

Vikas Yadav Vs. State of U.P.

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Court : Delhi

Decided On : Aug-11-2006

Reported in : 2006(92)DRJ703

Judge : A.K. Sikri, J.

Acts : Indian Penal Code (IPC) - Sections 34, 201, 302 and 364; Code of Criminal Procedure (CrPC) - Sections 82, 83 and 439

Appeal No. : Bail Appl. No. 2978/2005 and CrI.M. No. 1669/2006

Appellant : Vikas Yadav

Respondent : State of U.P.

Advocate for Def. : Mukta Gupta, Standing Counsel

Advocate for Pet/Ap. : D.C. Mathur,; Sandeep Sethi, Sr. Advs. and; Rajneesh Chopra

Disposition : Petition dismissed

Judgement :

A.K. Sikri, J.

1. After hearing the counsel for both the parties at length, this application was dismissed vide order dated 11th August 2006 when following brief order was

passed:

I have heard counsel for both the parties at length. It is 1.21 p.m. After lunch there are Special Bench matters and, therefore, I would not be in a position to dictate the detailed order today. However, after considering the respective submissions, I am of the view that the petitioner does not deserve bail at this stage.

These applications are dismissed.

Reasons to follow.

2. I now propose to give the reasons which persuaded me to dismiss the application seeking bail by the petitioner.

3. Petitioner/accused No. 1 in FIR No. 192/2002 registered under Section 302/201/364 read with Section 34 of the Indian Penal Code has filed this application seeking bail under Section 439 of the Code of Criminal Procedure. The petitioner is an accused charged with offence of murder of one Nitish Katara. The petitioner is facing trial in the said case and is in judicial custody since 23rd February 2002. The petitioner wants that he be admitted to bail during the pendency of trial. He had moved applications for the same purpose in the past as well but was denied bail. The reasons why he has renewed his request, as argued by the learned Counsel for the petitioner, are:

(i) the petitioner is suffering the incarceration since 23rd February 2002 and though the testimony of the last prosecution witness was recorded on 30th June 2004, further progress is halted for want of another prosecution witness viz., Ms. Bharti Yadav, who is yet to be examined and there is no possibility for her examination in near future. therefore, the petitioner cannot be made to languish in jail for indefinite period;

(ii) the prosecution evidence which has come on record up to now does not establish prosecution case and there is every chance of acquittal of the petitioner;

(iii) another co-accused, namely, Vishal Yadav who was similarly placed has already been released on bail vide order dated 6th October 2005 passed by this

Court and the petitioner, claiming parity with Vishal Yadav, states that he is also entitled to same treatment which is meted out to Vishal Yadav. The reasons because of which bail was granted to Vishal are pressed into aid in support of the present bail application.

4. The aforesaid submissions are noted in brief, which were otherwise argued by Mr. D.C. Mathur, learned senior counsel appearing for the petitioner in detail, stock whereof would be taken at the time of dealing with the submissions.

5. Per contra, Ms. Mukta Gupta, learned Counsel appearing for the State at the outset referred to the judgment of the Supreme Court in the case of Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav : 2004 CriLJ1796 and submitted that as laid down by the Supreme Court in the said judgment, the factors which are required to be considered by the Court before granting bail to the accused are: (a) the nature of accusation and the severity of punishment in the case of conviction and the nature of supporting evidence; (b) reasonable apprehension of accused tampering with the evidence or apprehension of threat to the complainant; (c) prima facie satisfaction of the Court in support of the charge.

6. In said judgment, the Supreme Court also held that grant of bail to the accused on the ground that he had been in custody for a period of three and a half years and that there was no likelihood of trial being concluded in the near future was not justified where gravity of the offence alleged was severe and serious allegations of tampering with the evidence or influence of witnesses were made against the accused. It also opined that where earlier bail applications of the accused were rejected, while bestowing consideration on the subsequent applications for grant of bail by same accused, it was the duty of the Court to consider the reasons and grounds on which the earlier bail applications were rejected and record the fresh grounds which persuaded the Court to take a view different from one taken in the earlier applications. Giving prima facie reasons for granting bail, particularly where the accused is charged of having committed a serious offence was necessary and order devoid of such reasons would suffer from non-application of mind.

