State Of Gujarat vs Lalji Popat And Ors. on 2 April, 1988

Equivalent citations: (1988)2GLR1073

Author: M.B. Shah

Bench: M.B. Shah

JUDGMENT

M.B. Shah, J.

1. This group of applications are filed for cancellation of bail granted by Mr. I.H. Parikh, Additional Sessions Judge, Junagadh.

2. I has been pointed out in this group of applications that Mr. Shah, Additional Sessions Judge, has either ignored the order passed by his colleague i.e. another Additional Sessions Judge rejecting the bail application by giving some irrelevant reasons. In one case he has ignored the order passed by this High Court rejecting the bail applica-tion. He has narrated the criteria laid down by this Court as well as by the Hon'ble Supreme Court but he has not applied the same to the facts of the case or ignored the facts of the case.

3. The particulars of the cases decided by this judgment wherein all the accused are involved in offences punishable under Section 302 and/or other sections and who are released on bail by Mr. I.H. Shah, Additional Sessions Judge, Junagadh, are tabularized as under:

Sr. No.	Cri. Rev. Misc. Appln. No. which is rejected by the	Cri. Misc. Appln. No by order, the other	Appln. No. & the date of order, the Additional Sessions Judge or by the High Court.
1.	(i) 369 of 1987 Applica- tion granted by the info- Ment.	292 of 1987 dt. 29-8-1987 in respect of accused Nos. 1, 2 & 3 and rejected in respect of accused Nos. 4, 5 & 6	232 of 1987 by the State dt. 13-7-1987 Against this order Misc. Cri. Appln. No. 1606 of 1987 was filed before the High Court and High Court has rejec- ted it by the judgment & order dt. 24-7-1987.
	(ii)	3040 of 1987	456 of 1987 -do-

		dt. 18-12-1987 Remaining accused are released.	
2.	6 of 1988	420 of 1987 Releasing the remaining accused-opponents.	297 of 1987 filed by and 307 of 1987 filed by applicants Nos. 5 & 6 which were rejected by order dt. 30-9-1987 and 393 of 1987 filed by applicants which was rejected on 3-11-1987.
3.	9 of 1988	436 of 1987 dt. 8-12-1987	373 of 1987 rejected on 12-10-1987.
4. (i)	7 of 1988 by State with 36 of 1988 by the informant.	432 of 1987 dt. 8-12-1987	412 of 1987 rejected on 17-11-1987.
(ii)	37 of 1988	475 of 1987 dt. 2-1-1988	-do-
5. (i)	14 of 1988	439 of 1987 dt. 8-12-1987 Application accused Nos. 3,4,7,9 & 10 and rejected in respect of accused Nos. 1, 2, 5, 6 & 8.	-do-
(ii)	15 of 1988	458 of 1987 dt. 17-12-1987 Releasing the remaining accused except one.	-do-

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The first group consists of Criminal Revision Application No. 369 of 1987 with Criminal Revision Applications Nos. 383 of 1987 and 3040 of 1987. In these revision applications FIR was lodged against the 7 persons by Bhaya Bhima, the son of the deceased. It is alleged that there was some dispute with regard to the purchase of the agricultural land and when the informant and the injured persons were constructing a hedge, the 7 accused went at the place of the incident with different weapons as stated in the FIR. The accused first injured Vala Deva who received in all 12 injuries as per the medical report. Thereafter the father of the informant i.e. the deceased Bhima Punja was injured. As per the post-mortem report the deceased was having 24 injuries.

4. The accused filed Miscellaneous Criminal Application No. 232 of 1987 for releasing them on bail. The Additional Sessions Judge, Junagadh, by his judgment and order dated 13th July, 1987 granted the bail application of only accused No. 1 and rejected the bail applications of accused Nos. 2 to 7. The learned Additional Sessions Judge has taken into consideration the FIR as well as the other police papers which were produced before him at the time of hearncg of the application. He has also taken into consideration the fact that on the person of deceased Bhima Punja 24 serious injuries

were found and injured Vala Deva was having 12 external injuries and was also having fracture of tibia fibula on his legs. He further considered that all the accused are involved in the offences punishable under Sections 147, 148, 302 & 307 of the Indian Penal Code and that there was prima facie case against them. He relied upon the affidavit of complainant Bhaya Bhima and witnesses Maniben Vala, Kadviben Bhima and Bharat Devji that if the accused are released on bail, they would not be in a position to come out of their field and that the accused are likely to tamper with the witnesses and rejected the bail application. Thereafter accused Nos. 2 to 7 named (1) Natha Anand, (2) Kachra alias Amratlal Ravji, (3) Lalji Popat, (4) Vallabh Thakarshi, (5) Ramesh Ravji and (6) Ravji Laxman filed Miscellaneous Criminal Application No. 1606 of 1987 before this Court. By the order dated 24-7-1987 J. P. Desai, J. dismissed the said application passing the following order:

> Heard Mr. S.S. Shah for the petitioners. Having gone through the copy of the complaint produced by the petitioners and the reasons recorded by the learned Sessions Judge while refusing bail to the petitioners, no case is made out for releasing the petitioners on bail. Hence, the petition is dismissed at the admission stage.
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> this Court has, therefore, approved the reasons given by the learned Additional Sessions Judge in his judgment and order dated 13th July, 1987.

5. In spits of the aforesaid orders, one by the High Court and another by Additional Sessions Judge Junagadh, by his judgment and order dated 29-8-1987 the learned Additional Sessions Judge has partly allowed the Miscellaneous Criminal Application No. 292 of 1987 and has released applicants Nos. 1 to 3 of that application i.e. (1) Laiji Popat, (2) Vallabh Thakarshi and (3) Amratlal @ Kara Ravji. Thereafter after few days he entertained Miscellaneous Criminal Application No. 456 of 1987 filed by the remaining accused and released them on bail by his judgment and order dated 18th December, 1987.

