

**(2004) 06 GUJ CK 0046**

**In the Gujarat High Court**

**Case No :** Misc. Criminal Application No. 9580 of 2003 and Miscellaneous Cri. Appli. No"s. 9785 of 2003 and 3807 of 2004

Patel Vishnubhai Shivrambhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

**Date of Decision :** 24-06-2004

**Acts Referred:**

Constitution of India, 1950 — Article 21  
Criminal Procedure Code, 1973 (CrPC) — Section 439

**Citation :** (2004) 3 GLR 2195

**Hon'ble Judges :** B.J. Shethna, J

**Bench :** Single Bench

**Advocate :** Haresh N. Joshi, for Petitioner Nos. 1 to 7 in Misc. Criminal application Nos. 9580 of 2003 and 3807 of 2004 and J.M. Malkan, in Misc. Criminal application No. 9785 of 2003, for the Appellant; P.R. Abichandani, Assistant Public Prosecutor for Respondent No. 1 in Misc. Criminal Application No. 9785 of 2003 and J.M. Malkan, for the Respondent

## **Judgement**

B.J. Shethna, J.—On 18-12-2003 this Court had allowed present Misc. Criminal Application No. 9580 of 2003 and released all the applicants-accused on certain terms and conditions. The order dated 18-12-2003 reads as under :

Misc. Criminal Application No. 9580 of 2003 is filed by the seven accused-petitioners for regular bail in connection with the offence registered against them as C.R. No. I-60 of 2002 with Visnagar Police Station.

1.1 Misc. Criminal Application No. 9785 of 2003 is filed by Mohammad Iqbal Khan Ahmed Khan Bloch, original complainant in above Misc. Criminal Application No. 9580 of 2003 opposing the grant of regular bail to the accused-petitioners.

1.2 Ordinarily, this Court does not entertain such application filed by the complainant, but in the interest of justice, Mr. Malkan appearing for original-complainant was heard. Seven accused-petitioners had earlier filed joint Misc. Criminal Application No. 6304 of 2002 before this Court. It was dismissed on

13-9-2002 without assigning any reasons on merits as learned Counsel for the accused-petitioners had not pressed for the reasons. However, request made by the learned Counsel for the accused-petitioners to expedite the trial was granted as out of 50 accused persons, only seven accused-petitioners were kept in jail since 28-2-2002 and learned Sessions Judge, Mehsana was directed to transfer the Sessions Case if it was ready, to the Fast Track Court for deciding the case as early as possible and Investigating Officer was directed to keep all the witnesses present at the time of trial. Accordingly, the recording of the evidence of prosecution witnesses was over and the statements of the accused u/s 313 of Cri.P.C. were also recorded. However, the trial could not be over because of the stay granted by the Apex Court on a petition filed by Shri Yusuf Khan Muradkhan Pathan, as stated at the Bar.

1.3 However, the fact remains that though the trial is almost over, the final judgment could not be pronounced by the learned trial Judge because of the stay granted by the Hon'ble Apex Court and because of that, 7 accused petitioners are in jail since 28-2-2002 i.e., for a period of almost two years. During this period, when the witnesses were examined before the trial Court during the trial, no complaint whatsoever is made against 43 accused persons who are already enlarged on bail and the present 7 accused petitioners who are not enlarged on bail of either threatening the witnesses or tampering with the witnesses. In this view of the matter, I am of the considered opinion that the petitioner-accused are now required to be enlarged on bail if they are kept in jail any more than it would amount to punishment without trial.

1.4 Before parting, I must state that learned A.P.P., Shri Kodekar for the respondent-State brought to the notice of the Court that during the pendency and final disposal of this bail application, Yunusbhai Alibhai stated before the police on 8-12-2003 that he has an apprehension to his life if the petitioner-accused are released on bail, but at the same time, Shri Yunusbhai Alibhai has stated in his statement before the police that so far as he has not received threats from any corner,

1.5 Under the circumstances, I am of the considered opinion that when personal liberty of a person is at a stake, then on mere apprehension, without any foundation, expressed by the complainant, the accused persons cannot be kept in jail for a longer period, if it is done, then it violates provisions of Article 21 of the Constitution of India.

