

(2011) 07 GUJ CK 0127
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 13181 of 2010

Pravinbhai Kashiram Patel

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 06-07-2011

Acts Referred:

Bombay Police Act, 1951 — Section 135, 325, 326, 395, 397
Constitution of India, 1950 — Article 141
Criminal Procedure Code, 1973 (CrPC) — Section 154, 196A(2), 438, 439(2), 482
Evidence Act, 1872 — Section 10, 25, 26, 30, 32
Penal Code, 1860 (IPC) — Section 120A, 120B, 143, 147, 148

Citation : (2011) 07 GUJ CK 0127

Hon'ble Judges : K.S. Jhaveri, J

Bench : Single Bench

Advocate : Srushti A. Thula, for the Appellant; Public Prosecutor for Respondent 1, Parthiv B. Shah, for Respondent 2, Yash N. Nanavaty, for Respondent 3, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Jhaveri, J.

1.0 The applicant herein has prayed to quash and set aside the order dated 8th October 2010 passed by Third Additional Sessions Judge, Ahmedabad (Rural), whereby the Respondents No. 2 and 3 were enlarged on bail in connection with FIR being C.R. No. I 213 of 2008 registered with Sanand Police Station, Ahmedabad (Rural) for the offences punishable under Sections 143, 147, 148, 149, 325, 395, 397, 506(2), 427, 267, 468 and 471 of Indian Penal Code and Section 135 of the Bombay Police Act.

2.0 The case of the applicant as emerging from the record are as under:

2.1 The Petitioner is one of the joint owners of land bearing Survey No. 166, situated at village Nidhrad, Taluka Sanand, District Ahmedabad since the year 1994. According to him, the Respondent No. 2 who is the sitting MLA of the

ruling party had tried to grab land of poor farmers including the applicant and a group of matters are pending before this Court. It is alleged that many other complaints have been filed against the Respondent No. 2. One complaint was filed with Karanj Police Station being C.R. No. 254 of 2008, and M Case No. 2 and 3 of 2008 and M Case No. 3 of 2009 were lodged with Sarkhej Police Station against the Respondent No. 2 and others.

2.2 It is alleged that the land owners of block No. 83 and 59 have filed complaint against the Respondent No. 2 and others which came to be registered as M Case No. 1 of 2009 and M Case No. 2 of 2009 with Sarkhej Police Station, which are pending.

2.3 According to the applicant an affidavit has been filed on behalf of AUDA to recover excess land granted in the consolidated plot, the market value of which shall be recovered from the developer/original allottee at the current rate. Therefore the Respondent No. 2 with an apprehension of being required to pay the amount of Rs. 15 crores to 20 crores at the market value of the said plots for the alleged fraud, with a view to take revenge and develop a sense of fear amongst the people, hatched a conspiracy to harass and assault the family members of the applicant.

2.4 It is alleged that the Respondent No. 3 went to the subject land in one Santro Car bearing No. GJ1 HN 1104 with a mob of people with sticks and dharia and the Respondent No. 2 pointed towards the applicant and his brother from the other side of the road. According to the applicant, the applicant had identified one Shri Vasudev Patel and Mahipatsingh Laxmansingh from the mob and that Vasudev bhai had a stick in his hand and Mahipatsingh was having dharia in his hand. He further alleged that Vasudev bhai had stated that the land did not belong to the applicant and had attacked and assaulted the applicant and his people.

2.5 According to the applicant the complaint was not registered immediately and therefore the family members of the applicant approached this Court on 11th September 2008 by way of Special Criminal Application No. 1821 of 2008 in pursuance of which complaint being C.R. No. 213 of 2008 came to be registered with Sanand Police Station. It is alleged that two paragraphs were deleted from the complaint before registering the same.

2.6 Later on, upon order dated 23rd January 2009 passed by this Court the investigation of complaint being C.R. No. 213 of 2008 came to be transferred to CID (Crime) with a direction to complete the investigation within a period of two months.

2.7 The Respondents No. 2 and 3 preferred Criminal Misc. Application No. 1241 of 2010 before Sessions Court, Ahmedabad (Rural) praying for regular bail. The learned Sessions Judge vide order dated 8th October 2010 ordered to enlarge the Respondents No. 2 and 3 on bail on the terms and conditions stipulated therein. It is against the said order that the present application has been filed

praying to cancel the bail granted to them.

3.0 Mr. Y.N. Oza, learned Senior Counsel submitted that the Sessions Court has totally ignored the fact that the FIR consisted of serious offences graver than Section 325 of IPC and even Sections 326, 395 and 397 of IPC came to be added later on and therefore this was not a fit case to grant regular bail to the Respondents No. 2 and 3.