6. It should be noted that before the Additional Sessions Judge who decided the Miscellaneous Criminal Application No. 232 of 1987 at the initial stage, all the papers pertaining to investigation were produced and the relevant papers were considered by the learned Additional Sessions Judge while rejecting the application. To this Court also some papers were shown and this Court has rejected the bail application. In spite of this, without there being any new material or change of circumstances it seems the learned Judge has entertained the applications and released the accused who are involved in a serious offence on bail by stating that the investigation is now over and the case is committed to the Sessions Court. This can hardly be said to be new ground for revising the order passed by the Court of co-ordinate jurisdiction or to ignore the order passed by this Court.

7. Mr. H.L. Patel, learned Advocate appearing on behalf of the accused in the aforesaid revision applications submitted that even though the offence is serious, yet this Court should not interfere at this stage because the accused are already released on bail and bail should not be cancelled unlesst here is evidence on record that the accused are likely to tamper with the evidence or are likely to abscond.

8. In all the aforesaid matters, the learned Advocates who are appearing on behalf of the accused vehemently relied upon the decision of the Supreme Court in the case of Bhagirathsinh Jadeja v. State of Gujarat , and submitted that unless the Court arrives at the conclusion that the accused would not be readily available for their trial and they were likely to abuse the discretion in their favour by tampering with the evidence, the Court should not cancel their bail which is granted by the Sessions Court by exercising its discretion. They further submitted that the approach of the Court in the matter of bail is to see that the accused should not be detained by way of punishment and if the presence of the accused could be readily secured at the time of trial, then the order of bail should not be cancelled.

9. It is true that normally this Court would be slow in interfering with the discretionary order granting bail to the accused. It is equally true that one of the paramount considerations for the Court at the time of cancelling bail would be whether the accused would be readily available for their trial and whether they are likely to abuse the discretion granted in their favour by tampering with the evidence. But at the same time the Court has also to consider the other relevant aspects in the matter before granting bail. The Court is required to exercise the discretion of granting bail judicially after following the well laid down principles. If the Sessions Court has ignored the said criteria of deciding bail application either intentionally or arbitrarily, then this Court has jurisdiction to set aside the said order. It is not the law that once the accused is released on bail on erroneous ground, till he tampers with the evidence or till he absconds, the High Court has no authority to interfere with the said order. In each case the Court is required to consider the reasonable apprehension of the prosecuting agency depending upon the facts of each case. The Sessions Court is subordinate to the High Court and it is always open to the State Government to point out to the High Court that the order passed by the Sessions Court is arbitrary or illegal one or it suffers from any serious infirmity and the High Court would have jurisdiction either under Section 439(2) or Section 482 to quash and set aside the said order.

10. The criteria for deciding bail application and the jurisdiction of the High Court would be clear from the catena of Supreme Court decisions and of this Court which are referred to hereinafter.

11. In the case of T.H. Hussain v. M.P. Mondkar , the Supreme Court has held that the High Court has inherent power to cancel the bail granted to a person accused of a bailable offence and in a proper case such power can be exercised in the interest of justice. The Court has further observed that if a fair trial is the main objective of the Criminal Procedure, any threat to the continuance of a fair trial must be immediately arrested and the smooth progress of a fair trial must be ensured and this can be done, if necessary, by the exercise of inherent power. The Court has further held that if the accused person, by his conduct, puts the fair trial into jeopardy, it would be the primary and paramount duty of the Criminal Courts to ensure that the risk to the fair trial is removed and Criminal Courts are allowed to proceed with the trial smoothly and without any interruption or obstruction; and this would be equally true in cases of both bailable as well as non-bailable offences. The Court has further held that by exercising inherent power the Court can cancel the bail.

12. In the case of State v. Captain Jagjit Singh , the Court has laid down certain guidelines while considering the bail application and set aside the bail granted by the High Court by holding that the

High Court has not taken into consideration the relevant factors and the fact that the matter was relating to non-bailable offence under Section 3 of the Indian Official Secrets Act, 1923. The Court has observed that when prima facie case has been found against the accused that he is involved in a non-bailable offence, while granting bail the Court should take into consideration (i) the nature of the offence, (ii) if the offence is of a kind in which bail should not be granted considering its seriousness, the Court should refuse bail even though it has very wide power under Section 498 of the Criminal Procedure Code (at-present Section 439 of the new Criminal Procedure Code). The Court has further observed that while granting bail the Court should take into account the various considerations such as (i) the nature and seriousness of the offence, (ii) the character of the evidence, (iii) circumstances which are peculiar to the accused, (iv) a reasonable possibility of the presence of the accused not being secured at the trial, (v) reasonable apprehension about the witnesses being tampered with, (vi) the larger interests of the public or the State and (vii) similar other consideration which arise when a Court is asked for bail in a non-bailable offence. The aforesaid decision of the Supreme Court is all throughout followed uptil now and, therefore, while granting bail the Court should take into consideration all the aforesaid criteria laid down by the Supreme Court. The trial Court or this Court cannot ignore the criteria laid down by the Supreme Court while granting bail and all these factors should jointly be taken into consideration while deciding the bail application. Therefore, merely because the presence of the accused can be secured at the trial, that is not the only factor which is required to be considered while granting bail. Following the aforesaid decision this Court in the case of State v. Lohana Lakhu , cancelled the bail granted by the Additional Sessions Judge. The Court held that even though under Section 498 of the Criminal Procedure Code the powers of the High Court in the matter of granting bail are very wide where the offence is non-bailable, such considerations as laid down by the Supreme Court in the aforesaid case are required to be taken into consideration and the Court should not brush aside the effect of Section 497(1) (at-present Section 437(1) of the new Criminal Procedure Code) about not releasing the persons reasonably believed to be guilty for an offence punishable with death or imprisonment for life and the proviso thereto. The Court also held that the mere fact that the accused is not likely to abscond would not be a sufficient criterion for releasing the accused on bail in a case of such character.

