
(1980) 03 BOM CK 0011

In the Bombay High Court

Case No : Criminal Application No. 288 of 1980

Rama Mhatre

APPELLANT

Vs

Dattatraya Janu Vayale and others

RESPONDENT

Date of Decision : 25-03-1980

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302, 307, 324

Citation : (1981) CriLJ 1605

Hon'ble Judges : Kambli, J

Bench : Single Bench

Judgement

1. This criminal application has been filed by Complainant Pandit Rama Mhatre in a crime registered at Hill-line Police Station as Cr. No. 6/1980 against the 45 respondents for having allegedly committed offences under Sections 302, 307, 148, 149, 324, 325 and 427 of the I.P.C. and S. 25(1) of the Indian Arms Act on 15-1-1980. The Complainant seeks to set aside the order made by the Addl. Sessions Judge, Thane allowing the application of the respondents for bail.

2. The complainant and the respondents 1 to 45 come from village Vasargaon, Taluka Kalyan, in District Thane. It is alleged in this application that the complainant-petitioner was the President of the Janta Party of the village Unit at the material time whereas the respondent No. 1 was the Sarpanch of the village. He had contested the election for Zilla Parishad membership on Indira Congress Ticket and was elected. One Pandurang Ganpat Patil, a resident of village Manur had contested the election as Janta Party candidate, as against Respondent No. 1. The petitioner and his party members had voted for him, Respondents No. 1, was therefore having grudge against the petitioner and his party members and since after the election of Zilla Parishad, quarrels and disputed were going on between these parties. It appears that both the factions belong to Agri community. It is alleged in the application that in order to put an end to disputes some leaders of the Agri community had intervened and tried to settle the disputes; however, the respondents were not interested in the disputes being

settled. The petitioner alleges in this application that the respondent No. 1 and others threw stones at his house and also on the house of his partymen on 13-1-1980 and 14-1-1980.

3. It is alleged that on 15-1-1980, at about 8.30 a.m. throwing of stones started towards the house of the petitioner. At that time the petitioner noticed that all the respondents and his party men, about 70 to 75 in number, marched towards the house of the petitioner when two police constables who were kept on the guard duty came in front of the house of the petitioner. The petitioner told these police constables that they should persuade the respondents to go away without indulging in any further assault. The police constables on their part tried to persuade the respondents to go away, but in spite of this they indulged in stone throwing. Respondent No. 1, Dattatraya fired a gun shot from his gun which he was carrying at that time. As a result of this gun shot complainant's brother Shankar Mhatre received the injuries. Finding this the Police constables on duty and two persons belonging to the party of the petitioner-applicant went to the Hill-Line Police Station to report the incident. In spite of this the stone throwing at the house of the petitioner was continued and it continued for an hour and half. In the meantime, the Police Sub-Inspector Sayyad and his police party attached to the Hill-Line Police Station arrived at the scene. Seeing that the police party had arrived, complainant's brother Kashinath, along with some partymen, started going to the P.S.I. Sayyed. At that time respondent No. 19 Balaram Vayale fired a gun short towards Kashinath, the brother of the petitioner. He fired about 2-3 shots. As a result of this firing of gun P.S.I. Sayyed and some other persons of petitioner's party received gun shot injuries. In the stone throwing towards the house of the petitioner the tiles of the house of the petitioner and others were broken. The petitioner received injuries due to the said stone throwing.

4. It appears that the petitioner filed his complaint the same night with the Circle Police, Inspector who happened to come in the village at 2.00 a.m. This was at night between 15-1-1980 and 16-1-1980. When the police party went to the house of respondent No. 1 he was found in his house. When his house was searched in the presence of the panchas a single loaded 12 Bore Gun was seized. The respondents Nos. 1 to 18 were arrested on the same night at about 4.00 a.m. The police party while carrying on search near Ram Mandir in the village at night, found one dead body which was identified to be the dead body of complainant's brother Raghunath Mhatre. It was noticed that the said dead body had mine gun shot injuries. The dead body of Raghunath was sent to the Medical Officer for post-mortem examination. It is alleged by the prosecution that one empty cartridge of 12 Bore was found near the dead body.