3.1 Mr. Oza argued that even the Investigating Officer's report dated 3rd November 2009 has not been considered by the learned Sessions Court wherein the Investigating Officer has clearly stated that "the accused have made illegal attack and also during the attack the complainant and the witnesses were seriously injured and created impression and committed the offence, thus, in this regard the Sections 395 and 397 of the Indian Penal Code". According to Mr. Oza the Sessions Court grossly erred in observing that no graver offence was made out in this case.

3.2 Mr. Oza contended that there is a conspiracy in pursuance of which the incident in question took place and the conspiracy was designed by Respondent No. 2 and therefore he ought not to have been granted bail.

3.3 According to him the order of Sessions Court is based on a total wrong premises and there is no parity in the present case and bail ought not to have been granted to them. He submitted that the status reports clearly show the involvement of the present Respondents No. 2 and 3 and therefore there is prima facie case against them.

3.4 Mr. Oza submitted that investigating agency's various reports and various orders have established that the Respondents No. 2 and 3 are tampering with the records and they are very much influential and therefore they are likely to tamper the evidence and/or manipulate the witnesses.

3.5 He submitted that the Investigating Officer had filed an affidavit before the Court dated 16th November 2009 stating that prima facie involvement of the accused was found in the investigation and the accused were involved in making false revenue record for the purpose of grabbing property of the complainant and therefore bail ought not to have been granted to the Respondents No. 2 and 3.

3.6 A contention has been raised in the petition that the alleged offence was registered with Sanand Police Station, but the bail was granted in Satellite Police Station. He alleged that since the residence of the accused is hardly one kilometer from satellite area, the bail was granted as per the convenience of the accused and therefore an inference can be drawn that manipulation is possible on the part of the accused.

3.7 Mr. Oza, contended that the complaint is being investigated by CID (Crime) and proper court for application of bail is the Court of Chief Metropolitan magistrate and therefore the Sessions Court, Ahmedabad (Rural) does not have any jurisdiction to grant bail to the Respondents No. 2 and 3.

3.8 Mr. Oza contended that the Sessions Court granted the bail to the Respondents without considering the observations made in the orders passed in anticipatory bail applications and the orders passed by the Apex Court.

4.0 Mr. Oza lastly submitted that the order passed by the Sessions Court is in total violation of the principles laid down by the Apex and also the orders passed by this Court. In this connection Mr. Oza has relied upon the following decisions:

4.1 Yash Pal Mittal Vs. State of Punjab, In the said case the Appellant therein along with several others was charged with various offences. The first charge in which all the accused are named including the Appellant is the principal charge describing the nature and object of the conspiracy in which a number of persons were involved. The Appellant contended that the first and the only charge in which he was involved speaks only of cheating, which is an offence u/s 417 IPC punishable with imprisonment for one year, and hence could not be proceeded with without a sanction u/s 196A(2) of Criminal Procedure Code. The trial court and the High Court rejected the contention and the Apex Court affirmed the same by holding as under:

On a careful reading of the first charge although the words "cheating by personation" were not mentioned therein, no valid objection could be made as the entire recitals are clear and are also followed up by a specific mention of the offence of cheating by personation u/s 419, IPC. In the case of an offence of criminal conspiracy u/s 120A the very agreement, concert or league is the ingredient of the offence and it is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participants in the main object of the conspiracy. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be in furtherance of the object of the conspiracy. Even if some steps are resorted to by one or the other of the conspirators without the knowledge of the others, it will not affect the culpability of those others who were associated with the object of the conspiracy. In the present case, the main object of the criminal conspiracy is undoubtedly cheating by personation. The other means adopted inter alia are preparation or causing to prepare spurious passports, forging or causing to forge entries and endorsements in that connection and using or causing to be used forged passports as genuine in order to facilitate travel of persons abroad. The final object of the conspiracy in the first charge being the offence of cheating by personation the other offences described therein are steps though they are offences themselves in aid of the ultimate crime. The charge does not connote plurality of objects of the conspiracy. That the Appellant himself was not charged with the ultimate offence which is the object of the criminal conspiracy is beside the point in a charge u/s 120B IPC as long as he is a party to the conspiracy with the end in view. That the Appellant himself does not personate is also beside the point when he is alleged to be a collaborator of the conspiracy with that object. The object of the criminal conspiracy is absolutely clear and there is no

substance in the argument that the object was merely to cheat simpliciter u/s 417, IPC. Since the object of the criminal conspiracy is cheating by personation u/s 419 IPC, punishable with imprisonment which may be extended to three years, Section 196A(2), Code of Criminal Procedure Is no bar to the trial in the absence of a sanction.