13. The same principle is laid down by the Supreme Court in the case of Gurcharan Singh v. State (Delhi Admn.) AIR 1978 SC 179. In this case the Court has considered the jurisdiction of the High Court under Section 439 of the Criminal Procedure Code and has held that if the State Government is aggrieved by the order of Sessions Judge granting bail and there are no new circumastances that have cropped up except those already existed, 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 bail. This position follows from the subordinate petition of the Court of Session vis-a-vis the High Court. In this view of the matter, even if there are no new circumstances, the High Court has jurisdiclion under Section 439 to set aside the order passed by the trial Court granting bail if the. said order is illegal and is passed without taking into consideration various criteria laid down by the Court in deciding the bail application. The Supreme Court further held that it would be legitimate to suppose that the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting bail under Section 439(1) of the Criminal Procedure Code by taking into consideration the provisions of Section 437(1) and also the nature and gravity of the circusmatances in which the

offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood of the accused fleeing from justice; of repeating the offence jeopardising his own life being faced wiih a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many variable factors, cannot be exhaustively sit out.

14. The Court further observed that ordinarily the High Court would not exercise its discretion to interfere with an order of bail granted by the Sessions Court in favour of an accused unless the order was vitiated by any serious infirmity. Thereafter the Court held that in that case the Sessions Judge did not take into proper account the grave apprehension of the prosecution that there was a likelihood of the appellants tampering with the prosecution witnesses and further held that in the peculiar nature of the case revealed from the allegations and the position of the appellants in relation to eye-witnesses it was incumbent upon the Sessions Judge to give proper weight to the serious apprehension of the prosecution with regard to the tampering with the eye-witneses. In paragraph 29 the Court has held as:

> We may repeat the two paramount considerations, viz. likelihood of the accused fleeing from justice and his tampering with prosecution evidence relate to ensuring a fair trial of the case in a Court of Justice. It is essentia] that due and proper weight should be bestowed on these two factors apart from others. There cannot he an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.

15. The aforesaid ratio nowhere lays down that while considering the bail application the Court should only consider whether there was likelihood of the accused fleeing from justice and tampering with the prosecution evidence. The Court has emphasized that due and proper weight should be bestowed on these two factors apart from others and there cannot be any inexorable formula in the matter of granting bail. The Court thereafter held that the following observations made by the Supreme Court in the case of State v. Captain Jagjit Singh AIR 1962 SC 253, equally apply to a case under Section 439 of the new Code and the legal position is not different under the new Code:

> It (the High Court) should then have taken into account the various considerations, such as, nature and seriousness of the offence, the character of the evidence circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of the witnesses being tampered with the larger interests of the public or the State, and similar other considerations, which arise when a Court is asked for bail in a non-bailable offence. It is true that under Section 498 of the Code of Criminal Procedure, the powers of the High Court in the matter of granting bail are very wide; even so where the offence is non-bailable, various considerations such as those indicated above have to be taken into account before bail is granted in non-bailable offence.

This clearly means that while granting bail all relevant factors as indicated above are to be taken into consideration. Further, in the case of G. Narasimhulu v. Public Prosecutor A.P. AIR 1978 SC 429, the Supreme Court again considered how the judicial discretion in deciding the bail application should be exercised. The Court held that the nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue. Bail discretion, on the basis of evidence about the criminal record of a defendant, is therefore not an exercise in irrelevance. The Court also held that reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice to the individual involved and society affected. In my view, the following observation of the Supreme Court is overlooked by the Additional Sessions Judge in number of cases:

Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal Rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the court punishing him with imprisonment, in this perspective, relevance of considerations is regulated by their nexus with the likely absence of the applicant for fear of a severe sentence, if such be plausible in the case. As Erle J. indicated, when the crime charges (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the court may reasonably presume, some evidence warranting that no amount of bail would secure the presence of the convict at the stage of judgment, should be enlarged (Mod. Law Rev. p. 50 ibid, (1852) 1E.&B. 1). Load Campbell. CJ concurred in this approach in that case and Coleridge J. set down the order of priorities as follows:

I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his appearance at trial...It is a very important element in considering whether the party, if admitted to bail, would appear to take his trial; and I think that in coming to a determination on that point three elements will generally be found the most important: the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted. In the present case, the charge is that of wilful murder; the evidence contains an admission by the prisoners of the truth of the charge, and the punishment of the offence is, by law, death.' (Mod. Law Rev. ibid. pp. 50-51) It is thus obvious that the nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

16. Further, in the case of Delhi Admn. v. Sanjay Gandhi , the Supreme Court held that Section 439(2) empowered the High Court or the Court of Session to direct any person who has been released on bail to be arrested and committed to custody and cautioned that refusal to exercise that wholesome power in, such cases, few though they may be, will reduce it to a dead letter and will suffer the Courts to be silent spectators to the subversion of the judicial process. It would be worthwhile to reproduce paragraph 25 of the said judgment:

> The power to cancel bail was exercised by the Bombay High Court in Madhukar Purshottam Mondkar v. Talab Haji Hussain where the accused was charged with a bailable offence. The test adopted by that Court was whether the material placed before the Court was 'such as to lead to the conclusion that there is a strong prima facie case that if the accused were to be allowed to be at large he would tamper with the prosecution witnesses and impede the course of justice'. An appeal preferred by the accused against the judgment of the Bombay High Court was dismissed by this Court. In Gurcharan Singh v State (Delhi Administration). 1978 Cri. LJ 129 at p. 137: (AIR 1978 SC 179 at p. 187) while confirming the order of the High Court cancelling the bail of the accused, this Court observed that the only question which the Court had to consider at that stage was whether 'there was prima facie case made out, as alleged, on the statements of the witnesses and on other materials', that 'there was a likelihood of the appellants tampering with the prosecution witnesses'. It is by the application of this test that we have come to the conclusion that the respondent's bail ought to be cancelled.