1.6 Under the circumstances, in view of the changed circumstances, present bail application i.e. Misc. Criminal Application No. 9580 of 2003 is required to be allowed by imposing stringent conditions so that the accused may not misuse their liberty.

1.7 Accordingly, Misc. Criminal Application No. 9580 of 2003 filed by the present accused-petitioners is allowed and they are ordered to be released on bail in connection with C.R. No. I-60 of 2002 registered with Visnagar Police Station on

their executing bond of Rs. 10,000/- (Rs. Ten thousand only) each with one surety of like amount to the satisfaction of the lower Court and subject to the conditions that they shall :

- (a) not take undue advantage of the liberty or abuse their liberty;
- (b) not act in a manner injurious to the interest of the prosecution;
- (c) maintain law and order;
- (d) mark their presence before the Visnagar Police Station on every Sunday between 9-00 a.m. to 2-00 p.m.;
- (e) furnish addresses of their residence at the time of execution of bond and shall not change the residence without prior permission of this Court;
- (f) surrender their passport, if any, to the lower Court within a week.

If breach of any of the above conditions is committed, then the learned Sessions Judge, Mehsana will be at liberty to issue warrant or take appropriate action in the matter against the concerned accused persons.

1.8 Bail before the lower Court having jurisdiction to try the case.

"Rule is made absolute in Misc. Criminal Application No. 9580 of 2003. D. S. Permitted.

When Misc. Criminal Application No. 9580 of 2003 is allowed and the accused-petitioners are ordered to be released on bail, then Misc. Criminal Application No. 9785 of 2003 filed by Mohammad Iqbal Khan Ahmed Khan Bloch is required to be dismissed, and accordingly, it is dismissed.

At this stage, a request is made by learned Advocate Mr. Malkan appearing for the complainant-Muhammad Iqbal Khan Ahmed Khan Bloch to stay the operation of the order passed by this Court in Misc. Criminal Application No. 9580 of 2003 releasing the accused-petitioners on bail. No concrete reasons are given for the same except that complainant-Muhammad Iqbal Khan Ahmed Khan Bloch wants to approach the Hon''ble Supreme Court against the order. As stated earlier, the accused are in jail since almost two years and they are ordered to be released on bail with stringent conditions, therefore, I do not find any reasons to stay the order of releasing the accused on bail and the prayer for stay of the operation of the order passed today in Misc. Criminal Application No. 9580 of 2003 is rejected. The complainant-Muhammad Iqbal Khan Ahmed Khan Bloch can always approach the Hon''ble Supreme Court against the grant of bail, but merely because he wants to approach the Hon''ble Supreme Court against this order would not be a ground to stay the order of releasing the accused on bail.

Sd/- (B. J. Shethna, J.)"

2. The complainant-Muhammad Iqbal Khan Ahmed Khan had challenged the above order before the Hon''ble Apex Court by filing Criminal Appeal Nos.

423-424 of 2004 and the said Criminal Appeals were allowed and the Hon''ble Apex Court by its order dated 5-4-2004 quashed and set aside the order of this Court, which reads as under :

"Leave granted.

Heard the learned Counsel for the patties.

Some of the reasons indicated for the gram of bail do not appear to us to be either relevant or have any bearing on the question of grant of bail. In the circumstances, we set aside the order of the High Court so that it can be re-heard afresh after taking note of all relevant aspects in accordance with law. The applications filed by the accused respondents shall be dealt with in accordance with law after hearing born sides, including the Counsel for the complainant. These Appeals are disposed of finally.

Sd/- (Doraiswamy Raju, J.) New Delhi Sd/- 5th April, 2004 (Arijit Pasayat, J.)"