4.2 Ajay Agarwal Vs. Union of India and others, wherein it is held as under:

An agreement between two or more persons to do an illegal act or legal acts by illegal means is criminal conspiracy. If the agreement is not an agreement to commit an offence, it does not amount to conspiracy unless it is followed up by an overt act done by one or more persons in furtherance of the agreement. The offence is complete as soon as there is meeting of minds and unity of purpose between the conspirators to do that illegal act or a legal act by illegal means. Conspiracy is conceived as having three elements: (1) agreement (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy.

4.3 State Rep. by the C.B.I. Vs. Anil Sharma, wherein it is held as under:

The High Court has approached the issue as though it was considering a prayer for granting regular bail after arrest. 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 High Court ought not to have side-stepped the apprehension expressed by the CBI (that the Respondent would influence the witnesses. 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.

4.4 State of T.N. Through Superintendent of Police CBI/SIT v. Nalini and Ors., wherein it is held as under:

In the case of Kunhayammed and Others Vs. State of Kerala and Another, the Apex Court discussed the issue of effect of dismissal of SLP by non-speaking or speaking order as under:

A petition for leave to appeal to the Supreme Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order

of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, the Supreme Court being the Apex Court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by the Supreme Court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The Court sometimes leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purpose of Article 141. This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court.

4.5 Superintendent of Police, C.B.I. and Others Vs. Tapan Kr. Singh, wherein it is held that a first information report is not an encyclopaedia, which must disclose all facts and details relating to the offence reported. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eye witness so as to be able to disclose in great detail all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence."

4.6 Brij Nandan Jaiswal Vs. Munna @ Munna Jaiswal and Another, wherein it is held as under:

12. It is now a settled law that the complainant can always question the order granting bail if the said order is not validly passed. It is not as if once a bail is granted by any court, the only way is to get it canceled on account of its misuse. The bail order can be tested on merits also. In our opinion, therefore, the complainant could question the merits of the order granting bail. However, we find from the order that no reasons were given by the learned Judge while granting the bail and it seems to have been granted almost mechanically without considering the pros and cons of the matter. While granting bail, particularly in serious cases like murder some reasons justifying the grant are necessary.

4.7 Chaman Lal and Others Vs. State of Punjab and Another, Paras 7 and 8 read as under:

7. It would be appropriate to deal with the question of conspiracy. Section 120-B IPC is the provision which provides for punishment for criminal conspiracy. Definition of "criminal conspiracy" given in Section 120-A reads as follows:

120-A. When two or more persons agree to do, or cause to be done -

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

The elements of criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to co-operate for the accomplishment of the object by means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime, is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design (See American Jurisprudence, Vol.II, Section 23, p.559) For an offence punishable u/s 120-B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or caused to be done an illegal act; the agreement may be proved by necessary implication. The offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

8. No doubt in the case of conspiracy there cannot be any direct evidence. The ingredients of the offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused."

4.8 Saquib Abdul Hameed Nachan Vs. State of Maharashtra, Para 50 thereof reads as under:

50. We are, therefore, of the view that having regard to all these weighty considerations, the confession of a co-accused ought not to be brought within the sweep of Section 32(1). As a corollary, it follows that the confessions of the first and second accused in this case recorded by the police officer u/s 32p, are of no avail against the co-accused or against each other. We also agree with the High Court that such confessions cannot be taken into consideration by the Court u/s 30 of the Evidence Act. The reason is that the confession made to a police officer or the confession made while a person is in police custody, cannot be proved against such person, not to speak of the co-accused, in view of the mandate of Sections 25 and 26 of the Evidence Act. If there is a confession which qualifies for proof in accordance with the provisions of the Evidence Act, then of course, the said confession could be considered against the co-accused facing trial under POTA. But, that is not the case here. (SCC pp.672-74, paras 49-50).

Section 10 of the Evidence Act.

66. The next question is whether the confession of the accused which cannot be proved against a co-accused either u/s 32(1) of POTA or u/s 30 of the Evidence Act, would be relevant evidence against the co-accused involved in the conspiracy by reason of Section 10 of the Evidence Act. The section reads thus:

10. This said or done by conspirator in reference to common design - Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

4.9 Vikram Singh and Others Vs. State of Punjab, Paras 33 to 35 read as under:

"33. In State of H.P. v. Krishnan Lal Pradhan this Court while examining the concept of criminal conspiracy has observed: (SCC pp.20-21, para 8)

8. ... In the opinion of the Special Judge every one of the conspirators must have taken active part in the commission of each and every one of the conspiratorial acts and only then the offence of conspiracy will be made out. Such a view is clearly wrong. The offence of criminal conspiracy consists in a meeting of minds of two or more persons for agreeing to do or causing to be done an illegal act or an act by illegal means, and the performance of an act in terms thereof. If pursuant to the criminal conspiracy the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of offences.

