

(2016) 02 GUJ CK 0037

In the Gujarat High Court

Case No : Criminal Misc. Application (For Cancellation of Bail) No. 23576 of 2015
and Criminal Misc. Application No. 18248 of 2015

State of Gujarat

APPELLANT

Vs

Desai Jigishbhai

RESPONDENT

Date of Decision : 04-02-2016

Acts Referred:

Arms Act, 1959 — Section 25(1)(c)
Criminal Procedure Code, 1973 (CrPC) — Section 437, Section 439, Section 439 (2),
Section 439(2), Section 70, Section 82, Section 83
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) - Sec

Citation : (2016) 02 GUJ CK 0037

Hon'ble Judges : J.B. Pardiwala, J.

Bench : Single Bench

Advocate : Mitesh Amin, Public Prosecutor, for the Appellant; Anuja S. Nanavati,
Advocate, for the Respondent

Final Decision : Allowed

Judgement

J.B. Pardiwala, J.—1. Both the captioned applications are for cancellation of bail, one filed by the State of Gujarat and the another by the original first informant. In such circumstances, both were heard together and are being disposed of by this common judgment and order.

2. The application filed by the State of Gujarat for cancellation of bail granted to the respondent accused is considered as the lead matter.

3. By this application under section 439(2) of the Code of Criminal Procedure, 1973, the State of Gujarat, has prayed for the following reliefs;

"(A) Your Lordships be pleased to admit and allow this Criminal Misc. Application.

(B) Your Lordships be pleased to quash and set aside the order dated 18.09.2015 passed by Learned Sessions Judge, Mehsana, in Criminal Misc. Application No.

635 of 2015 and cancel the bail of the respondent/accused and further order to take the respondent/accused in custody, in the interest of justice.

(C) Your Lordships be pleased to stay the execution, implementation and operation of the order dated 18.09.2015 passed by Learned Sessions Judge, Mehsana in Criminal Misc. Application No. 635 of 2015, and order to take respondent/accused in custody, pending this application, in the interest of justice.

(D) Your Lordships be pleased to grant any other and further relief which may be deem fit by this Hon"ble Court."

4. The case of the prosecution is as under;

4.1 The applicant of Criminal Misc. Application No. 18248 of 2015 lodged a first information report being C.R. No. I-15 of 2011 with the Bechraji Police Station, District: Mehsana for the offence punishable under sections 147, 148, 149, 302, 307, 323, 324, 337, 120-B of the Indian Penal Code and section 25(1)(c) of the Arms Act. In the first information report, it has been alleged that two groups of the Rabari Community, one affiliated with the B.J.P and the other with the Congress, are at an inimical terms after the results of the election of the Taluka Panchayat of Surpura. On the date of the election, the nephew of the first informant, in company of others, left his house for the purpose of voting, and at that point of time, a quarrel ensued with the respondent No. 2. It appears as alleged that the respondent No. 2(original accused) lost in the election, as a result, he decided to seek revenge. It is the case of the prosecution that the respondent No. 2-accused along with the other co-accused travelled from Ahmedabad to village Surpura in a car and came at the place where the first informant and others were sitting. The respondent No. 2 had a twelve bore gun in his hand, whereas the other co-accused were also armed with different weapons. It is alleged that the co-accused, namely, Dahyabhai and Mafabhai caught hold of the deceased Bhagvanbhai Mohanbhai and the respondent No. 2 herein fired a gunshot on the deceased which proved to be fatal.

4.2 It also appears that a cross first information report was also lodged against the first informant and others.

4.3 Having given a fair idea as regards the case of the prosecution, I may now narrate few events so far as the respondent No. 2 is concerned.

"(i) The first information report is dated 11th February, 2011. From day one, the respondent herein remained absconding. At the end of the investigation, charge-sheet was filed, in which, the respondent herein has been shown in Column No. 2 as an absconding accused.

(ii) The filing of the charge-sheet culminated in Sessions Case No. 81 of 2011, pending as on today, in the court of the learned Additional Sessions Judge, Mehsana. It appears that the respondent preferred an anticipatory bail application before this Court being Criminal Misc. Application No. 15630 of 2011, which came to be disposed of as not pressed with liberty to approach the

Sessions Court.

(iii) Accordingly, an application for anticipatory bail was filed before the Sessions Court, which came to be rejected vide order dated 3rd December, 2011.

