

CASE NO.:
Appeal (crl.) 740 of 2008

PETITIONER:
Dr. Narendra K Amin

RESPONDENT:
State of Gujarat and Anr

DATE OF JUDGMENT: 28/04/2008

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM & AFTAB ALAM

JUDGMENT:
J U D G M E N T
REPORTABLE

CRIMINAL APPEAL NO. 740 OF 2008
(Arising out of SLP (Crl.) No.788 of 2008)

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Gujarat High Court cancelling the bail granted to the appellant in terms of Section 439 (2) of the Code of Criminal Procedure, 1973 (in short the 'Code').

3. The case numbered as Criminal Miscellaneous Application No.12646/2007 was taken up alongwith Criminal Miscellaneous application No.12644/2007 filed in respect of a co-accused Dinesh the appellant in Criminal Appeal relating to Special Leave Petition (Crl.) No.867/2008. Both the matters were taken up in view of the order dated 12.12.2007 passed by this Court in Contempt Petition (Crl.) No.8/2007 in Writ Petition (Crl.) No. 6/2007.

4. The application under Section 439(2) was filed by the State of Gujarat through Investigating Officer, C.I.D. (Crime), Gandhinagar for cancellation of bail granted to the appellant by order dated 5.10.2007 by learned Additional City and Sessions Judge, Ahmedabad in Criminal Miscellaneous Application No.2359/2007 qua FIR being CR No. 5/2005 registered with ATS Police Station for the offences punishable under Sections 302, 364, 365, 368, 193, 197, 201, 120B, 420, 342 read with Section 34 of the Indian Penal Code, 1860 (in short the 'IPC') and under Sections 25 (1)(b)(a) and 27 of the Arms Act, 1950 (in short the 'Arms Act').

5. Background facts in a nutshell are as under:

One Rubabuddin Shaikh, brother of Sohrabuddin, filed petition before this Court which was registered as Writ Petition (Crl.) No.6 of 2007. Pursuant to the directions issued from time to time, the Investigation Agency of the State of Gujarat carried out investigation and it was found by the Investigating Agency that death of Sohrabuddin and subsequently reported death of Kausarbi, wife of Sohrabuddin, was a result of fake encounters carried out by the then officers of the Anti-Terrorist Squad (for short 'ATS'), State of Gujarat and senior

IPS officers of State of Gujarat and State of Rajasthan are involved in the fake encounters. All those officers were arrested and appellant who is accused No.3 is one of such senior IPS officer belonging to the State of Rajasthan.

During the course of investigation, preliminary inquiry being Inquiry No.66 of 2006 was instituted by CID (Crime), Gujarat State, role of the appellant surfaced in the statement of one Ajay Parmar, Police Constable of ATS, Gujarat State. Considering the material which had come on record, the Director General of Police ordered further investigation under Section 173(8) of the Code on 6.3.2007. Accordingly, the Metropolitan Magistrate was informed and the appellant therein was arraigned as accused. He was arrested on 24.4.2007, remanded to custody for 15 days and charge sheet was filed on 16.7.2007. The appellant preferred a regular bail application being Criminal Misc. Application No.3459 of 2007 on 17.9.2007, which was allowed vide order dated 5.1.2007 by learned Additional City and Sessions Judge, Court No.6, Ahmedabad.

While enlarging the appellant on regular bail in exercise of power under Section 439 of the Code, learned Additional City and Sessions Judge, relied on various circumstances, more particularly on three facets:- first facet is prior to 26.11.2005, second facet is dated 26.11.2005 and the third facet is post 26.11.2005. The first facet was about conspiracy part and bringing Sohrabuddin from Hyderabad to Ahmedabad. Second facet is the day on which alleged encounter of Sohrabuddin took place on 26.11.2005 and the third facet, i.e. post 26.11.2005 about death of Kausarbi and destroying evidence relating to her death.

According to the prosecution, role played by the appellant in the episode surfaced initially from the statements of Shri Nathubha Pravinsinh Jadeja who is a driver with ATS and Shri Vijay Arjun Rathod, Police Inspector relating to an alleged fake encounter. Therefore, process was started to find out the truth for which initially summons under Section 160 of the Code were issued. In response to it, the appellant appeared before the then investigating officer, Shri G.B. Padheriya and was not at all cooperating in disclosing the facts and was trying to avoid any question. It was apparent from the record that the appellant had already influenced the witnesses in whose statements his role had surfaced. His statement was recorded on 22.5.2007. The date of first statement of the appellant and the date of Shri Nathubha surrendering before the Chief Metropolitan Magistrate was the same. When Shri Nathubha appeared before the Chief Metropolitan Magistrate, IGP CID Crime submitted an affidavit dated 24.5.2007. The appellant was not available either at his residence or at the place where he was posted. Thereafter, by an order dated 8.6.2007 learned City and Sessions Court granted anticipatory bail against which Special Leave Petition was filed before this Court and the same was allowed on 13.8.2007 by quashing and setting aside the order of anticipatory bail granted by the learned City and Sessions Judge. Thereafter, charge sheet was filed on 16.7.2007.