5. During the course of investigation the police arrested the rest of the respondents on 24th January 1980. They were produced before the learned Magistrate who remanded them to the police custody. While they were in the police custody an application came to be made for releasing them on bail on 30th

January 1980. The said application was heard by the learned Sessions Judge who by his order dated 15th February 1980, ordered that all the forty-five accused to be released on bail on each of them executing a bond in the sum of Rs. 1500/- with one or more sureties for the like amount. The petitioner by this criminal application challenges the said order.

6. While admitting the petition, Rule has been issued against the respondents Nos. 1 and 19 only. The Public Prosecutor for the State supports this application for cancellation of bail failed by the petitioner.

7. It must be stated at the outset that the learned Addl. Sessions Judge observed in his order that the learned public prosecutor for the State has "very fairly submitted" that the State had no objection in view of the instructions furnished to him by the Investigating Officer to release these accused-applicants on bail and that in view of that "fair concession" he granted the application for bail. Whether the Investigating Officer was right in instructing the Public Prosecutor that he should not oppose the application for bail, if at all he had so instructed, and whether the learned Public Prosecutor was right in acting on these instructions and further whether the learned Addl. Sessions Judge was justified in ordering the release of the accused on bail on such a concession would be considered by me a little later. Suffice it to say for the present that the learned Addl. Sessions Judge made the impugned order on the concession made by the learned Public Prosecutor. He does not appear to have applied his mind to the material collected in the course of the investigation or to relevant considerations and the provisions of law which should be taken into consideration while granting or rejecting an application for bail. This is, therefore, not a case where an application for bail was granted on merits. It is, therefore not necessary to consider the various principles and consideration which the Court has to bear in mind while cancelling the bail already granted by the Court below.

8. The Supreme Court has in the case of State (Delhi Administration) Vs. Sanjay Gandhi, observed that the rejection of bail when bail is applied for is one thing and cancellation of bail already granted is quite another; that it is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. 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 no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. These observations would obviously not apply to the instant case because as stated earlier the learned Addl. Sessions Judge allowed the bail application merely on concession being made by the learned Public Prosecutor. It is, therefore, necessary for me to see whether the respondents Nos. 1 and 19 deserve to be released on bail, having regard to the material collected in the course of the investigation and relevant provisions of law.

9. It is true that Section 439(1) of the Code of Criminal Procedure (hereinafter referred to as "the Code) confers special power on the High Court or on the Court

of Session in respect of bail. Unlike u/s 437(1) there is no ban imposed u/s 439(1), against granting of bail by the High Court or the Court of Session to persons accused of offences punishable with death or imprisonment for life. As observed by the Supreme Court, however, in *Gurcharan Singh and Others Vs. State (Delhi Administration)*, the High Court or the Court of Session has to exercise its judicial discretion in considering the question of granting of bail even u/s 439(1). Certain overriding considerations in granting bail are common both in the case of Section 437(1) and Section 439(1).

The nature of the offence and gravity of the circumstances in which the offence is committed, the position and the status of the accused with reference to the victim and the witnesses; the likelihood of the accused fleeing from justice or of repeating the offences of tampering with the witnesses, are some of the relevant considerations while considering an application for bail even u/s 439(1) of the Code. These considerations as observed by the Supreme Court cannot be exhaustively set out. Section 437(1) of the Code provides that when any person accused or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. Even though this section refers to the powers of and limitations of a Court other than High Court or Court of Session, Supreme Court has observed in the case of *Gurucharan Singh v. State (Delhi Administration)* (supra) that some considerations which are to be borne in mind while granting bail u/s 437(1) of the Code have to be taken into consideration while considering an application for bail u/s 439(1) of the Code, unless there are special circumstances to justify the departure from these considerations.