3. Mr. Joshi, learned Counsel for the applicants-accused firstly submitted that after the matter is sent back to this Court by the Apex Court, on two occasions, learned Counsel Mr. Malkan for the complainant did not remain present and the complainant is simply indulging in delay tactics as the applicants arc once again in jail. Learned Counsel Mr. Joshi for the applicants-accused also submitted that from the order of the Hon''ble Apex Court, it is clear that only some and not all the reasons assigned by this Court for releasing the accused on bail in its order dated 5-4-2004 were found either not relevant or not having any bearing on the question of grant of bail, therefore, the order of grant of bail passed by this Court was set aside and the matter is remanded to this Court for its reconsideration. Mr. Joshi submitted that Mr. Malkan may point out which reasons were not relevant.

However, Mr. Malkan submitted that when the Hon''ble Apex Court has not thought it fit, then he would not like to state which reasons were not relevant. Learned A.P.P. Mr. P. R. Abichandani was also not in a position to point out any particular reason not relevant and not having bearing on the question of grant of bail.

4. From the rival submissions made by the learned Counsel for the parties and the order passed by the Hon''ble Apex Court, it is not clear that what reasons were found to be not relevant by the Hon''ble Apex Court. However, it becomes clear from the order of the Hon''ble Apex Court that no all the reasons, but only some reasons assigned by this Court in its earlier order dated 18-12-2003 were not found to be irrelevant by the Hon''ble Apex Court.

This Court had given number of reasons in its earlier order dated 18-12-2003 for releasing the applicants-accused on bail and in addition to it, learned Counsel Mr. Joshi for the applicants-accused submitted that there are in all 81 accused in this case, out of them, 74 accused are already on bail as per the different orders passed by the trial Court in separate applications filed by them. Earlier, present 7

applicants-accused were not granted by this Court in Misc. Criminal Application No. 6304 of 2002 (hereinafter referred to as "the earlier application"), but direction was issued for early disposal of the trial and as per the said direction trial had commenced before the Fast Track Court, and it was almost over. When it was at the stage of recording of the statements of the accused at that stage the Hon''ble Apex Court has stayed the trial. Therefore, the accused had filed present application before this Court, which was allowed by this Court on 18-12-2003 for the reasons assigned in the order. He submitted that when it is not clear from the order of the Hon''ble Apex Court, as stated in its order that some reasons were not relevant and not having bearing on the question of grant of bail, then in absence of any specific mention about those reasons by the Hon''ble Apex Court, he relies on all the grounds stated in the earlier order by this Court. In addition to it, he submitted that the complainant has given initially given names of 9 accused persons in his F.I.R. Out of that two accused : (1) Patel Parimal Babubhai, and (2) Patel Bhurabhai are on bail since long as per the order passed by the trial Court in 2002. Therefore, the present accused be released on bail on the ground of parity.

However, Mr. Malkan submitted that this ground was urged by the learned Counsel appearing for the applicants-accused in the first bail application, which was rejected by this Court, therefore, on this ground of parity the accused should not be released on bail. When asked Mr. Malkan conceded that neither he had appeared in the first bail application filed by the applicants-accused nor he was present when the first bail application was rejected by this Court with a direction to the trial Court for expeditious disposal of the trial. Then, in that case, how can he submit like this! In fact, while rejecting the said application, on the request of the learned Counsel of the applicants-accused this Court had not assigned any reasons. But, Mr. Malkan submitted that this ground of parity was very much there in the first application filed by the applicants-accused, therefore, it is to be presumed that such point was argued. Even assuming for the sake of argument that such point was there in the first bail application filed by the applicants-accused, but the Court has to consider only those contentions raised before it. Earlier, petition was filed by another Advocate who had not urged this point. Had it been urged this Court would have released the applicants-accused at that time. It may be stated that when this bail application was earlier allowed by this Court, at that time also, this point was not pressed into service by learned Counsel Mr. Joshi as on other points this Court released the applicants-accused on bail.

