

(2001) 03 GUJ CK 0040
In the Gujarat High Court

Case No : Miscellaneous Criminal Application No. 1669 of 2001

Mohmed Salim Abdul Rasid Shaikh

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 21-03-2001

Acts Referred:

Arms Act, 1959 — Section 25(1)A, 25C
Constitution of India, 1950 — Article 22
Criminal Procedure Code, 1973 (CrPC) — Section 162, 438, 439
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 114, 120B, 143, 147, 148
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 3, 5

Citation : (2001) 2 GLR 1580

Hon'ble Judges : C.K. Buch, J

Bench : Single Bench

Advocate : J.M. Panchal, for the Appellant; N.D. Gohil, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

C.K. Buch, J.—Rule. Service of Rule is waived by learned A.P.P. Mr. N. D. Gohil for the respondent-State.

2. Heard learned Counsel Mr. J. M. Panchal for the applicant-accused. This application u/s 438 of Cr.P.C. is filed by the applicant-accused apprehending his arrest in connection with CR. No. I. 220/2000 of Aslali Police Station registered on 29/30-12-2000 for the offence punishable u/s 302 I.P.C., praying to release him on anticipatory bail in the event of his arrest.

3. Learned Counsel for the applicant has taken me through the nature of allegations made in the F.I.R. and other relevant aspects mentioned in the application and both the affidavits viz. affidavit filed by the Investigating Officer and affidavit-in-rejoinder filed by the applicant.

4. It is settled legal position that the grant of anticipatory bail stands on

altogether a different footing than the grant of regular bail. When serious offence is registered against the accused and police intends to arrest such accused for such serious offence at the initial stage, even if Court feels that the apprehension of the arrest in the mind of the accused is reasonable, in that event, various aspects need consideration. One should not ignore the spirit and object of the provisions of Section 438 of Cr.P.C. This Court as well as Apex Court, time and again, have emphatically propounded that the discretion in favour of the person accused praying for anticipatory bail should be exercised sparingly and in exceptional circumstances. Hence, the crucial question is that who can expect a bail in advance from the Court? Anticipatory bail is prayed and granted normally to avoid extreme hardships and inconvenience or harassment by investigating agency to a person who has never experienced or expected police arrest in a serious offence in the earlier part of his life or by an innocent and law-abiding citizen, prima facie, found falsely or mala fide implicated in a non-bailable offence with political or other vendetta, as an accused in a crime. A person who is having checkered history and against whom number of non-bailable offences of serious nature have been registered and trials are pending, whether should be granted advance bail, is also a question.

5. During the oral submissions, it is not disputed by the applicant that he was arrested earlier in 9 different offences registered against him in different police stations under Ahmedabad Police Commissionerate. In the instant case, Investigating Officer, Mr. D. S. Chauhan, P.S.I. of Aslali Police Station has filed affidavit giving the details or say checkered history of the present applicant. I would like to refer statement attached with the affidavit of I.O. showing number of offences of grave nature registered against the present applicant, as under :-

1. Gaekwad Haveli I.C.R. No. 161 of 1993 I.P.C. 302, 120B, 365, 387, 342, 201, 202, 212, 470, 471, 188 and T.A.D.A. 3, 5, Arms Act 25(1)A etc. .
2. Gaekwad Haveli I.C.R. No. 60 of 1994 I.P.C. 302, 34, 120B, 465, 466, 470, 471, 202, T.A.D.A. 3, 5 etc.
3. Shahibag I.C.R. No. 284 of 1993 I.P.C. 120B, 307, 365, T.A.D.A. 3, 5 etc.
4. Vatva I.C.R. No. 92 of 1994 I.P.C. 395, 120B, 212, 465, 470, 471 T.A.D.A. 3, 5 etc.
5. Vejalpur I.C.R. No. 28 of 1994 I.P.C. 365, 395, 465, 467, 470, 471, Arms Act. 25C, T.A.D.A. 3, 5 etc.
6. Shahpur I.C.R. No. 47 of 1994 I.P.C. 367, 114, 465, 468, 470, Arms Act, 25(1)BA.
7. Shahpur I.C.R. No. 112 of 1994 I.P.C. 307, 452, 143, 147, 148. B.P. Act 135, Arms Act, 25(1)C.
8. Ellisbridge I.C.R. No. 29 of 1994 I.P.C. 307, 34, Arms Act 25(1)C.
9. Rakhiyal I.C.R. No. 94 of 1993 I.P.C. 302, 307, 120B, Arms Act, 25(1)C etc.