17. In the case of Shahzad Hasan Khan v. Ishtiaq Hasan Khan AIR 1987 SC 1618, with regard to granting bail on the ground of delay in trial the Court held that this cannot be helped if a litigant is encouraged to make half a dozen applications on the same point without any new factor having arisen after the first bail application was rejected. The Court further held that while granting bail application the Court should consider that apart from the inherent danger of tampering with or intimidating witnesses and aborting case, there was also the danger to the life of the main witnesses or to the life of the accused being endangered as experience of life has shown to the members of the profession and the judiciary. Following further observations of the Court would show that merely because liberty of the accused is involved in cases of detention of the accused during trial, it would not be a ground for releasing the accused on bail:

> No doubt liberty of a citizen must be zealously safeguarded by Court, non-theless when a person is accused of a serious offence like murder and his successive bail applications are rejected on merit there being prima facie material, the prosecution is entitled to place correct facts before the Court. Liberty is to be secured through process law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution. Learned Judge was unduly influenced by the concept of liberty, disregarding the facts of the case.

18. From the aforesaid observations of the Supreme Court in various cases it is crystal clear that while deciding bail application, the Court has to consider all relevant factors including whether the accused is likely to flee or whether he is likely to tamper with the evidence. But these facts are to be taken into consideration along with the relevant factors as laid down by the aforesaid cases. Some observations made in the case of Bhagirathsinh Jadeja v. State of Gujarat , and in the case of Delhi Admn. v. Sanjay Gandhi depend upon the peculiar facts in those appeals before the Supreme Court. In those cases it has been nowhere laid down that other relevant factors are not to be taken into consideration for deciding the bail application.

19. A similar contention was dealt with by this Court in the case of Kanubhai v. Kalabhai [1986(1)] 27(1) GLR 308, wherein this Court has observed as under (at page 310-311):

> 5. Be it noted that in the aforesaid two cases, decided by the Supreme Court, the accased were not charged with the offence of murder. In Delhi Administration's case (supra) popularly known as "Kissa-Khursi-Ka" case, the accused were charged for offences under Sections 409, 435 and 201 read with Section 120-B of the Indian Penal Code while in Bhagirathsinh Jadeja's case (supra), the accused was charged for offence under Section 307 of the Indian Penal Code and Section 135 of the Bombay Police Act and it was an admitted position that the victim had survived the blows administrated by the assailant.
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> 6. As laid down by the Supreme Court, one of the considerations which should weigh with the Court while granting or refusing bail is to see the availability of the accused at the time of trial. More serious the offence, the more likelihood of the accused to escape and not to stand the trial. This can safely be inferred because, if the case in which the accused is charged with serious offence is proved, the stake would be very high. He may even be imprisoned for life or may be ordered to be hanged. Therefore, in such cases, it will surely be one of the relevant circumstances to take into consideration as to with which offence the accused is charged. In the instant case, it is an undisputed position that the charge against the accused is that of offence under Section 302 of the Indian Penal Code.

20. Hence taking into consideration the aforesaid observations of the Supreme Court in the decisions mentioned above, it can be said that following factors are the relevant factors which are required to be taken into consideration for deciding 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 Section 439(1) of the Criminal Procedure Code, the Court should take into consideration the provisions of Section 437(1) in spite of the fact that under Section 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 offence is committed-say highway robbery or dacoity, going rape, 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.

Merely because the accused is the owner of large property, movable, or immaoveable would be no ground to presume that the presence of the accused would be secured at the trial by granting him bail. For this purpose the charge, the nature of evidence by which it is supported and the punishment to which the party would be liable, if convicted, are to be taken into consideration. In cases of highest magnitude of punishment assigned under the law the Court can reasonably presume that no amount of bail was sufficient to secure the presence of convict at the stage of judgment. In some cases accused may leave the country or go underground in such a manner that it becomes difficult to trace him out.

(7) Any likelihood of tampering with the witnesses.

This also depends on the seriousness of the offence and the nature of evidence. In serious offences if the accused are released on bail, they would be tempted to tamper with the evidence by hook or crook. Therefore, the position and the status of the accused with reference to the victim and the witnesses and the events leading to the incident and the history of the accused are required to be taken into consideration. As observed by the Supreme Court, in regard to habituals. it is part of criminological history that a thorghtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society.

(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.

It should be noted that law regarding bail cannot be staticand in each case the Court has to decide it on facts of each case and in the interest of justice and fair trial.

21. Further, it should not be forgotten that the accused party is detained in custody not because of his guilt but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried and the society be shielded from the hazards of his misdeeds and because the detention is necessary to ensure his appearance at the trial.

22. Further, in my view, to avoid any complications if the learned Public Prosecutor submits to the Sessions Court that the order granting bail may be suspended for few days so that the prosecuting agency can approach the High Court and obtain appropriate order, then the Sessions Court should consider the said oral or written application. If the accused are involved in serious offence and there is some evidence connecting them with the crime, then it would be just and reasonable for the Sessions Court to suspend the order granting, bail to them for few days so that the prosecuting agency may get a chance of approaching the High Court.

23. Applying the aforesaid tests laid down by the Supreme Court, it cannot be said that if the Sessions Court grants the bail application erroneously or illegally or arbitrarily without considering the relevant factors, then this Court is helpless and cannot quash and set aside the order passed by the Sessions Court. This Court under Section 439(2) or under Section 482 of the Criminal Procedure Code has jurisdiction to quash and set aside any arbitrary or illegal order passed by the subordinate Court.

24. Now with regard to the merits of each case, while discussing the evidence collected by the investigating officer as far as possible elaborate discussion of the evidence is avoided lest it might prejudice either the accused or the prosecution. But for arriving at the conclusion that prima facie case is established some facts are stated.