5. It is not disputed by Mr. Malkan that other two similarly situated accused were released on bail. When two other accused similarly situated accused are released on bail since long then there is no reason for this Court to deny the bail to the present 7 applicants-accused. The incident in question took place on 28-2-2002 at about 8-00 p.m., and within less than 2 hours the complainant lodged his F.I.R. before police naming 9 accused, who were arrested on the spot by the police. Out of them two are already on bail since long, whereas, the present applicants-accused have remained in jail for a period of almost 2 years.

Therefore, they are entitled for bail.

There is one more reason for releasing the applicants-accused on bail as after they were released on bail by this Court on 18-12-2003 till their bail cancelled by the Hon''ble Apex Court on 5-4-2004, for a period of almost 5 months, they have maintained peace and abide by the terms and conditions of the bail order and not threatened any witness.

6. Time and again, the Hon''ble Apex Court has held that grant of bail is rule and refusal is an exception. When the liberty of the person is at stake, then this Court cannot overlook the provision of Article 21 of the Constitution of India. As stated earlier, the trial of the accused is already stayed by the Apex Court, and obviously, it will take time to get over. Therefore, till the trial is over, the accused cannot be kept in jail any more, more particularly, when the evidence of the prosecution witnesses before the trial Court is already over and the matter is at the stage of recording of the statements of the accused persons.

7. Learned Counsel Mr. Malkan for the private complainant, however, submitted that after the bail order of the applicants-accused was cancelled by the Hon''ble Apex Court, the applicants-accused did not immediately surrender before the police and at least three accused Nos. 2, 5 and 7 were absconding. However, it was submitted by Mr. Joshi that the order of the Hon''ble Apex Court would become effective only after it is served upon the accused persons. When the police came to arrest them with the warrant of arrest they surrendered on different dates, therefore, it cannot be said that they were absconding. If the accused were absconding, then either the complainant or the prosecution could have applied before the trial Court for declaring them as absconders. But nothing is done by them.

8. Learned Counsel Mr. Malkan submitted that some of the accused were about to leave the country after the Hon''ble Apex Court cancelled their bail. If they are released on bail then they may jump the bail. However, Mr. Joshi submitted that except the bare allegations there is nothing on record to show that they were really attempting to leave the country. He submitted that all the accused are having their families, and therefore, they will never leave the country. In fact, on earlier occasion also, this Court imposed the condition to surrender their passport which they had already complied with. He, therefore, submitted that it is only with a view to prejudice the mind of the Court, without any authentic proof about it, this type of submission is made by Mr. Malkan.

In absence of any material on record, it is difficult for this Court to accept the submission of Mr. Malkan that some of the accused were likely to leave the country after the Hon''ble Apex Court cancelled their bail. The trial is almost over. If there was any evidence against them to connect with the crime then after they were released on bail by this Court they would have left the country for ever when they were released on bail by this Court on 18-12-2003, but no such attempt was made.

9. Learned A.P.P., Mr. Abichandani has also vehemently opposed grant of bail to the applicants-accused by submitting that when 11 innocent people from minority community of "Muslims" were massacred, then looking to the sensitiveness of the case, the accused should not be released on bail, when there is a strong prima facie case against them. I am afraid this submission of Mr. Abichandani, learned A.P.P., cannot be accepted. This is a Court of law, which is expected to decide the matters strictly in accordance with law without any other consideration.

It may be stated that in similar type of communal riots broke in Ahmedabad in 1985, eight persons of majority community of "Hindus" were burnt alive in Dabgarwad area of Ahmedabad. Relying on the evidence of witnesses, including eye-witnesses, T.A.D.A. Court convicted the accused persons belonging to minority community of Muslims holding them guilty and sentenced them to death, but the Hon'ble Apex Court disbelieving the evidence of the witnesses acquitted the accused. I would like to reproduce certain observations of the Hon'ble Apex Court in case of Dilaver Hussain and Others Vs. State of Gujarat and Another, which are as under :

"Tragic trauma of ghastly, inhuman and beastly behaviour of one community against another depicted for weeks and weeks, in this criminal appeal, forcefully, at times, emotionally still hangs heavily. What a tragedy? Eight human lives roasted alive. Five in waiting for gallows. Neighbours residing peacefully for generations sharing common happiness and sorrow even playing cricket together suddenly went mad. Blood-thirsty for each other. Burning, looting and killing became order of the day. Even ladies attempted to prevent fire brigade from extinguishing fire. How pathetic and sad.

