

(1989) 11 BOM CK 0022

In the Bombay High Court

Case No : Criminal Application No. 2355 of 1989

State of Maharashtra

APPELLANT

Vs

Arun Gulab Gawali

RESPONDENT

Date of Decision : 23-11-1989

Acts Referred:

Arms Act, 1959 — Section 25
Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 437(1), 439(2)
Penal Code, 1860 (IPC) — Section 120

Citation : (1990) CriLJ 2171

Hon'ble Judges : G.H. Guttal, J

Bench : Single Bench

Judgement

1. This application by the State of Maharashtra is for cancellation of bail granted by the Order dated 19th September, 1989 made by the learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Bombay.

2. The Respondent charged with offences punishable under Sections 143, 144, 147, 148, 149, 302 and 120-B of the Indian Penal Code and Section 25 of the Arms Act, applied to this Court for bail. Suresh J. on 7th June, 1989 dismissed the application. He held that the Respondent belongs to a gang of criminals, is involved in various cases of murder and takes law into his own hand.

Three months later, on or about 19th September, 1989, the Respondent applied for bail to the learned Magistrate on the basis of a certificate issued on 11th September, 1989 by Dr. B. K. Goyal, a renowned Cardiologist. The certificate is that the Respondent was under treatment of Dr. B. K. Goyal from 30th March, 1987 to 12th October, 1987, a fact which was known to the Respondent when Suresh J. rejected his application. According to Dr. Goyal, the Respondent suffered from "Ischaemic Heart Disease". The respondent was in the Yeravada Central Prison, Pune, until he was released on bail on 21st Sept. 1989, pursuant to the Order of the learned Magistrate impugned in this application.

3. A brief history of the illness which is the basis of the impugned Order is this :-

On 17th June, 1989, the Respondent complained of chest pain for which he was treated by the doctor in the Yeravada Central Prison, Pune. The name of the doctor is Dr. Musa Dadamiya Mokashi who has made an affidavit and produced the medical papers. The treatment continued till 21st June, 1989. On 1st July, 1989, the Respondent again complained of chest pain. Dr. Kakrani was called who also treated him. The Respondent continued to complain of severe chest pain on 20th August 1989, 5th September, 1989 and 12th September, 1989. Dr. Mokashi observed, on 12th September, 1989, that the Respondent was restless, had high blood pressure (100/60) and pulse rate was 100 per minute. However he treated the patient for bronchitis. He admitted before me that the Prison Hospital does not have the equipment for recording electro-cardiogram. On 21st September, 1989, the Respondent was released from the jail.

4. In this application, rule was issued on 18th October, 1989. On 27th October, 1989, Miss Kasale filed her appearance and relied upon the same ailment in defence. The application was adjourned to 10th November, 1989. 16th November, 1989 and 20th November, 1989. During these adjourned dates, nothing was done by the learned Additional Public Prosecutor to meet the Respondent's case that he was suffering from Ischaemic heart disease. It was expected of the learned Public Prosecutor that she utilised these adjournments to inquire and find out whether (a) such disease could be treated in a prison ward of a Government Hospital; (b) Ischaemic heart, disease was something so serious that the patient should be set free. The Respondent lives in Pune because the terms of the bail direct him not to enter the limits of Greater Bombay. However, the Respondent, on 13th October, 1989 visited Dr. Mandora, Cardiologist of Pune with the complaint of chest pain. Dr. Mandora advised him to take bedrest but did not admit him in any hospital. He merely prescribed tablets and asked the Respondent to visit after a month. On 28th October, 1989, the Respondent again visited Dr. Mandora with the same symptom of chest pain. On that day, electro-cardiogram was taken by Dr. Mandora. He found that the Respondent had high blood pressure. He advised certain treatment and rest. On 14th November, 1989, the Respondent again visited Dr. Mandora. He advised the Respondent to have himself checked for Coronary Angina. Dr. Mandora issued a certificate that the Respondent was suffering from Angina Pectoris.

There are renowned Cardiologists in the J.J. Hospital and St. George Hospital, both owned by the Government. Instead of seeking their opinion on affidavits about the nature of the disease, its incidents and seriousness, the learned Public Prosecutor sent the Investigating Officer to Pune for recording the statement of Dr. Mandora which was done.

5. The only question is whether the learned Magistrate's Order, based on the medical evidence, suffers from any illegality and impropriety calling for interference in revisional jurisdiction. No doubt, Suresh J. rejected the application for bail on considering the gravity of the crime and the antecedents of the

Respondent. However, the symptoms of heart disease persisted even after the Order of Suresh J. Therefore, it cannot be said that the learned Magistrate committed an error in entertaining the application for bail based on the events which occurred after 7th June, 1989.