25. With regard to Criminal Revision Applications Nos. 383 of 1987, 3040 of 1987 and 369 of 1987, as discussed above, in the beginning the learned Sessions Judge has ignored the decision of this Court in Miscellaneous Criminal Application No. 1606 of 1987 and the order passed by the other Additional Sessions Judge and has released the accused on bail without there being any new material or change of circumstances. Not only that, but by his order dated 29-8-1987 he partly allowed the bail application of three persons and rejected the bail application of the rest of the applicants. After few days he entertained the bail application of the remaining persons and released them on bail on 18th December, 1987. These orders are nothing but arbitrary orders. Hence the aforesaid revision applications are required to be allowed on this ground.

26. Further, on facts also the learned Judge has ignored the relevant statements of the witnesses and the evidence collected by the investigating officer and has given some reasons here and thereafter narrating in detail the arguments of both sides. He has emphasized the arguments of the learned Advocate of the accused as if he was accepting them, but curiously enough he has not dealt with the same or decided the same. The learned Judge has ignored the fact that the deceased Bhikha Punja was having 24 injuries as per the post-mortem report and injured Vala Deva was having 12 injuries. The learned Judge has not considered the FIR of Natha Bhima and the statements of Bharat Devji, Vala Deva, Devji Karsan, Jitendra Mavji and Arvindlal who connect the accused with the crime. He has also ignored the affidavits filed by Bhaya Bhima, Maniben Vala, Kadviben widow of deceased

Bhikha Punja and Bharat Devji opposing the previous bail application. Hence the aforesaid revision applications are allowed. The judgment and order dated 29-8-1987 in Miscellaneous Criminal Application No. 292 of 1987 and the judgment and order dated 18-12-1987 in Miscellaneous Criminal Application No. 456 of 1987 passed by the Additional Sessions Judge, Junagadh, are quashed and set aside. The bail bonds of the accused stand cancelled and they are directed to surrender to custody forthwith. Rule made absolute.

27. Criminal Revision Application No. 6 of 1988 arises out of the judgment and order dated 27-11-1987 passed by Mr. I.H. Shah, Additional Sessions Judge, Junagadh. The accused were arrested for the offences punishable under Sections 302, 307, 324 and 323 of the Indian Penal Code. It was alleged that there was quarrel between Patel families and Maiya Darbar families as one boy of Maiya Darbar has married one girl of Patel family. Because of this enmity members of Patel community attacked the members of Maiya Darbar family. In all 42 persons are involved in the said crime. 36 were previously released on bail. Subsequently applicants Nos. 1 to 4 filed Miscellaneous Criminal Application No. 297 of 1987 and applicants Nos. 5 & 6 filed Miscellaneous Criminal Application No. 307 of 1987 before the Sessions Court for releasing them on bail. Those applications were rejected by the Court.

28. After lapse of some time fresh Miscellaneous Criminal Application No. 393 of 1987 was filed which was also rejected by the Additional Sessions Judge on 3-11-1987.

29. In spite of the aforesaid orders rejecting the bail applications, the learned Sessions Judge entertained the Criminal Miscellaneous Application No 420 of 1987 and released the accused on bail by holding that there was substance in the contention of the learned Advocate for the accused. The learned Advocate for the accused had submitted that while deciding the previous bail application, the learned Additional Sessions Judge had not taken into consideration that there was no prima facie case against the accused and merely because the allegations against the accused are of serious nature, they should not be detained in jail. Thereafter the learned Additional Sessions Judge has tried to appreciate the evidence of some of the witnesses as if he was deciding the Sessions Case and released the accused on bail. He observed that there was no sufficient light for identifying the accused. It is apparent that the whole approach of the learned Additional Sessions Judge is unreasonable one. He has ignored the statements of injured witnesses Bhupat Bhanabhai, Pravin Bharatbhai, Maniben Bharatbhai, Rajbhai Kamabhai, Kamabhai Hamir and Kama Ala. He has also ignored the evidence of other eye-witnesses including the statement of Valiben widow of deceased Deva Dana. As per post-mortem notes deceased Deva Dana was having 7 injuries while injured Bhupat Dana was having 10 serious injuries. The other witnesses are also having serious injuries. The learned Judge further observed that the accused are not likely to abscond or are not likely to tamper with the evidence. The learned Judge has forgotten the fact that he has no jurisdiction to sit in appeal against the judgment and order or revise the order passed by the other Additional Sessions Judge. Fresh bail application could be entertained only under new circumstances. Further, he was not required to appreciate the evidence as if he was deciding the Sessions Case and giving benefit of doubt. He was required to find out whether there was prima facie case against the accused. He has also overlooked the fact that number of persons attacked the persons of the other community to take revenge and this type of incident may lead to other similar incident if the accused are released on

bail.

30. Mr. Jasani, learned Advocate appearing on behalf of the accused, submitted that in any set of circumstances this Court should not interfere with the order passed by the learned Additional Sessions Judge because subsequent to the aforesaid order the learned Magistrate has released the accused on bail on the ground that the charge-sheet was not submitted within the prescribed time under Section 167 of the Criminal Procedure Code. As against this, Mr. Mehta, Additional Public Prosecutor submitted that the charge-sheet is submitted within the period of 90 days but by committing some mistake in calculation the learned Magistrate has passed the order which is being challenged by the State by filing revision application.

31. In my view, taking into consideration the facts of this case, statements of witnesses and the fact that prior to the impugned order bail applications filed by the accused were rejected on merits, the impugned order requires to be quashed and set aside. However, this order would have no effect on the order passed by the learned Magistrate under Section 167 of the Criminal Procedure Code.

32. In the result, the revision application is allowed. The judgment and order dated 27-11-1987 passed by the Additional Sessions Judge, Junagadh, in Misc. Cri. Application No. 420 of 1987 releasing the opponents on bail is quashed and set aside. The bail bonds of the opponents (1) Vallabh Ramji Ghodasar, (2) Masukh Moban Devaji, (3) Laxmidas Gagdas, and (4) Harilal Bhanji stand cancelled and they are directed to surrender to custody forthwith. Rule made absolute. However this order would have no effect. If the learned Magistrate has already released the aforesaid persons or any of them on bail under Section 167 of the Criminal Procedure Code. If the order under Section 167 is quashed and set aside, then only this order shall be implemented.

