

# **Nirmalkumar vs State on 10 May, 2011**

**Author: Ks Jhaveri**

**Bench: Ks Jhaveri**

Gujarat High Court Case Information System

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CR.MA/14680/2010

12/ 12 JUDGMENT

IN  
THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL  
MISC.APPLICATION No. 14680 of 2010

For  
Approval and Signature:

HONOURABLE  
MR.JUSTICE KS JHAVERI

=====

1

Whether

Reporters of Local Papers may be allowed to see the judgment ?

2

To be

referred to the Reporter or not ?

3

Whether

their Lordships wish to see the fair copy of the judgment ?

4

Whether

this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5

Whether

it is to be circulated to the civil judge ?

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NIRMALKUMAR

TULSIRAM RAKHECHA - Applicant(s)

Versus

STATE

OF GUJARAT & 1 - Respondent(s)

=====

Appearance

:

MR

HIMANSU M PADHYA for

Applicant(s) : 1,

MS CHETNA M SHAH, ADDL PUBLIC PROSECUTOR for

Respondent(s) : 1,

MS. KRUTI M SHAH for Respondent(s) :

2,

=====

CORAM

:

HONOURABLE

MR.JUSTICE KS JHAVERI

Date  
: 10/05/2011

ORAL  
JUDGMENT

1. Ms. Kruti Shah, learned advocate for the respondent no. 2-accused no. 1 was not present when the matter was called in the first round. Thereafter, when the matter is called on in the second round, Ms. Kruti Shah, learned advocate for the respondent no. 2-accused has requested for time to file affidavit-in-reply. This court was not inclined to grant the said request in view of the fact that on the last date of hearing i.e. on 06.05.2011, time was granted to Ms. Shah to file reply which has not been done yet. The court on 06.05.2011 dismissed the other cognate matters qua co-accused but had specifically stated that the present matter qua accused no. 1 required serious consideration and that the court was inclined to cancel the bail. However, as a last chance, time was granted to Ms. Shah to file reply.

1.1 Ms. Shah has tried to make an excuse by saying that she had to attend a funeral of a close relative on 09.05.2011. However, even though time was granted way back on 06.05.2011, affidavit-in-reply was not filed. This court when directed Ms. Shah to place unaffirmed copy on record, she could not do so and she stated that the reply has not been typed yet as the accused could not be contacted in view of the ongoing Chartered Accountancy examinations for which he appears. This Court is of the opinion that all such excuses and grounds are only an attempt to prolong the matter in view of the ensuing vacation. Moreover, Ms. Shah ought to have taken the present case seriously when bail was to be cancelled and she ought to have been on guard in respect of filing reply instead of waiting till the eleventh hour.

1.2 Ms. Shah remarked that this court has been granting time to the applicant on several occasions and is not granting time to the accused. This court has from 02.05.2011 when this matter along with other connected matters was placed made it clear that the accused no. 1 ought not to have been released on bail. Accordingly, on 06.05.2011 the other co-accused's bail were not cancelled and the said matters were dismissed. However, this matter was specifically kept today for hearing which was conveyed to Ms. Shah. In spite of the said fact, she has not filed reply and still seeks for time. This court is therefore not at all inclined to grant further time, more particularly when the accused is not

entitled to be released on bail in such a serious crime. Hence the request for grant of time is rejected and the matter is heard on merits.

2. The present application has filed praying to cancel the bail granted to respondent No. 2 by order dated 20.10.2010 passed in Criminal Misc. Application No. 2372 of 2010 by 3rd Additional Sessions Judge, Surat.

3. The respondent No. 2 along with other co-accused was arrested in connection with C.R. No. I-169 of 2010 registered with Khatodara Police Station for the offence punishable under section 304(B), 498(A), 120(B) and 114 of Indian Penal Code. The respondent no. 2 is the original accused no. 1 and husband of the deceased lady Mukta.

4. The niece of the complainant-present applicant was married to the respondent no. 2 on 29.06.2009. It is the case of the prosecution that the respondent no. 2 in connivance with other co-accused used to harass the deceased with dowry demands and since such demands were not honoured, Mukta was treated cruelly physically and mentally as a result of which she committed the alleged suicide on 29.07.2010 at the residential premises of the applicants. It is the case of the complainant that the family members in conspiracy killed his niece by pushing her from the 9th floor of their flat.