The appellant's bail application was accepted by the trial Judge and was the subject matter of challenge as noted above before the High Court.

According to the trial Court the accused had served the department with sincerity and dedication to curb the anti-social and anti-national element. Persons like him should not

be subjected to unnecessary harassment and humiliation when there is possibility of securing the persons by imposing appropriate conditions.

Stand of the State before the High Court was that role of accused No.12 the appellant was narrated in the charge sheet and he was charged with offences punishable under Sections 302, 193, 201, 120B read with Section 34 IPC. It was pointed out that presence of the accused is very much evident as per the statements of witnesses namely, Nathubha-driver and Vijay Rathod-Police Inspector and, therefore, the grant of bail is illegal. It was pointed out that accused was not cooperating with the investigation. He did not respond to the notice in terms of Section 160 of the Code. It was pointed out that the date of statement of the accused and the date of Nathubha surrendering before the Chief Metropolitan Magistrate are the same and even during that period only Nathubha tried to retract from the statement earlier recorded and requested the Magistrate to join him as an accused and protection in terms of Section 438 of the Code was granted on 4.6.2007 and this Court by order dated 13.8.2007 set aside the order passed by the learned Judge. It was pointed out that the trial Judge came to an abrupt conclusion and without any material concluded that the nature and gravity of the offence alleged is serious but as emerges from the record, there is no cogent, sufficient and reliable evidence to support the prosecution case. In other words, he had written indirectly an order of acquittal even before the trial was concluded.

Reference was made also to the fact that accused was in no way connected with ATS of the Gujarat police but his presence at the scene of offence where the body of Kausarbi was burnt was sufficient enough to deny the discretionary relief under Section 439 of the Code. With reference to the statement of owner of 'Disha Farm' where the victims were illegally confined it is submitted that his role is clear. Reference was also made to the telephonic conversation of the accused with Shri D.G. Vanzara between 25.11.2005 to 29.11.2005. Though the accused was in no way concerned with the enquiry or investigation of ATS, mobile tracking indicated presence of the accused at the Disha Farm. It was pointed out that weekly diary shows his presence in the court during the period, but he was not actually in the court and some places were kept vacant in weekly diary and surprisingly during the entire operation mobile phone of the accused was switched off. The presence of appellant when corpse of Kausarbi was cremated has been established by the statement of witnesses.

Stand of the accused before the High Court was that the parameters for cancellation of bail and grant of bail are entirely different. It was pointed out that some of the witnesses have also retracted from the statements allegedly made earlier. Therefore, the order granting bail should not be interfered with.

The High Court noticed that the accused was charged with serious and heinous offences punishable under Sections 302 read with Section 120B IPC and while enlarging him on bail, the trial Court ought to have kept in view the seriousness of the offences, punishment prescribed for such offences and involvement of the accused, a high ranking official against whom grave and serious offences have been made. It was pointed out that there was no question for referring to the antecedents of Sohrabuddin and his characteristics as that

was of no relevance. The bail, therefore, was cancelled.

In support of the appeal, learned counsel for the appellant submitted that the parameters for grant of bail and cancellation of bail are entirely different as has been laid down by this Court in several cases. In the application for cancellation of bail there was no reference to any supervening circumstance and only analysis of the materials which were considered by the trial Court to grant bail were highlighted. It is submitted that even if two views are possible, once the bail has been granted, it should not be cancelled. Reliance is placed on decisions of this Court in *State of Karnataka v. L. Muniswamy* (1977 (2) SCC 699), *Babu Singh v. State of U.P.* (1978 (1) SCC 579), *State (Delhi Adm.) v. Sanjay Gandhi* (1978 (2) SCC 411), *Bhagirathsinh v. State of Gujarat* (1984 (1) SCC 284), *Aslam Babalal Desai v. State of Maharashtra* (1992 (4) SCC 272), *Dolat Ram v. State of Haryana* (1995 91) SCC 349), *Ramcharan v. State of M.P.* (2004 (13) SCC 617), *Mehboob Dawood Shaikh v. State of Maharashtra* (2004 (2) SCC 362), *Jayendra Saraswati v. State of Tamil Nadu* (2005 (2) SCC 13), *Nityanand Rai v. State of Bihar* (2005 (4) SCC 178), *State of U.P. v. Amarmani Tripathi* (2005 (8) SCC 21) and *Panchanan Mishra v. Digambar Mishra* (2005 (3) SCC 143). It is pointed out that the common thread passing through the aforesaid decisions is that there is no scope for cancellation of bail on re-appreciation of evidence. It is pointed out that in *Mehboob's* case (supra) and *Amarmani's* case (supra) the bail was cancelled as it was established that there were serious attempts to tamper with the evidence and to interfere with and sidetrack the investigation and threaten the witnesses. It is pointed out that as laid down by this Court in *Sanjay Gandhi's* case (supra) and *Dolat Ram's* case (supra) the bail granted should not have been cancelled by way of re-appreciating evidence.