33. Criminal Revision Application No. 9 of 1988 arises out of the judgment and order dated 8th December, 1987 whereby the learned Additional Sessions Judge has allowed the Miscellaneous Criminal Application No. 436 of 1987 filed by the opponents and released them on bail. In this case also the accused have filed Miscellaneous Criminal Application No. 373 of 1987 prior to filing of this application. That application was rejected by the Additional Sessions Judge by his judgment and order dated 12-10-1987. The accused are involved in an offence punishable under Sections 302, 201 read with Section 34 of the Indian Penal Code. It is alleged in this case that one Bai Nathi was murdered and her dead body was found at the instance of opponent No. 1-Patel Vallabh Ramji. It is further alleged that Bai Nathi was having illicit relations with the opponent No. 1. This case depends upon circumstantial evidence. In this case also the learned Judge has narrated the arguments advanced on both the sides and thereafter arrived at the conclusion that he finds substance in the arguments of Mr. Nanavati, learned Advocate for the accused. He held that according to criminal jurisprudence unless the case is proved beyond reasonable doubt, it should be presumed that the accused is innocent and that the accused should not be detained in prison as punishment till he is convicted. He further held that the accused are residents of village Mesvan and were agriculturists and were having agricultural land and other immovable property, hence they are not likely to abscond. He arrived at the conclusion that there was no prima facie case against the accused. He therefore, released the accused on bail by holding that personal liberty of a citizen is protected under the Constitution.

34. I is apparent that the learned Judge has ignored the order passed by the Additional Sessions Judge in Miscellaneous Criminal Application No. 373 of 1987. He has further not taken into consideration the following circumstantial evidence against the accused as revealed from the investigation papers:

(1) There is evidence on record that Bai Nathi was having illicit relations with accused No. 1.

(2) The accused were last seen together in the company of the deceased Bai Nathi.

(3) Accused No. 1 asked witness Bai Lasu to inform the deceased that he wants to meet her at the bus stand.

(4) Accused No. 1 was suspecting that the deceased was having illicit connection with another person.

(5) Accused No. 1 was having Rs. 15,000/- in his Bank account and he withdrew the amount of Rs. 4,000/- on 3-10-1987 and Rs. 5.000/- on 5-10-1987.

(6) Rs. 3,300/- were recovered from the house of opponent No. 2 i.e. accused No. 2 on 8-10-1987 and the notes were of rupees one hundred denomination.

(7) At the instance of accused No. 1 the dead body of Bai Nathi was found.

(8) As per post-mortem notes the deceased was murdered by strangulation.

35. In view of the aforesaid circumstantial evidence it was unreasonable on the part of the learned Additional Sessions Judge to appreciate the evidence and arrive at the conclusion that there was no prima facie case against the accused.

36. In this view of the matter, the revision application is allowed. The judgment and order dated 8-12-1987 passed by the Additional Sessions Judge, Junagadh in Miscellaneous Criminal Application No. 436 of 1987 is quashed and set aside. The bail bonds of the accused stand cancelled and they are directed to surrender to custody forthwith. Rule made absolute.

37. Criminal Revision Applications Nos. 7 of 1988, 36 of 1988 and 37 of 1988 arise out of the same incident Criminal Revision Application No. 7 of 1988 is filed by the State Government against the order passed by the Additional Sessions Judge, Junagadh, on 8-12-1987 releasing (1) Kanaiyalal @ Kanu nagardas Nathwani and (2) Atul Nagardas Nathwani in Miscellaneous Criminal Application No. 432 of 1987. Against the said order, original informant R.K. Mehta has filed Miscellaneous Criminal Application No. 36 of 1988. Third accused of the said case Kamlesh Vaidya had filed Miscellaneous Criminal Application No. 475 of 1987. That application was granted by the learned Additional Sessions Judge on 2nd Junuary, 1988 and the accused is released on bail. Against that order original informant has filed Criminal Revision Application No. 37 of 1988.

38. With regard to Criminal Revision Applications Nos. 7 of 1988 and 36 of 1988 it should be noted that prior to filing Miscellaneous Criminal Application No. 432 of 1987, the accused had filed Miscellaneous Criminal Application No. 412 of 1987 for releasing them on bail. That application was rejected by the learned Additional Sessions Judge on 17-11-1987.

39. In Miscellaneous Criminal Application No. 432 of 1987 which is entertained and granted by the learned Judge it was pointed out to the learned Judge that while rejecting the application for bail the learned Additional Sessions Judge has not reasonably and properly appreciated the evidence. The learned Judge arrived at the conclusion that from the dying declaration of the deceased it can be said that the accused were standing at a distance of 500 ft. when the incident took place and there was no evidence on record that they instigated the assailants. Hence he has released them on bail. It seems that the learned Judge has not taken into consideration the dying declaration of deceased Kiran Savchand Sheth. A question was asked to the deceased whether he was knowing the names of assailants. To that question the deceased has replied that he was knowing the names of Kanubhai Nathwani and Atulbhai Nathwani and he was not knowing the names of other persons. In reply to further question he has stated that he was not knowing as how and who out of them assaulted him. The deceased has in terms stated that because there was previous enmity with the aforesaid two persons, he was assaulted.

