
(1980) 07 GUJ CK 0009
In the Gujarat High Court

Narsinh Revaji Ayachi and Another

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 31-07-1980

Acts Referred:

Constitution of India, 1950 — Article 134, 19(1)(b)
Criminal Procedure Code, 1973 (CrPC) — Section 418, 437, 438
Penal Code, 1860 (IPC) — Section 302

Citation : (1981) 22 GLR 234

Hon'ble Judges : S.H. Sheth, J;S.B. Majmudar, J

Bench : Division Bench

Judgement

S.H. Sheth, J.—Two petitioners who are father and son have made this application u/s 438 of the Code of Criminal Procedure for obtaining an order of anticipatory bail. The record discloses that petitioner No. 1 is accused of having committed murder of one Vira Ibrahim and he is going to be charged with having committed an offence punishable u/s 302 of the Indian Penal Code. Section 437 of the Code of Criminal Procedure expressly provides that an accused shall not be released if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life. There is no doubt about the fact that petitioner No. 1 has been charged with an offence punishable with death or imprisonment for life. Therefore, under Sub-section (1) of Section 437, he is not entitled to bail unlike any other offender. See. 438 of the Code of Criminal Procedure does not make any express or specific reference to an offence punishable with death or life imprisonment. However, in our opinion, Sections 437 and 438 have got to be read together because it is inconceivable that an accused charged with having committed murder is entitled to anticipatory bail u/s 438 even if he is not entitled to bail u/s 437. To take the view that the benefit of Section 438 is available to all accused including persons accused of having committed murder is to defeat the provisions of Section 437. If such a person is released on anticipatory bail, he will always continue to remain on bail until the trial is over. In such a case the bar enacted by Section

437 will never become operative. We are, therefore, of the view that a person accused of having committed murder is not entitled to anticipatory bail u/s 418 of the Code of Criminal Procedure.

2. The police officer has filed an affidavit herein which shows that petitioner No. 1 is accused of having committed murder of Vira Ibrahim and that he had got evidence in that behalf. Mr. Shah has raised the contention that the police have, in the course of their investigation, recorded more than 300 statements and that copies of those statements should be furnished to the petitioners in order that they can effectively meet the affidavit which the police officer has made. Investigation is not yet over. In our opinion, before the investigation is over, a murder-accused cannot as of right demand copies of police statements. If copies of statements are given to him, it will in all probability prejudice further investigation. It is quite likely that he may try to fabricate evidence in some other manner. It is also quite probable that he may temper with investigation which is yet to be done. Therefore, in the very nature of things, unless the police has no objection, copies of statements recorded by them cannot be ordered to be furnished to a murder-accused before the investigation is over.

3. In *Kottam Raju Vikram Rao v. The State* 18. G.L.R. 107, a learned Single Judge of this Court has interpreted Sub-section (5) of Section 173 and come to the conclusion that it enacts an implied bar against giving copies of police statements to an accused before the investigation is over. Mr. Shah who appears on behalf of the petitioners has argued that decision does not lay down the correct principle because, in his view, Sub-section (5) of Section 17.3 does not enact such an implied bar. It is not necessary to examine his argument in details because, for the purpose of this case, it is not necessary for us to express any opinion on the soundness or otherwise of that decision. Even assuming that Sub-section (5) of Section 173 does not imply such a bar, copies of police statements, unless the police agree, cannot be ordered to be given to an accused before the investigation is over. However, in order to satisfy ourselves whether the affidavit made by the police officer is correct or not, we ourselves have looked into the police statements produced before us. We are satisfied that the affidavit which the police officer has made in the instant case is correct. There is evidence on record which accuses petitioner No. 1 of having committed murder of Vira Ibrahim. Mr. Shah, in this context, has further argued that if the entire record is made available to him, he will be able to point out that the police are trying to make out a false case against petitioner No. 1. The court may peruse the entire record in order to satisfy that there is a prima facie case against the accused but an accused cannot be ordered to be given, before the investigation is over, copies of police statements. We have pointed out one danger of succumbing to the argument which Mr. Shah has raised before us. The second danger is that if copies are given to the accused at such a state, then there will be affidavits and counter-affidavits, controverting, denying and asserting what has been stated in the police statements. It will lead to a trial in the midst of investigation before the actual sessions trial commences. Therefore, to accede to the argument which

Mr. Shah has raised is to upset the apple cart of criminal investigations. It cannot be done. We may also state that the First Information Report which the police received within about five hours of Vira Ibrahim having been murdered discloses the name of petitioner No. 1. We may also state that at the stage of anticipatory bail and particularly when the police investigation is not over, we cannot look into police papers, weigh the evidence, pros and cons and come to the conclusion whether the police case against the accused is tenable or not. To do so is to again hold a trial before the actual trial is held. All that we are required to be satisfied with is whether there is prima facie case against the accused. In the instant case, we are satisfied that there is a prima facie case against petitioner No. 1.

