SUPREME COURT OF INDIA

Dinesh M.N. (S.P.)

Vs

State of Gujarat

Appeal (crl.) 739 of 2008 (Arising out of SLP (Crl.) No. 867 of 2008)

(Dr. Arijit Pasayat and P.Sathasivam and Aftab Alam)

28/04/2008

JUDGMENT

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.12644/2007 was taken up alongwith Criminal Miscellaneous application No.12646/2007 filed in respect of a co-accused Narendra K Amin (the appellant in Criminal Appeal relating to Special Leave Petition (Crl.) No.788/2008). 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.3459/2007 qua FIR being CR No. I-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 sans unnecessary details are as follows:

The application for cancellation of bail had matrix in FIR being CR No. I-5 of 2005 filed by one Abdul Rehman, a Police Officer, subordinate to the appellant and now an accused, who was a member of the Special Investigating Party formed at Udaipur, Rajasthan to investigate into various offences registered against one Sohrabuddin. As per the above FIR, said Sohrabuddin, son of Ahwaruddin Shaikh, resident of Zaraniya, Nagda, Madhya Pradesh, who was accused of offences punishable under Sections 120(b), 121, 121-A, 122, 123, 307, 186, 224 of IPC, under Sections 25(1)(b) and Section 27 of the Arms Act and under Section 13 (1) of the Bombay Police Act. In the above FIR it was stated that the above accused (Sohrabuddin) was acting at the behest of ISI to spread terror and to disturb the unity and integrity of the country and also entered into conspiracy by

possessing arms and ammunition so as to kill one of the big leaders of the State of Gujarat and when asked to surrender by the police party, fired from his revolver and attempted to kill them.Later on, 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.

The evidence against the accused appellant revealed his presence as stated by one Nathubha Jadeja on 26.4.2007. As per the letter dated 7.5.2005 of Investigating Officer said Shri Nathubha Jadeja is shown as accused, but later on Smt. Gita Johri, a senior police officer declared in her affidavit before learned Chief Judicial Magistrate that Shri Nathubha Jadeja is a witness and on 25.5.2007 Shri Jadeja had stated in his affidavit before the learned CJM that his statement dated 26.4.2007 was recorded under duress. The other statements of the driver Puranmal Prabhudayal Mina clearly indicate that the accused had come alongwith other police officers from Udaipur to Ahmedabad on 24.11.2005. He stated that he was not present at the time of alleged encounter and he had no personal knowledge. Another statement of Shri Bhailal K Rathod does not also specifically indicate presence of the accused at the place of encounter. According to the trial Court these statements leave room for doubt about the involvement of the accused. At the same time, learned trial Judge observed that truthfulness of allegations levelled against the accused and the satisfaction of the ingredients of various sections applied are subject matter of appreciation of evidence and it can be considered at the time of trial. But it was concluded that sufficient evidence did not surface against the accused for having committed any heinous crime punishable with death or imprisonment for life.

So far as the possibility of tampering with evidence is concerned, the trial Court observed that charge sheet was submitted. By imposing strict conditions, the above aspects can be taken care of. After discussing the credentials of Sohrabuddin that as many as 25 FIRs were lodged against him and considering the remarkable service record of the accused, it was observed that police officers like him should not be allowed to be harassed and humiliated unless strong prima facie evidence or

the material for committing a serious offence is found. Reliance was placed on a decision of this Court in Jayendra Saraswathi Swamigal v. State of T.N. (2005 (2) SCC 13). Several conditions were imposed to grant bail.

Before the High Court the primary stands taken were that seriousness of the offences and the sentences to be imposed were not kept in view. Irrelevant factors were taken into consideration for granting bail.

Stand of the applicant-State before the High Court was that very approach of the trial Court in weighing evidence even prima facie is contrary to the law laid down by this Court, and based on presumptions of exercise of power under Section 439 of the Code and should not have been exercised.

Highlighting the definite role of the accused, it was pointed out that Sohrabuddin was a wanted accused involved in an offence registered with Hathipole Police Station, Udaipur. It was under his jurisdiction the role of the accused surfaced. He contacted Ahmedabad Police to trace out Sohrabuddin. When he was apprehended information was given to the accused and the accused informed his superior officers to send a team to Ahmedabad. He was leader of the team. Before any formal order came to be passed for forming a team, weapons were procured from Kotwali upon his arrival in Ahmedabad. He coordinated in the fake encounter alongwith ATS officers of the State of Gujarat. Therefore, it was contended that it was a clear case of conspiracy attracting ingredients of Section 120B IPC. It was pointed out that the whole case is based on circumstantial evidence and from the charge sheet, needle of suspicion unerringly pointed out at the accused and the circumstantial evidence even the form of statements of witnesses and in view of the role played by accused as afore-noted, the trial Court should not have granted bail.

So far as the alleged discrepancies in the evidence of different witnesses are concerned, it was submitted that the stage for assessing the contradictions, if any, has not come. It is pointed out that as per the statement of Nathubha on 26.4.2007 presence of the respondent was shown at the place of encounter which was sufficient to deny the protection under Section 439 of the Code. A very significant factor was pointed out to falsify claim of encounter as narrated in C.R. I-5/2005 and creation of one FIR to falsify that fake encounter aspect itself amounted to misuse of power by the accused so as to misguide the investigating agency, though such incident as narrated in the FIR never took place. It was also pointed out that the retraction of the statement made by Nathubha on 25.5.2007 has to be viewed in the background of the affidavit by Smt. Gita Johri on 25.4.2007.

It was also pointed out that by comparing the antecedents of Sohrabuddin and the alleged bright career of the accused, the trial Judge mis-directed himself and acted on irrelevant materials which made his order vulnerable.

The High Court on consideration of the rival submissions held that the learned trial Judge has not kept in view the seriousness of the offences, punishments prescribed for such offences and involvement of the accused, a high ranking officer when allegations or misuse of power necessary in law by registering false FIR has been lost sight of. The comparative past conduct and antecedents of Sohrabuddin by the so called good official record of the accused could not have been a ground for grant of bail. Accordingly, the bail granted was cancelled.

6. 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 (Delhi Admn.) 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 (1) SCC 349), Ramcharan v. State of M.P. (2004 (13) SCC 617), Mehboob Dawood Shaikh v. State of Maharashtra (2004 (2) SCC 362), 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 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.

7. 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. He referred to findings of the High Court as to how appellant has tried to divert attention and thereby defeat the course of justice.

8. 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.

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

10. 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 or 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).

11. 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."

12. 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.

13. 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-`-vis the High Court."

14. 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 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 a 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. The accused was the leader of the Rajasthan team and the other officials were Abdul Rehman, Himanshu Singh, Mohan Singh, Shyam Singh and Jai Singh. The first named Abdul Rehman had lodged the FIR. It is pointed out from the General Diary in respect of entry on 26.11.2005 that accused Dinesh was present. In FIR CR-I 5/2005 also the presence of Dinesh has been noted. The relevance of these factors does not appear to have been noticed by the High Court. In other words, relevant materials were kept out of consideration. Once it is concluded that bail was granted on untenable grounds, the plea of absence of supervening circumstances has no leg to stand.

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 expression of any opinion on merits. The case relating to acceptability or otherwise of the evidence is the subject matter for the trial Court.