

(2011) 06 GUJ CK 0017
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 1818 of 2011

Rajubhai Pithabhai Vala

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 16-06-2011

Acts Referred:

Arms Act, 1959 — Section 25(1), 25(1)(B)(A)
Constitution of India, 1950 — Article 21, 22
Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 202, 438, 439(2)
Penal Code, 1860 (IPC) — Section 114, 120(B), 141, 142, 143

Citation : (2011) 3 GLH 42

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

Bench : Single Bench

Advocate : P.M. Thakkar, with N.R. Kodekar 1, for the Appellant; Chetna Shah, Addl Public Prosecutor for Respondent 1, Mr. N.D. Nanavati, with Mr. Tushar L. Sheth for Respondents 2 - 3, for the Respondent

Final Decision : Allowed

Judgement

Mr. K.S. Jhaveri, J.—Heard Mr. P.M. Thakkar, learned Senior Counsel appearing with Mr. N.R. Kodekar for the applicant, Mr. N.D. Nanavati, learned Senior Counsel with Mr. Tushar Sheth for the respondent-accused and Ms. Chetna Shah, learned AGP for the respondent-State.

2. This is an application for cancellation of successive bail granted to the original accused No. 3 & 7 -present respondents No. 2 & 3 vide order dated 13.01.2011 by the Sessions Judge, Amreli in Criminal Misc. Application No. 16 of 2011.

3. It is the case of the prosecution that the complainant Rajubhai Pithabhai Vala lodged an FIR on 22.05.2010 at about 13.45 hours before Amreli Taluka Police Station wherein it is alleged that at around 7.00 am the father and three sisters namely Lilaben, Induben, Hiraben of the first informant were proceeding on a bullock-cart towards Nagjibhai's farm. The first informant and his brother Jairaj @ Ghogho reached the farm by motor cycle. While the first informant and his

father were busy in agricultural work at around 08.30 am, the accused No. 1 Dilu Tapu armed with a sword, accused No. 2 Dada Tapu armed with an iron pipe, accused No. 3 Bharat Tapu armed with a Gun, accused No. 4 Jagu Tapu armed with a spear, accused No. 5 Umesh Dada Dhakda armed with a sword, accused No. 6 Joru Valku Bachiya armed with a sword, accused No. 7 Sangram Rabari armed with a Lathi and accused No. 8 Girish Chunibhai armed with a dhariya came there.

3.1 The accused No. 1 Dilu Tapu objected to the cultivation being carried out in Nagjibhai's farm. When the first informant tried to explain them the situation they got excited and the accused started abusing them. Accused No. 1 Dilu Tapu gave a sword blow on the chest as well as on forehead of the brother of first informant, accused No. 6 gave a sword blow on the right upper limb and on left side of the abdomen of the father of the first informant. Accused No. 1 also gave sword blow on the head of the first informant and all the accused assaulted them indiscriminately with deadly weapons.

3.2 It is the case of the prosecution that the first informant received injuries on his finger and the brother of the complainant fell on the ground bleeding profusely. As the sisters of the complainant started screaming and raised alarm, the accused fired gun shots in the air and fled from the scene of offence. In this incident, the brother of the complainant died on the spot.

3.3 An FIR came to be lodged in connection with the above incident by the complainant being C.R. No. 1-73 of 2010 with Amreli Taluka Police Station. The accused persons except accused No. 1 & 5 who are absconding came to be arrested. After completing investigation, charge sheet came to be filed on 23.08.2010 for the offences punishable under Sections 143, 147, 148, 149, 302, 325, 326, 504, 34 & 120(B) of Indian Penal Code and u/s 25(1)(!), (1)(B)(A) of Arms Act.

3.4 The accused No. 4 Jagu Tapu also lodged a cross-complaint being C.R. No. 1-72 of 2010 with Amreli Taluka Police Station against the complainant and his father for the offences punishable under Sections 326, 324, 323, 504 and 114 of IPC alleging therein that on 22.05.2010 at about 08.30 am while Jagubhai and Girishbhai were going on a motorcycle and on reaching the field of Pithabhai his sons stopped the motorcycle and started using abusive language and asked them as to why they were passing through that road. It is also stated therein that the complainant inflicted Dharia blow on the head of Girish. In the meanwhile the brothers of the accused being other co-accused came at the spot and a fight took place between both the sides.

3.5 The accused persons preferred Criminal Misc. Application No. 16 of 2011 praying for regular bail before the Sessions Court. The Sessions Court after hearing the parties granted regular bail to the original accused No. 3 & 7-present respondents No. 2 & 3 vide order dated 13.01.2011. Being aggrieved by the said order, the present application is preferred.

4. Mr. P.M. Thakkar, learned Senior Counsel appearing with Mr. N.R. Kodekar for the present applicant original complainant submitted that the respondent no. 2 Bharat Tapu preferred an application for enlarging him on bail being Criminal Misc. Application No. 421 of 2010 before the Additional Sessions Judge, Amreli on 21.09.2010 and after hearing the Court below rejected the said application vide order dated 30.09.2010. Thereafter, the respondent No. 2 preferred regular bail application before this Court being Criminal Misc. Application No. 12625 of 2010 and after hearing this Court disposed of the application as withdrawn vide order dated 28.10.2010.

4.1 Mr. P.M. Thakkar submitted that similarly the respondent No. 3 Sangram Kanabhai Rabari preferred an application for enlarging him on bail being Criminal Misc. Application No. 406 of 2010 before the Additional Sessions Judge, Amreli on 08.09.2010 and after hearing the Court below rejected the said application vide order dated 22.09.2010. Thereafter, the respondent No. 3 preferred regular bail application before this Court being Criminal Misc. Application No. 15307 of 2010 and this Court disposed of the application as having not pressed vide order dated 30.12.2010.

4.2 Mr. Thakkar further contended that the trial Court ought to have looked into the narration of the FIR wherein the first informant has specifically attributed the role to all 8 accused persons giving indiscriminate blows to all the three victims which is corroborated by the documentary evidence particularly the Post Mortem report of the deceased Jairaj @ Ghogha whereby almost 8 external injuries were found in the report.