10. Now coming to the material that has been collected in the course of investigation in the instant case it would appear that according to the prosecution case there was enmity between the two factions in the village. The petitioner was the President of the village unit of Janata Party whereas the respondent No. 1 was at the relevant time the sarpanch of the village and had contested the election to the membership of Zilla Parishad on Indira Congress Ticket and was elected. As against respondent No. 1, one Pandurang Ganpat Patil, the resident of village Manur, had contested the election on Janata Party Ticket for membership of Zilla Parishad and the petitioner complainant and his party members voted for him. It is stated that on account of this the respondent No. 1 was having grudge against the petitioner and his party members and since then the quarrels and disputes were going on between these two factions.

11. Coming to the incident giving rise to this case it has transpired in the investigation that on 15th January, 1980 at about 8.30 a.m. all the respondents and their party members totalling to about 70 to 75 persons marched towards the house of the applicant and indulged in stone throwing. The two Police

Constables who were kept on the guard duty in the village then came in front of the house of the petitioner. The petitioner asked them (Police constables) to persuade the respondents to go away. The Police on their part tried to persuade the respondents to go away but in spite of this they indulged in the stone throwing. The respondent No. 1 Dattatraya Vayale there fired a gun shot from his gun which he was carrying at the relevant time and as a result of this gun shot Shankar Mhatre, the brother of the complainant, received injuries. Finding this the Police Constables on duty and some persons belonging to the party of the applicant went to the Police Station Hill-Line. The P.S.I. Sayyed and his Police Party attached to the Hill-Line Police Station arrived at the scene. Seeing that the Police had arrived, according to the material collected in the course of the investigation, the complainant's brother Kashinath and some other members of the complainant party started going to the P.S.I. Sayyed. At that time the respondent No. 19, Balaram Vayale, fired a gun shot towards the complainant's other brother Kashinath. He fired about 2 to 3 shots. As a result of this firing of gun, the P.S.I. Sayyed and other persons belonging to the complainant's party received injuries. In all 9 persons from the complainant's party received gun shot injuries. In the stone throwing the Head Constable Bachrao received the injuries. The investigation further reveals that the complainant's other brother Raghunath was returning from near the school in the village. At that time, Gopal a resident of the same village, saw that he was coming running towards his (Gopal's) house. At that time, respondent No. 1, Dattatraya, fired a gun shot at him. The statement of Gopal is to the effect that at that time some 70 to 75 persons were indulging in stone throwing and some of them were throwing stones on his house. He says that he (Gopal) ran away to his field out of fear. He returned from the field next day morning. At that time he saw that the dead body of Raghunath was lying behind his house.

12. This is in short the material that has been collected, in the course of investigation. It is obvious that at this stage while deciding the question whether there appear reasonable grounds for believing that the accused have been guilty of the offence punishable with death or imprisonment for life, we have to go by the material collected in the course of investigation unless the material on the face of it is found to be totally unacceptable. The question of assessing the material and ascertaining whether it proves the offences against the accused beyond reasonable doubt, obviously would not arise at this stage.

13. Mr. Chitnis, the learned counsel for the petitioner, submitted that the material that has been collected in the course of investigation is sufficient to show that the respondents Nos. 1 and 19, who were armed with guns indulged in indiscriminating firing and as a result of this firing as many as 9 persons came to be injured and complainant's brother Raghunath came to be fatally wounded. He, therefore, submits that there is sufficient material on record to show that there are reasonable grounds for believing that both the respondents are guilty of offences punishable with death or imprisonment for life. As against this, Mr. Ramrao Adik, the learned counsel for the respondents submits that even if the

prosecution case is taken at its best it does not disclose the offences beyond Section 325 of the Indian Penal Code. According to him, the statement of Gopal to the effect that the respondent No. 1, Dattatraya, fired gun shots at Petitioner's brother Raghunath does not deserve credence at all. He points out that according to Gopal the immediately ran away from his house and returned only next morning. He further points out that Gopal is after all a man belonging to the party of the petitioner. He also submits that the post-mortem report which shows that Raghunath had as many as 11 injuries falsifies the statement of Gopal who says that the accused No. 1 fired a shot at Raghunath. Mr. Adik, the learned counsel, further submitted that this application for cancellation of bail has not been preferred by the State but that it has been preferred by the complainant only out of personal vendatta. As I have pointed out it would not be proper at this stage to assess the statements collected in the course of investigation in order to find out whether the material collected in the course of investigation would be sufficient to prove the offences alleged against the accused beyond reasonable doubt. What is to be found out is whether there appear reasonable grounds for believing that the accused have bene guilty of offences punishable with death or imprisonment for life.