40. It seems that the learned Judge has forgotten that Section 34 of the Indian Penal Code is still on the Statute Book and by ignoring the said section he arrived at the conclusion that there was no prima facie case against the opponents. Firstly as pointed out above, he has omitted to refer to the dying declaration of the deceased Kiran Savchand Sheth. He also omitted to consider the further fact that the opponents were having some dispute with the deceased and at the instance of opponents if other persons have infilicted knife blows on the deceased, it cannot be said that there is no prima facie evidence against the accused, Mr. Nanavati learned Advocate appearing on behalf of the accused, submitted that the statements of the eye-witnesses do not disclose that the opponents have inflicted knife blows or that they were assailants. As such the learned Additional Sessions Judge has not discussed or considered the said aspect. But, however, Mr. Mehta, learned Additional Public Prosecutor, for the State, has pointed out that from the dying declaration it is amply clear that the opponents Nos. 1 and 2 are the real culprits and other persons acted at their behest. In this view of the matter, the order passed by the learned Additional Sessions Judge releasing the accused Kanaiyalal (Kanu) Nagardas Nathwani and Atul Nagardas Nathwani requires to be quashed and set aside.

41. In the result Criminal Revision Application No. 7 of 1988 is allowed. The judgment and order dated 8-12-1987 passed by the Additional Sessions Judge, Junagadh, in Miscellaneous Criminal Application No. 432 of 1987 is quashed and set aside. The bail bonds of the accused stand cancelled and they are directed to surrender to custody forthwith. Rule made absolute.

42. In view of the orders passed in Criminal Revision Application No. 7 of 1988, no orders on Criminal Revision Application No. 36 of 1988 filed by the informant and it stands disposed of accordingly. Rule discharged.

43. With regard to Criminal Revision Application No. 37 of 1988, taking into consideration the age of the accused, without entering into the merits of the matter or without appreciating the reasons given by the learned Additional Sessions Judge, this revision application for cancellation of bail requires to be rejected. Hence it is rejected. Rule discharged.

44. Criminal Revision Application Nos. 14 of 1988 and 15 of 1988 arise out of the same incident. In this case in all 10 accused are involved. Out of the 10 accused the learned Additional Sessions Judge has released 5 accused i.e. accused Nos 3, 4, 7, 9 & 10 on bail in Miscellaneous Criminal Application No. 439 of 1987 by his judgment and order dated 8-12-1987. Against this Criminal Revision Application No. 14 of 1988 is filed by the original informant. He has rejected the application of accused Nos. 1, 2, 5, 6 & 8 on the ground that they were not pressing their application.

45. Subsequently the remaining accused filed Miscellaneous Criminal Application No. 458 of 1987 before the same learned Judge. By the judgment and order dated 17-12-1987 he has released the 4 accused i.e. accused Nos. 1, 3, 4 & 5 on bail against which Criminal Revision Application No. 15 of 1988 is filed by the original informant.

46. It is difficult to find out what was the change in circumstances between 8th December, 1987 when the learned Additional Sessions Judge had decided the Miscellaneous Criminal Application No. 439 of 1987 and 17th December 1987 when he had decided Miscellaneous Criminal Application No. 458 of 1987. May be that he had not taken the risk of releasing all the 10 accused at a stocke in a case where accused are involved in double murder.

47. Both these revision applications arise out of the same incident and as per the FIR the accused are involved in offences punishable under Sections 302, 326, 324, 147, 148, 149 of the Indian Penal Code. The incident took place on 18-11-1987 at about 6-15 p. m, at village Ghed Bagasara. It is the say of the complainant that on the date of the incident when he was returning after doing labour on scarcity work, when he reached near the High School, he heard some hubbub and he rushed to the place of incident. At that time he saw that all the accused were giving blows to his brother Nagabhai Meru. The accused were armed with lethal weapons such as spears, axes and sticks. His brother's wife Sajuben was shouting 'save, save'. When the complainant and other persons intervened to save Nagabhai, they were also beaten and thereafter the accused persons ran away. During this incident Nagabhai Meru and Bhura Naga were murdered. As per the post-mortem report of deceased Nagabhai the following injuries were found:

(1) Blackening of (Rt) upper & lower eyelid with swelling.

(2) Incised wound just above and behind the upper part of (Rt) ear oblique & dark clotted blood 1" x 1/2" x 1/2" upto muscle.

(3) Diffuse swelling over (Rt) frontal, temporal, parietal area.

(4) Diffuse swelling over (Lt) frontal, temporal, parietal area.

(5) C.L.W. over (Rt) parietal bone 4" above (Rt) ear 6" above (Rt) eyebrow I" X 1/2" X bone deep oblique.

(6) Incised wound over (Rt) leg 9" blow (Rt) knee, anteriorly 3/4" x 3/4" bone deep, muscle protruding through the wound vertical.

(7) Incised wound over (Rt) leg I" blow and 1 1/2" medial to Inj. No. (6) 1/4" X 1/4" X bone deep oblique.

(8) Incised wound over (Lt) leg anteriorly 51" below (Lt) knee 3/4" x 1/ 4-" x 1/4" upto muscle oblique.

(9) Incised wound over (Lt) leg anteriorly -1/2" below Inj. No. (8) 1/2"x 1/4" x bone deep, vertical.

(10) Incised wound over (Lt) leg I" medial to Inj. No. (9) 1/2" x 1/4" x 1/4" upto muscle oblique.

(11) Incised wound 1" below Inj. No. (10), 1/2" x 1/4' x 1/4' upto muscle, horizontal.

On the person of deceased Bhura Naga the following injuries were found:

(1) Stiched wound of 3" size present at middle of scalp oblique & curved in direction. On opening it was bone deep.

(2) Stiched wound of i" size present just above injury No. 1. On opening it was 1/2 deep.

(3) Dark red abrasion of size 1/2" x 1/2" x 1/2" present over Lt forehead.

(4) Dark red abrasion of 1/2" x 1/2" over face below Lt eye.

Inspite of the aforesaid injuries to the deceased, the learned Judge arrived at the conclusion that there was no evidence on record to show that the deceased were having any injuries by stick blows. He further held that merely because the accused were present at the scene of offence and that they have caused some injuries by stick to the other witnesses, they should not be detained in jail. May be that they may be liable for the offences punishable under Section 324 and 325 of the Indian Penal Code. He further held that as there was mutual fight between the accused and the prosecution witnesses, he passed the order releasing the accused Nos. 1, 2, 5, 6 & 8 by his judgment and order dated 8th December, 1987.

