
(2006) 11 GUJ CK 0015

In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 11699 of 2005 in Criminal Appeal No. 635 of 2004

Mohmed Salim Samsuddin Shaikh

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 27-11-2006

Acts Referred:

Arms Act, 1959 — Section 25(1), 25(1)(AA), 35
Criminal Procedure Code, 1973 (CrPC) — Section 313

Citation : (2006) 11 GUJ CK 0015

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

Bench : Single Bench

Advocate : Chetan K. Pandya and Himanshu J. Mehta, for the Appellant; A.J. Desai, Ld. APP for Respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

C.K. Buch, J.—Heard Shri S.V. Raju, learned Counsel appearing with Shri Chetan K. Pandya, for the applicant and Shri A.J. Desai, learned Additional Public Prosecutor, appearing on behalf of the opponent-State.

2. The applicant-orig. accused No. 2 has prayed for bail pending hearing and final disposal of he appeal filed by the applicant against the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Court No. 11, Ahmedabad City, at the conclusion of the trial in Sessions Case Nos. 46 of 1999 and 190 of 2000. The present applicant is the orig. accused No. 2, who has been held guilty with orig. accused No. 1-Noormohamad Mohamad Yasin Shaikh and orig. accused No. 4-Mohamad Rafik Abdul Salim Shaikh for the offences punishable under Sections 25(1)(b) read with Section 35 of the Arms Act, 1959 (hereinafter referred to as "the Act"). In the same way, the applicant herein has further been held guilty for the offence punishable u/s 25(1)(AA) read with Section 35 of the Act. The maximum period of punishment imposed in the present case is of seven years. The amount of fine has been paid by the

applicant. The say of Shri Raju before this Court is that:

i. The amount of fine has been paid by the applicant.

ii. The applicant was on bail pending trial.

iii. For want of any objectionable history against the applicant, this Court should exercise discretion in favour of the applicant.

iv. It is submitted that the applicant is the brother dealing in estate as well as motor vehicles and was doing his business in the name and style of "Jasmine Estate and Auto Dealers", keeping one shop in Vejalpur area. The learned trial Judge has linked the applicant with the offence in question as he had claimed the motor vehicle i.e. the car from which certain cartridges of 455 bore were discovered at the instance of orig. accused No. 1-Noormohamad.

v. The applicant was not in the car when the car in question was intercepted. The alleged discovery was made on the next day. The search of the alleged car was made in respect of another offence punishable under the Prohibition Act, and the weapons were discovered including A.K.47 rifle with large number of cartridges, which can be used in an A.K.47 rifle along with country-made pistols, popularly known as "Tamancha" from the Bungalow No. 19, Satyam Society, Shahpur. The owner of the said bungalow has been enlarged on bail by the Court and as there is no evidence as to the involvement of the present applicant in the offence in question, which is made punishable under the Act, the applicant should be given advantage of bail pending hearing and final disposal of the appeal, especially when he is in prison for the last about three years.

vi. In response to the query raised by the Court, Shri Raju has drawn the attention of the Court to the evidence available at page Nos. 385, 389 and also to the fact emerging from paragraph No. 43 (page No. 285 of the paperbook). According to Shri Raju, mere claiming the custody of the vehicle in question from the Court would not make the applicant responsible for such an offence because ultimately he was broker and he had paid the amount of consideration to the registered owner of the car namely Gangadhar. The orig. accused No. 1-Noormohamad was the potential buyer and the applicant was the mediator only. A mediator will not know that the potential buyer will use the car in commission of such a serious offence.

vii. Ultimately, number of cartridges found from the motorcar are very meager and there is ample scope for the applicant to argue at the time of final hearing that there is scope of planting of muddamal cartridges in the motorcar at a later stage.

viii. The discovery panchnama of the cartridges recovered from the motorcar was at the instance of the orig. accused No. 1-Noormohamad. So the culpatory statement which is made while answering the questions and explaining the incriminating evidence against the applicant u/s 313 of the Code of Criminal Procedure, 1973, would not go against the applicant and the applicant has a

fairly strong arguable case. In such a situation, the applicant should be enlarged from unwarranted imprisonment.

ix. The presence of the applicant is otherwise securable in the event of failure of the appeal and he is eager to furnish the bail bond of any amount as ordered by this Court and that too on any stringent condition.

x. Shri Raju has also taken this Court through some part of the evidence led during the course of trial and he has also tried to submit that there is no positive evidence against the applicant to the effect that he was a party in removing the number plate of the car prior to handing over the same to the orig. accused No. 1-Noormohamad, after taking delivery of the car from the registered owner Shri Gangadhar.