14. It appears from the material collected in the course of the investigation that Raghunath met his death as a result of gun shot injuries sometime in the same night. His dead body was found near the school, which the learned Public Prosecutor on the instructions from P.S.I. states is at a distance of about 200 paces from the complainant's house. Panchnama of the offence shows that earth stained with blood was found on the spot. Dr. Jamne of the Central Hospital, Ulhasnagar, performed the post-mortem examination on the dead body of Raghunath on 16-1-1980 at 2.00 a.m. He opined that Raghunath might have met his death sometime 6 to 24 hours before his examination. According to the prosecution the incident, in which the respondents indulged in stone throwing and the incident in which the two respondents namely respondents Nos. 1 and 19 fired the gun shots, began at about 8.30 p.m. on 15-1-1980. The opinion of the Doctor that Ragunath might have met his death between 6 to 24 hours prior to his examination supports the prosecution case that Raghunath must have received the injuries in the same night at the hands of Respondents No. 1.

15. It is true that witness Gopal stated that the saw the respondent No. 1 firing gun short at the deceased Raghunath and seeing that he ran away from his house out of sight and that he returned to his house on the next day morning. It is also true that Gopal belonged to the party of the petitioner. However, all these alleged infirmities attributed to his statement will have to be properly weighted at the time of the trial. The question that I have to decide at this stage is whether the statement of Gopal along with other materials collected in the course of investigation points out to the guilt's of respondents Nos. 1 and 19, and whether the materials, further point out that there are reasonable grounds for believing that they have committed offences punishable with death or imprisonment for life. Coming to the argument that the statement of Gopal is not

consistent with the post-mortem report, which shows the Raghunath received as many as 11 gun shot injuries it must be said that Gopal states that out of fear he ran away from his house immediately after he saw the respondent No. 1 firing gun shot at Raghunath. He says that he was fear stricken because of the stone throwing on his house. It is, therefore, not unlikely that he took to his heels as soon as respondent No. 1 started firing at Raghunath. There is other material also on which the prosecution relies in support of its case that Raghunath came to be fatally wounded by respondent No. 1.

16. Respondent No. 1 was arrested on the same night. As many as 9 persons namely complainant, Namdeo Shankar Police Head Constable, Police Constable Prabhakar Naik, Gajanan Mandali, Lalchand Pakare, Shankar, Shankar Rama Mhatre and Gopal Patare stated that the respondent No. 1 fired gun shots. It must also be noticed that 12 bore gun was, according to the prosecution, seized from his house on the very night. The prosecution case further is that when the gun was seized that barrel of the gun gave out smell which indicated that the gun might have been fired recently. It is also the prosecution case that one empty cartridge of 12 bore was found near the dead body. All this material, in my view, supports the prosecution case that the deceased Raghunath in all probability met his death as a result of the gun shots fired by respondent No. 1. It is important to note that the prosecution attributed the possession of gun only to the two respondents namely respondents Nos. 1 and 19. So far as No. 19 is concerned it is not the case of prosecution that Raghunath came to be wounded by him. All this material, thereafter, at least at this stage is sufficient to show that Raghunath must have met his death at the hands of respondent No. 1.

17. It is true that the first information report lodged by the complainant at 2.00 a.m. on the night of the incident does not refer to the fact that Raghunath was killed in the gun shot firing. However, it has come on the record that it was a dark night. The picture that emerges from the material on record is that there must have been a sense of panic amongst the persons who were injured and also their partymen. The material shows that the dead body of Raghunath was lying at some distance from the house of the complainant. It is not unlikely that the complainant and members of his party did not dare to go out during that night in search of the persons who were missing. It appears that when the Police took a thorough search of the locality they found the dead body of Raghunath lying near the school early morning. The absence, therefore, of the reference in the complaint to the fatal assault on Raghunath would not in my view be of much assistance to the respondents at this stage.