48. Thereafter by his judgment and order dated 17th December, 1987 he released the accused Nos. 1, 3, 4 & 5 on bail by holding that the fact that the accused are involved in a serious case is no ground for refusing bail. He thereafter relied upon the decision of the Supreme Court in the case of

Bhagirathsinh Jadaja v. State of Gujarat , and arrived at the conclusion that as the accused are sot likely to abscond and as there was aquarrel between the two groups, it was difficult to believe that the accused would be in a position to tamper with the evidence. He further held that accused No. 3 was a Police Constable and accused No. 5 was the S.T. Bus Driver and if they are released on bail, they are not likely to abscond or tamper with the evidence. He, therefore, released them on bail. In previous bail application he had heard the same learned Advocate who was appearing for the accused before him and at that time the learned Advocate had not pressed the bail application of the remaining accused for whom he had filed the subsequent bail application. As such there is nothing on record to show that there was any change of circumstances. The same facts were before him.

49. It is true that in this case a cross complaint is filed against the prosecution witnesses for the murder of one person. Therefore the learned Advocate for the opponents-accused submitted that once there is a cross complaint for murder, it would mean that there was mutual fight between two groups and, therefore, the accused should be released on bail. For this purpose he relied upon the unreported judgment of this Court in Miscellaneous Criminal Application No. 479 of 1975 decided on 26-8-1975. In that case the applicants-accused were to be tried for the offence of murder punishable under Section 302 read with Section 34 of the Indian Penal Code. It seems that the investigating papers were shown to the Court and thereafter the Court held as under:

> Now looking to the facts of this case, it is found that the accused No. 1 has filed a cross complaint with regard to the very incident on which the prosecution has put reliance to prosecute him. The applicants have produced medical certificates to show that three of them were medically examined on the day of the incident and all the three of them had injuries on their persons. Under these circumstances, it is prima facie found that there was some mutual quarrel between the parties and that during the course of this quarrel deceased Bachu received injurises on his head which proved fatal. These facts prima facie show that the applicants have got good case to put forward before the Court to escape punishment under Section 302 I.P.C. In these circumstances, I find this is a fit case for enlarging the applicants on bail.
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> From this judgment it is difficult to cull out the ratio that merely "Decause a cross compaint is filed, it would indicate that there was mutual fight between the two groups. After considering the investigation papers the Court arrived at the conclusion that there was some quarrel between the parties. Each and every case depends upon the facts. May be in some cases the accused may be aggressors. In some cases prosecution witnesses may be aggressors. If the accused are aggressors and during the course of incident if some of them received any injury, it cannot be said that there was mutuall quarrel. In this case nothing has been pointed out which would reveal that there was mutual quarrel between the parties. The learned Advocate has not pointed out any statement Nor the learned Judge has referred to it. Hence it would be difficult to arrive at the conclusion that there was mutual quarrel between the parties. Even if there is mutual quarrel, it is not the law that the accused who are involved in a serious case should be released on bail. On the contrary in this type of cases some times by releasing the accused on bail there are chances of further incidents taking

> place between the two groups of victims group taking law in their hands may try to take revenge and cause injuries to the accused.

50. Mr. Thakkar, learned Advocate for the accused, further relied upon the decision of this Court in Miscellaneous Criminal application No. 990 of 1979 decided cm 16th October, 1979. In my view, this decision on the contrary does sot support the contention of the accused in any manner. This is clear from the following observations of the Court:

> But while hearing a bail application, Court should normally consider the case of the prosecution about causing injuries to the deceased. Any person who causes injuries to the deceased, even though the injuries might not be fatal, could be considered to have shared the common intention with the other who caused fatal injuries. Because sometimes death may be due to a particular injury or due to the cumulative effect of all the injuries taken together. Even if there is a specific case that a particular injury caused the death, the Court would not hesitate to attribute the common intention to other persons who caused injuries to a person who has died because they might have caused a fatal blow or they might have caused the injuries later on after the deceased received a fatal blow and, therefore, their common intention must be there.
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> Further, even after taking into consideration the injuries to the accused the Court held that though apparently this argument of Mr. Patel may appear to be justified, it does not create any concession in favour of any of these injured persons, if they have caused injuries to the deceased. Thereafter the Court appreciated the evidence in that case and passed appropriate order. But from this judgment it cannot be said that because the cross complaint is filed or that some of the accused have received injuries, their application for bail should be granted without referring to the relevant criteria for deciding bail application.

51. The learned Advocate for the accused further submitted that in any set of circumstances these applications are for cancellation of bail and, therefore. The Court should find out on the basis of some material whether the accused are lively to abscond or whether they are likely to tamper with the evidence. It is true that for cancellation of bail these are the two vital factors, but at the same time these vital factors are to be determined by taking into consideration the charge against the accused, the evidence against the accused and the likely sentence. Merely because accused No. 3 is a Police Constable and accused No. 4 is the S.T. Bus Driver, it cannot be said that they would not attempt to tamper with the evidence. On the contrary a Police Constable would be more resourceful and it is quite; possible that to avoid extreme punishment he would try his best to tamper with the evidence.

52. From the medical evidence and from the evidence of the witnesses it is apparent that all the accused took part in assaulting the deceased Naga Meru and Bhura Naga. The charge against them is of double murder. The learned Judge has not taken into consideration this aspect before releasing the accused on bail. Hence the orders passed by the learned Judge required to be quashed and set aside.

53. In this view of the matter, these revision applications are allowed. The judgments and orders dated 8th December, 1987 and 17th December, 1987 passed by the Additional Sessions Judge, Junnagadh, in Miscellaneous Criminal Applications Nos. 439 of 1987 and 458 of 1987 are quashed and set aside. The bail bonds of the accused stand cancelled and they are directed to surrender to custody forthwith. Rule made absolute.