
(1990) 06 GUJ CK 0010
In the Gujarat High Court

Sardarkhan Niwazkhan Pathan

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 07-06-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439, 482

Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 323

Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 3, 4, 5

Citation : (1991) 1 GLR 173

Hon'ble Judges : K.J. Vaidya, J

Bench : Single Bench

Judgement

K.J. Vaidya, J.—Two Material Questions arising for our consideration in this Misc. Criminal Application, are:

Firstly "Whether pending trial before the Court, any accused involved in a serious offence and already released on bail, can as a matter of his right, be permitted to leave the jurisdiction of me Court and a Country even for a limited period to go abroad on any justifiable ground?"

And Secondly "Whenever be faced with such sort of questions, what ought to be the advisable guiding considerations to be kept in view by the Court on the basis of which it is expected to exercise its judicial discretion to meet with the situation?"

2. Few relevant facts necessary to appreciate and answer the aforesaid two questions are: that one Sardarkhan Niwazkhan Pathan, the accused herein was one of 23 accused persons who came to be arrested in connection with C.R. No. 1-161 of 1989, registered at Chaklashi Police Station for having committed offences under Sections 307, 323, 324, 326, 147, 148, 149 of the I.P.C. and under Sections 3, 4 and 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short hereafter referred to as TADA).

2.1. While in custody, he submitted an application, me same being Misc. Criminal

Application No. 870 of 1989 before the learned Sessions Judge, Kaira, at Nadiad, for getting himself released on bail.

2.2. That the learned Judge after taking a view that Sections 3, 4 and 5 of TADA were not attracted in the facts and circumstances of the case, by a judgment and order dated 25th December, 1989, released the petitioner-accused on bail in sum of Rs. 5000/- and a surety of like amount.

3. Thereafter, the petitioner-accused submitted yet one another application, the same being Misc. Criminal Application No. 498 of 1990 before the very learned Judge inter alia seeking permission to allow him to visit Saudi-Arabia for "HOLY HAJ PILGRIMAGE" on any just and reasonable terms and conditions the Court deemed it proper to impose. This was opposed by the State and ultimately the learned Judge by a judgment and order dated 23rd May, 1990 dismissed the said application.

Having been aggrieved and dissatisfied by the same, the petitioner-accused has moved this Court under Sections 439 and 482 of the Code of Criminal Procedure, 1973, making two-fold prayers, namely - (i) that the impugned judgment and order passed by the learned Judge be quashed and set aside; and (ii) that the necessary permission to leave India for a limited period to go on Haj Pilgrimage may be granted.

4. Mr. S.K. Bukhari, the learned Advocate appearing for the petitioner-accused submitted that the impugned judgment and order rejecting the Application of the petitioner-accused (to permit him to go on Haj Pilgrimage) is patently illegal and unjust inasmuch as the discretion exercised by the learned Judge in the matter is arbitrary. Mr. Bukhari further submitted that the petitioner-accused is a deeply religious and old man. He is having a large family, big circle of friends and relatives and is permanent resident of village Narsanda since many years. Not only that, he is also having movable and immovable properties in his village. It was further submitted that but for this offence, otherwise the antecedents of the accused were blotless. In substance, Mr. Bukhari submitted that aforesaid facts and circumstances clearly indicated that the petitioner-accused is firmly rooted, grounded in his native soil of Narsanda, ruling out any conceivable possibility of his not returning to India after his "Haj Pilgrimage" which can frustrate the pending trial proceedings. Mr. Bukhari further submitted that if a star-cricketer Mr. Navjotsingh Sidhu, who also was alleged to have committed an offence u/s 307 of the I.P.C. can be permitted to leave India to tour West-Indies for just playing the test-matches, there are no justifiable reasons for his client being denied similar permission to leave India for holy and nobler purpose of going on "Haj Pilgrimage". In support of his last submission. Mr. Bukhari has not produced any reported or unreported decision, but has simply relied upon information which appears to have been gathered from some news medias.

5. As against the above, Mr. S.R. Divetia, the learned A.P.P. has vehemently opposed this application. In support of his submissions, the learned A.P.P. has

tendered a short affidavit-in-reply filed by investigating officer Mr. R.K. Upadhyaya, who is very much present in the Court. According to the learned A.P.P. since the learned Judge has properly exercised his judicial discretion in not granting the application of the petitioner-accused, this Court should not lightly interfere with the impugned order, Mr. Divetia further submitted that today, the petitioner-accused has not obtained any passport for going on Haj Pilgrimage and therefore unless so secures the same, he cannot leave country and if that is so, this Court should not grant permission sought for by the petitioner-accused. He further submitted that while dismissing the said application, the learned Judge has given two good reasons. They are - (i) "Though the Court has released the applicant on bail, it cannot be said at this stage as to what will be the fate of the case at the end of the trial"; and (ii) "Though the applicant is no bail, the applicant is likely to be charged with offences under Sections 307, 324, 326, 147, 148 and 149 of the I.P.C" It was finally urged that having regard to the gravity of offence any permission risking trial should be avoided.

