

Kavitaben Vs. State of Gujarat and Another

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Court : Gujarat

Decided On : Sep-08-2014

Judge : S.G. Shah

Appeal No. : Criminal Misc. Application (For Cancellation of Bail) No. 6317 of 2014

Appellant : Kavitaben

Respondent : State of Gujarat and Another

Judgement :

Heard learned counsel for the parties.

1. Rule. Mr. P.M. Thakkar, learned counsel for Mr. Bhushan B. Oza, learned advocate for respondent no.2 waives service of notice of rule while Ms. J.D. Jhaveri, learned APP waives service of notice of rule for respondent no.1 State.

2. Though this is an application to cancel the bail and may be dealt with considering the settled principle of law relating to the subject, after submission of both the sides and on scrutiny of available record as well as papers of chargesheet submitted by the respondent, irrespective of the relief of bail in favour of respondent no.2, the Court has no option but to take care of the relevant material, impugned order and to pass certain observations, directions which will follow after referring certain materials from the record and discussion thereon in following manner.

3. The applicant herein is wife of the victim whose dead body was found in a burnt car. On the day of incident, present applicant who is being a wife of the victim Pritesh Gambhirsinh Chauhan was probably not aware about the factual details of actual incident wherein her husband has got burnt alive in a car. Therefore, initially on 8.10.2012, Police Official of Ankleshwar (Rural) Police Station has registered an FIR being 1st C.R. No.105 of 2012 under Section 302, 201 and 120(B) of I.P.C. based upon a complaint lodged by one Jivrajbhai Jethabhai Vasava. On perusal of such complaint, it becomes clear that there is disclosure that the incident has taken place at about 10.00 p.m., on 7.10.2012 and it was disclosed to the Police on 8.10.2012 at about 12.00 noon, wherein, complainant has stated that he is doing labour work and on that day, they were working on one site of foundation works at filling point of ONGC, under the Contractor Mr.Dheerajbhai Panchal, in sim of Umarvada village on road approaching to National Highway no.8 from Umarvada in Ankleshwar of Bharuch District. At that place in all thirteen persons including men and women were doing labour work of construction and staying at the site at night in tents. Amongst them complainant and two others were keeping watch on the material of construction at the site during night hours and therefore they were sitting on the road. At such time, at about 10.00 p.m. On 7.10.2012, they felt a smell of petrol, therefore, they have looked on the road where they show two vehicles standing nearby with their headlights on. In light of such head light, they recognized one vehicle with a white color and another vehicle with a red color. It is further stated that out of these vehicles, two people had come down and in between there was a sudden fire and thereafter red color car has gone towards Ankleshwar. They have seen the fire from their tents. He has further stated that the fire continued in the car for one and half hour but they have not gone on the site by leaving their camp and on next day i.e. 8.10.2012, they have conveyed such fact to their contractor, Mr.Dheerajbhai Panchal when he came on the site and thereafter they have seen the vehicles by reaching on road where they found a burnt dead body of a human being. With such disclosure, he has lodged a complaint to the effect that in view of above facts, the persons of red car have burnt the person sat in a white car by burning the car totally and thereby an offence of killing a human being was committed. Such F.I.R. was recorded by P.S.I., Ankleshwar (Rural) Police Station namely; Mr.H.Z. Solanki and

investigation was started.