5. Mr. Padhya, learned advocate appearing for the applicant-complainant submitted that looking to the statement of Nortanlal Tulsiram Rakhecha-father of the victim, the harassment for car and five lakhs rupees by her husband and in-laws is clearly borne out. It is clearly stated that the victim had frequently visited her parental house complaining about the ill-treatment meted out to her by the respondent no. 2 and other family members. He submitted that the marriage span of the victim and the respondent no. 2 is only of one year and during this short span the victim was harassed to the extent of killing her.

5.1 Mr. Padhya submitted that the trial court has misread the evidence on record and has erred in arriving at a conclusion that looking to the case papers the incident in question seems to be a case of suicide and not dowry death. He submitted that the case on hand clearly falls under the ambit of section 304(B) of the IPC which calls for severe punishment and considering the same the accused ought not to have been released on bail.

5.2 Mr. Padhya has drawn the attention of this court to the post mortem report and the injuries sustained by the victim which show that the injuries were ante mortem. He submitted that the trial court has not taken note of these piece of evidence and instead on vague observations granted bail to the accused. In fact all the ingredients which constitute to an offence under section 304(B) of IPC are borne out and even then the trial court has not considered the said fact.

5.3 In support of his submissions, Mr. Padhya has relied upon a decision of the Apex Court in the case of Puran vs. Rambilas and Another with Shekhar and Another vs. State of Maharashtra and Another reported in AIR 2001 SC 2023. He, submitted that as stated in his application, if the respondent no.2-accused is allowed to remain on bail, it would cause prejudice.

6. Ms. Kruti Shah, learned advocate appearing for the respondent no. 2-accused no. 1 has supported the order of the trial court and contended that Looking to the contents of the complaint, it appears that the complaint is vague and it cannot be said that there is a prima facie case against the applicants under section 304(B) of IPC.

6.1 An attempt is made by Ms. Kruti Shah to make this Court believe that the maximum punishment for conviction under Section 304(B) of IPC is seven years. This contention has been controverted by Ms. Chetna Shah, learned APP by drawing the attention of this Court to the provision of Section 304(B) of IPC whereby it is categorically set out that the minimum punishment for conviction under the said offence is seven years, which may extend to life imprisonment.

6.2 Ms. Shah has submitted that the role of all the accused in the present case is equal and therefore if the other accused in cognate matters are still on bail, this court may not cancel the bail granted to the present respondent no. 2.

6.3 After making submissions on merits, Ms. Kruti Shah has requested this court to keep the matter post recess so as to enable her to cite judgements in support of her submissions. This court does not think it fit to accede to her request and keep back the matter when the arguments are over and the matter is ready for dictation of judgement thereby disturbing the entire chain of matters which are listed for hearing. When the learned advocate was aware about the view of this Court in the case of the present respondent-accused no. 1 she ought to have prepared herself so as to present proper facts and citations before this court. However, as stated hereinabove it appears that the learned advocate had already prepared her mind to take an adjournment.

7. At the outset it would be relevant to peruse Section 304(B) of the Indian Penal Code which is the main section charged against the accused and the same reads as under:

"304B.

Dowry death.- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

7.1 From the overall facts and circumstances of the case, it appears that the trial court has not given cogent and valid reasons for enlarging the respondent no. 2 on bail. The trial court has simply stated that the accused is young and is doing business in Surat and therefore there are not reasons for him to abscond and since he is from Rajasthan he shall not tamper with evidence or threaten the

witnesses. Apart from these aspects the trial court has not discussed any detail which has weighed with it for releasing the accused no. 1 on bail. Certain facts have been ignored by the trial court and certain observations have been made which are contrary to the evidence on record while passing the impugned order. However, this court is not entering into the details of those things otherwise the same may prejudice the case.

7.2 The post mortem report more particularly Sl. No. 18 mentions that the injuries which were 13 in number are ante mortem and have occurred within 24 hours before the death of the victim. This aspect cannot be lost sight of and is very crucial piece of evidence in the present case. The trial court seems to have ignored all these aspects. Moreover, the complaint reveals that specific demands for car and cash were made and the said demands increased after the respondent no. 2-accused no. 1 failed in his Chartered Accountancy examinations.

8. In the case of State of Gujarat V. Lalji Popat, reported in 1988(2) GLR 1073, this Court has laid down the factors which are required to be taken into consideration for deciding a bail application:

[1] The nature of the charge is the vital factor and the nature of evidence is also pertinent.