6. Then the question is was the ailment for which Dr. Goyal treated the Respondent from 30th March, 1987 to 12th October, 1987 not known to the respondent when Suresh J. made the Order ? The Respondent did know it and it cannot be said that Ischaemic heart disease was something which developed after the Order of Suresh J. This raises a suspicion whether the Respondent has not made out a false case, only to make out a fresh application for bail. However, the record of the Chief Medical Officer of the Yeravada Central Prison is subsequent to the Order of Suresh J. If the case of the Respondent were founded only on the certificate of Dr. Goyal, it would be open to suspicion. As already stated, the learned Additional Public Prosecutor has failed to present any useful material to suggest that Ischaemic heart disease once treated in 1987 does not surface again. That is why an opinion of a Government cardiologist would have greatly helped. Instead, she chose to secure Dr. Mandora's statement. Ischaemic heart disease means reduced supply of blood, in this case, to the heart. It can be caused by narrowed blood vessels and manifests itself through chest pain and high blood pressure. The prosecution has not made even an attempt, based on medical opinion, to show that such disease could not have recurred after it was once treated by Dr. Goyal in 1987. I was longing to read or hear such opinion. But the learned Additional Public Prosecutor merely repeated that the Respondent is a notorious criminal and did not advance any argument in regard to the ground on which the Respondent relies. If the Respondent is such a notorious criminal, the public interest demands that the prosecution brings forth competent medical evidence to rebut the case of heart disease.

7. Now the Chief Medical Officer produced his file before the learned Magistrate as he did before me. The diagnosis of Ischaemic heart disease, made by Dr. B. K. Goyal too, was produced before the learned Magistrate. The 1st proviso to sub-section (1) of Section 437 of the Code of Criminal Procedure empowers the Magistrate to release on bail the persons referred to in clauses (i) and (ii) of that sub-section, if such person is "a woman, or is sick or infirm". The application before the learned Magistrate was based on this proviso.

The learned Magistrate analysed the report of the Chief Medical Officer of the Yeravada Central Prison. The learned Magistrate records -

"The doctor reported that the general condition of heart is weak. At that time, the accused had clearly informed that he is a heart patient. That report is filed in the case papers on 5-9-1989."

The learned Magistrate examined another report made by the Superintendent of Yeravada Central Prison dated 16th September, 1989 along with the report of the Chief Medical Officer. The learned Magistrate records with reference to this report

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"The Chief Medical Officer in that report clearly stated that the patient, i.e. Arun Gawali, complained of severe chest pain and giddiness. He also reported that there is a history of Ischaemic heart disease."

After considering these reports, the learned Magistrate took into account the need for treatment of the disease. He observes -

"There is one more fact to be noted from this report of the Chief Medical Office is that the accused required specialised treatment and that his general condition of heart has gone weak."

The learned Magistrate very rightly examined the state of health of the Respondent subsequent to the Order of Suresh J. It is only thereafter that he took into account the certificate of Dr. B. K. Goyal, the credibility of which has not been called into question.

After carefully considering the, medical evidence, the learned Magistrate delivered his finding on the only question urged. His finding is -

"I find that the ground of illness for bail shown in the bail application is genuine. There are no reasons to disbelieve the ground of sickness mentioned in the application for bail."

8. I have quoted in the last paragraph the passages from the impugned Order which show that the learned Magistrate has considered all the material produced before him. The analysis of evidence is careful. He has relied upon relevant circumstances. The evaluation is entirely right.

9. I am called upon to exercise revisional authority to reverse the decision of the Magistrate. There is neither an error of law or fact. There is no impropriety or procedural irregularity. I see no reason to interfere with the impugned Order in my revisional jurisdiction.

10. For cancellation of bail, granted, by the learned Magistrate after evaluating the Government's own record, very cogent and overwhelming circumstances are necessary *Bhagirathsinh Judeja Vs. State of Gujarat*, . It is 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. The State through the State (Delhi Administration) *Vs. Sanjay Gandhi*, . This application by the State is not based on facts suggesting that the Respondent has tampered with evidence or threatened witnesses. The thrust of the case is, that the learned Magistrate was wrong in accepting the evidence of the Respondent's heart disease. The Respondent's case of heart disease based on the record of the Hospital in the Yeravada Central Prison, which supports the opinion of Dr. Goyal and Dr. Mandora, is unanswerable. The learned Additional Public Prosecutor had nothing to present except her view that the Respondent is a notorious criminal. He probably is. But such prejudice and passion does not answer the evidence

produced by the Government's own doctor.