4. After investigation, investigating agency has come to the conclusion that respondent no.2 herein namely; Karansinh Laxmansinh Gohil as well as Dharmendrasinh Dahyabhai Solanki who is brother in law of respondent no.2 Karansinh have conspired to kill the victim Pritesh Gambhirsinh Chauhan. Though they are partners in a business, wherein, they were executing a work of poring sands at the site of isolate on National Highway no.6 at Bora area. It is further revealed during the investigation that on 7.12.2012 all of them i.e. victim Pritesh Gambhirsinh Chauhan, respondent no.2 being Karansinh Laxmansinh Gohil and Dharmendrasinh Dahyabhai Solanki, brother in law of respondent no.2 had started their journey from Bora area in an I20 car no.GJ 05CA6408 towards village Mahuva. At that time, pursuant to prior conspiracy, there was a hot discussion about the relationship with one Mr. Vijay Patel, who was probably competitor of them and pursuant to such business dispute, Karansinh Laxmansinh Gohil has caught the victim Pritesh Gambhirsinh Chauhan from his neck and antagonized him with such a force till he died because of suffocation. Thereafter, to destroy the evidence and the dead body, the dead body of Pritesh Gambhirsinh Chauhan kept on back sit of I20 car and they went towards Bardoli and from Bardoli, they took another Ford Figo car bearing registration no.GJ 19AA355 of Karansinh Laxmansinh Gohil and in both the cars, they went on different places during which they were in contact with witness namely; Ajaybhai and Jagmohanbhai and ultimately at night times, they have collected diesel in a can from the witness Bharatbhai Amarsinh from petrol pump and reached to the place of incident being sim of Umarvada village where at about 10.00 a.m., again put a dead body of Pritesh Gambhirsinh Chauhan on front seat of the care and tied it with seat belt and after poring flammable liquid on vehicle, they burnt the vehicle with the body of Pritesh Gambhirsinh Chauhan and thereby they have committed offences under Sections 302, 120(B) and 201 of I.P.C.

5. Because of outcome of such investigation, ultimately, charge sheet was filed in the month of January, 2013 and thereafter, trial was initiated against both the accused.

6. The record confirms that none of the accused were granted bail either by the Sessions Court or by this High Court. At present, we are concerned with the bail so far as respondent no.2 being accused no.1 is concerned. It seems that Criminal Misc. Application No.1132 of 2013 for regular bail filed by accused no.1 before this High Court was withdrawn on 23.8.2013. Thereafter on 13.2.2014, he has filed Criminal Misc. Application No.40 of 2014 before the Sessions Court on the grounds of delay in trial. However, such application was rejected by Sessions Court on 26.2.2014. Meanwhile, applicant has filed Criminal Misc. Application No.2833 of 2014 for transferring the trial to some another District, wherein, this High Court has issued notice on 2.4.2014 making it returnable on 17.2.2014. It seems that thereafter such transfer application has not been decided till date. In such transfer application, respondent no.2 has filed his appearance on 16.4.2014 and therefore he is aware about such transfer application. However, thereafter, immediately on 18.4.2014 accused no.1 has filed another successive bail application being Criminal Misc. Application No.100 of 2014 for regular bail before the Sessions Court, again mainly on the ground of delay in trial. Such application is allowed by the Sessions Court on 21.4.2014 enlarging the accused no.1 - respondent no.2 herein on regular bail.

7. Such order dated 21.4.2014 in Criminal Misc. Application No.100 of 2014 by the 2nd Additional Sessions Judge at Ankleshwar enlarging the respondent no.2 on regular bail is under challenge at present.

8. On plain reading of such impugned judgment, prima facie, it becomes clear that irrespective of order of enlarging the accused on bail, the judgment needs to be scrutinized and requires to be quashed and set aside on several grounds, inasmuch as while enlarging the accused on bail, the Sessions Court has not only travelled beyond the jurisdiction and scope of the Sessions Court while deciding such an application for bail but made certain observations in a manner as if the Court is deciding the Sessions Case finally and so far as applicable case law is concerned, the Sessions Court has not only misinterpreted but committed a grave error in discussing and thereafter determining certain issues. Therefore, prima facie irrespective of the merits of granting bail, the impugned judgment requires to be quashed and set aside with certain observations. However, before making any

observations, it would be relevant to recollect the relevant portion of such judgment which are reproduced herein.

9. Since the entire impugned judgment is in 17 pages, it would not be appropriate to reproduce entire 17 pages. Therefore, only relevant disclosure, discussion and observations are reproduced hereunder:

"2. His first bail application was rejected while making observation that the prima facie case is made out against him. Thereafter second bail application has been filed on the ground of delaying trial and said application was rejected by this court and prosecution was directed to proceed the trial expedite."