3. The Court has also considered the resistance placed by Shri A.J. Desai, learned Additional Public Prosecutor, appearing on behalf of the opponent-State. It is submitted by Shri Desai that the applicant has been held guilty in respect of a very serious offence and one of the weapons seized is A.K.47 rifle and type of cartridges found can be loaded and used in A.K.47 rifle, if the same are to be used. The Court cannot go into detailed appreciation of the evidence at a bail stage. The present applicant has been held guilty along with two other accused persons on appreciation of the evidence and there is no presumption of innocence in favour of the applicant. The applicant himself has accepted that he had claimed the car and obtained the custody; and at present he himself is the registered owner. Even this fact has been accepted by Shri Raju that as the registered owner was not ready to take back the delivery of the car in question, under the guise that he had already sold and entered into contract, the present applicant was compelled to take the car for him and got the same registered in his name in the office of the Road Transport. Undisputedly, the vehicle when was intercepted first, it was being plied without number plate. How the Court should get through the controversy as to who took out the number plate and when. Few cartridges, which were recovered from the car, were compared with the cartridges recovered from the said house in question from which the other weapons including A.K.47 rifle, were recovered. It is in evidence that the said house was searched at the instance and information given by the orig. accused No. 1. It is claimed by the applicant that orig. accused No. 1 was not the driver. He was potential buyer. The orig. accused No. 1 could not examine the registered owner because he had already died at the time when the trial had reached that stage. But it is clear that the present applicant had not even produced the transfer form signed by the registered owner in favour of the orig. accused No. 1. In response to the query raised by the Court, when it is accepted that the applicant was not even paying the Income Tax and there is no other documentary evidence produced as to the business of the present applicant, the Court should not accept the explanation at the bail stage pending appeal because the learned trial Judge has concentrated while holding the applicant guilty not only on the statement made by the applicant u/s 313 of the Code of Criminal

Procedure, 1973, but also on other evidence as well as legal aspects involved in the matter.

4. It is not possible for the Court to ignore the arguments advanced by Shri A.J. Desai, learned Additional Public Prosecutor, in reference to Section 35 of the Act. The applicant has been held guilty for the offence punishable u/s 35 of the Act. For the sake of brevity and convenience, this Court would like to reproduce the said Section 35 of the Act as under:

Section 35 : Criminal responsibility of persons in occupation of premises in certain cases- Where any arms or ammunition in respect of which any offence under this Act has been or is being committed are or is found in any premises, vehicle or other place in the joint occupation or under the joint control of several persons, each of such persons in respect of whom there is reason to believe that he was aware of the existence of the arms or ammunition in the premises, vehicle or other place shall, unless the contrary is proved, be liable for that offence in the same manner as if it has been or is being committed by him alone.

5. On careful reading of the statement of the applicant recorded before the learned trial Judge u/s 313 of the Code of Criminal Procedure, 1973, and the fact that the cartridges recovered from the motorcar were capable of being used in A.K.47 rifle and they were similar to the other cartridges found during the search operation, it would not be proper for the Court to exercise discretion in favour of the applicant because there is ample scope of the applicant's indulging into similar type of activities. Gujarat is a sensitive State and internal security of the whole country is also at stake. In such a situation, whether the Court should exercise discretion in favour of the applicant who has been held guilty by the learned trial Judge, is a crucial question. There is nothing on record even to show as to before how many days or hours, the car was handed over to the said orig. accused No. 1- Noormohamad. It is not the claim of orig. accused No. 1 that he was the purchaser of the car in question, and he could have got the car registered in his name even after releasing from the Jail and it was not impossible for the applicant to register the vehicle in the name of the buyer. There is nothing on record to show that the orig. accused No. 1-Noormohamad was financially strong who could purchase and maintain a car. At this stage, it would not be either proper or justifiable to comment on various aspects of the evidence which have been brought to the notice of the Court because it is likely to prejudice the persons convicted or even the State, which is to face the grounds of challenge when the appeals of all the accused will be taken up for final hearing.

6. The applicant has not even spent half of the sentence in Jail. He was in prison for some period during the course of trial and thereafter, he was enlarged on bail. The offence in question being the first against the applicant would not make him entitled for bail when he has been held responsible for commission of criminal wrong. The Court also should think one more point as to if the bail is granted to the applicant herein, what message would go to the Society because a

large number of cartridges which can be a challenge to even a strong security forces, have been recovered in the present case and it will be too early to comment on the arguments advanced by Shri Raju that perhaps in the present case, the cartridges may have been planted by the Investigating Agency. The question would be as to why the orig. accused No. 1 would become a party in pointing out the cartridges which were concealed in the car. Who was a party in preparing the special space where such cartridges can be placed or concealed, are also the questions which shall have to be considered by this Court while dealing with the appeal. So according to me, the resistance placed by Shri Desai has enough strength.

7. The Court is not convinced with the logic, submissions and arguments advanced by Shri Raju, learned Counsel appearing for the applicant. The Court is not in agreement with the submission of Shri Raju that when the owner of the house in question from where more incriminating muddamal articles were seized, has been enlarged on bail, the Court can grant some relief to the applicant herein. I have carefully considered the earlier order passed by the Court giving advantage of bail to the owner of the house because it was successfully pointed out by that accused to the concerned Court that when his residential premises was raided, he was in prison because of the order of detention passed by the competent authority under PASA and much prior from the date of actual raid carried out in his house, he was taken in custody and was sent to prison. There is no positive evidence as to close relationship between the applicant and the said accused, who has been granted bail. How and why, and in what fact situation, orig. accused No. 1 was knowing that a large number of prohibited arms and cartridges are lying in the house of the person who is already under detention is also a question which needs appreciation. So the present applicant is not entitled to claim any advantage under the principle of so-called parity. This is not a case of party at all.

8. In view of above observations and discussion, I do not find any merit in this application and hence, the same is hereby dismissed. Rule is discharged.

9. It is, however, clarified that if the appeal of the present applicant against the judgment and order of conviction and sentence under challenge in appeal is not heard and decided within a period of one year from today, the applicant can raise a bail plea afresh and in the event of submission of such a fresh bail application, the Court obviously shall hear and decide the same on its own merits and not merely on the ground of period undergone by the applicant in prison.