4.3 Mr. Thakkar also contended that the trial Court while rejecting bail to the accused vide order dated 30.06.2010 has mentioned elaborate reasons for the same. However, the same Court while granting bail to the present respondent has ignored the said reasons and granted bail only on the ground that no blood stains were found in the clothes of the accused and the weapons which were recovered from them. He submitted that no substantial changes in circumstances were found and even then the trial Court has exercised discretion which is wrong and requires to be set aside.

4.4 Mr. Thakkar has relied upon the following decisions of the Apex Court as well as this Court in support of his submissions :-

18. Ramsing Virabhai Machhar v. State of Gujarat reported in 2010 (0) GLHEL-HC 223311.

19. Subodh Kumar Yadav Vs. State of Bihar and Another,

20. Ranjit Hemubhai Gohil v. State of Gujarat and Others reported in 2008 (3) GLH 486.

21. (The) Kheralu Nagarik Sahakari Bank Ltd. v. State of Gujarat and Another reported in 2006 (2) GLH 307.

22. State of Gujarat v. Kanaksinh Mohansinh Mangrola reported in 2005(1) GLH 665.

23. Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Another reported in 2005 (3) GLH 601.

24. Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another,

25. State of Gujarat v. Alpeshbhai Navinbhai Patel reported in 2004(1) GLH 754.

26. Vithalbhai Talsibhai Parmar Vankar v. State of Gujarat and Another reported in 2001(1) GLH 653.

27. State of Gujarat v. Ashish B. Gandhi reported in 1993 (1) GLH 268.

28. Shyamdudd Upadhyay and Another v. State of Gujarat reported in 1992 (1) GLH 259

29. State of Maharashtra v. Budhikota Subbarao reported in 1989 (0) GLHEL-SC 28635.

30. State of Gujarat v. Lalji Popat And Others reported in 1988 (2) GLH 114.

31. Sikandar Singh and Others v. State of Bihar reported in 2010 (7) SCC 477.

32. Sheo Prasad Bhor @ Sri Prasad Vs. State of Assam,

33. Lalji and Others Vs. State of U.P.,

34. Masalti Vs. State of U.P.,

5. Mr. Nirupam Nanavati, learned Senior Counsel appearing with Mr. Tushar Sheth for the accused has supported the order of the trial Court granting bail. He submitted that the trial Court has granted bail to the accused in view of the fact that the blood group on muddamal stick and pipe is undecided and the clothes of the accused are given mark J,L,N,P and S wherein blood group "O" of the deceased is not found. He submitted that it is also observed by the trial Court that as per serological report and FSL report no blood of the deceased was found on the alleged weapons and clothes of the accused.

5.1 Mr. Nanavati submitted that the trial Court has considered the fact that the co-accused have been released on regular bail by the orders passed in Criminal Misc. Application No. 552 of 2010 qua Jagubhai Vala and Girishbhai Soni - accused as well as Criminal Misc. Application No. 557 of 2010 qua Dadbhai Vala and Jorubhai Basiya-accused.

5.2 Mr. Nanavati also submitted that the petitioners were aggressive and the complaint of Jagubhai Tapubhai Vala is first in point of time and the present subsequent complaint implicating the opponents is false and got up one. He submitted that the accused have not misused their liberty after their release on bail and three months have passed and no breach of conditions is committed by the accused and therefore the present application may be rejected.

6. At the outset it is required to be noted that the law on the subject of successive bail application is very clear. The Court while exercising its discretion under Sections 438 and 439 of the Criminal Procedure Code has to do the same with care and caution and not in one and all cases. It should be exercised in very good and deserving cases in favour of the accused persons; quite sparingly and not as a matter of course. Ordinarily the High Court would not exercise its discretion to interfere with an order of bail granted by the Sessions Court in favour of an accused unless the order was vitiated by any serious infirmity.

6.1 It has to be borne in mind that offences under Sections 306, 304(B) or 302 of IPC are considered to be very serious and heinous crime as the same are committed not only against the individual but also against the society as a whole. A bail order is the first step toward acquittal and therefore the Court should not ordinarily grant bail to accused persons who are charged with the aforesaid offence.

6.2 It would be relevant at this stage to peruse the law laid down by the Apex Court as well as this Court and therefore the relevant and pertinent points of the decisions cited by the applicant are discussed hereinafter :-

i. State of Maharashtra v. Budhikota Subbarao reported in 1989 (0) GLHEL-SC 28635 wherein para 7 reads as under :-

Liberty occupies a place of pride in our socio-political order. And who knew the value of liberty more than the founding fathers of our Constitution whose liberty was curtailed time and again under Draconian laws by the colonial rulers. That is why they provided in Article 21 of the Constitution that no person shall be deprived of his personal liberty except according to procedure established by law. It follows therefore that the personal liberty of an individual can be curbed by procedure established by law. The Code of Criminal Procedure, 1973, is one such procedural law. That law permits curtailment of liberty of anti-social and anti-national elements. Article 22 casts certain obligations on the Authorities in the event of arrest of an individual accused of the commission of a crime against society or the Nation. In cases of under trials charged with the commission of an offence or offences the Court is generally called upon to decide whether to release him on bail or to commit him to jail. This decision has "to be made, mainly in non-boilable cases, having regard to the nature of the crime, the circumstances in which it was committed, the background of the accused, the possibility of his jumping bail, the impact that his release may make on the prosecution witnesses, its impact on society and the possibility of retribution, etc. In the present case the successive bail applications preferred by the respondent were rejected on merits having regard to the gravity of the offence alleged to have committed. One such application No. 36 of 1989 was rejected by Suresh, J. himself. Undeterred the respondent went on preferring successive applications for bail. All such pending bail applications were rejected by Prank, J. by a common order on 6th June, 1989. Unfortunately, Puranik, J. was not aware of the pendency of yet another bail application No. 995/89 otherwise he would have