7. Submission of learned Counsel for the State was that if one were to apply the principles laid down by the Supreme Court in the aforesaid judgment to the facts of

this case, the petitioner was not entitled to grant of bail. She submitted that charge against the petitioner was of serious nature; there was a criminal history of the petitioner as he was involved in other cases as well; the evidence which has already come on record would prima facie establish the case of the prosecution; this Court on earlier occasion had refused the bail to the petitioner and there was no change in the circumstances. She also argued that the case of Vishal Yadav was on different footing. In any case, said order was under challenge before the Supreme Court inasmuch as the State as well as the complainant had preferred Special Leave Petition seeking cancellation of the bail order. The Supreme Court had also observed that this bail application of the petitioner herein be decided by this Court on its own merits and, therefore, the Court should consider the matter independently. She also submitted that there was a strong motive established inasmuch as Ms. Bharti Yadav was in love with the deceased Nitish Katara and both wanted to marry each other and it was objected to by the family members of Bharti Yadav and particularly the petitioner who is brother of Bharti Yadav. In these circumstances, Bharti Yadav was most material witness as held by this Court itself in earlier proceedings. However, she was not appearing in the Court being under the influence of her family members including petitioner and in case the petitioner is released on bail, pressure on Bharti Yadav would mount tremendously resulting in either her non-appearance or not giving testimony fearlessly and honestly.

8. It has come on record that the deceased Nitish Katara and Bharti Yadav studied together at IMT, Ghaziabad. Case of the prosecution, as noted above, is that they shared an intimate relationship. The prosecution has led the evidence which, prima facie, establishes this fact. Evidence consists of love letters written by Bharti Yadav to the deceased, various greeting cards sent on different occasions, their photographs in amorous postures etc. The prosecution further alleges that they wanted to marry each other. The deceased had even broached this topic with his family members, including his mother/complainant and had also stated that family of Bharti Yadav was not accepting this relationship and it had become particularly an eye soar to the petitioner. PW-30/complainant has also deposed to the effect that she had expressed her apprehension about the petitioner's retaliation. therefore, strong motive is imputed on the petitioner, though I may hasten to add

that that I am conscious of the fact that, it would by itself be not sufficient to prove the guilt as motive is presumptive evidence.

9. The murder was committed in a diabolical manner. Death was caused due to ante-mortem injury inflicted on the head and thereafter body of the deceased was burnt in a grotesque manner. No doubt, these are only allegations against the petitioner and the prosecution has to prove the charges beyond reasonable doubt. However, what is emphasised is the grave nature of offence of which the petitioner is charged with.

10. Keeping in view the aforesaid factors when on an earlier occasion petitioner's bail application being CrI.M.(M) No. 1506/2003 was considered, same was rejected by this Court vide order dated 14th October 2003, inter alia, observing as under:

After hearing learned Counsel for the parties, this Court is of the considered view that the allegations against the petitioners are very serious. The prosecution witness Ms. Bharti Yadav, who has gone to U.K. for pursuing her studies, appears to be under the control of the petitioners and their family. If the Petitioners had been keen to have her statement recorded, they could have easily persuaded her to come to India and go back after making a statement. Possibility cannot be ruled out that in case the Petitioners are enlarged on interim bail at this stage, they may influence Ms. Bharti Yadav and exert more pressure on her to make a statement in their favor.

11. In fairness to the petitioner it may be noted that along with petitioner's application, application of Vishal Yadav also came up for hearing and by common order both the applications were dismissed. Even at that time, 34 prosecution witnesses had been examined and the statement of Ms. Bharti Yadav remained to be recorded and this aspect of the case was noted in the aforesaid order in the following manner:

34 prosecution witnesses and a Court witness have already been examined. Many of the witnesses have turned hostile and not supported the prosecution case. However, a witness namely Ms. Bharti Yadav, sister of the accused-petitioner is

yet to be examined. She is an important witness in regard to the presence of deceased and petitioner in the marriage party soon before the commission of crime and also in regard to her familiarity with the deceased. Ms. Bharti Yadav is stated to be in U.K. Steps are being taken to serve summons upon her and ensure her presence before the Court for her statement. This Court has been informed that she is likely to be examined in the month of November 2003.