"4. Mrs. Shalini appearing on behalf of the applicant has submitted that the 18th adjournment the learned PP remained absent and did not turn up for opening case and for framing of charge. The charge was framed on 19/10/2013 and the date of hearing of this bail application 11 witnesses were examined by the prosecution and total period of 6 months and 2 days taken from the date of framing the charge."

"5. Mrs. Shalini has submitted that the each and every adjournment were taken by the learned public prosecutor and period between two adjournment of 13 to 14 days."

"6. Since last 4 adjournments only 2 witnesses were examined by the prosecution. This facts itself established that the learned public prosecutor has attributed intentionally delay and has killed the Article 21 of the constitution of India."

"20. The case was committed by the learned Magistrate in the month of February. The accused were appeared before this court on 8/3/2013 and thereafter 18th adjournments the learned PP remained absent and did not turn up for opening file and for framing charge. This facts on record itself speaks gross negligence and deliberately delay on the part of the learned PP."

"23. In the instant case the witnesses were examined by the prosecution and most of the witnesses were not supported to the prosecution case and therefore the learned PP knew the result of his case and due to that reason his intention is not

to proceed the trial and by thus the learned PP has violated the constitutional provision guaranteed to the people of India.

Further more I am of the view that no one has right to take the court in 'baan' but in the instant case the learned PP has played several practice and tractice to keep the court in 'baan' and has asked each and every adjournment for an interval of 13 to 14 days."

"24. In the instant case the complainant has not supported to the case of prosecution. The complainant has stated on oath before this court that he did not see the car and the persons. So in my view the evidence of complainant prima facie not involving the applicant in the alleged crime. In the instant case the panch witnesses are the stock witnesses. Furthermore the place of offence was published before the it was shown by the accused. So in my view merely shown the place of offence by the accused person is not sufficient evidence to involve the accused in the alleged crimes. In the instant case the most important witness Ajaykumar Mohanbhai Aahir who had last seen together at the Bardoli in the alleged car has also not supported to the prosecution case. In the instant case the witnesses yet to be examined are not the eye witness of the incident and therefore their evidence is not important in this matter. In the instant case the entire case of the prosecution hinges on the circumstantial evidence and as per my above noted reasons and discussion that the witness were examined by the prosecution have not supported to the prosecution case.

Furthermore the witness yet to be examined are also not important witnesses.

"25. In the instant case this court has given direction to the prosecution for expedite hearing of this matter but however the learned PP had not complied the said direction issued by this court and by thus the learned PP has violated the constitutional provision of speedy disposal guaranteed under the Article 21 of the constitution of India."

"26. This court is very well aware about the settled principles of law and therefore this court cannot elaborate the evidence is on record while dealing of the bail application."

"27. The Hon'ble Supreme Court had laid down the principles for judgement. It is well accepted that this court is not required to appreciate or scrutinize the evidence in detail at this stage."

"28. It is true that the delay in trial itself would not be a valid ground to grant bail to an accused in a nonbailable offence, but, delay in trial certainly will be a relevant circumstances to be considered by the Court along with other relevant grounds urged for grant of bail."

"34. So in view of the evidence of the complainant the prima facie involvement of the accused in alleged crimes creates suspicious."

In paragraph no.34, after listing the name of witnesses who are examined as prosecution witnesses nos.1 to 11, the Sessions Court has stated as under:

"I have gone through the oral evidence of these witnesses is on record. I am very well aware that at the time of dealing with the bail application the court cannot give finding of the evidence and cannot elaborate the evidence."

"35. In the case on hand the complainant did not supported to the case of prosecution. Hence the presence of the accused at the place of offence creates great suspicious and then after the main witness Mohnishbhai Sumanbhai Chauhan has also not supported to the prosecution case and lastly the main witness Ajay kumar Mohanbhai Aahir, who had seen the applicant accused with I20 car of the deceased Pritesh has also not supported to the prosecution case. In the instant case the witness yet to be examined are not the important witnesses and they were also not eye witness of the incident."