disposed it of by the very same common Order. Before the ink was dry on Puranik, J. 's order, it was upturned by the impugned order. It is not as if the Court passing the impugned order was not aware of the decision of Puranik, J., in fact there is a reference to the same in the impugned order. Could this be done in the absence of new facts and changed circumstances? What is important to realise is that in Criminal Application No. 375 of 1989, the respondent had made an indential request as is obvious from one of the prayers (extracted earlier) made therein. Once that application was rejected there was no question of granting a similar prayer. That is virtually overruling the earlier decision without there being a change in the fact-situation. And, when we speak of change, we mean a substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. Between the two orders there was a gap of only two days and it is nobody's case that during these two days drastic changes had taken place necessitating the release of the respondent on bail. Judicial discipline, propriety and comity demanded that the impugned order should not have been passed reversing all earlier orders including the one rendered by Puranik, J. only a couple of days before, in the absence of any substan-tial change in the fact-situation. In such cases it is necessary to act with restraint and circumspection so that the process of the Court is not abused by a litigant and an impression does not gain ground that the litigant has either successfully avoided one Judge or selected another to secure an order which had hitherto eluded him. In such a situation the proper course, we think, is to direct that the matter be placed before the same learned Judge who disposed of the earlier applications. Such a practice or convention would prevent abuse of the process of Court inasmuch as it will prevent an impression being created that a litigant is avoiding or selecting a Court to secure an order to his liking. Such a practice would also discourage the filing of successive bail applications without change of circumstances. Such a practice if adopted would be condusive to judicial discipline and would also save the Court's time as a Judge familiar with the facts would be able to dispose of the subsequent application with despatch. It will also result in consistency. In this view that we take we are fortified by the observations of this Court in paragraph 5 of the judgment in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, For the above reasons we are of the view that there was no justification for passing the impugned order in the absence of a substan- tial change in the fact situation. That is what prompted Shetty, J. to describe the impugned order as "a bit out of the ordinary". Judicial restraint demands that we say no more.

ii. Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another, wherein paras 12 & 20 read as under :-

12. In regard to cases where earlier bail applications have been rejected there is a further onus on the Court to consider the subsequent application for grant of bail by noticing the grounds on which earlier bail applications have been rejected and after such consideration if the Court is of the opinion that bail has to be granted then the said Court is of the opinion that bail has to be granted then the

said Court will have to give specific reasons why in spite of such earlier rejection the subsequent application for bail should be granted. (See Ram Govind Upadhyay).

20. Before concluding, we must note that though an accused has a right to make successive applications for grant of bail the Court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the Court also has a duty to record what are the fresh grounds which persuade it to take a view different from the one taken in the earlier applications. In the impugned order we do not see any such fresh ground recorded by the High Court while granting bail. It also failed to take into consideration that at least on four occasions order refusing bail has been affirmed by this Court and subsequently when the High Court did grant bail, this Court by its order dated 26-7-2000 cancelled the said bail by a reasoned order. From the impugned order, we do not notice any indication of the fact that the High Court took note of the grounds which persuaded this Court to cancel the bail. Such approach of the High Court, in our opinion, is violative of the principle of binding nature of judgments of the superior Court rendered in a lis between the same parties, and in effect tends to ignore and thereby render ineffective the principles enunciated therein which have a binding character.

iii. Subodh Kumar Yadav Vs. State of Bihar and Another, wherein paras 16 & 26 read as under :--

16. In fact it is now well settled that if a superior Court finds that the Court granting bail had acted on irrelevant material, or if there was non-application of mind or failure to take note of any statutory bar to grant bail, or if there was manifest impropriety as for example failure to hear the Public Prosecutor/complainant where required, an order for cancellation of bail can in fact be made. (See Gajanand Agarwal v. State of Orissa and Rizwan Akbar Hussain Syed v. Mehmood Hussain, at SCC p. 370 para 7.) Further, while cancelling bail, the superior Court would be justified in considering the question whether irrelevant materials were taken into consideration by the Court granting bail.

26. As the judicial discretion was exercised by the learned Judicial Magistrate, First Class in an arbitrary manner and with oblique motives, the learned Sessions Court was justified in setting aside the order granting bail to the appellant. To say the least, the order passed by the learned Magistrate was the result of arbitrary exercise of discretion vested in him. Further, the learned Magistrate had taken into consideration totally irrelevant documents which were never referred to in the complaint at all. By taking into consideration those documents, the learned Magistrate exhibited his anxiety to release the appellant anyhow on bail.

iv. State of Gujarat v. Lalji Popat And Others reported in 1988 (2) GLH 114 wherein paras 7 & 10 read as under :-

7. It should be noted that before the Additional Sessions Judge who decided the Miscellaneous Criminal Application No. 232 of 1987 at the initial stage, all the

papers pertaining to investigation were produced and the relevant papers were considered by the learned Additional Sessions Judge while rejecting the application. To this Court also some papers were shown and this Court has rejected the bail application. In spite of this, without there being any new material or change of circumstances it seems the learned Judge has entertained the applications and released the accused who are involved in a serious offence on bail by stating that the investigation is now over and the case is committed to the Sessions Court. This can hardly be said to be new ground for revising the order passed by the Court of co-ordinate jurisdiction or to ignore the order passed by this Court.