18. The statements of a number of witnesses recorded in the course of investigation reveal that the respondent No. 1 fired at complainant's brother Shankar. He sustained injury at the back as a result of this firing. The material also shows that as many as 10 persons including P.S.I. Sayyed sustained injuries as a result of gun shots being fired by respondents Nos. 1 and 19. The witnesses have stated that gun shots were fired by respondents Nos. 1 and 19. They have

not stated which persons sustained injuries as a result of the gun shots fired either by respondent No. 1 or who sustained injuries as a result of firing by respondent No. 19 specifically. Of course, it has been stated by some witnesses that Kashinath, another brother of the complainant, was fired at by respondent No. 19. Except the injuries sustained by the deceased Raghunath, Shankar and Kashinath, the material shows that other seven persons sustained injuries as a result of firing either by respondent Number 1 or by respondent No. 19. This material will have to be taken into consideration while considering the case of respondent No. 1 for bail. It may be mentioned that some of the persons sustained injuries on the vital parts like chest, and back and the stomach. For example the material shows that Shankar Rama sustained injuries at the back. P.S.I. Sayyed sustained injuries in the stomach and the chest, and also near the right ear. Lalchand Ananda sustained injury in the chest. In view of these materials it is very difficult to hold that there are no reasonable grounds to believe that the respondent No. 1, committed the offence punishable with death or imprisonment for life.

19. Coming to the case of respondent No. 19 the material that is collected in the course of investigation shows that this respondent and respondent No. 1 were armed with guns. They fired the gun shots resulting in the injuries to persons. Even if the fatal injuries to deceased Raghunath are left out of consideration, some of the wounded persons namely Shankar, P.S.I. Sayyed and Lalchand Anand sustained injuries on the parts of the body which can be said to be vital. It is true that in respect of many of the injured persons there is no definite material to point out which of the two respondents fired at them. However, when a number of persons is said to have marched towards the house of the complainant and when these two persons went armed with guns, it is prima facie permissible at this stage to say that Section 149 of the I.P.C. would be attracted. The material shows that the two respondents were armed with guns and fired the gun shots indiscriminately causing injuries to as many as 10 persons and some of the injuries were sustained by the victims on their vital parts. The mob is said to have marched towards the house of the complainant. Deceased Raghunath came to be fatally wounded at some distance from the house of complainant. I am, therefore, for the present no connection respondent No. 19 with the injuries to Raghunath. It is, however, possible to say that there is reasonable ground to believe that respondent No. 19 is guilty of an offence at least u/s 307 of the Indian Penal Code. That offence being punishable with imprisonment for like the respondent No. 19 also should not be released on bail.

20. One of the considerations which has to be borne in mind while considering an application for bail is the seriousness and gravity of the offence. Assuming that the acts attributed to these accused would not have fallen within the mischief of Section 302 or Section 307 of the Indian Penal Code still I would have been inclined to hold that in view of the seriousness and gravity of the alleged offences respondents Nos. 1 and 19 did not deserve bail. Merely because the offence is not one punishable with death or imprisonment for life the accused is not entitled

to bail of right. If the allegations so warrant bail may properly be refused even in case of the non-bailable offence not punishable with death or imprisonment for life. In the instant case not only the number of persons are alleged to have been injured by the gun shot injuries but even the Police Officer. P.S.I. Sayyed, who came on the spot sometime after the incident was fired at recklessly. As is pointed out above, he sustained injuries in his stomach and also on chest.