(iv) Thereafter, the respondent came again before this Court with a prayer for anticipatory bail by filing Criminal Misc. Application No. 17200 of 2011. The said application was disposed of as not pressed, and I am told that a statement was made that the respondent would surrender before the police.

(v) Once again, the respondent preferred an anticipatory bail application being Criminal Misc. Application No. 4389 of 2012, which came to be rejected by this Court vide order dated 3rd May, 2012.

(vi) The respondent preferred SLP (Criminal) No. 5328 of 2012 before the Supreme Court, which was also ordered to be dismissed.

(vii) Since the respondent No. 2 remained absconding and was not available, the investigating officer initiated proceedings to declare him as a proclaimed absconder. A warrant of arrest under section 70 of the Code of Criminal Procedure, 1973 was issued and, thereafter, the court proceeded to issue proclamation and order of attachment of property under sections 82 and 83 of the Code of Criminal Procedure, 1973.

(viii) It is not in dispute that the respondent No. 2 remained absconding for a period of almost four years and seven months. He left India and went abroad.

(ix) All of a sudden, on 8th September, 2015, he surreptitiously surrendered before the learned Judicial Magistrate, First Class, Bechraji after four years and seven months, but the surrender was not accepted by the learned Judicial Magistrate, First Class, Bechraji on the ground that the case was one of murder and the Magistrate had no record of the case with him.

(x) On 9th September, 2015, he surrendered before the Sessions Court, and the Sessions Court directed him to remain present before the learned Judicial Magistrate, First Class, Bechraji.

(xi) On 10th September, 2015, he surrendered before the learned Judicial Magistrate, First Class, Bechraji, and the learned Judicial Magistrate, First Class, Bechraji, in turn, passed an order to take the accused in the judicial custody. The accused was, thereafter, sent to the Mehsana Sub-Jail.

(xii) On 11th September, 2015, the accused filed an application for regular bail being Criminal Misc. Application No. 635 of 2015.

(xiii) After the filing of the regular bail application, it came to the knowledge of the investigating officer that the accused had voluntarily surrendered before the court. The investigating officer took the custody of the accused from the Mehsana Sub-Jail.

(xiv) On 15th September, 2015, the investigating officer prayed for remand on

the grounds stated in the remand application.

(xv) The Magistrate though fit to reject the remand application on the very same day.

(xvi) On 18th September, 2015, the Sessions Judge ordered the release of the accused on regular bail subject to certain terms and conditions."

5. The chronology of the events referred to above are quite shocking and depressing because of the manner in which the Judicial Officers conducted themselves, i.e., the learned Judicial Magistrate, First Class as well as the learned Sessions Judge.

6. I may not comment anything so far as rejection of the remand application by the Magistrate is concerned because I am told that the State has challenged the said order by filing a criminal revision application.

7. However, the disturbing feature of this matter is the manner in which the Sessions Judge exercised his discretion under section 439 of the Code of Criminal Procedure, 1973.

8. The following facts are not in dispute.

8.1 The respondent No. 2 has been named in the first information report being armed with a firearm.

8.2 He is alleged to have opened fire, which resulted in firearm injuries on the body of the deceased.

8.3 There are as many as ten eye witnesses to the incident, supporting the version of the first informant. The names of the eye witnesses are (i) Ishwarbhai Gowabhai Desai (ii) Vikrambhai Desai (iii) Vishnubhai Devrajbhai Desai (iv) Ashaben Virambhai Desai (v) Ashaben Somabhai Desai (vi) Amthabhai Desai (vii) Dharamshibhai Laxmanbhai Desai (viii) Motibhai Mayjibhai Desai (ix) Champaben Bhagwanbhai Desai (x) Kamleshbhai Mafabhai Desai.

8.4 It appears that one of the eye witnesses named above, i.e., Ashaben Virambhai Desai also sustained firearm injuries on her hand. Those injuries were caused by another accused who was also armed with a shotgun.