10. It is true that normally this Court would be slow in interfering with the discretionary order granting bail to the accused. It is equally true that one of the paramount considerations for the Court at the time of cancelling bail would be whether the accused would be readily available for their trial and whether they are likely to abuse the discretion granted in their favour by tampering with the evidence. But at the same time the Court has also to consider the other relevant aspects in the matter before granting bail. The Court is required to exercise the discretion of granting bail judicially after following the well laid down principles. If the Sessions Court has ignored the said criteria of deciding bail application either intentionally or arbitrarily, then this Court has jurisdiction to set aside the said order. It is not the law that once the accused is released on bail on erroneous ground, till he tampers with the evidence or till he absconds, the High Court has no Authority to interfere with the said order. In each case the Court is required to consider the reasonable apprehension of the prosecuting agency depending upon the facts of each case. The Sessions Court is subordinate to the High Court and it is always open to the State Government to point out to the High Court that the order passed by the Sessions Court is arbitrary or illegal one or it suffers from any serious infirmity and the High Court would have jurisdiction either u/s 439(2) or Section 482 to quash and set aside the said order.

v. Shyamdutt Upadhyay and Another v. State of Gujarat reported in 1992(1) GLH 259 wherein para 4 reads as under :-

4. From the order passed by the learned Additional Sessions Judge on 26th July, 1991 in Bail Application No. 602/01, it has become more than clear that in fact the charge-sheet was with the trial Court Advocate. In fact on the basis of that only the petitioners' Advocate made a submission before the trial Court that now the charge-sheet is filed and the investigation is over and therefore, there should not be any objection in releasing the accused on bail by the Court. If the papers of the charge-sheet were with the trial Court's Advocate of the petitioners then it is very difficult to believe that the papers of the charge-sheet were not with the Advocate of the petitioners who had filed earlier Bail Application being Miscellaneous Criminal Application No. 2412/91 before this Court. At this stage, it is to be noted that in the earlier Bail Application being M.C.A. No. 2412/91 the statement is made in para 8 by Mr. Saiyed himself, learned Advocate for the

petitioners that the charge-sheet has already been filed. Thus, the charge-sheet was filed and the papers of the said charge-sheet were with the petitioners' Advocate even at that time. In my view, once the bail application is filed before this Court after the charge-sheet is received by the accused and the same is withdrawn from this Court, it amounts to dismissal of the petition. When a Court is not inclined to grant the bail, it would give some reasons rejecting the application, which might come in the way of the accused during the trial and because of that the Advocate for the accused would prefer to withdraw the application instead of getting the application rejected with reasons. In such an event the subsequent bail application of the same accused cannot be entertained, unless and until fresh circumstance or ground is made out by the accused for releasing him on bail. In this case, no new ground is made out by the petitioners for releasing them on bail. Therefore, this application is required to be rejected.

vi. *State of Gujarat v. Ashish B. Gandhi* reported in 1993(1) GLH 268 wherein para 8 reads as under :--

8. In my opinion, the impugned order granting bail passed by the SEPTEMBER 2011 learned Addl. City Sessions Judge Mr. Pirzad is required to be set aside and the bail granted in favour of the respondent -accused is required to be cancelled forthwith firstly on the ground that once the earlier application of the respondent-accused was not pressed and the same was withdrawn, it amounts to an order of dismissal and in absence of fresh ground or change in circumstances, the accused should not have been released on bail by the learned Judge. This point is directly covered by the judgement of this Court in the case of *Shyamdudd Upadhyay and Others Vs. State of Gujarat*, As stated earlier, it may be noted that after the bail application of the original accused was rejected by the learned Metropolitan Magistrate on 8-7-92 they had moved bail application being C.M.A. 1451 of 1992 before the City Sessions Court, Ahmedabad, which was withdrawn as not pressed qua the present respondent-accused before the learned Addl. City Sessions Judge Mr. Atodaria, prior to 17-7-92. On 17-7-92 the respondent-accused preferred fresh bail application being C.M.A. 1535 of 1992 on which learned Judge Mr. Atodaria had issued notice on 21-7-92 and made it returnable on 22-7-92. But, surprisingly the learned Judge Mr. Pirzada first only passed an order dated 7-8-92 of releasing the accused on bail on certain terms and conditions and subsequently on 12-8-92 passed the reasoned order.

vii. *Vithalbhai Talsibhai Parmar Vankar v. State of Gujarat and Another* reported in 2001(1) GLH 653 wherein paras 10 & 13 read as under :-

10. In the case of *State of Maharashtra Vs. Captain Buddhikota Subha Rao*, the Apex Court has observed that when no substantial change in fact situation thereafter necessitating release of accused on bail, order granting bail thereafter by the High Court is illegal. In the said judgment the Supreme Court has observed that judicial discipline, propriety and comity demanded that the order granting bail should not have been passed reversing all earlier orders including

the one rendered by the single Judge of the same High Court only a couple of days before, in the absence of any substantial change in the fact situation. In such cases it is necessary to act with restraint and circumspection so that the process of the Court is not abused by a litigant and an impression does not gain ground that the litigant has either successfully avoided one Judge or selected another to secure an order which had hitherto eluded him.

13. Keeping in forefront the aforesaid settled principle laid down by the Supreme Court and this Court, now, again, reverting to the facts of the case, it clearly appears that the learned Additional Sessions Judge has ventured to entertain the petition by examining it afresh even by ignoring two previous orders recorded by him whereby bail was refused to the respondent No. 2. The propriety requires that the learned Additional Sessions Judge should have refrained himself from entertaining the petition by examining it afresh. It is true that before the learned Additional Sessions Judge there was no mention about the two applications for bail moved before this Court by the respondent No. 2 and the ultimate result of rejection of the same. But if learned Additional Sessions Judge had perused his earlier two orders then he would have noticed that no change in any circumstance is shown in the third application for bail which would have justified the order passed by him granting bail to respondent No. 2.

viii. State of Gujarat v. Alpeshbhai Navinbhai Patel reported in 2004(1) GLH 754 wherein para 9 reads as under :-