[2] The punishment to which the accused may be liable if convicted.

[3] While considering the question of granting bail under sec.439(1) of the Criminal Procedure Code, the Court should take into consideration the provisions of Sec.437(1) in spite of the fact that under Sec.439(1) the High Court and Sessions Court have wide jurisdiction to grant bail.

[4] The nature and gravity of the circumstances in which the offences is committed, say highway robbery or decoity, gangrape, murder or murders because of group rivalry, attack by one community on other community or such other cases.

[5] The position and the status of the accused with reference to the victim and the witnesses say in case of burning of house, wife, witnesses may be neighbours, their evidence might be tampered with by any means.

[6] The reasonable possibility of the presence of the accused not being secured at the trial.

[7] Any likelihood of tampering with the witnesses.

[8] jeopardising his own life being faced with the grim prospect of possible conviction in the case.

[9] The prospect of victim or his relatives indulging in private retribution who feel helpless and may believe that law may not protect them.



[10] The larger interests of public, society or the State.

[11] Similar other circumstances depending on facts and peculiarity of each case.

8.1. Applying the aforesaid tests laid down by the Apex Court and looking to the facts and circumstances of the case, it can be said that the Sessions Court granted bail to the respondent no.2 without considering the relevant factors more particularly the fact that section 304(B) is charged which attracts a minimum punishment of seven years and which may extend to life imprisonment. It appears that the bail was granted to the accused in wrong exercise of discretion by the trial court.

9. Moreover, the decision of the Apex Court in the case of *Puran vs. Rambilas* (supra) is squarely applicable to the facts of the present case. The Apex Court in a case where sections 498A and 304A were disclosed observed that the High Court has noted that evidence prima facie indicated demand of dowry and considering the nature of injuries and other circumstances, the bail granted to the accused therein was cancelled by the High Court and the same was not interfered with by the Apex Court. The Apex Court in paras 9 and 12 observed that generally speaking the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. However, these instances are merely illustrative and not exhaustive. One such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of the nature like bride burning and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offence are on the rise and have a very serious impact on the Society. Therefore, an arbitrary and wrong exercise of discretion by the trial court has to be corrected and the bail granted to the respondent no. 2 is required to be cancelled.

[Emphasis Supplied]

10. As regards the contention regarding co-accused's bail not cancelled and parity to be considered, this court is of the view that the role of the husband must be taken very seriously. Moreover, the role of each and every accused is to be seen in its own perspective. In the present case, the victim is said to have died at around 5.00 am in which case the presence of other accused prima facie is difficult to be established at this stage other than the husband. Therefore, this court thought it fit not to exercise discretionary powers in the case of other co-accused at this stage but the case of the husband has to be dealt with seriously considering his prima facie involvement in the entire offence right from the beginning. The decision of this court in the case of *State of Gujarat vs. Alpeshbhai Navinbai Patel* reported in 2004(1) GLH 754 shall also be applicable on the facts and circumstances of the present case.

11. In view of the aforesaid discussions, this court is of the view that when the trial court has ignored the material piece of evidence placed on record which prima facie establish the role of the accused no. 1 and whilst granting bail some reasons on merits for prima facie concluding why bail was being granted ought to have been indicated. In the absence of same, for securing the ends of justice this court thinks it fit to interfere with the impugned order which has caused miscarriage of justice and is unjustified. therefore, in light of the discussion hereinabove, the Court is of the opinion that the present application deserves to be allowed.

12. Accordingly, this application stands allowed. The impugned order dated 20.10.2010 passed in Criminal Misc. Application No. 2372 of 2010 by 3rd Additional Sessions Judge, Surat is hereby set aside and the bail granted to the respondent-accused pursuant to said order shall stand cancelled. The respondent no. 2-accused no. 1 shall surrender to police custody within 48 hours. The Investigating Officer shall take necessary steps in accordance with law for the arrest of the respondent-accused. Bail bond and security shall stand cancelled. Rule is made absolute to the aforesaid extent.

(K.S. JHAVERI, J.) FURTHER ORDER After the aforesaid order was dictated, learned counsel for the respondent-accused, Ms. Shah has requested for stay of the aforesaid order to enable the accused to approach the higher forum. Request cannot be accepted in view of the fact that staying the present order shall mean re-operation of the order of the trial court which is otherwise erroneous and palpably illegal. Hence the request is rejected.

(K.S. JHAVERI, J.) Divya//