34. It was observed in *Kehar Singh v. State (Delhi Admn)* that even the post-incident conduct of an accused can be taken into account to determine as to whether the criminal act which had been committed was pursuant to a criminal conspiracy.

35. In the case on hand, we find categorical evidence with regard to the purchase of the forwin injections and chloroform and merely because Pws Baljeet Saini and Satish Kumar did not refer to the presence of Sonia in the Alto car at the time of the actual kidnapping would not mean that she was not privy to the conspiracy. Moreover, the evidence also reveals that she was attempting to destroy the evidence relating to the kidnapping when she had been apprehended. We are, therefore, of the opinion that the second set of incriminating circumstances is the medical evidence and the conspiracy hatched between the three Appellants including Sonia, leading to the kidnapping and murder."

4.10 Decision of this Court dated 2-6/3/2009 passed in Criminal Misc. Application No. 297 of 209. Para 12 thereof reads as under:

12. It has been submitted by the learned Counsel for the applicant that the applicant was on duty at the Central Workshop of the State Transport Corporation in Naroda Patia area, on the day of the incident. On the other hand, it is also the case of the prosecution, on the basis of the statements of witnesses recorded by the SIT, that the applicant was seen throwing burning rags from the premises of the workshop on to the adjoining Chawl where the houses and properties of the minority community are located, which is separated from the Workshop by a wall, having a gate in between. The learned Counsel for the applicant has not exactly pleaded alibi, but has sought to establish that the applicant was present on duty in the Workshop on the fateful day. Certain documents, as referred earlier, have been annexed to the application in support of this submission. However, as per the settled position of law, the plea of alibi has to be proved by the accused on the basis of evidence in the trial court and it is not open to this Court to look into it, at this stage. It is, therefore, not necessary for the Court to look into this aspect of the matter or deal with this submission.

4.11 *State of Gujarat v. Mayaben Surendrabhai Kodnani and another*, reported in 2009 (2) GLH 109. Para 4.4 reads as under:

4.4 Recent judgment of the Supreme Court in *State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain* [(2008) 1 SCC 176] was relied upon for the following observations made therein:

"23. So far as the fact that the Respondents have not been named in the first information report is concerned, suffice it to say that the first information report may not be encyclopaedic.

24.

25. Out of the eight Respondents, five are police officers, two are politicians and one is owner of a hotel. It is not in dispute that after having come to learn that their names had been taken by the prosecutrix in her supplementary statement, they had been absconding for a long time. It is not necessary for us to record their respective period of abscondance. We may furthermore notice that the Respondents had not scrupulously complied with the conditions imposed upon them. Admittedly, at least on four occasions, some of them were not present.

26.

27. There cannot be any direct proof that the Respondents have been tampering with evidence, but that question will have to be considered by the appropriate authority at the appropriate stage.

30. A case of this nature should be allowed to be fully investigated. Once a criminal case is set on motion by lodging an information in regard to the commission of the offence in terms of Section 154 of Code of Criminal Procedure, it may not always be held to be imperative that all the accused persons must be named in the first information report. It has not been denied nor disputed that the prosecutrix does not bear any animosity against the Respondents. There is no reason for her to falsely implicate them. It is also not a case that she did so at the behest of some other persons, who may be inimically disposed towards the Respondents. The prosecution has disclosed the manner in which she was being taken from place to place which finds some corroboration from the testimonies of the other witnesses and, thus, we can safely arrive at a conclusion that at least at this stage her evidence should not be rejected outrightly.

4.12 Mr. Oza has also relied upon a decision of this Court dated 18th February 2010 passed in Criminal Misc. Application No. 12865 of 2009 which was filed praying to cancel the anticipatory bail granted to Respondent Nos. 2 and 3 therein. He has relied upon certain observations made in paragraphs 8 and 9 of the said decision.

5.0 Mr. N.D. Nanavati, learned Senior Counsel appearing for the Respondents No. 2 submitted that the applicant has not made out any ground for cancellation of bail and this application deserves to be dismissed.

5.1 Mr. Nanavati submitted that reading the entire evidence on record it cannot

be said that there is a conspiracy at the instance of Respondent No. 2. According to him at the most it can be inferred that it is an instigation and not a conspiracy.

5.2 He submitted that looking to the conduct of the applicant it is clear that it is nothing but chasing the litigation and complainant is trying to capitalise out of these proceedings.

5.3 Mr. Nanavati submitted that all co-accused have been granted bail and such orders were confirmed by this Court and even on parity the Respondent No. 2 deserved bail which was duly granted by the Sessions Court and no interference may be caused by this Court.