In response, learned counsel for the State of Gujarat submitted that it has not been laid down by this Court that only if supervening circumstances are there, on assessing the same bail can be cancelled.

6. As is evident from the rival stands one thing is clear that the parameters for grant of bail and cancellation of bail are different. There is no dispute to this position. But the question is if the trial Court while granting bail acts on irrelevant materials or takes into account irrelevant materials whether bail can be cancelled. Though it was urged by learned counsel for the appellant that the aspects to be dealt with while considering the application for cancellation of bail and on appeal against the grant of bail, it was fairly accepted that there is no scope of filing an appeal against the order of grant of bail. Under the scheme of the Code the application for cancellation of bail can be filed before the Court granting the bail if it is a Court of Sessions, or the High Court.

7. The High Court also erroneously held that there was a ban in granting bail in heinous crime.

8. It has been fairly accepted by learned counsel for the parties that in some judgments the expression "appeal in respect of an order of grant of bail" has been used in the sense that the State can move the higher court.

9. Though the High Court appears to have used the expression 'ban' on the grant of bail in serious offences, actually it is referable to the decision of this Court in *Kalyan*

Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Anr.
(2004 (7) SCC 528) In para 11 it was noted as follows:

"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh (2002 (3) SC 598) and Puran v. Rambilas (2001 (6) SCC 338).

10. It was also noted in the said case that the conditions laid down under Section 437 (1)(i) are sine qua non for granting bail even under Section 439 of the Code.

In para 14 it was noted as follows:

"14. We have already noticed from the arguments of learned counsel for the appellant that the present accused had earlier made seven applications for grant of bail which were rejected by the High Court and some such rejections have been affirmed by this Court also. It is seen from the records that when the fifth application for grant of bail was allowed by the High Court, the same was challenged before this Court and this Court accepted the said challenge by allowing the appeal filed by the Union of India and another and cancelled the bail granted by the High Court as per the order of this Court made in Criminal Appeal No. 745 of 2001 dated 25-7-2001. While cancelling the said bail this Court specifically held that the fact that the present accused was in custody for more than one year (at that time) and the further fact that while rejecting an earlier application, the High Court had given liberty to renew the bail application in future, were not grounds envisaged under Section 437(1)(i) of the Code. This Court also in specific terms held that the condition laid

down under Section 437(1)(i) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail."

11. Even though the re-appreciation of the evidence as 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. That is so because it is not known as to what extent the irrelevant materials weighed with the Court for accepting the prayer for bail.

12. 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."

13. The perversity as highlighted in Puran's case (supra) can also flow from the fact that as noted above irrelevant materials have been taken into consideration adding vulnerability to the order granting bail. The irrelevant materials should be of a substantial nature and not of a trivial nature. In the instant case, the trial Court seems to have been swayed by the fact that Sohrabuddin, husband of Kausarbi 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. By way of illustration, it can be said that the accused cannot take a plea while applying for bail that the person whom he killed was hardened criminal. That certainly is not a factor which can be taken into account. Another significant factor which was highlighted by the State before the High Court was that an FIR allegedly was filed to divert attention from the fake encounter. The same was not lodged by the Gujarat Police.

14. Once it is found that bail was granted on untenable grounds, same can be cancelled. The stand that there was no supervening circumstance has no relevance in such a case.

15. We have only highlighted the above aspects to show that irrelevant materials have been taken into account and/or relevant materials have been kept out of consideration. That being so, the order of granting bail to the appellant was certainly vulnerable. The order of the High Court does not suffer from any infirmity to warrant interference. The appeal is dismissed. However, it is made clear that whatever observations have been made are only to decide the question of grant of bail and shall not be treated to be expressing any opinion on merits. The case relating to acceptability or otherwise of the evidence is the subject matter for the trial Court.