21. Ordinarily this Court would not interfere with the order of bail granted by the Sessions Judge in favour of the accused. However, in this case as is pointed out at the outset, the order granting bail has been made on concession having been made by the Public Prosecutor. All the facts relevant for consideration while considering an application for bail were not kept in view by the learned Sessions Judge nor he appears to have gone into the materials collected in the course of investigation. The Court has to exercise judicial discretion keeping in view the recognised principles and factors while considering the application for bail. That discretion has not been exercised by the learned Judge in the instant case merely because the Public Prosecutor did not oppose the application for bail. It was the duty of the Court not to go by concession but to insist upon the Public Prosecutor to bring to his notice the material that was collected in the course of investigation. Instead of doing so the learned Additional Sessions Judge made the order on the concession being made by the Public Prosecutor and in that order he has stated :

"The Public Prosecutor for the State has very fairly stated that the State has no objection, in view of the instructions furnished to him by the Investigating Officer."

No doubt the Court would have been justified in characterising the conduct of the Public Prosecutor in not opposing the bail as fair; however, before that was done it was necessary for the learned Judge to see that the concession that was made by the Public Prosecutor was just and proper. The learned Additional Sessions Judge, in my view, seriously erred in releasing the accused on bail merely on the concession made by the Public Prosecutor.

22. So far as the Public Prosecutor is concerned it appears that it was stated by him before the Court that in view of the instructions furnished to him by the Investigating Officer he was not opposing the bail application. The learned Public Prosecutor for the State in this Court has invited my attention to the report made by the Sr. P.S.I. on 1-2-1980 to the Public Prosecutor in the Sessions Court. It appears that this report was made after the accused had filed the application for bail in the Sessions Court. In that report after setting out the facts as they transpired in the investigation the P.S.I. has concluded by saying that the accused did not deserve to be released on bail. The P.S.I. also pointed out that in case the accused were released on bail there was likely to be repetition of similar offences. However, when the application for bail came to be heard by the Additional Sessions Judge on 15-2-1980, the Public Prosecutor informed the Court that the Investigating Officer had instructed him not to oppose the bail

application. Mr. Adik, the learned counsel for the respondent, submitted that the Investigating Officer might have changed his mind subsequently and might have given instructions to the Public Prosecutor not to oppose the bail. It is not likely that the Public Prosecutor will make a statement before the Court that the Investigating Officer has instructed him not to oppose the bail unless such a statement was made. Anyway the matter in my view requires investigating. I do not think that in view of the seriousness and gravity of the acts attributed to respondents Nos. 1 and 19 and in view of the material that was collected in the course of investigation to which a reference had been made in the report of the Investigating Officer dated 1-2-1980 referred to above, the Investigating Officer was justified in giving instructions not to oppose the bail, if at all he gave such instructions to the Public Prosecutor. I think this is a fit case where the Superintendent of Police, Thane, will enquire into the matter and as-certain whether the instructions were given by the Investigating Office to Public Prosecutor not to oppose the bail application. On such enquiry the Superintendent of Police will take appropriate action as demanded by the result of the enquiry. The matter assumes importance because it is alleged in this application filed in this Court that no objection was submitted on behalf of the Public Prosecutor out of political pressure inasmuch as the respondents belonged to the other party i.e. Congress (I) Party.

23. So far as the Public Prosecutor is concerned, it is obvious that he has to discharge a double role. He has not only to represent the State but he has also a duty to assist the Court by placing before the Court the material facts in a free and fair manner. I do not think that the Public Prosecutor in this case was justified in telling the Court that he did not oppose the application for bail because he had instructions to that effect from the Investigating Officer. It was, in my view, his duty to see whether the instructions given to him were proper and warranted by the material collected in the course of investigation, and if he found that the investigations were not proper it was his duty to place before the Court in a fair manner the material that had been collected in the course of investigation and to request the Court to pass such orders as were warranted by the materials on record.

24. In the result, I allow this application and cancel the bail granted by the learned Additional Sessions Judge, Thane to respondents Nos. 1 and 19, and order that they shall be taken into custody. Warrant to issue.

25. At this stage Mr. Adik, the learned counsel for the respondents, orally prays for leave to appeal to the Supreme Court. Leave refused.

26. A copy of this order be sent to the Superintendent of Police Thane.

27. Application allowed.