12. It may also be noted that the petitioners had even made a prayer for grant of interim bail till the time Ms. Bharti Yadav is examined by the Trial Court which plea was turned down and the Court had observed that the petitioner may move the Trial Court again for release on interim bail after the statement of Ms. Bharti Yadav is recorded by the Trial Court.

13. The petitioner moved as many as three applications before the learned ASJ/Trial Court as well, on different occasions for grant of bail and all these applications were dismissed. Last application was dismissed vide order dated 10th November 2005 which order was passed after order dated 6th October 2005 releasing Vishal Yadav on bail. In fact, after Vishal Yadav was admitted to bail, the petitioner had filed bail application in this Court which was, however, dismissed as withdrawn on 28th October 2005. Thereafter, the petitioner had approached the learned ASJ by moving third application and this application was also dismissed vide detailed order dated 10th November 2005. One has to consider the aforesaid facts in the light of the principles laid down by the Supreme Court in the case of Kalyan Chandra Sarkar (*supra*). Offence with which the petitioner is charged is grave and serious. Merely because he is in custody for last four years would not by itself be a ground to release him on bail. In fact, as noted above, the Supreme Court has gone to the extent of observing that even if there is no likelihood of trial being concluded in the near future, that would not justify grant of bail. On earlier occasions applications for bail were rejected. It may also be noted that when these applications were rejected, the prosecution evidence on record was the same.

14. I may mention at this stage that the learned senior counsel appearing for the petitioner extensively read the testimony of some of the prosecution witnesses. He referred to the testimony of PW-3, who is doctor and conducted the postmortem

and tried to contend that said doctor had doubted that the death was caused by hammer allegedly recovered in this case. He also read the testimony of PW-11 Ms. Shivani Gaur, PW-23 Virender Singh and two Beat Constables PW-28 and PW-32 among others. His submission was that none of these witnesses have supported the case of the prosecution. He pointed out that PW-26 Gaurav Gupta had categorically stated that the deceased left Pandal only at 12:45 A.M. and he had talked to him at 1:00 A.M. whereas it had come on evidence that the accused persons had left the Pandal much earlier. Referring to the testimony of PW-11 Shivani Gaur, he submitted that she was class fellow of Bharti Yadav and the deceased and categorically stated that there was no intimacy between them. She also deposed that she had seen the deceased around 12:30-1:00 A.M. According to him, PW-25 gave deposition to the same effect. PW-28 and PW-32, who were the Constables posted around 20 meters from the place of wedding, had stated that the deceased and accused were in separate cars. He also challenged the alleged recovery on the basis of alleged disclosure and submitted that such a discovery does not inspire confidence and for this purpose he referred to the deposition of PW-23, PW-5 and PW-34. He further submitted that the only person who supported the prosecution case was PW-33 Ajay Katara, who stated that he had last seen the deceased along with the accused in the same car at 12:30 A.M. at Hapur Chungi, Ghaziabad, could not be believed as there was some discrepancy in his statement and he was also an interested witness.

15. On the other hand, learned Counsel for the State had submitted that the testimony of PW-30 Neelam Katara, complainant and mother of the deceased was relevant who had stated about the relationship between the deceased and Bharti Yadav and also produced on record documents supporting the version of their intimate relationship and fear of the petitioner expressed by the deceased to her. Referring to the statement of PW-11 she argued that though Shivani Gaur had stated that there was no intimacy between the deceased and Bharti Yadav, such a statement could clearly be falsified in view of plethora of documents coming on record showing the intimacy between the two and in any case, even PW-11 had accepted the fact that deceased Nitish Katara and Bharti Yadav had gone to Mumbai together to attend the party of a friend. She also extensively relied upon the statement of PW-33, who is the witness to last seen and argued that though he