All this generated a little emotion during submissions. But sentiments or emotions, however strong, are neither relevant nor have any place in a Court of law. Acquittal or conviction depends on proof or otherwise of the criminological chain which invariably comprises of why, where, how and who. Each knot of the chain has to be proved, beyond shadow of doubt to bring home the guilt. Any crack or loosening in it, weakens the prosecution. Each link, must be so consistent that the only conclusion which must follow is that the accused is guilty. Although, guilty should not escape. But on reliable evidence truthful witnesses and honest and fair investigation. No free man should be amerced by framing or to assuage feelings as it is fatal to human dignity and destructive of social, ethical and legal norms. Heinousness of crime or cruelty in its execution however abhorring and hateful cannot reflect in deciding the guilt".

So, it is not always necessary that the evidence of the witnesses, including interested witnesses like complainant in the present case, be relied and acted upon by the trial Court for convicting the accused if it is found to be not reliable. Sensitiveness of the case should never be the criteria for denying the bail to the accused. In the past, in many sensitive cases, worst than this one, various Courts of this country, in absence of legal evidence acquitted the accused.

Hence, on this ground of sensitiveness of case accused cannot be denied bail, and accordingly, this submission of Mr. Abichandani, learned A.P.P., is rejected.

10. It is not unknown to anyone that how police of this country acts. In the instant case, it was submitted by learned A.P.P., Mr. Abichandani that all the applicants-accused were arrested on the spot by the police. If that is so, then I fail to appreciate that why immediately police did not register the F.I.R. on its own against the present accused and waited for the complainant to file the F.I.R. against them? Merely submitting that there is a strong prima facie case against the accused is not sufficient. One has to make out prima facie case. Before the stage of commencement of trial, the Court has to consider the prima facie case on the basis of the statements of the witnesses recorded in the case. But, when the evidence of the witnesses is over then in light of evidence of witnesses prima facie case is required to be considered by the Court. Neither learned A.P.P., Mr. Abichandani nor learned Counsel Mr. Malkan was in a position to point out the prima facie case against the accused from the evidence of the witnesses. On the basis of the evidence, the trial Court has to decide whether the prosecution has proved its case against all the accused or some of the accused or the present applicants-accused beyond reasonable doubt or not. Any further discussion by this Court on this point is likely to come in the way of the parties during the trial, therefore, I have refrained myself from further going into it. That apart, prima facie case is not the only consideration while considering bail application as held by the Hon'ble Apex Court. The Court has to take into consideration other aspects also, namely that, whether the accused are likely to tamper with the prosecution evidence or likely to threaten the prosecution witnesses? Admittedly, the present applicants-accused after being released earlier by this Court on 18-12-2003 had never threatened any witnesses or tried to tamper with the evidence. It may be stated that learned Counsel Mr. Malkan had orally submitted on the instruction from the complainant, who is present before the Court that in March, 2004 one of the accused-Bhavin Patel (not the present applicant), had threatened him for which he had made an application to the D.S.P., Mehsana. Learned A.P.P., Mr. Abichandani stated on instruction from Mr. Asari, I.O., who was present before the Court that on receiving the said complaint, the police had registered the case against that accused-Bhavin Patel for the offence u/s 506(2) I.P.C., but he was released on bail by the trial Court in that case. He also submitted that because of the threat given to the complainant by the accused-Bhavin Patel, the State has moved the trial Court for cancelling his bail, but so far no order is passed by the trial Court. Be that as it may. The fact remains that the present applicants-accused have never threatened any witness. Merely because it is alleged that one of the co-accused has threatened the complainant that would not be a ground to deny the bail to the present applicants-accused.