6. Learned Counsel Mr. Panchal for the applicant has brought to the notice of this Court that out of aforesaid 9 cases, in 2 cases, the applicant has been acquitted and in two offences, he has been discharged by competent Court. Rest of the cases are pending for trial. He has, therefore, submitted that it is not correct to say that CR. No. 1. 284 of 1993 of Shahibagh Police Station and CR No. I. 94 of 1993 of Rakhiyal Police Station are pending for trial. He has further submitted that year of commission of offence also cannot be ignored.

7. I have carefully considered the year and various sections indicating the nature of the offences registered against the present applicant and the fact of acquittal in two cases and the orders of discharge in another two cases by the competent Courts. This Court is also aware of the fact that nobody should be viewed with any prejudice when he approaches the Court with a prayer to exercise a judicial discretion u/s 438 of Cr.P.C. However, in view of the special provisions of Section 438 of Cr.P.C. for bail in advance and spirit and/or object underlying, a person apprehending arrest irrespective of the gravity of the offence, can pray for bail in advance. Status and characteristic of an individual, in the background of previous antecedent, are also important and relevant aspects. Consideration of such aspects cannot be equated with the discriminatory treatment.

8. To appreciate rival contentions raised on behalf of the parties, it would be proper to quote observations of the Apex Court, while dealing with Section 438 of Cr.P.C., in the case of Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, . The Apex Court, in para 33 has said :-

"33. We would, therefore, prefer to leave the High Court and the Court of Sessions to exercise their jurisdiction u/s 438 by a wise and careful use of their discretion which by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these Courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic to take a statute as one finds it on the ground that after all, "the legislature in its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Sessions may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected."

9. Number of offences of grave nature registered against the accused-applicant indicates the area of activity, modus and tendency which might be working in the mind of the applicant-accused. The Apex Court, in the case of Gurubaksh Singh (supra) has observed in para 13 of the said case that "the High Court and the Court of Sessions to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse

bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant u/s 439 of the Code." Observations made by the Apex Court in paras 18 and 19 of the said judgment are also very much relevant.

10. Mr. Panchal, learned Counsel for the applicant has hammered that in view of the scheme of Section 438 of Cr.P.C. and Art. 22 of the Constitution, this Court should grant pre-arrest bail as there is nothing unjust or unfair in it. But, in my view, the duty of this Court is also to see that ends of justice are better served, and it has to be decided whether case is made out for granting such relief. This is not a case of prosecution instituted with an ulterior motive. It is difficult to say that the charge is evidently baseless and/or is actuated by mala fide. The application of a petitioner apprehending arrest should not be thrown only on the ground of gravity of the crime registered against or on the quantum of punishment prescribed for. It is also true that bail and anticipatory bail are not two entirely different concepts and the language of Section 438 of Cr.P.C. is explicitly clear. The legislature intends to bring anticipatory bail within the category of bail and not to treat it as something different than bail. As per the settled legal position, the considerations which should weigh with the Court while dealing with the request to grant to anticipatory bail, need not be same as the application to release one on bail after arrest. I have considered the ratio of the decision in the case of State of Andhra Pradesh Vs. Bimal Krishna Kundu and another, . The Apex Court has rejected the pre-arrest bail plea as accused was, prima facie, found responsible for leakage of question papers of Public Service Commission under a conspiracy with the Printer. The same principle is reflected in a decision in the case of State Rep. by the C.B.I. Vs. Anil Sharma, . "Values of life" is a relative term and is a changing phenomenon, but in total socio-economical perspective, value-based non-natural behaviour or conduct is much expected if one is desirous of advance bail.

11. This Court can reasonably infer that the present applicant must be well-versed with the Court proceedings and litigancy (sic. nitty gritty) criminal investigation. Advantage of custodial interrogation in certain cases is more helpful. The Court has to presume that the police officer would conduct custodial interrogation in a responsible manner.

Grant of anticipatory bail in present case, is likely to create some hardship in interrogating the present applicant, if pre-arrest bail is granted. In the case of Anil Sharma (supra), the Apex Court has observed as under :-

"6. We find force in the submission of the C.B.I, that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well-ensconced with a favourable order u/s 438 of the Code. In a case like this, effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during

the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third degree methods need not be countenanced, for, such an argument can be advanced by all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders.

