeping in mind the further fact that at the time when the offence was committed, the CDR report suggests that the deceased and the present applicant were together at the place of incident and, therefore, prima facie, chain of circumstances appears to have been completed and thereby, his role is far distinguishable than the other co-accused and thus, in my view, the principle of parity cannot be invoked in favour of the present applicant.

15. In view of aforesaid facts and circumstances, in my considered opinion, the present applicant, who being a prime accused and has a strong motive behind the offence, cannot be considered for regular bail at this stage, when the trial is under active progress and more particularly this Court, at this stage, cannot delve into the veracity and legality of the evidence already recorded before the trial court, as it would be amounting to evaluating the evidence recorded by the trial court. This Court cannot consider and/or interpret the evidence which is led before the trial court while considering the bail application and thereby, one witness turned hostile would not be a ground to grant the bail to the applicant when the trial is at advance stage and other important witnesses to be examined. The entire evidence is to be evaluated by the trial court and any observation and finding recorded by this Court would prejudice the rights and contentions of the accused as well as the prosecution which is not permissible while considering the bail application.

I answer the question accordingly.

16. In view of aforesaid, the present application fails and is hereby dismissed. Rule is discharged.