4. Mr. Shah has invited our attention to a decision of the Supreme Court in Additional District Magistrate, Jabalpur Vs. Shivakant Shukla, . In that decision, the Supreme Court has laid down that copies of the evidence before the police Authorities should be made available to a detenu.

5. A detenu is detained after the investigation is over. Therefore, if copies of police evidence are furnished to a detenu, the question of prejudicing the police investigation does not arise. Copies are also necessary to be supplied to a detenu in order to enable him to make effective representation against his detention which is his right under the Constitution as well as under the detention law. Therefore, the principle laid down by the Supreme Court in Shivakant Shukla's case (supra) is not applicable to a case under police investigation under the Code of Criminal Procedure. Probably realising that the petitioners will face these difficulties, they have tried to challenge vires of Sections 173(5), 157 and 437(1). According to them, they are ultra vires Articles 14, 19(1)(b) and 21 of the Constitution. We find no substance whatsoever in this challenge.

6. So far as challenge under Article 14 is concerned, persons accused of having committed criminal offences constitute a class by themselves. Secondly, so far as murder-accused are concerned, they constitute a class by themselves because they pose serious danger to the society. Liberty of an individual cannot be ensured unless there is order in the society. Therefore, if separate treatment to murder accused has been given by Sub-section (1) of Section 437 (as well as Section 438), it cannot be said that it is in any manner unduly discriminatory and, therefore, violative of Article 14. Similarly, those against whom police investigation is over constitute a class by themselves and are distinct from those against whom the police investigation is in progress. Therefore, Sub-section (5) of Section 173 as well as Section 157 do not contain the vice of hostile discrimination and are not hit by Article 14.

7. So far as challenge to Article 19(1)(b) is concerned, we are of the opinion that to deprive persons, against whom investigation is in progress, of the benefit of copies of police statements and to deprive a murder accused of the benefit of bail u/s 437(1) as well as Section 438, constitutes a reasonable restriction on the liberty of the individual. Those who make human being their targets cannot have

the right to assemble under Article 19(1)(b) They also constitute a danger to the society and are not supposed to be peaceable. Therefore, in order that others may enjoy their fundamental rights, it is necessary to place restrictions on the offenders at law or persons accused of having committed offences against law. Such reasonable restriction on fundamental right of a citizen is contemplated by Clause (3) of Article 19. The second constitutional challenge, therefore, is without any substance and is rejected.

8. So far as the third challenge is concerned, it is under Article 21. It cannot be gainsaid that every citizen must enjoy an unfettered right to life and liberty. He cannot be deprived of it. However, it can never be said that those who deprive others or are accused of having deprived others of their life or liberty should enjoy life and liberty untrammled or uninterfered with. Those who commit offences or are accused of having committed offences, must suffer because it ensures liberty to law abiding citizens and order in society. Secondly Article 21 itself envisages that no one shall be deprived of his life or personal liberty except according to the procedure established by law. That procedure has been established by Sections 173(5), 157, 437(1) and 438. It is necessary to remember that what our Constitution provides is "procedure established according to law" and not "due process of law." If a certain procedure is established by law, it is valid under the Constitution unless it is established that it is violative of some other provision in the Constitution. We, therefore, find no substance whatsoever in any of the three challenges which Mr. Shah has made to the aforesaid sections under the Constitution. In the result, the petition fails and is rejected.

9. Mr. Shah applies for a certificate of fitness under Article 134 of the Constitution of India to appeal against this decision to the Supreme Court. The principles which we have borne in mind while dismissing this petition are well-settled. In our opinion, therefore, there is nothing substantial which requires to be decided by the Supreme Court. The oral application made by Mr. Shah in that behalf is therefore rejected.

10. Mr. Shah has further requested that the interim order against apprehended arrest which the learned Single Judge made at the initial stage in this case before he referred the case to the Division Bench may be continued for a period of four weeks in order to enable petitioner No. 1 to challenge this order in the Supreme Court. The police investigation has been held up for a very long time.

11. We, therefore, do not propose to accede to the full extent to the request which Mr. Shah has made. However, we think that some time should be granted to petitioner No. 1 to enable him to challenge this order in the Supreme Court. We, therefore, direct that interim order which the learned Single Judge of this Court earlier made in this case shall continue to be in force until 11th August 1980 after which it shall stand vacated. Mr. J.U. Mehta who appears on behalf of the State has expressly stated to us that the police have nothing against petitioner No. 2.