The Court has also to consider possibility of the accused jumping the bail. At the cost of repetition, I must state that when they were earlier released on bail on 18-12-2003 they had never even attempted to jump the bail. They had abide themselves with the conditions imposed by this Court in its earlier order and

always reported before the police station once in a week, till the Hon''ble Apex Court cancelled their bail on 5-4-2004. Mere allegation made by learned Counsel Mr. Malkan for the complainant that applicants-accused Nos. 2, 5 and 7 were planning to leave the country for ever, without any authentic proof about it, cannot be considered because the complainant had so far not made any grievance in writing to any authority. Merely because the accused surrendered or arrested by the police after some time of the cancellation of bail by Hon''ble Apex Court, it would not be proper for this Court to draw the inference that they were attempting to leave the country for ever.

11. Before parting, I must state that I had asked Mr. Malkan, learned Counsel for the complainant whether he would like to incorporate the condition in the order of bail, to keep the accused out of Mehsana district till the trial is over or not? But Mr. Malkan, on instruction from the complainant and his briefing Advocate, stated at the Bar that he only wants rejection of bail petition of the accused and nothing less than that. It appears that the complainant wants pound of flesh of the applicants-accused and nothing less than that. If the accused are kept in jail for a longer period, then it would amount to pre-trial sentence. Ultimately, if the accused are acquitted for want of legal evidence against them by the trial Court, then no one can compensate the period during which they remained in jail.

12. In view of the above discussion, I am of the considered opinion that the applicants-accused are required to be released on bail. Accordingly, present Misc. Criminal Application No. 9580 of 2003 filed by the applicants-accused is allowed, and they are ordered to be released on bail in connection with C.R. No. I-60 of 2002 registered with Visnagar Police Station on their executing bond of Rs. 20,000/- (Rupees Twenty thousand only) each with two sureties of like amount to the satisfaction of the lower Court and subject to the conditions that they shall :

- (a) not take undue advantage of the liberty or abuse their liberty;
- (b) not act in a manner injurious to the interest of the prosecution;
- (c) maintain law and order;
- (d) mark their presence before the Visnagar Police Station on every Sunday between 9-00 a.m. to 2-00 p.m.;
- (e) furnish addresses of their residence at the time of execution of bond and shall not change the residence without prior permission of this Court;
- (f) surrender their passport, if any, to the lower Court within a week.

If breach of any of the above conditions is committed, then the learned Sessions Judge, Mehsana will be at liberty to issue warrant or take appropriate action in the matter against the concerned accused persons.

Bail before the lower Court having jurisdiction to try the case.

Rule is made absolute in Misc. Criminal Application No. 9580 of 2003. Direct service is permitted.

Misc. Criminal Application No. 9785 of 2003 is dismissed in view of the order passed in Misc. Criminal Application No. 9580 of 2003.

No order on Misc. Criminal Application No. 3807 of 2004 in view of the order passed in Misc. Criminal Application No. 9580 of 2003.

13. At this stage, a request is made by learned Advocate Mr. Malkan appearing for the complainant-Mohammad Iqbal Khan Ahmed Khan Bloch to stay the operation of the order passed by this Court in this Misc. Criminal Application No. 9580 of 2003 releasing the accused-petitioners on bail. No concrete reasons are given for the same except that complainant-Mohammad Iqbal Khan Ahmed Khan Bloch wants to approach the Hon"ble Supreme Court against the order. As stated earlier, the accused are in jail since almost two years and they are ordered to be released on bail with stringent conditions, therefore, I do not see any reason to stay the order of releasing the accused on bail. Accordingly, the prayer for stay of the operation of the order passed today in Misc. Criminal Application No. 9580 of 2003 is rejected.