9. The only change thereafter as per the accused is the filing of complaint for receiving/giving threats before the Ld. Magistrate (JMFC) by the aforesaid persons, namely, Jigar, Anant and others and the verification of statements made u/s 202 of Cr.P.C. disclosing that they have not made any such statement. The thrust of the argument on behalf of the accused is that it is on account of such a change in circumstances, the learned sessions judge considered the fresh bail application. I am afraid such contention can be accepted, when a prima facie case is made out as per prosecution and the learned sessions judge having found that there is a prima facie involvement of the accused in the alleged offence. As such, the statements made before another Authority for disowning the earlier statement or stating that no such statements were made, may result into tampering with the evidence or the statements already made before the police. Whether such disowning or denial of any statement made before during investigation would invite further consequences or not would be a different aspect and I do not want to express any final view on the same at this stage since the same is not the issue in the present case and the said question is kept open. However, if such statements made before another Authority in the other proceedings is to be made as basis for invoking of powers of the Court for considering the fresh bail application then in that case it would leave room to any witness to frustrate the case of the prosecution and would result into upsetting the sanctity of the order passed by the judicial Authority and consequently would create absurd situation. It is true that at the time when the Court has to consider

the matter for granting and/or rejecting the application for bail prima facie the matter is to be examined and the observations are also to be made prima facie with a view to see that the defence of the accused is not prejudiced at the trial, but, thereby it can not be said that if before a different Authority in the different proceedings subsequently some statement is made by the witnesses, the same would result into substantial change and would form a valid basis for invoking power of the very Court once again for bail. Normally, the substantial change in the circumstances are being considered stagewise, i.e. (i) at the stage of considering the matter for granting anticipatory bail, (ii) at the stage of considering the matter for regular bail before the chargesheet when the investigation is in progress and (iii) after filing of chargesheet and after completion of investigation. If retraction or denial of statement made by the witnesses before any Authority is to be considered as a substantial change in the circumstances at the stage of bail, then the consequences would be that there will not be any end to proceedings of bail application and also more serious consequence would arise which will leave room to accused who are involved in a serious offence either directly or indirectly to take a chance of invoking the power of the Court for bail, time and again, on such grounds. It may also result into tampering the witnesses and thereby damaging the investigation and case of the prosecution before commencement of trial. Therefore, I find that merely because the statements which are made in different proceedings by witnesses can not be said to be a substantial change attracting the powers of the Ld.sessions judge for considering the fresh application for bail.

ix. Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Another reported in 2005(3) GLH 601 wherein paras 17, 18 & 19 read as under :-

17. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the Court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the Court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations required it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing require that such persons to be released on bail, in spite of his earlier applications being rejected, the Courts can do so.

18. The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the Courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher Court or a coordinate bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the Courts must give due weight to the grounds which weighed with the former or higher Court in rejecting the bail application.

Ordinarily, the issues which had been canvassed earlier would not be permitted to be re-agitated on the same grounds, as the same would lead to speculation and uncertainty in the administration of justice and may lead to forum hunting.

19. The decisions given by a superior forum, undoubtedly, is binding on the subordinate fora on the same issue even in bail matters unless of course, there is a material change in the fact situation calling for a different view being taken. Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application. Therefore, we are not in agreement with the argument of learned Counsel for the accused that in view of the guaranty conferred on a person under Article 21 of the Constitution of India, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by Courts earlier including the Apex Court of the country.

[Emphasis Supplied]

x. State of Gujarat v. Kanaksinh Mohansinh Mangrola reported in 2005(1) GLH 665 wherein para 30 reads as under :--

30. It is required to be mentioned that in this case, while deciding the second successive anticipatory bail application of the respondent No. 1-accused, learned Sessions Judge has not taken into consideration the following aspects. Due to change in circumstance, party can approach the Court below or the High Court under Sec. 438 of the Code and Court can deal with that point of change in circumstance only. However, the Court cannot enter into the grounds which were previously contested by the parties and have become final. Here in this case, Court below has violated the basic principle of law laid down by the Apex Court on this point by dealing with all points raised by the accused in the first application filed under Sec.438 of the Code and which were already decided by the learned Addl. Sessions Judge, Surat, in detail with prima-facie reasons. Said order was carried further by the accused in the High Court and at the end of arguments, it was withdrawn and hence it has become final between the parties and hence, learned Sessions Judge should not have dealt with the same points again in the successive anticipatory applications. The impugned order passed by

the learned Sessions Judge also does not disclose as to why and in what circumstances said points were necessary to be dealt with again. Learned Sessions Judge has not properly dealt with the facts on record prima-facie involving the respondent accused in the crime in question namely, bank record and statements of employees of the bank shown by the learned Public Prosecutor. Not only that, no satisfactory reasons have been assigned regarding the change in circumstance. Learned Sessions Judge has also failed to link the investigation with the audit report. It clearly appears that auditor has been appointed by the Government not for the purpose of investigation in question but for the whole scam of the bank to know the financial irregularities and position of the bank so as to decide about further course of action of the bank wherein complaint has been filed for individual offences which was required to be investigated in that manner. This aspect has also been ignored by the learned Judge. The act of the accused was such which cannot be visualized on plan eye either by the auditor or by any person unless a detailed scrutiny of the transactions is done by the investigating agency and in these circumstances, the audit report cannot tilt the balance in favour of the accused. Even in doing so, learned Judge has not given any cogent and satisfactory reasons. Moreover, reasons assigned by the learned Addl. Sessions Judge in the first order of anticipatory bail have not been properly dealt with. Over and above, Court below has ignored various statements recorded by the investigating agency during the course of investigation as they are the statements of arrested persons. Such a baseless finding has been given by the learned Judge. Even if they are the statements of co-accused or arrested persons, same cannot be discarded at this stage as they provide clue only to the investigating agency to proceed further into the matter. Hence, it was required for the learned Judge to have given permission to the investigating agency to proceed further on that basis and if the accused is ultimately found to be innocent at the end of investigation, appropriate summary might be filed. However, investigating agency cannot be restrained by that baseless finding. Learned Sessions Judge has given much weight on the FIR and the charge-sheet submitted in the Court qua other accused on the ground of non-involvement of the respondent No. 1-accused in the crime in question. As I have discussed earlier, it was a well planned and well designed typed FIR prepared by the then Chairman of the bank submitted to the Commissioner of Police, Surat, for the purpose of diverting the whole investigation for the purpose of saving real culprits as is conspicuous from para 14 of the complaint. Instead of going into the same, it has been used in favour of the accused which is totally unwarranted. Learned Sessions Judge has also ignored the fact that charge-sheet submitted was qua other accused against whom investigation was completed and, therefore, most of the evidence appearing in that charge-sheet will be connecting the accused shown there and not the accused shown in column No. 2 of the charge-sheet (summary sheet) as absconding accused. It is thus clear that the accused is not making himself available for investigation by filing various proceedings and is evading investigation to be done qua him. Still, however, he is seeking benefit on the