was extensively cross-examined, his testimony could not be shaken. She further mentioned that though PW-28, the beat Constable, had turned hostile, even he had admitted that the accused persons were in Tata Safari vehicle when they left the place of wedding of Shivani Gaur which vehicle was identified by PW-33. She also submitted that the weapon of offence, namely, hammer etc. were recovered on the disclosure statement of the petitioner and the recovery memo bears the signature of an Advocate, whose assistance had been given to the petitioner at his own request during the period of police remand. On the basis of this, she argued that at this stage the prosecution case cannot be thrown out on the basis of alleged contradictions sought to be pointed out by the learned senior for the petitioner and it could not state that there was not even a prima facie case.

16. At this stage, it is not necessary for me to comment upon the evidence and dissect the same minutely as I am dealing with application for bail and the Trial Court has yet to analyze the evidence produced and record its findings. I may only say that in the detailed order dated 10th November, 2005, while rejecting the 3rd bail application of the petitioner herein, this very contention is dealt with by the then learned ASJ in the following manner:

There is no doubt some merit in these submissions but the other evidence and circumstances cannot be ignored. Admittedly, deceased Nitish Katara and the accused had both attended the marriage party at Diamond Place, Banquet Hall, Ghaziabad at the night of occurrence. It is also in evidence that accused Vikas Yadav and Vishal Yadav were seen in the vicinity of the Banquet Hall around 12:30 am on that night. The police may not have been able to recover the hammer on 17/2/02 itself but it is also a fact that the recovery memo which was prepared on 28/2/02 bears signature of an advocate whose assistance had been given to the accused at his own request during the period of police remand. Dr. Anil Singhal may have stated that there is little possibility of the fatal injury of having been caused by hammer but he has also stated that such possibility cannot be ruled out. therefore, at this stage, the prosecution case cannot be thrown out on the basis of contradictions pointed out by the Ld. Counsel for the accused. In any event it will be impossible to say that the prosecution does not even have a prima facie case.

17. Furthermore, as pointed out above, this very evidence was before the Court when earlier applications of the petitioner were rejected. It has also to be kept in mind that most crucial witness Bharti Yadav is yet to be examined.

18. The only ground which survives for consideration is the remote possibility of trial being concluded and Bharti Yadav has not been examined so far. This is an aspect which cannot be considered in isolation and holistic view of the matter needs to be taken. I say so because of the reason that accusation of the prosecution is that Bharti Yadav is under the influence of the petitioner and his family members and it is because of this reason that she has been avoiding to come to the Court and depose in the matter.

19. I may say at the outset that the necessity of examining Bharti Yadav as a material witness, has already been established. She has been named as prosecution witness. However, much before she could be examined, she left this country and as per the information available, she is pursuing her studies in U.K. Initially when prosecution could not procure her attendance in spite of efforts made, she was dropped as a witness in this case. However, the complainant challenged this move of the prosecution by filing Criminal Revision Petition in this Court. Vide detailed judgment dated 3rd October 2005 this Court held that she is an essential and important witness in the prosecution case and that to drop her at this stage would damage the case resulting in failure of justice. Order of the Trial Court permitting the prosecution to drop her as witness was labelled as one that does not justify the ends it seeks to achieve. thereforee, this Court gave direction that Ms. Bharti Yadav may be examined in accordance with law. While holding so, the Court, inter alia, recorded as under:

7. It appears to me that the trial court as also the High Court has repeatedly held in various orders that this witness, Ms. Bhati Yadav, is material and an essential witness for the prosecution. Her deposition will have an important bearing on the outcome of the trial. In that view of the matter, the prosecution not being able to secure her presence, is an act of despair knowing fully well that its case would suffer. Surely, an act of despair cannot be one which advances the ends of justice.