"Looking to the facts and circumstances of the case and the oral evidence deposed by the witnesses before this court and considering the oral evidence is on record, it appears that the accused is not prima facie involved in the alleged crimes. No doubt the previous two applications have been rejected by this court on the basis of statement recorded by the investigation agency and as per the say of the complainant in his police statement that he had saw two cars but when he was examined by the prosecution he has not supported his statement recorded by the

police. Mr.Ajaykumar M. Aahir has also not supported his statement recorded by the police. Now the witness yet to be examined are also not the eye witness of the incident."

"Keeping in mind the entire set of circumstances, the evidence so far adduced by the prosecution to prove the criminal conspiracy and murder of Pritesh by the applicant no prima facie evidence against the accused came on record."

10. Since certified copy of impugned judgment is on record, only relevant observations, discussion and findings are recollected hereinabove, which shows that the Sessions Court has though specifically observed that the delay may not be only reason to release the accused on bail, the bail is granted on both the grounds i.e. delay and absence of evidence. Again, it is surprising to note that though the trial Court has observed at some place that it has not given findings on the evidence and evidence cannot be elaborated at the time of deciding such bail application, unfortunately, thereafter, the Sessions Court has not only referred all the deposition of 11 witnesses, which disclosed the outcome of such deposition and observed that they do not support the prosecution and ultimately came to the conclusion that accused is not prima facie involved in the alleged crime at all. One more surprising observation is with respect to examination of eye witnesses when Sessions Court has said that witnesses yet to be examined are not the eye witness of the incident. Though the Court has also admitted that the prosecution is based solely upon circumstantial evidence and practically there is no eye witness except the complainant who has simply seen the burning car.

11. Unfortunately, with such observations, the Sessions Court has not only failed to realize the error which is committed by it in saying that the evidence so far as adduced by the prosecution to prove the criminal conspiracy and murder of Pritesh Gambhirsinh Chauhan by the applicant, no prima facie evidence came on record; though none of the witnesses who are listed in paragraph 34 of the judgment which relied to prove the submission inasmuch as the Sessions Court itself has discussing the same impugned judgment that they are complainant and panch witnesses and they are not supporting the case of the prosecution.

12. So far as witnesses regarding conspiracy is concerned, it is certainly known to the victim as well as accused and not the witnesses who are otherwise third parties to them, but concerned with the place of incident and part of investigation viz. different Panchnamas, Inquest Panchnama, Panchnama of the place of incident or recovery Panchnama of certain articles.

13. It would be appropriate to observe and explain that how Sessions Court has failed to consider the material evidence so as to prove the involvement of the accused without elaborating in detail since it cannot be done at such a stage.

14. In addition to factual and legal errors as referred in previous paragraphs, a glaring proposition has been found from the impugned judgment when the trial Court has observed, discussed and determined with reference to framing of charge when it is stated that;

"20.The case was committed by the learned Magistrate in the month of February. The accused were appeared before this court on 8/3/2013 and thereafter 18 th adjournments the learned PP remained absent and did not turn up for opening file and for framing charge. This facts on record itself speaks gross negligence and deliberately delay on the part of the learned PP."

Probably such observation is because of the submission by the learned advocate for the applicant before the Sessions Court, which is recorded in Paragraph no.4, wherein, it is stated that public prosecutor remained absent and did not turn up for opening the case and for framing of charge. It is surprising to note that the Sessions Court is considering the absence of public prosecutor for not framing the charge, since otherwise framing of charge is the duty and function of the Court and not of the concerned public prosecutor at all.