ground that there are no evidence connecting him with the crime in question in the charge-sheet which is contrary to the settled law. Learned Sessions Judge has neglected the basic fact leading to the only conclusion of rejecting the second successive application that the accused is not available for interrogation for a period of more than one year and for the purpose of securing his presence, prosecution has taken sufficient care by obtaining non-bailable warrant from the learned C.J.M., and initiating proceedings under Secs. 70 and 82 of the Code. Instead of taking into consideration all these aspects, learned Sessions Judge has interfered with the points which have become final between the parties. Merely because the respondent No. 1-accused is having the political background and is connected with various social activities, learned Sessions Judge should not have exercised discretion in his favour. Learned Sessions Judge should not have taken into consideration the status of the person while passing the order. All these indicate the very act of a senior District and Sessions Judge not being in bone fide exercise of power.

[Emphasis Supplied]

xi. (The) Kheralu Nagarik Sahakari Bank Ltd. v. State of Gujarat and Another reported in 2006(2) GLH 307 wherein para 10.3 reads as under :-

10.3 It is required to be noted that the respondent No. 2 had preferred anticipatory bail application before the Sessions Court which was rejected. Thereafter, the respondent No. 2 approached this Court praying for anticipatory bail which was withdrawn. Thereafter, after arrest of the respondent No. 2, he moved an application for regular bail before the sessions Court. The Sessions Court, without considering the fact that earlier applications for anticipatory bail were not granted, by Sessions Court and High Court, allowed the application and granted bail. When the anticipatory bail was not granted earlier, there was no change in the circumstances to grant regular bail.

xii. Ranjit Hemubhai Gohil v. State of Gujarat and Others reported in 2008(3) GLH 486 wherein paras 11 & 12 read as under :--

11. In the present case, reading the complaint as well as the statement of witnesses and the nature of accusations levelled against the present respondent Nos. 2 to 6 - accused, prima facie, it is abundantly clear that respondents Nos. 2 to 6 were involved in the commission of the crime in question and that they have used deadly weapons that were in their possession at the time of the offence as is evident from the statements of eyewitnesses. Considering the conduct of the respondents-accused in absconding as aforesaid, the use of deadly weapons and the severity of the punishment in the event of conviction lead me to believe that there are reasonable grounds to cancel the bail having regard to the nature and gravity of the offence and the materials collected during investigation so as to prevent miscarriage of justice and adverse impact in the society. This is so in view of the judgements rendered in the case of (1) State Vs. Amarmani Tripathi, wherein the factors that are required to be looked into while granting bail have

been highlighter and, (2) Panchanan Mishra Vs. Digambar Mishra and Others, wherein the objectives underlying the cancellation of bail is reflected and (3) Gobarbhai Naranbhai Singala Vs. State of Gujarat and Others, wherein paragraphs 25, 26 and 27 are relevant.

12. On a careful consideration, in my view, the learned Principal Sessions Judge has failed to exercise the discretion judiciously in granting bail to the present respondents Nos. 2 to 6-accused, and therefore, both these Criminal Revision Applications are allowed. The impugned order dated 4th December 2007 passed by the learned Principal Sessions Judge, Surendranagar is hereby set aside and the bail granted to the respondent Nos. 2 to 6 accused stands cancelled. The respondent Nos. 2 to 6-accused are directed to surrender before the concerned Magistrate forthwith and the learned Magistrate shall take them into Judicial Custody forthwith. In case the respondent Nos. 2 to 6-accused fail to comply with the above directions, the learned Magistrate shall take appropriate legal steps to apprehend them. Rule is made absolute in these applications..

xiii. Ramsing Virabhai Machhar v. State of Gujarat reported in 2010(0) GLHEL-HC 223311 wherein para 3 reads as under :-

3. Looking to the seriousness of the offences alleged against the petitioner, more particularly discovery of muddamal from the possession of the petitioner, the petitioner cannot be released on bail. Even otherwise, this is a successive bail application and no change of circumstances has been pointed out by learned Advocate appearing on behalf of the petitioner after the earlier petition and the order passed by this Court. Hence, the present application is dismissed. Rule is discharged.

7. In the present case, the respondent no. 2 Bharat Tapu preferred an application for enlarging him on bail being Criminal Misc. Application No. 421 of 2010 before the Additional Sessions Judge, Amreli on 21.09.2010 and after hearing the Court below rejected the said application vide order dated 30.09.2010. Thereafter, the respondent No. 2 preferred regular bail application before this Court being Criminal Misc. Application No. 12625 of 2010 and after hearing this Court disposed of the application as withdrawn vide order dated 28.10.2010.

7.1 Similarly the respondent No. 3 Sangram Kanabhai Rabari preferred an application for enlarging him on bail being Criminal Misc. Application No. 406 of 2010 before the Additional Sessions Judge, Amreli on 08.09.2010 and after hearing the Court below rejected the said application vide order dated 22.09.2010. Thereafter, the respondent No. 3 preferred regular bail application before this Court being Criminal Misc. Application No. 15307 of 2010 and this Court disposed of the application as having not pressed vide order dated 30.12.2010.

8. The fact that the Courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country should not be lost sight of. The findings of a higher Court or a coordinate bench must receive

serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier. The decisions given by a superior forum, undoubtedly, is binding on the subordinate fora on the same issue even in bail matters unless there is a material change in the fact situation calling for a different view being taken.