5.4 He submitted that the complainant went on improving his version and all the versions of the complainant are contradictory to each other. According to him the entire incident took place in two parts. First part is that a mob of people come to the subject land and threatened the complainant and his associates to give possession of the subject land. Second part is that of actual assault on the complainant and others. If the version given at v. Hospital is perused the applicant impleaded the Respondent in the first part of the incident and if the FIR is perused the applicant impleaded the Respondent in the second part of the incident.

5.5 He submitted that though the applicant has produced compilation of number of pages with the application, he has intentionally not produced the representation made by him to Shri P.C. Pandey, Director General of Police, Gandhinagar on 16th February 2009 in which entirely new version of complaint was narrated. From the said version it is clear that the Respondents were not present at the place of incident. Copy of this representation is produced at Annexure-R-6 to the affidavit in reply filed by Respondent No. 3.

5.6 Mr. Nanavati submitted that the entire investigation was monitored by this Court and it was clearly disclosed before this Court that the presence of Respondent No. 2 is not found at the scene of incident.

5.7 Mr. Nanavati submitted that the Hon"ble Supreme Court, in the order passed in SLP (Cri.) No. 1923 of 2010 observed as under:

20. In the instant case, on account of the different versions noticed in the three different complaints made in respect of the incident of 11th September 2008, and having regard to the fact that allegations with regard to offence under Sections 395, 397, 467, 468 and 471 IPC were sought to be added at a later stage of investigation, no case has been made out for allowing the Petitioner's application u/s 439(2) read with Section 482 Code of Criminal Procedure .

5.8 He therefore submitted that the applicant is changing his version time and again and in such circumstances this is not a fit case to cancel the bail already granted by the trial court.

5.9 He submitted that there is variation in the statements made in this

application as well as in the representation dated 16th February 2009. The applicant cannot change his stand according to his convenience and such facts cannot be taken as a base for cancellation of liberty already granted to the Respondent.

5.10 Mr. Nanavati has also submitted that if the facts of the case are perused, no offence is made out against the Respondent. He further submitted that from the events as narrated by the applicant is evident that even before the FIR was registered, the Petitioner has prayed to add the offences under Sections 395, 397, 326, etc. of IPC in the FIR against the Respondent.

5.11 According to him after continuous monitoring made by this Court from the date of incident i.e. 11.9.2008 till the Respondents filed anticipatory bail application, no independent material is coming against the Respondents. As per the case of investigating officer, there are statements of only two co-accused, which are against the Respondents.

5.12 Mr. Nanavati submitted that it is not the case of the applicant that there is any single instance of breach of any of the conditions of bail order granted by the Court. The Respondent has all the time scrupulously followed the conditions imposed on him while releasing on bail. There is no complaint regarding misusing the liberty by the Respondent. He therefore submitted that the application deserves to be dismissed.

6.0 Mr. J.M. Panchal, learned Advocate appearing for the Respondent No. 2 has also argued on the same lines as that of Mr. Nanavati and submitted that There was no breach of conditions of bail nor any complaint was filed about misuse of liberty by Respondent No. 2. He has also submitted that there are variations in different complaints and no case is made out to cancel the liberty granted to the Respondent No. 2. He further submitted that the record does not support the conspiracy theory and in any case it is a matter of evidence.

7.0 Having heard the learned Advocates for the respective parties, certain factual aspects emerging from the record are required to be noted.

7.1 As regards the contention that the bail was granted in Satellite Police Station instead of Sanand Police Station is concerned, it was pointed out that the Respondent Nos. 2 and 3 presented themselves before Sanand Police Station where they were arrested and thereafter they were released by the Investigating Officer in view of the order passed by the trial court. Therefore there is no substance in the said contention.

7.2 Another contention is that the bail application should have been preferred before Court of Chief Metropolitan Magistrate. However, this contention was never raised before any court and even when the anticipatory bail was granted.

7.3 From the record it is evident that out of 7 accused persons, who were arrested and against whom the chargesheet was also filed on 23.2.2009 in respect of very same incident, 6 accused persons were granted regular bail by

the Sessions Court. The said order passed by the Sessions Court was challenged before this Court by Criminal Misc. Application No. 14874 of 2008. However, the said application was not pressed and was disposed of accordingly.

7.4 One of the co-accused Vasudevbbhai Mafatbbhai Patel, who is named in the FIR, was also granted anticipatory bail in Criminal Misc. Application No. 1104 of 2008. The said accused was also granted regular bail on 24.11.2008 in Criminal Misc. Application No. 1187 of 2008. The said order was not challenged by the applicant and therefore it attained finality.

7.5 Other two co-accused viz. Mahipatsinh Sursinh Vaghela and Bahadursinh Harisinh were also granted regular bail by learned Sessions Judge vide order dated 21.11.2009 passed in Criminal Misc. Application No. 1169 of 2009 and 1170 of 2009. The said orders came to be challenged by the applicant before this Court by filing Criminal Misc. Application No. 13485 and 13486 of 2009. The said applications came to be rejected on 29.1.2010 by this Court.