8.5 The postmortem report reveals the cause of death to be the firearm injuries.

9. Mr. Mitesh Amin, the learned Public Prosecutor appearing for the State and Mr. Ashim Pandya, the learned counsel appearing for the original first informant, submitted that the bail granted to the respondent herein deserves to be cancelled. They submitted that the Sessions Judge ought not to have exercised his discretion solely on the ground that the accused was absconding past four years and seven months. They submitted that there was a warrant of arrest operating against him and was declared as a proclaimed absconder. They submitted that the manner in which the discretion has been exercised by the learned Sessions Judge is quite disturbing because irrelevant materials, not at all

germane as regards the grant of bail, were considered. They submitted that relevant materials like statements of the eye witnesses have been very conveniently ignored. They submitted that the only ground on which the Sessions Judge thought fit to enlarge the accused on bail is the so called discrepancy in the opinion of the ballistic expert. They submitted that as such there is no discrepancy in the opinion of the ballistic expert as regards use of the firearm. They submitted that even if there is one, the same could not have been taken into consideration at this stage as it is a matter of appreciation of evidence in the course of the trial. They submitted that the impugned order of bail is almost like a judgment of acquittal ignoring relevant aspects and principles as regards grant of bail in an offence of murder.

10. The learned Public Prosecutor submitted that even before the remand application could be considered by the Revisional Court since the same was rejected by the Magistrate, the Sessions Judge showed undue haste in hearing the bail application and passed the impugned order. It has been submitted that the bail granted in favour of the respondent deserves to be cancelled.

11. On the other hand, both the applications have been vehemently opposed by Mr. N.D. Nanavati and Mr. Sudhir I. Nanavati, the learned senior advocates appearing for the respondent. The learned counsel submitted that it is not in dispute that the accused remained at large for a period of almost four years and seven months but that by itself is not sufficient to refuse bail if he is otherwise found to be innocent. The learned counsel submitted that the man may abscond for number of reasons. A person may abscond because he feels he is innocent. Therefore, according to the learned counsel, the circumstance of absconding should not be considered. They submitted that even the warrant of arrest under section 70, and proclamation proceedings under sections 82 and 83 of the Code of Criminal Procedure, 1973 should not be a ground to refuse bail or cancel the bail.

12. They submitted that the very involvement of the respondent-accused is doubtful. According to them, the accused has been falsely implicated on account of rivalry between the two groups affiliated to the two different political parties. They submitted that, in fact, at the time of incident, the accused was not present in the village.

13. The learned counsel laid much emphasis on the fact that the Ballistic Expert report is quite otherwise. According to the learned counsel, the report does not indicate that the firearm, discovered under a Panchnama drawn under section 27 of the Evidence Act, at the instance of a co-accused, was the firearm said to be in possession of the accused herein, alleged to have been used in inflicting injuries on the deceased.

14. They pointed out that the two firearms, one said to be used by the respondent-accused herein and the other by a co-accused, were discovered from an open field under a Panchnama. One of the firearms is alleged to have been

used by the respondent-accused which, according to the Ballistic Expert Report, does not match with the cartridges recovered from the spot of occurrence.

15. It was vehemently submitted that in an application for cancellation of bail, the conduct subsequent to release on bail and the supervening circumstances alone are relevant. It was submitted that even if there is a prima facie case, bail should not be cancelled by way of punishment. They submitted that all the relevant aspects germane to the grant of bail have been considered by the Sessions Judge and, therefore, the discretion exercised could not be said to be perverse or illegal in any manner. The learned counsel laid much stress on the fact that the respondent-accused is on bail past four months and the trial has also commenced so far as the other co-accused are concerned. In such circumstances, according to the learned counsel, the order of bail may not be disturbed.

16. Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is whether the learned Judge committed any error in passing the impugned order.

17. In *Bhagirathsinh s/o Mahipat Singh Judeja v. State of Gujarat*, (1984) 1 SCC 284 : (AIR 1984 SC 372) and *Dolat Ram and Ors. v. State of Haryana*, (1995) 1 SCC 349 and *Ramcharan v. State of M. P.*, (2004) 13 SCC 617, the Supreme Court has from time to time held that the consideration of cancellation of bail is different from the consideration for grant of bail. It has been held that bail can be cancelled only on existence of cogent and overwhelming circumstances, but not on re-appreciation of the facts of the case. It is also settled that cancellation of bail should not be by way of punishment even if prima facie case against the accused is established. On the other hand, the prosecution contended that while granting bail, the Court has to look into the nature and gravity of charges, the character, behaviour, means, position and standing of the accused and reasonable apprehension of the witnesses being tampered with. For this, the learned Counsel for the prosecution relied upon *Anil Kumar Tulsiyani v. State of U. P. and Anr.*, (2006) 2 SCC (Cri) 565 : (2006 AIR SCW 4339) wherein the Supreme Court observed thus in paras 10 and 11:--

"10. By now it is well-settled principle of law that one of the considerations in granting bail in non-bailable offences is the gravity and the nature of the offence. The High Court has not at all addressed to this issue while granting bail to the respondent.