8.1 In the present case, the trial Court while granting bail vide impugned order has observed that after the investigation is over as per the Serological report and FSL report, no blood of the deceased was found in the alleged weapons and clothes of the accused. The trial Court has granted bail to the accused in view of the fact that the blood group on muddamal stick and pipe is undecided and the clothes of the accused are given mark J,L,N,P and S wherein blood group "O" of the deceased is not found. Other than the said ground, the trial Court has not found any other reason which can be said to be a change in circumstances for granting successive bail application pursuant to the earlier bail applications which were rejected by the trial Court and not granted by even this Court.

9. In this regard the law in case of unlawful assembly is required to be perused. In the case of Masalti Vs. State of U.P., paras 17 & 18 read as under :--

17. Mr. Sawhney then attempted to argue that the High Court failed to give effect to the principles enunciated by this Court in the case of Baladin v. State of Uttar Pradesh indiankanoon.org 808611. In that case, it was observed by Sinha, J., who spoke for the Court, that it is well-settled that mere presence in an assembly does not make a person, who is present, a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under s.142, I.P.C. The argument is (1) Baladin and Others Vs. State of Uttar Pradesh, that evidence adduced by the prosecution in the present case does not assign any specific part to most of the accused persons in relation to any overt act, and so, the High Court was in error in holding that the appellants were members of an unlawful assembly. The observation of which Mr. Sawhney relies, prima facie, does seem to support his contention; but, with respect, we ought to add that the said observation cannot be read as laying down a general proposition of law that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of such an unlawful assembly. In appreciating the effect of the relevant observation on which Mr. Sawhney has built his argument, we must bear in mind the facts which were found in that case. It appears that in the case of Baladin(1), the members of the family of the appellants and other residents of the village had assembled together; some of them shared the common object of the unlawful assembly, while others were merely passive witnesses. Dealing with such an assembly, this Court observed that the presence of a person in an assembly of that kind would not necessarily show that he was a member of an unlawful assembly. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons

constituting the assembly, and he entertained along with the other members of the assembly the common object as defined by s.141, I.P.C. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of s. 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by s.....141. While determining this question, it becomes relevant....to consider whether the assembly consisted of some persons.....who were merely passive witnesses and had(1) Baladin and Others Vs. State of Uttar Pradesh, joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of Baladin(1) assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, s.149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by s.149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. Therefore, we are satisfied that the observations made in the case of Baladin(1) must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition of law such as Mr. Sawhney suggests.

18. In this case, the High Court has carefully examined the evidence and has made a finding that the whole group of persons who constituted the assembly were members of the faction of Laxmi Prasad and they assembled together, armed with several weapons, because they entertained a common object in pursuance of which the five murders were committed on that day. Therefore, there is no substance in the argument that the conclusion of the High Court that the appellants are guilty of the offences charged is not supported by the principles of law enunciated by this Court in the case of Baladin(1).

It is thus clear that the general grounds of attack urged before us by Mr. Sawhney in challenging the validity of the conclusions recorded by the High Court fail, and so, there (1) Baladin and Others Vs. State of Uttar Pradesh,

9.1 Lalji and Others Vs. State of U.P., paras 8, 9 & 10 read as under :-

8. Section 149 I.P.C. provides that if an offence is committed by any member of

an unlawful assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person, who at the time of committing of that offence is a member of the same assembly, is guilty of that offence. As has been defined in Section 141 I.P.C. an assembly of five or more persons is designated an "Unlawful Assembly", if the common object of the persons composing that assembly is to do any act or acts stated in clauses "First", "Second", "Third", "Fourth", and "Fifth" of that Section. An assembly, as the explanation to the Section says, which was not unlawful when it assembled, may subsequently become an unlawful assembly. Whoever being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. Thus, whenever so many as five or more persons meet together to support each other, even against opposition, in carrying out the common object which is likely to involve violence or to produce in the minds of rational and firm men any reasonable apprehension of violence, then even though they ultimately depart without doing anything whatever towards carrying out their common object, the mere fact of their having thus met will constitute an offence. Of course, the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm person of reasonable firmness and courage. The two essentials of the Section are the commission of an offence by any member of an unlawful assembly and that such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Not every person is necessarily guilty but only those who share in the common object. The common object of the assembly must be one of the five objects mentioned in Section 141 I.P.C. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

9. Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this Section created a specific and distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the Section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hands commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken

to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This Section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability u/s 149. It must be noted that the basis of the constructive guilt u/s 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge.

10. Thus, once the Court hold that certain accused persons formed in unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it.

9.2 In the case of Sheo Prasad Bhor @ Sri Prasad Vs. State of Assam, para 6 reads as under :--

6. We have gone through the statements made under Sections 161, 164 Cr.P.C. of these witnesses and before the trial Court, after going through the statements, we are of opinion that the approach of the learned Single Judge of the High Court appears to be justified. So far as P.W.2- Faizul Hussain is concerned, he has named accused Manik Keot and Jaharlal Bhor. P.W.3 has also named accused Manik Keot and Jaharlal Bhor in the Court though not before the Police and not before the Magistrate. P.W.4 has named accused Sheo Prasad Bhor, Champalal Bhor and Jaharlal Bhor. P.W. 6 has also alleged that Champalal Bhor, Manik Keot and Sheo Prasad Bhor were lifting Rehmat Ali from the spot and were dragging him to the bank of the river. He has also stated that accused Jaharlal also gave a baitha blow to the deceased and accused Champalal Bhor gave a dagger blow and when he tried to intervene, he was threatened by accused Sheo Prasad Bhor. Similarly, P.W.7 has also mentioned that accused Sheo Prasad Bhor was there and participated in the assault. He also mentioned the name of Jaharlal Bhor before the Magistrate and the Court. His statement was sought to be controverted by P.W.9 - Investigating Officer. Small contradiction and omission are natural when body of persons attacked deceased. One has to only assure that there should not be over implication. After review of statements by both the Courts below have correctly appreciated the testimony of

witnesses. We have also perused the statements made by the witnesses, it is clear that some took part in the assault while others actively assisted them. When charge u/s 149, I.P.C. is there, it is not necessary that each one should be assigned independent part played in the beating. If it is found that one of them was a member of the unlawful assembly and that unlawful assembly assaulted the deceased which ultimately caused the death of the deceased, then all who were members of the unlawful assembly can be held liable. Having regard to the facts and circumstances of the case the view taken by the trial Court convicting accused appellant u/s 304 (II) read with Section 149 cannot be said to be bad. The High Court has rightly observed that it was a case u/s 302, I.P.C. but since there was no appeal preferred by the State, therefore, High Court did not interfere with the conviction of the appellants. Be that as it may, we are satisfied that the learned Single Judge as well as the trial Court has correctly appreciated the testimony of the witnesses and there is no ground to interfere in these appeals. Consequently, the appeals are dismissed.