15. Similarly, when it is stated by the Court that there is no prima facie evidence, Court has practically decided the Sessions case finally though more than 50 witnesses are yet to be examined. Moreover, in absence of key witnesses like Doctor, who has examined the accused no.1 - present respondent no.2 for his burnt injury on his hand and in support of FSL to confirm the presence of flammable material on the Mudamal articles like cloth etc. recovered from the

accused and also the barber who has helped the accused to cut his hairs at night hours so as to avoid the sample of hairs which were burnt, probably, at the time of incident for which accused is being tried. Even if we consider the submission by the defence, that all such evidence is not confirming the conspiracy, the fact remains that there is prima facie evidence regarding burnt injuries to the accused no.1, for which, Police has investigated in detail and collected relevant evidence which is yet to be adduced and proved on record. Unless relevant evidence is produced and either proved or results into rebuttal i.e. disproof, no conclusive findings relating to involvement of the accused can be recorded in such an application for bail. To prove conspiracy, the material witnesses are yet to be examined which are certainly known to both the victim and the accused and knows about the business activities and details of controversy. Therefore, in absence of any evidence, it cannot be said, as observed by the Sessions Court while releasing the accused on bail, that prosecution has failed to prove the conspiracy. It is obvious that evidence regarding conspiracy is yet to be adduced by examining several witnesses.

16. In view of above facts and circumstances, prima facie, it becomes clear that the impugned order could not sustain as it is and therefore, it is certainly required to be quashed and set aside.

17. Therefore, irrespective of merits of bail or no bail, when impugned order cannot sustain and requires to be quashed and set aside and when transfer application is pending before the coordinate bench, it seems that it would be inappropriate to discuss the factual details which is done by the Sessions Court. Otherwise to arrive at specific conclusion, all such observations are to be looked into and determined after scrutiny which would certainly prejudice not only the trial but the final judgment in a Sessions Case. In any case, scrutiny and determination of the oral evidence adduced till date is unwarranted at all at such stage of bail application. Therefore, though I have looked into the affidavits in reply with which respondents have produced copies of deposition of all 11 witnesses with order of confirming the bail by rejecting the application for cancellation of bail of accused no.2 Dharmendrasinh Dahyabhai Solanki, it could not be discussed at this stage. However, only because the bail of co accused is confirmed, it cannot be said that

another accused is entitled to get bail, more particularly, when we peruse the police papers i.e. chargesheet papers, it becomes clear that several witnesses are yet to be examined, which can certainly throw better light and adduce necessary evidence to confirm certain factual details which may lead to the evidence against the present accused. It cannot be ignored that witnesses which are examined till date are mainly Panch witnesses and the complainant who had simply disclosed an incident before the Police and nothing more than that. So far as case like present is concerned, wherein, the entire charges are based upon conspiracy, the deposition of third person being complainant is not much material.

18. So far as delay in trial is concerned, it is a pure misconception before the Sessions Court or by the Sessions Court that delay is attributed only because of the PP appearing before the trial Court. Inasmuch as the trial Court is certainly empowered to fix the Sessions case on daily basis for couple of days and to issue summons to the witnesses on daily basis so as to complete the trial at the earliest. Otherwise, practically, date of hearing is being fixed by the most of the Sessions Court, considering nonservice of summons in time, nonavailability of witnesses at the relevant point of time, uncertainty of total time that may be taken in recording evidence of a particular witness, wherein, defence may continue the cross examination for hours or days and sometime they may also seek adjournments after recording examination in chief to cross examine particular witness under the pretext of collecting further details, and all such other reasons though result into delay in deciding the case or the trial, it cannot be said that because of such reasons, delay is to be considered in trial so as to entitle the accused to be immediately released on bail.

19. In the present case, the same Court has not considered all such grounds of delay in the month of February, 2014 and just within sixty days, in April, 2014, all such grounds are considered for delay and that too as if it is because of prosecution while releasing the accused on bail. Therefore, in such case, there must be a cogent reason and change in circumstances, then it was inexistence in the month of February, 2014 when bail application was rejected and in the month of April, 2014, when bail was granted by impugned judgment. If there is no change in circumstances, just within two months, there is no reason to deviate from the

earlier decision of refusing bail on the ground of delay in trial and that too by finding a fault of the prosecution.