11. This Court in *State of U. P. v. Amarmani Tripathi* in which one of us (Raveendran, J) was a member has considered various decisions of this Court and observed that the circumstances to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused

absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail" (SCC p.31, para 18)"

In that case, bail was granted to the accused, who was an Advocate and that order was challenged before the Supreme Court. The Supreme Court held that the respondent i.e. accused being an advocate was in commanding position and had standing in the society. In this background, there was reasonable apprehension of the witnesses being tampered with, coerced, threatened or intimidated by using his influence. As these circumstances were not considered by the High Court while granting bail, the Supreme Court set aside that order and cancelled bail.

18. In *Dinesh M. N. (S. P.) v. State of Gujarat*, 2008 Cri L J 3008: (AIR 2008 SC 2318), a police officer was granted bail in the case of fake encounter of Sohrabuddin, who had allegedly a shady reputation and criminal antecedents. The High Court, after consideration of the material on record, cancelled the bail and that order was challenged before the Supreme Court. The Supreme Court dismissed the appeal and observed thus in para 14:--

"14.... In the instant case, the trial Court seems to have been swayed by the fact that Sohrabuddin had shady reputation and criminal antecedents. That was not certainly a factor which was to be considered while granting bail. It was nature of the acts which ought to have been considered."

19. The Supreme Court also observed in Para-12 that even though re-appreciation of evidence as was done by the court granting bail is to be avoided, the court dealing with an application for cancellation of bail under section 439 (2) can consider whether irrelevant materials were taken into consideration. The relevant material, if not taken into consideration, can also be looked into by the court dealing with an application for cancellation of bail.

20. Thus, the argument canvased on behalf of the accused that in an application for cancellation of bail, conduct subsequent to release on bail and the supervening circumstances alone are relevant, is rejected. Both the applications before me are under section 439(2) of the Code of Criminal Procedure, 1973 and are in a form of an appeal to a Higher Forum. If the grant of bail by the Sessions Court is challenged on merits, then all aspects that were relevant under section 439 read with section 437 of the Code of Criminal Procedure, 1973, continued to be relevant.

21. I just fail to understand how could the Sessions Judge overlook the fact that the accused remained absconding for four years and seven months. He remained abroad and all of a sudden, one fine day, he surrenders before the Magistrate and then within eight days, he is out on bail in an offence of murder where he is shown as a principal accused. Even before the investigating officer could

interrogate the accused, and in my view, interrogation was very much necessary, the court ordered release on regular bail.

22. Mr. Mitesh Amin, the learned Public Prosecutor, made available, for my perusal, the F.S.L report, i.e., the Ballistic Expert Report. It appears that the pellets which were recovered from the body of the deceased were also sent to the F.S.L. The report is to the effect that those pellets could have been fired from the twelve bore gun discovered under a discovery Panchnama drawn under section 27 of the Evidence Act and said to be used by the accused. I just fail to understand how could the Sessions Judge overlook the statements of the ten eye witnesses and disbelieve them at this stage on the basis of some discrepancy although, in my view, there is none so far as the Ballistic Expert opinion is concerned. The Ballistic Expert would also step into the box and he can be cross-examined, but it cannot be a ground at this stage to say that the accused was not at all present and had not participated in the alleged offence. I may also quote the decision of the Supreme Court in the case of Ash Mohammed v. Shiv Raj Singh, , 2012 Criminal Law Journal, 4670. I quote the observations as contained in paras-10 to 27.

"10. In Ram Govind Upadhyay v. Sudarshan Singh and others, it has been opined that the grant of bail though involves exercise of discretionary power of the Court, such exercise of discretion has to be made in a judicious manner and not as a matter of course. Heinous nature of the crime warrants more caution and there is greater chance of rejection of bail, though, however dependent on the factual matrix of the matter. In the said case the learned Judges referred to the decision in Prahlad Singh Bhati v. NCT, Delhi and another and stated as follows:

"(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

11. In Chaman Lal v. State of U. P. and another this Court while dealing with an application for bail has stated that certain factors are to be considered for grant of bail, they are; (i) the nature of accusation and the severity of punishment in

case of conviction and the nature of supporting evidence; (ii) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; and (iii) prima facie satisfaction of the court in support of the charge.