9.3 In the case of *Sikandar Singh and Others v. State of Bihar* reported in 2010(7) SCC 477 paras 15 & 17 read as under :--

15. The provision has essentially two ingredients viz. (i) the commission of an offence by any member of an unlawful assembly and (ii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability for the offence committed by a member of such unlawful assembly under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object.

17. A common object" does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of

the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.

10. In the present case, the respondents accused themselves have in their affidavit in reply admitted that a fight had taken place at the scene of offence, it is clear that when the accused persons assembled together, armed with swords, iron pipes and gun and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This Section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability u/s 149. It must be noted that the basis of the constructive guilt u/s 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge.

11. Thus, from the overall facts and circumstances of the case, this Court is of the view that once the Court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it.

12. It is required to be noted that Bharatbhai Tapubhai Vala, the respondent No. 2 herein had filed Criminal Misc. Application No. 421 of 2010 before the Sessions Court, Amreli. While dealing with the said application the Sessions Court found that the said accused was part of an unlawful assembly with a gun. Thus, he was an member of unlawful assembly which was proved beyond doubt. It was also recorded that chargesheet has already been filed and the trial has commenced. The Sessions Court found prima facie case against this accused and concluded that no case was made out to grant bail to him.

13. In the case of Sagrambhai Kanabhai Rabari, respondent No. 3 herein, earlier he had filed Criminal Misc. Application No. 406 of 2010 before the sessions Court, Amreli. In this case also the Sessions Court found the involvement of respondent No. 3 in the alleged incident and he was having a stick with him. The Court therefore found that there is a prima facie case against him and therefore the bail was rejected. Thereafter the applicant approached this Court by filing Criminal Misc. Application No. 15307 of 2010. The said application was withdrawn on the ground that the trial has commenced and it has reached the stage of evidence.

14. Having come to such conclusion, in the impugned order the Sessions Court

has taken a different stand. The Sessions Court has relied on Serological report and FSL Report and stated that there are no bloodmarks of the deceased on the weapon. It is further observed that there are no bloodstains on the clothes of the accused.

15. The pertinent question in this situation is whether there should be bloodstains on the clothes of the accused as also on the weapon in all the cases? The answer could be that it is not necessary that in all cases such bloodstains can be found. Merely because there are no blood marks on the weapon or clothes cannot be a ground for grant of bail. Ultimately the evidence should be proved in trial and the bail Court cannot appreciate the evidence. In the case of Bharatbhai Tapubhai Vala, he was having a gun and even if he has used it may not be necessary that bloodstain be found on the weapon or on his clothes.

15.1 Even in the case of Sagrambhai Rabari, he was wedding a stick and it cannot be presumed there will be blood stain on the stick. In both the case even if the weapons were used it will be from a distance and the chance of having bloodstain on the weapon as also the clothes of the accused is remote. In these circumstances the reasoning of the Sessions Court that in the FSL report, there is no evidence against the accused is highly unreasonable. Such scientific evidence is required to be appreciated by the Court during trial and trial is at the stage of evidence.

15.2 It is also required to be noted that in the order passed in Criminal Misc. Application No. 406 of 2010 on 22nd September 2010, in the case of Sagrambhai, it is clearly observed that "looking to the case papers, the accused has taken part in the unlawful assembly and therefore there is a prima facie case. Further, it is also found that the accused is a Maldhari and if he is released on bail, his presence cannot be secured at the time of trial." The trial Court in the successive bail application has ignored these reasons while granting bail.

15.3 The trial Court while rejecting the bail applications of the accused has observed this very fact that the accused were found armed with deadly weapons and they are prima facie found to be members of unlawful assembly being more than five persons. The filing of cross complaint by the very accused endorses the happening of the incident and the presence of the accused at the scene of offence. The trial Court had specifically observed therein that it shall be difficult to secure the presence of the accused if they are set at liberty. It is very glaring and shocking to note that all these aspects which were considered by the Court while rejecting the earlier bail applications have not been considered by the very same Court while granting bail to the accused. Thus, when the present accused are charged with offences punishable under Sections 143, 147, 148, 149, 302, 325, 326, 504, 34 & 120(B) of Indian Penal Code and u/s 25(1)(B), (1)(B)(A) of Arms Act coupled with the fact that this Court did not think it fit previously to interfere in grant of bail to the same accused, the trial Court ought to have scrutinized the developments in the case. This Court is of the view that this is not a fit case wherein the successive bail ought to have been granted to the accused.

16. In view of the above, this Court is clearly of the view that bail was granted to the accused improperly by wrong and arbitrary exercise of judicial discretion. The Court below has clearly looked at the materials and came to a conclusion which on the face of it is contrary to the materials on record and therefore it amounts to non-application of mind. Therefore the bail deserves to be cancelled.

17. Accordingly, this application is allowed. The impugned order dated 13.01.2011 passed by the Sessions Judge, Amreli in Criminal Misc. Application No. 16 of 2011 is hereby quashed and set aside. The bail bonds of the respondents No. 2 & 3-accused No. 3 & 7 stand cancelled and they are directed to surrender to custody forthwith. Rule is made absolute.

After the above order was dictated, Mr. Tushar Seth, learned Advocate appearing for the respondents-accused requested this Court to extend the time to surrender. Request is accepted. The respondents-accused shall surrender to custody within a period of four weeks from today.