7.6 Being aggrieved by the order passed by this Court in Criminal misc. Application No. 13865 of 2009, confirming the order of the anticipatory bail granted by trial court in favour of the present Respondents the applicant filed Special Leave to Appeal (Cri.) No. 1923 of 2010 before the Hon'ble Supreme Court. It appears that this fact was not mentioned by the applicant in the present proceedings. The said Special Leave to Appeal (Cri.) No. 1923 of 2010 came to be dismissed on 8.7.2010 by the Hon'ble Supreme Court. Copy of the said order is produced on record by the present Respondents.

7.7 Thus, all the accused against whom charge sheet is already filed and who are shown as accused Nos. 1 to 6 are granted bail . The applicant preferred application for cancellation of regular bail of accused Nos. 1 to 6 before this Court being Criminal Misc. Application No. 14874 of 2009 which came to be disposed of as not pressed. Therefore, the Respondents-accused are justified in claiming parity in the matter.

7.8 The present Respondents-accused had preferred anticipatory bail application on 4.11.2009 before the trial court which came to be granted on 11.11.2009. During the pendency of the said application interim protection was granted to the Respondents-accused. On 11.11.2009 the applicant preferred Criminal Misc. Application No. 12865/2009 before this Court for cancellation of anticipatory bail granted to Respondent. However during the pendency of the said application the Respondents accused were interim protection by directing "not to arrest" . On 18.2.2010 the said application came to be rejected and it was directed that the Respondents-accused should present themselves before Sanand Police Station on 2.3.2010. Thereafter the Respondents were granted regular bail.

8.0 The Sessions Court, while considering the bail application, has taken note of all the orders passed in the earlier proceedings either by the Apex Court or by this Court and also the trial court. The Sessions Court has also taken note of the fact that there is a fight between the parties in respect of land and its

possession. The Sessions Court has also considered the aspect of "Parity" in view of the orders passed in respect of the accused Nos. 1 to 6 enlarging them on bail.

8.1 Learned Advocate for the applicant is not in a position to show anything from the record to take a different view of the matter in respect of the ground of "parity". It is also a well settled law that once the accused has been given the benefit of Section 438, CrPC, then regular bail application u/s 439 of the Code of Criminal Procedure is only a Rule. No exception thereto can thereafter be taken. The Sessions Court further found that the allegations leveled against the Respondents prima facie show that they are not so serious that they cannot be granted bail. It is required to be noted that while granting the bail to the Respondents-accused the Court has imposed conditions which would secure the presence of the Respondents-accused.

8.2 It also emerges from the record that the applicant made a comprehensive representation on 16.2.2009, which the applicant has not produced along with the present proceedings. Copy of the said representation is produced by the Respondents. In the representation it is stated that the Respondents-accused had left the place of incident two hours prior to the alleged incident. However, in the FIR, the complainant has stated that the Respondent No. 2 was present at the place of incident. Therefore there is change of version of the complainant. Both the versions as stated in the affidavit in reply are as under:

Version from FIR

.... at that time at about 12.30 to 1.00, we were sitting with my brother Becharbhai, my nephew Keval and four-five persons of security, mob of 30-40 persons was rushed to us with stick and dharia in their hand. At that time on road, Mr. Babubhai Jamnadas Patel and Ambli and Lalitbhai Babubhai Patel, residing at Ambli were stand on road with car. They both have done sign to us, and in the mob, I knew Vasudev Mafatbhai Patel and Mahipatsinh Lamansinh, residing at Godhavi, I know them all."

"We have filed cases against Babubhai Jamnadas in the high court and to withdraw these cases, they are threatening us and today, Babubhai Jamnadas Patel and his son given sign to us and stated that to mob of 30-40 persons to beat us. ...

Version from representation dated 16.2.2009

12. ... It is our categorical case before the Hon"ble High Court and we expect your goodself to investigate into the same that two hours before the time of offence, both father and son i.e. Shri Babubhai Jamnadas Patel and Shri Lalit Babubhai Patel were present at village - Nidhrad.

13. That if the mobile record of Shri Babubhai Jamnadas Patel and his son is examined, it would show that couple of hours before the time of offence, they were at village-Nidhrad (location of mobile holders may be examined from mobile record) and after having directed as to how the entire operation of the offence is

to be carried out, they left the place...

Thus, there are two various versions in respect of the very same incident. It is also required to be noted that there is no reply with regard to suppression of material facts on the part of the applicant.