7. The High Court has approached the issue as though it was considered a prayer for granting regular bail after arrest. The learned single Judge of the High Court reminded himself of the principle that "it is well settled that bail and not jail is a normal rule" and then observed thus :

"unless exceptional circumstances are brought to the notice of the Court which may defeat the proper investigation and fair trial, the Court will not decline bail to a person who is not accused of an offence punishable with death or imprisonment for life. In the present case, no such exceptional circumstances have been brought to the notice of this Court which may defeat proper investigation to decline bail to the applicant."

8. The above observations are more germane while considering an application for post-arrest bail. The consideration which should weigh with the Court while dealing with a request for anticipatory bail need not be the same as for an application to release on bail after arrest. At any rate, the learned single Judge ought not to have side-stepped the apprehension expressed by the C.B.I, (that the respondent would influence the witnesses) as one which can be made against all accused persons in all cases. The apprehension was quite reasonable when considering the high position which the respondent held and in the nature of accusation relating to a period during which he held such office."

12. I agree that conditional anticipatory bail can be granted and investigating agency can be permitted to ask for remand for custodial interrogation or applicant can be directed to co-operate with the investigation in drawing panchanama u/s 27 of the Evidence Act etc. Such conditions are normally imposed, but when the Court, prima facie, is of the opinion that grant of anticipatory bail to a particular person is likely to hamper investigation and investigating agency is likely to lose an opportunity to exploit all the fact situation, probabilities, or opportunities which the Agency may get during the custodial interrogation of a person, the Court should go slow in granting anticipatory bail. Therefore, only the Apex Court has observed that this discretionary jurisdiction should be exercised sparingly. It is pertinent to note that the prosecution case rests mainly on circumstantial evidence and police has received a clue against the present applicant from the statement of co-accused, already arrested. Irrespective of the fact that statement of co-accused to police is not admissible in evidence before the Court, but police can certainly consider that statement as a clue while interrogating him further or other persons arrested or interrogated during the course of investigation. Premature stage of

investigation cannot be ignored, and anticipatory bail, as a matter of course, should not be granted. Police intends to arrest this applicant for the offence punishable u/s 302 of I.P.C. wherein a dead body of a young male person inflicted by sharp-cutting instruments. Non-disclosure of name of the applicant in F.I.R., considering the set of facts available in F.I.R., would not be a matter of much relevance. Act, prima facie, committed by the accused seems to be an act of more than one person. It is likely that the police may, after interrogation of present applicant, may arrest even more persons. Hence, this is not a fit case wherein the Court should exercise discretion in favour of the applicant.

13. There is no scope for present applicant to urge that he may be saved from disgrace or unwarranted hardship. While entertaining the anticipatory bail application of the accused, the Court should consider various aspects such as :

(i) earlier offences registered against the applicant accused and the nature thereof including the area of activity, modus etc. if brought to the notice of the Court;

(ii) gravity of the circumstances in which the offence is committed. Whether custodial interrogation is, prima facie, unavoidable?

(iii) likelihood of the accused fleeing from justice;

(iv) position and status of the accused individually and also with reference to the victim and witnesses;

(v) likelihood of repetition of similar type of offence;

(vi) whether he would jeopardise his own life being faced with grief or grim prospects of possible conviction in the case;

(vii) likelihood of tampering with the evidence or witnesses during the process of investigation, status and stage of investigation;

(viii) plea of false implication on some special vendetta, if taken.

(ix) other relevant grounds which may apply to facts and circumstances of that particular case;

14. I have considered all relevant aspects anxiously and carefully and this is not a case wherein even there is any scope for the applicant to argue that if this Court refuses to exercise discretion vested in it u/s 438 of Cr. P. C., would amount to punishment before trial. For the reasons aforesaid, there is no merit in the application and the same is dismissed. Rule is discharged.

15. Before parting with the order, I would like to observe that till this date, role allegedly played by the applicant only indicates his role which has been noticed by the investigating agency but when investigation is at a premature or initial stage, the set of arguments based on limited facts as advanced by the learned Counsel Mr. Panchal for the applicant, would not help the applicant.

16. Application dismissed.