12. In *Masroor v. State of Uttar Pradesh and another*, while giving emphasis for ascribing reasons for granting of bail, however, brief it may be, a two-Judge Bench observed that there is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case.

13. In *Prasanta Kumar Sarkar v. Ashis Chatterjee and another* it has been observed that normally this Court does not interfere with an order passed by the High Court granting or rejecting the bail of the accused, however, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. Among other circumstances the factors which are to be borne in mind while considering an application for bail are whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; nature and gravity of the accusation; severity of the punishment in the event of conviction; danger of the accused absconding or fleeing, if released on bail; character, behaviour, means, position and standing of the accused; likelihood of the offence being repeated; reasonable apprehension of the witnesses being influenced; and danger, of course, of justice being thwarted by grant of bail.

14. In *State of U.P. through CBI v. Amarmani Tripathi* it has been ruled that in an appeal against grant of bail all aspects that were relevant under Section 439 read with Section 437 continue to be relevant.

15. In *Puran v. Rambilas and another* it has been noted that the concept of setting aside an unjustified, illegal or perverse order is totally different from the cancelling an order of bail on the ground that the accused had misconducted himself or because of some supervening circumstances warranting such cancellation.

16. In *Dr. Narendra K. Amin v. State of Gujarat and another*, a three-Judge Bench has observed that when irrelevant materials have been taken into consideration the same makes the order granting bail vulnerable. If the order is perverse, the same can be set at naught by the superior court.

17. In *Prakash Kadam and others v. Ramprasad Vishwanath Gupta and another*, while making a distinction between cancellation of bail and consideration for grant of bail, this Court opined thus:--

"18. In considering whether to cancel the bail the court has also to consider the gravity and nature of the offence, prima facie case against the accused, the position and standing of the accused, etc. If there are very serious allegations against the accused his bail may be cancelled even if he has not misused the bail granted to him. Moreover, the above principle applies when the same court which granted bail is approached for cancelling the bail. It will not apply when the order granting bail is appealed against before an appellate/Revisional Court.

19. In our opinion, there is no absolute rule that once bail is granted to the accused then it can only be cancelled if there is likelihood of misuse of the bail. That factor, though no doubt important, is not the only factor. There are several other factors also which may be seen while deciding to cancel the bail."

18. We have referred to the above authorities solely for the purpose of reiterating two conceptual principles, namely, factors that are to be taken into consideration while exercising power of admitting an accused to bail when offences are of serious nature, and the distinction between cancellation of bail because of supervening circumstances and exercise of jurisdiction in nullifying an order granting bail in an appeal when the bail order is assailed on the ground that the same is perverse or based on irrelevant considerations or founded on non-consideration of the factors which are relevant.

19. We are absolutely conscious that liberty of a person should not be lightly dealt with, for deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes it causes a sense of vacuum. Needless to emphasize, the sacrosanctity of liberty is paramount in a civilized society. However, in a democratic body polity which is wedded to Rule of Law an individual is expected to grow within the social restrictions sanctioned by law. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law. In an orderly society an individual is expected to live with dignity having respect for law and also giving due respect to others' rights. It is a well accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialized. The life of an individual living in a society governed by Rule of Law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his individual as well as social interest. That is why Edmond Burke while discussing about liberty opined, "it is regulated freedom".

20. It is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilized milieu. True it is, there can be no arithmetical

formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. Law and order in a society protect the established precepts and see to it that contagious crimes do not become epidemic. In an organized society the concept of liberty basically requires citizens to be responsible and not to disturb the tranquility and safety which every well-meaning person desires. Not for nothing J. Oerter stated:

"Personal liberty is the right to act without interference within the limits of the law."

21. Thus analyzed, it is clear that though liberty is a greatly cherished value in the life of an individual, it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardized, for the rational collective does not countenance an anti-social or anti-collective act.

22. Having said about the sanctity of liberty and the restrictions imposed by law and the necessity of collective security, we may proceed to state as to what is the connotative concept of bail. In Halsbury's Laws of England it has been stated thus:--

10. Halsbury's Laws of England, 4th Edn., Vol. 11, Para 166.

"The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned."