20. In view of the alleged relationship between the deceased and Ms. Bhati Yadav, evidence in support which has been produced by the prosecution and discussed in nutshell above, it is obvious that she is a material witness and can shed much light on the case. Why she has been avoiding to appear and depose is intriguing. She has shown her willingness to depose if video conferencing is arranged which request has already been rejected by this Court on an earlier occasion. The apparent reason given, namely, if she comes to India, media would haunt her, is not convincing. In order to appreciate the contention of the prosecution, we shall have to consider sociological conditions in which she is as that tends to influence psychological behavior of a person. The family and family members play important role in the bringing up of a child. The psychological theory has long stressed the link between parent-child interaction and emotional development of the individual. Other family members, including siblings also play important role in the process. As per sociological theory, there are two broad patterns of socialisation of an individual. One pattern, oriented towards obedience, is called 'repressive socialisation'. The other, oriented towards gaining participation of the child, is known as 'participatory socialisation.' In an Indian society a girl child is more particularly influenced by other family members in her decision-making. Male members and particularly elder brothers tend to play authoritative role in the upbringing of the girl child in a family. At the same time we also find some shift in this regard in recent times. One of the reasons is the education of a girl child and in the process coming in contact with other social groups in the society like teachers, friends etc. Interaction of an adult child with other groups, including peer groups shape and develop his/her personality and the individual may undergo great changes in his/her self-conception, habits and values. thereforee, if a child is totally subjugated, she would remain under the command of her family members. On the other hand, if she has acquired some independent thinking, it may bring about a situation of conflict between her and her family. Because of this conflict, she would be in a dilemma as to whether to go by the wishes of her family members or be governed by his/her own preferences. If what is stated by the prosecution is correct, namely, Bharti Yadav was having love affair with Nitish Katara and they wanted to marry but their relationship was not palatable to Bharti's family and particularly the petitioner herein, such a conflicting situation is bound to

arise. There is going to be an inner conflict as far as Bharti's deposition before the Court is concerned. Such conflict is powerfully illustrated by the story of Abraham, commanded by God to kill his son Isaac. Abraham's dilemma was that he felt love for God and for his son, and yet he was apparently required to betray one of them. How far was his obedience to God supposed to go? Possibility of this conflict situation in the mind of Bharti cannot be ruled out in the facts of this case. This coupled with the fact that there is a strong possibility of the petitioner influencing and/or intimidating her, as discussed hereinafter, would afford a good ground to reject this bail application at this stage and till she is examined.

21. I have ventured into this Sociological Jurisprudence and the reason for the aforesaid discussion is obvious. It is this. To understand whether Bharti Yadav, in the situation in which she is placed, would be under the influence of her family members and the petitioner in particular. Sociological hypothesis enumerated above would provide an answer in the affirmative. However, I am not going on the basis of hypothesis alone. There are certain events which have taken place in this case persuading me to take this view. As mentioned above, at crucial stage of the case when she was to appear as witness she goes to U.K. Apparent reason given is that she was to undertake higher studies. Still, she could come to India for giving her deposition in this case. The learned ASJ in her order dated 29th July 2006 has elaborated this aspect and I need not burden this order with all those details. Reading of few orders passed by the Trial Court is sufficient to bring the point to the surface. On 11th May 2006, the Trial Court recorded in its order as under:

Counsel for the accused Vikas Yadav has requested for adjournment of 2/3 days since they are considering the suggestion of the Court given on the last date of hearing for assistance in the production of the witness Bharti Yadav for her evidence making all necessary arrangement for her security.

22. Thus, counsel for the petitioner took time to consider as to whether he would be producing Bharti Yadav for her evidence. On 22nd may 2006 Mr. D.P. Yadav, father of the petitioner and Bharti Yadav appeared before the Trial Court and following order was passed:..Shri D.P. Yadav has submitted that he had gone abroad and had met his daughter at London in a function arranged by one of his

friend and he discussed the matter with her at length. He further submits that the witness Bharti Yadav told him that since she is being humiliated every day due to the media reports in the press against her. As such she is not in a position to appear before the Court. At this, Sh. D.P. Yadav has been directed to disclose the address of Bharti Yadav, but he has submitted that he is not aware of the same and she was called to attend the function by his friend. He has been asked to disclose the address of his friend, which he refused on the pretext that he does not remember. He is further directed to give the details of all these facts by moving an appropriate application to which he has again refused.