6. Now, none of the aforesaid submissions made by the learned A.P.P has got any substance. Firstly, the question of getting passport particularly when a person is found to be an under trial accused, the same is always subject to the permission to be granted by the concerned Court. Therefore, the submission of the learned A.P.P. that since the accused has failed to obtain passport till today, he should not be granted permission to go on Haj Pilgrimage, is an argument which moves in circle and therefore is just devoid of any substance. Similarly, two reasons assigned by the learned Judge for rejecting the permission to leave India, do not appear to be that material and significant than as questions as to (i) Whether, in case the permission sought for going on Haj Pilgrimage if it is granted to the petitioner-accused, his ultimate presence before the Court for trial can reasonably be secured back and that too within time to make him face the trial and bow to its consequences? and (ii) When the trial is likely to commence? This question is important from that view of the fact that if the trial is round the corner and it is commencing soon, then his prayer for even a short period to visit foreign country can be rejected. As against that, if the trial is likely to commence in round about 12 months, then in that case, the same can be considered. In fact, reasons given by the learned Judge dismissing the application of the petitioner-accused, with due respect to him, are little beside the point. The fact remains that despite the allegation of the accused having committed offences under Sections 307, 326, 147, 148 and 149 of the I.P.C. the learned Judge has thought it safe to release the accused on bail without any condition, meaning thereby that he was fully satisfied that there were no reasonable apprehensions regarding the petitioner-accused (i) either tampering with prosecution witnesses; and/or (ii) committing breach of peace; and/or (iii) repeating similar offences; and/or (iv) fleeing from justice if he was released on bail. Not only that, but the learned Judge also felt quite sure and secured of securing back the presence of the accused at trial on releasing the accused on bail in sum of Rs. 5000/- and a surety of like amount.

7. It is but quite natural that when any accused particularly when he Ms involved in a serious offence, seeks permission to leave India, the Court to which such application is made, is bound to have an anxious concern over the same, because once the accused leaves India and does not voluntarily return, it is indeed difficult if not impossible to secure back his presence for the trial purpose. In such circumstances, it becomes the duty of the Court to find out whether the cause shown in the application is a genuine one or merely a ruse to frustrate the trial or an excuse to abuse liberty either by fleeing from justice and/or indulging in same or similar offences. Accordingly, in order to forestall such eventualities, the Court has to direct itself to determine the issue involved keeping in view following points, namely: (i) whether there is any material on the basis of which the prosecuting agency reasonably allege to the satisfaction of the Court that the permission sought for by the accused for the Haj Pilgrimage (and/or any other such reasonable and justifiable purpose to visit any foreign country for a definite and limited period) was merely a ruse or a device to get away from the clutches of trial? (ii) whether the accused was socially, psychologically and financially rooted deep and uneradicably enough rendering himself incapable to sever his relationship with his native soil under any circumstances and thereby intrinsically and indirectly lending guarantee and assurance to the judicial conscience regarding securing back his presence to face the trial? (iii) at what stage either an investigation or trial proceedings were? (iv) that on consideration of the aforesaid three points, if the Court feels that the accused has made out a good case in order to enable him to visit the foreign country for any justifiable ground, the same should not be granted till it performs one or more duty, viz., to summon a person or persons who earlier stood surety or sureties when released on bail and be specifically asked whether he or they as the case may be are ready and willing to stand or sureties assuring the Court about producing and keeping the accused present before the Court in time after the permission to visit the foreign country is granted. If such surety or sureties are prepared to satisfy the Court to so produce the accused for trial, then in that case the Court may on suitably increasing the bail amount and number of sureties, permit the accused to visit the foreign country.

8. Now keeping in mind the above guidelines, let us have a look at the stand taken by the State in this matter. The Investigating Officer in his reply-affidavit has stated that accused was aged 75 years and at the time of the alleged incident, he was armed with a stick and had given blow with it on the head of prosecution witness Devanand. It is further stated in the said reply-affidavit that the petitioner had made an application dated 22nd May, 1990 to "Dudhwala Tours" for going to Haj Pilgrimage and that till today, he has not got necessary passport. Except these facts only, no other facts have been brought on the record, by the Investigating Officer to oppose the permission sought by the petitioner-accused to go on Haj Pilgrimage. When inquired from the learned A.P.P. as to when the trial was likely to commence, he on instruction from the Investigating Officer submitted that the same was likely to take round about 12

months. Thus, applying the test laid down in earlier para 8 of this judgment, it is not possible to hold either that the cause shown for going on Haj Pilgrimage is ruse or an eye-wash or that the petitioner-accused had no deep-roots in his native soil to bring him back to his village, or that trial is likely to commence shortly during the period of Haj Pilgrimage. If that is so, it would be absolutely unjust and harsh not to permit the petitioner-accused, who is aged 74 years to go on Haj Pilgrimage which is a cherished dream, life's event, and a sacred religious duty of every Mohammedan to bow and offer prayer to Great Allah at holiest shrine at Mecca and Madina.

9. One thing which is required to be clarified at this stage is this that pending trial, neither any accused person has any absolute vested right to have permission to leave the territorial limits of India (much less jurisdiction of Sessions Court) for any justifiable purpose whatsoever, nor the Court has any blind and mechanical power to deny the same to any accused person unless, of course, on careful consideration of the material on record it forms a definite opinion that granting of such permission would seriously undermine the overall interests of fair and expeditious trial. The process of reasoning leading to such formation of opinion must find duly reflected in its judgment. Both granting as well as refusal to grant permission to visit foreign country even on any honest, bona fide and justifiable ground of unavoidable necessity is always subject to the law of the land and judicial discretion to be exercised on the lines suggested above and/or any other reasonable lines. Ultimately, in such matters, it is only subject to keeping in mind the absolute and overall interest of trial that the secondary interest of the accused is to be considered.

10. In the result the application succeeds. The prayer of the applicant seeking permission to go on Haj Pilgrimage pending trial is granted. Accordingly, the petitioner-accused Sardarkhan Niwazkhan Pathan is permitted to proceed for Haj at Saudi Arabia and Iraq pending trial before the learned Sessions Judge. The petitioners-accused who is very much present before the Court undertakes to return round about 27th July, 1990 and immediately thereafter he will report to the police Station. By way of abundant caution, the petitioner-accused is directed to furnish additional bail in the sum of Rs. 10,000/- and two sureties of the like amount on or before 11th June, 1990. Rule made absolute to the aforesaid extent.