23. In *Sunil Fulchand Shah v. Union of India and others* Dr. A.S. Anand, learned Chief Justice, in his concurring opinion, observed:--

"Bail is well understood in criminal jurisprudence and Chapter XXXIII of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word "bail" is surety."

24. As grant of bail as a legal phenomenon arises when a crime is committed it is profitable to refer to certain authorities as to how this Court has understood the concept of crime in the context of society. In *P.S.R. Sadhanantham v. Arunachalam and another*, *R.S. Pathak, J.* (as his Lordship then was), speaking for himself and *A.D. Kaushal, J.*, referred to *Mogul Steamship Co. v. McGregor Gow and Co.* (1989) 23 QBD 598, 606 and the definition given by Blackstone and

opined thus:--"A crime, therefore, is an act deemed by law to be harmful to society in general, even though its immediate victim is an individual."

25. In *Mrs. Harpreet Kaur Harvinder Singh Bedi v. State of Maharashtra* and another a two-Judge Bench, though in a different context, has observed:--

"Crime is a revolt against the whole society and an attack on the civilization of the day. Order is the basic need of any organized civilized society and any attempt to disturb that order affects the society and the community."

26. In *T.K. Gopal alias Gopi v. State of Karnataka* it has been held that crime can be defined as an act that subjects the doer to legal punishment. It may also be defined as commission of an act specifically forbidden by law; it may be an offence against morality or social order.

27. Keeping in mind the aforesaid aspects, namely, the factors which are to be borne in mind while dealing with an application preferred under Section 439 of the Code of Criminal Procedure in respect of serious offences, the distinction between a perverse or illegal order and cancellation of order granting bail, the individual liberty and social security, the concept of bail, the definition of crime and the duty of the court, we may proceed to deal as to how in the case at hand the bail application has been dealt with by the High Court."

23. The cross F.I.R registered is also not a circumstance which points only towards the innocence of the respondent-accused which could be said to render the entire case of the prosecution as false.

24. In the overall view of the matter, I am convinced that the discretion exercised by the Sessions Court could be termed as illegal and perverse. Many things could have been observed as regards the discretion exercised is concerned, but I have refrained myself from doing so.

25. When a Court is given a discretion, the statute confers upon it the power to act according to what may appear to be best and appropriate under the circumstances of the particular case. The discretion is not willful or arbitrary, but is regulated by well-known and well established principles. In many circumstances, the Judge has a discretion as to whether, and in what manner, to exercise his powers. Commonly encountered instances of judicial discretion are the discretion as to grant of bail in a non-bailable offence. However, no discretion is absolute and there may be a successful appeal to the Court of Appeal in relation to the exercise of a judicial discretion if the appellant can show that the judge exercised his discretion under a mistake of law, or under a misapprehension as to the facts, or that he took into account irrelevant matters or gave insufficient weight, or too much weight, to certain factors or that he failed to exercise his discretion at all.

26. In *Puran v. Rambilas and Anr.* (, 2001 (6) SCC 338) it was noted as follows:

"11. Further, it is to be kept in mind that the concept of setting aside the

unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in *Gurcharan Singh v. State (Delhi Admn.)*. In that case the Court observed as under (SCC p. 124, para 16):

"If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-à-vis the High Court."

27. In the result, both the applications are allowed. The impugned order passed by the Sessions Judge, Mehsana dated 18th September, 2015 in Criminal Misc. Application No. 635 of 2015 is hereby ordered to be quashed. The bail stands cancelled. The respondent is directed to immediately surrender before the Sessions Court who, in turn, shall remand him to the judicial custody. If the respondent fails to surrender before the Sessions Court, then the Court shall issue non-bailable warrant for arrest. Rule is made absolute to the aforesaid extent.

28. The Registry is directed to place a copy of this judgment and order before the Hon'ble the Acting Chief Justice for perusal on the administrative side.

After the order is pronounced, the learned counsel appearing for the respondent-accused made a request that the order pronounced today may be stayed from its operation for a period of two weeks to enable the accused to challenge the order before the Supreme Court. I take notice of the fact that the accused is on bail past more than four months. In such circumstances, the order is stayed from its operation for a period of two weeks from today. If the accused is able to seek any relief from the Supreme Court within two weeks, then it is fine, but if not, then he shall surrender before the Sessions Court as directed.