9.0 There is yet another aspect of the matter. The alleged incident has taken place at around 1 pm and a writ petition came to be filed on the very same day at about 4.45 pm before this Court. A specific prayer was made for adding Sections 395, 397, 447, 326, 323, 143, 147, 149, 34 and 120-B of IPC. There is no explanation forthcoming as to how the applicant came to know within that short span of time that those sections were not added in the complaint. On the next day an amendment was moved in the writ petition making an averment that the FIR in question has been registered on the previous night. If the FIR has been registered after 10 pm on 11.9.2008, there is a question as to how a writ petition drawn and mentioned on the same day at an earlier point of time contains an averment that a subsequently registered FIR does not contain those sections.

10.0 At this stage it would not be out of place to quote the observation of the Hon'ble Supreme Court in the order passed in SLP (Cri.) No. 1923/2010 as under:

20. In the instant case, on account of the different versions noticed in the three different complaints made in respect of the incident of 11th September, 2008, and having regard to the fact that allegations with regard to offences under Sections 395, 397, 467, 468 and 471 IPC were sought to be added at a later stage of investigation, no case has been made out for allowing the Petitioner's application u/s 439(2) read with Section 482 of Code of Criminal Procedure .

10.1 Thus, it is crystal clear that the applicant has improved his version time and again and under such circumstances it would not be appropriate to cancel the liberty already granted to Respondents. Even the presence of the Respondents at the site is doubtful in view of the different versions. All other co-accused have been enlarged on bail and therefore even on parity the Respondents are entitled get bail. Further, no fresh evidence is available against the Respondents to support the case of the applicant for cancellation of bail.

10.2 It is also evident from the record that no allegations of looting the articles is made or reported by the complainant in the FIR. Even after the order passed by this Court on 12.9.2008, after which the complainant's version was recorded on 14.9.2008, no such allegation of looting the articles was made by the applicant.

10.3 There is another aspect that one Ms Roma Fidelis, Advocatet has addressed a communication to Shri.P.P. Gondhiya, I.G. CID (Crime) dated 10th August 2010 in effect asking the investigating officer to ask for remand or for effecting arrest. The said letter is not addressed by her on behalf of any client. It is not stated under what circumstances the said letter has been written nor how the said

Advocate was concerned with the investigation of the complaint being C.R. No. I-213 of 2008. The letter shows that she is more concerned about the investigation of the said case.

10.4 There is also suppression of material facts. The Respondent No. 2 along with another was granted anticipatory bail on 11th November 2009. The applicant filed Criminal Misc. Application No. 12865 of 2009 before this Court. This Court rejected the said application with the following observations:

10. Before parting with the judgment it may be pertinent to observe that, in the facts of the present case the investigation is found to be tardy, lukewarm and interrupted by various judicial proceedings. Not only that many man-hours and days of the investigating officers are consumed in attending Courts, as reported by learned A.P.P., but so much public time of the Courts is consumed at the cost of many other cases of humble litigants waiting for justice since decades. The matter has been intermittently argued by learned senior advocates appearing on both sides for nearly two weeks and decisions mentioned hereinabove have been discussed in detail for making minute and often irrelevant points. It is but unfortunate that limited time and resources of the Judiciary has to be disproportionately devoted to such fiercely fought legal battles of the rich and powerful.

10.5 Against the said decision the applicant filed SLP (Cri) No. 1923/2010 before the Hon'ble Supreme Court. The SLP came to be rejected with the following observations:

20. In the instant case, on account of the different versions noticed in the three different complaints made in respect of the incident of 11th September 2008, and having regard to the fact that allegations with regard to offences under Sections 395, 397, 467, 468 and 471 I. I.P.C. Were sought to be added at a later stage of investigation, no case has been made out for allowing the Petitioner's application u/s 439(2) read with Section 482 Code of Criminal Procedure .

No such facts are mentioned in the present application.

11.0 At this stage it would be advantageous to refer to certain decisions of the Hon'ble Supreme Court on the question of cancellation of bail.

11.1 In the case of Bhagirathsinh Judeja v. State of Guajrat, reported in AIR 1984 SC 373 it is held as under:

Very cogent and overwhelming circumstances are necessary for an order seeking cancellation of bail. It is now well settled by a catena of decisions of the Supreme Court that the power to grant bail is not to be exercised as if the punishment before trial is being imposed. The only material considerations in such a situation are whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tempering with the evidence. If there is no prima facie case there is no question of considering other circumstances. But even where a prima facie case is established, the approach of

the court in the matter of bail is not that the accused should be detained by way of punishment but whether the presence of the accused would be readily available for trial or that he is likely to abuse the discretion granted in his favour by tampering with evidence.

12.0 In the case of Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others, it is held that in cases where court is of considered view that accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided, and anticipatory bail should be granted, which after hearing Public Prosecutor, should ordinarily be continued till end of trial.