20. One more surprising observation has been found in Paragraph 14 of impugned judgment, when Sessions Court has recorded the arguments of learned APP with the provisions of Section 309 of the Code of Criminal Procedure that it is not mandatory and Court cannot ask the prosecution for proceeding the trial as per the will of the Court. Even if this may be a reason for observing against the learned APP and blaming the prosecution for the delay, the accused may not be released on bail solely on such ground since, Sessions Court is certainly empowered to take necessary steps even under Section 309 so as to see that trial may not be delayed because of any such practice as being alleged and pleaded by both the sides before Sessions Court.

21. For the purpose, provision of Section 309 of the Code of Criminal Procedure should be recollected here, which confirms that in every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses once started, the same shall be continued on daytoday basis until all the witnesses in attendance have been examined, and unless the Court finds the adjournments of the case beyond the following date is necessary it may be granted with reasons which is to be recorded. Sub Section (2) of Section 309 of the Code further provides that if the Court finds it necessary to postpone any inquiry or trial, it may be done on such terms as it may deem fit by recording reasons thereof for such time as it considers reasonable and may by a warning, remand the accused if in custody. The proviso confirms that such remand of an accused person to custody shall not exceed fifteen days at a time. The other provisos to such Section reconfirms that unless special reasons for granting adjournments, when witnesses are in attendance, no adjournment or postponement shall be granted. To keep the witness present before the Court, Court is free to issue summons and if necessary bailable warrant. Therefore, it cannot be said that delay is caused only because of the prosecution, hence it is the duty of the Court to see that the case is taken up at the earliest and therefore, releasing the accused on bail simply on the ground of delay by prosecution, when previous application on same ground was rejected and when regular bail of such

accused was refused by High Court, would certainly results into interference in such order of bail in present application.

22. Therefore, considering the fact that transfer application is pending before the coordinate bench and that several witnesses are yet to be examined by the trial Court and that trial Court has practically determined the case in favour of the accused, it would be appropriate to quash and set aside such impugned order. But to avoid the discussion on factual details, which may otherwise prejudice the final trial though remand of such application would generally not require, this is a fit case, where by quashing the impugned order the bail application is required to be remanded back before the Sessions Court for deciding it afresh, in accordance with law applicable to such bail application rather than relying upon the unwarranted facts and materials, is being done by the Sessions Court in impugned judgment. However, considering the fact that transfer application is pending before the co ordinate bench, YADI of this order is to be forwarded to the concerned learned Principal District and Sessions Judge to verify the factual details and considering the fact that practically, the Sessions Court has decided the case at such interim stage of bail application by discussing and coming to the conclusion that there is no prima facie evidence against the accused, the learned Principal District and Sessions Judge should verify that whether case requires to be transferred from one Court to another Court or not. If the learned Principal District and Sessions Judge finds so, he may pass appropriate order to that effect so as to avoid prejudice on either side.

23. Thereby, at present, the impugned order is quashed and set aside. The appeal is allowed to the aforesaid extent. However, since the petitioner is on bail pursuant to such orders since April, 2014, the learned Principal District and Sessions Judge, Bharuch as well as the concerned Sessions Court where such case is listed for hearing are directed to decide such application in four weeks, without fail. However, such direction shall not affect to ongoing trial in any manner. If such bail application is not decided in four weeks after receipt of a copy of Writ of this judgment and order, then accused no.2 shall surrender himself, since practically his bail is hereby cancelled. While deciding the bail application afresh, the Sessions Court is free to decide it in accordance with law after hearing both the

sides, without being influenced by the present judgment and shall consider rival contentions. Thereby, all observations and findings about the commission of offences by accused are hereby strike out from the impugned judgment. Registry of Sessions Court shall make necessary endorsement to that effect below the impugned order. Rule is made absolute to the aforesaid extent.

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