11. Mrs. Rao, learned Public Prosecutor relied upon Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, and urged that the learned Magistrate erred in considering the application after the High Court had rejected it. The reliance on this judgment is totally misconceived. Her argument about judicial discipline is inappropriate. In the case of Shahzad Hasan Khan, successive applications were made in the same Court to different Judges and it is in this context that the question of judicial discipline was decided. In this case, the learned Magistrate was within his authority in considering the application for bail based on subsequent events. The judgment in Shyam Lal and Others Vs. State of U.P., lays down the well known principle that bail can be cancelled for such reasons as chances of the accused of jumping bail, threatening or influencing the witnesses, interfering with the investigation or prosecution, obstructing the judicial process or otherwise misusing or abusing the bail. I do not see how this case assists the prosecution. The prosecution wants that bail to be cancelled on grounds which do not fall within the accepted grounds on which bail is cancelled.

12. It is distressing to record that the learned Additional Public Prosecutor made no effort, based on study, to substantiate the case for cancellation of bail. At the end of the argument, upon being prompted by another Counsel, she stated that there is judgment of Gujarat High Court in which it has been held that bail can be cancelled if the accused has secured bail by hoodwinking the Court. She did not cite the judgment but left a note of the "case with the Sheristedar. She heard about it and never read it to me. The implication of her performance was "I have given a reference to the Sheristedar. If you want, you may read it and decide the case." This is a deplorable way of citing judgments. Such performance is of no assistance either to the prosecution, to the State, to the public or to the Court. The traditions of advocacy on the Appellate Side are very high. Counsel read the judgments at home, absorb the ratio and then come to the Court to state the facts and the propositions laid down in judgments. But the learned Additional Public Prosecutor chose to break from this tradition and left the reference which the Court was left to read and consider. The learned Additional Public Prosecutor has a responsible function to perform and ought to study the judgment before referring to it. Notwithstanding this approach of the learned Additional Public Prosecutor, I have gone through the judgment. In the The State of Gujarat Vs. Hirasing Kesarising Solanki, , the accused secured bail from the Magistrate on the ground that he was sick. He did not produce any medical certificate but produced the outdoor case papers of the hospital. The State of Gujarat filed a Criminal Revisional Application No. 51 of 1975 in the Court of the Sessions Judge, Baroda. Two affidavits of two Police Officers were filed which indicated that the accused was not sick, which would have required him to remain in the hospital. The learned Sessions Judge held that the accused had hoodwinked to the learned Magistrate and obtained the order of bail. But the learned Sessions Judge did not cancel the bail. The High Court held that the learned Sessions Judge failed to exercise his jurisdiction under sub-section (2) of Section 439 of

the Code of Criminal Procedure and therefore allowed the petition under Article 227 of the Constitution of India. In the present case, it is not the case of the prosecution that the Respondent had hoodwinked to the Court. There is no such ground in the applications. Nor did the learned Additional Public Prosecutor urge this point for, as already stated, she merely left the reference of the case without even citing it. The prosecution has come forward with the case that the finding about the sickness made by the learned Magistrate is erroneous because the certificate of Dr. B. K. Goyal was not produced before Suresh J. The learned Magistrate has taken into account subsequent events such as illness while the accused was in custody in the Yeravada Central Prison Hospital. The judgment of Gujarat High Court is not applicable to this case because there is Government's own record which proves the Respondent's heart disease.

The grounds in the petition reveal the case of the State of Maharashtra. In a nutshell, the Petitioners urged that (a) the learned Magistrate was wrong in entertaining the application after Suresh J. had rejected it; (b) the Respondent had not brought to the notice of the High Court the fact that he was a heart patient; (c) the Respondent is a notorious gangster involved in several cases.

13. The substance of the whole case is Dr. Goyal's certificate of not having been shown to Suresh J., the illness is not genuine. But, as already stated, a careful analysis of all the evidence by the learned Magistrate reveals that the complaint about heart disease is genuine. Nowhere has the prosecution urged in the petition that the Respondent had hoodwinked the learned Magistrate. The factual foundation which is necessary for relying upon the judgments is absent.

14. The Criminal Revision Application for cancellation of bail granted by the learned Additional Chief Metropolitan Magistrate, 19th Court, Bombay in Case No. 319/P/1989 by his Order dated 19th September, 1989, is dismissed. Rule discharged.

15. Rule discharged.