23. Stating that he did not know the exact address where Ms. Bharti Yadav was staying was clearly pretentious. This pretension was exposed when on 22nd July 2006 an application was moved by one Sh. Bharat Singh, maternal uncle of Bharti Yadav and her representative in U.K., where again request was made that she be examined either by way of video conferencing or commission.

24. Normal human conduct coupled with aforesaid events cannot rule out the possibility that Ms. Bharti Yadav is under the influence of the petitioner and other family members. If for this reason she has not appeared in the Trial Court for all these years, can the petitioner, her brother, be allowed to take the plea that since it is not certain as to when she would appear and give a deposition and, therefore, he cannot be allowed to remain in incarceration? The answer would be an emphatic 'No'. All other witnesses were examined in the year 2004. Only Bharti Yadav remains to be examined. Prosecution witness would have been closed much earlier had she co-operated or, to put it more bluntly, had the petitioner and his family members co-operated in ensuring Bharti's presence. This conduct comes in the way of the petitioner on two counts. First, if there is a delay in recording the statement of Bharti, which can be possibly attributed to the petitioner and his family members, the petitioner cannot take advantage of his own wrong. Second, in view of sound possibility of the witness being intimidated, the petitioner's plea for bail cannot be considered till Bharti is examined. As pointed out above, Bharti may already be in dilemma. Release of the petitioner at this stage, who may exert further pressure on her, is likely to influence her testimony.

25. Be as it may, in view of the last order passed by the learned Trial Court on 29th July 2006, there is some hope for the light at the end of the tunnel. With the receipt of the fax by the Trial Court from Bharti Yadav, which has been established to be genuine pressure of contemplation of proceedings under Section 82/83 Cr.P.C., it is hoped that she would appear in the Trial Court in very near future for giving her testimony. thereforee, looking into the gravity of the offence and the fact that one of the most important witnesses has to be examined which has been delayed because of the petitioner in my view, I am of the opinion that the petitioner is not entitled to bail at this stage.

26. Apart from the aforesaid reasons why petitioner is not entitled to bail even when Vishal Yadav was granted bail, one difference which stands out is that it is the intimidation which is much more and directly attributed to him in contra-distinction to that of Vishal Yadav. This would be apparent from the following testimony of PW-30 Neelam Katara:

Nitish had told me that Bharti was planning to tell her father about their intention to marry and that her brother knew about her intention but they were averse to her marriage with him but she was confident that she would be able to convince her father. I was told by my son that Bharti was waiting for an opportunity time and she was waiting her brother to go out of town after the election and his marriage was fixed as far as I know for 6th March and she was hopeful that after marriage goes out she would be able to convince her father and would be able to talk to her. I asked my son as to what was the objection being raised and I was told that there were two objections, that they will marry the girl in their own community and secondly because our family was Govt. servant and they consider the service class to be poor class. I also had my own objection and after considering pros and cons I told my son that it would not be a suitable marriage but my son was adamant. I had told my son about the possible interference and that he (brother of Bharti was already facing criminal case etc.) but my son was looking everything through tinted glass and was adamant in marrying her.

27. The aforesaid testimony brings out the strong probability and threat perception from Vikas Yadav as the reference to 'brother' is to him. This statement was

recorded on 30th April 2003, i.e. much before Vishal Yadav was released on bail.

28. These were the reasons which persuaded me to reject the bail application of the petitioner when order dated 11th August 2006 was passed.

29. I have heard counsel for both the parties at length. It is 1.21 p.m. After lunch there are Special Bench matters and, therefore, I would not be in a position to dictate the detailed order today. However, after considering the respective submissions, I am of the view that the petitioner does not deserve bail at this stage.

30. These applications are dismissed.

Reasons to follow.

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