13.0 In any case it is not the case of the applicant that there is any single instance of breach of any of the conditions of bail order granted by the Court. The Respondents-accused have all the time scrupulously followed the conditions imposed on them while releasing on bail. There is no complaint regarding misusing the liberty by the Respondent. There is no allegation of any manipulation made by the Respondents-accused. The present application has been filed solely on the merits of the case which is to be tried before the Sessions Court.

13.1 Merely because a person happens to be an MLA cannot be a factor for consideration of the issue that he may influence the witness or manipulate the evidences. The applicant is not in a position to point out from record any such instances. In fact the applicant has come before this Court only on the ground of validity of grant of the bail to the Respondents-accused. The applicant has emphasized on the point of conspiracy theory and has relied upon various decisions of the Apex Court as already quoted hereinabove. The attempt of the applicant is that this Court should go into the merits of the conspiracy theory and to come to a conclusion that the conspiracy theory exists and therefore the bail granted to the Respondents should be cancelled. However, such an exercise cannot be undertaken by this Court at this stage as the investigation is not yet over and the trial has not commenced. Even otherwise, such a question can be considered only at the trial and not at the stage of consideration of bail application. As stated hereinabove, in view of the contradictions in the statement and also about the presence of the Respondents-accused at the scene of offence, this is not a case where the bail already granted to the Respondents-accused can be cancelled.

13.2 Learned Advocate for the applicant has argued the matter on merits of the matter including the dispute with regard to various lands. Dispute with regard to lands is subject matter of various litigations which are pending. Consideration of those factual aspects are not relevant for the purpose of deciding the issue with regard to cancellation of bail. The only point mainly urged is with regard to conspiracy theory which can be gone into and a finding can be arrived at only at the trial and not at this stage.

13.3 Mr. Oza has mainly emphasised on conspiracy theory. However from the evidence available on record, prima facie it appears that it may be an instigation. However, in any case, this is a matter of evidence and it would not be advisable to discuss the evidence threadbare when the trial is pending. Apart from that all co-accused have been granted bail which attained finality. Therefore even on parity, at this stage the Respondents accused deserved bail and nothing is pointed out in this application to disturb the order of grant of bail.

13.4 It is also relevant to note that the alleged incident has taken place on 10th September 2010. The applicant had approached this Court on 11th September 2010. A conspiracy theory was pointed out by the learned Advocate in the present application. However, the Panchnama was made on 15th April 2008 in view of which the conspiracy theory may not be proved.

13.5 It is further required to be noted that the trial court has considered the statement of witnesses and other documents. Looking to the evidence on record, the orders passed in different proceedings by this Court and the Apex Court, I am of the view that this is not a fit case to interfere with order granting bail.

14.0 Ordinarily the High Court cannot exercise its discretion to interfere with the bail granted by the Sessions Judge in favour of the accused and where cancellation of bail is sought in an application, the prosecution has to prove its allegation by preponderance of probabilities. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be not conducive to a fair trial to allow the accused to retain his freedom during the trial. A bail once granted cannot be cancelled on the off-chance or on the supposition that witnesses have been won over by the accused. The power to take back in custody an accused, who has been enlarged on bail, has to be exercised, with care and circumspection. Very cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail and the trend today is towards granting bail because it is now well settled that the power to grant bail is not to exercise as a punishment before trial. The material considerations in such a situation are whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with the evidence. While considering the application for canceling a bail the Court has to see whether the accused continues or repeats the same offence while he is on bail, whether the accused tampers with the prosecution evidence or otherwise impedes the course of justice, whether fresh evidence for believing that the accused has been guilty of an offence punishable with death or imprisonment for life has been discovered; whether the bail was granted in wrong exercise of discretion; whether the accused runs to a foreign country or goes underground or beyond the control of his sureties or whether he commits acts of violence, in revenge, against the police and the prosecution witness and those who have booked him or are trying to book him.

15.0 On the facts of the present case, none of the aforesaid ingredients has been

pointed out to support the contention of the applicant to cancel the bail. The prosecution has failed to establish its case by showing a preponderance of probabilities, and not beyond reasonable doubt, that the accused has attempted to tamper or has tampered with its witnesses, or has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice. On the grounds mentioned in the application the liberty granted to the accused cannot be cancelled. In any case, as stated hereinabove, the power of cancellation of bail must be exercised with care and circumspection and only in proper cases [State (Delhi Administration) Vs. Sanjay Gandhi, Learned Advocate for the applicant has failed to point out any circumstances which would warrant interference in the present application.

16.0 In the premises aforesaid the application is devoid of any merits. The same is therefore dismissed. No order as to costs.

17. Before parting it may be noted that the observations made herein are tentative which are made only with respect to the question of cancellation of bail already granted to Respondents-accused and the Sessions Court shall try the case uninfluenced by any of such observations.