

(2012) 02 BOM CK 0175

Bombay High Court

Case No: Criminal Bail Application No. 265 of 2012 in Criminal Appeal No. 812 of 2011 in Criminal Application No. 607 of 2011 in Session Case No. 276 of 2010 in C.C. No. 152/PW of 2010 in C.R. No. 26 of 2010

Balkrishna Mahadev Lad

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision: Feb. 29, 2012**Acts Referred:**

- Bombay High Court (Appellate Side) Rules, 1960 - Rule 7
- Constitution of India, 1950 - Article 136, 142
- Criminal Procedure Code, 1973 (CrPC) - Section 378, 390, 427
- Penal Code, 1860 (IPC) - Section 302, 364, 376(2)

Citation: (2013) 2 ABR 762 : (2012) BomCR(Cri) 101**Hon'ble Judges:** A.V. Potdar, J; A.S. Oka, J**Bench:** Division Bench**Advocate:** R.A. Shaikh, for the Appellant; U.V. Kejriwal, AP for the State, for the Respondent

Judgement

A.S. Oka, J.

This is an Application for bail made by the Respondent in the Appeal against acquittal preferred by the State. The Respondent in the Appeal was acquitted for the offences punishable under Sections 364, 376(2)(f) and 302 of the Indian Penal Code. On 18th July, 2011, the Appeal was admitted and action u/s 390 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the said Code of 1973") was ordered. Accordingly, the Trial Court issued a warrant against the Applicant in accordance with Section 390 of the said Code of 1973. Accordingly, the warrant was executed and the Applicant was brought before the learned Additional Sessions Judge, Mumbai on 20th January, 2012. The learned Judge committed him to the custody till 3rd February, 2012.

2. The Applicant applied for bail. By an order dated 25th January, 2012, the Application was rejected. The learned Additional Sessions Judge recorded the objection of the learned APP that if the Applicant is enlarged on bail, he will abscond and his presence before this Court cannot be secured. The learned Judge observed that the Applicant was arrested at his native place i.e. Sunderwarchi Wadi, Post Makhjan, Taluka-Sangmeshwar, District - Ratnagiri. The learned Judge observed that the Applicant has not produced any document to show that he is a permanent resident of Mumbai and, therefore, if he is released on bail, he will abscond.

3. The learned counsel appearing for the Applicant submitted that the Applicant is residing with his sister at Ratnagiri. He stated that the Applicant is ready and willing to furnish a detailed address of place of his residence. He submitted that in view of the direction issued by this Court in the case of State of Maharashtra Vs. Bapu Pandu Mali, [(2010 ALL.M.R. (Cri.) 120)], the Applicant was entitled to be enlarged on bail as a matter of right. He submitted that in fact the learned Sessions Judge has acted completely contrary to the directions issued by this Court in the aforesaid case. He submitted that the Applicant is entitled to be enlarged on bail. The learned APP has placed reliance on a decision of the Apex Court in the case of [Amin Khan Vs. State of Rajasthan and Others](#), . The learned APP submitted that u/s 390 of the said Code of 1973, discretion is conferred on the Court before which the Accused is brought u/s 390 of the said Code of 1973 either to commit the accused to prison pending the disposal of the Appeal or admit him to bail. The learned APP submitted that the said Court always has a power to direct that the Respondent in the Appeal against acquittal shall remain in custody till disposal of the Appeal. The learned APP relied upon a decision of the Apex Court in the case of State of U.P. Vs Poosu & Another (AIR 1976 SC 1750). The learned APP submitted that as held by the Apex Court, after an appeal against acquittal is admitted, the status of the Respondent to the appeal as the accused person is revived. The learned APP submitted that the submission that the Applicant is entitled to bail as a matter of right is completely contrary to the express provisions of Section 390 of the said Code of 1973 and to the decisions of the Apex Court in the cases of State of U.P. (supra) as well as Amin Khan (supra). The learned APP submitted that the view taken by this Court in the case of Bapu Pandu Mali (supra) needs reconsideration. The learned APP submitted that in the present case, the address of the Applicant as disclosed on record of the Trial Court is "Grant Road (West) footpath, Opposite Railway Station, Mumbai". The learned APP submitted that considering his address which is of a footpath opposite Railway Station in Mumbai, it will be impossible to secure his presence before this Court. The learned APP submitted that considering the gravity of the offence alleged against the Applicant, this is not a case where the Applicant can be enlarged on bail. She pointed out that the allegation against the Applicant is of committing offence of rape against the victim girl who was only five years old and of brutally murdering the victim girl.

4. The first question to be considered is whether the Applicant is entitled to bail as a matter of right after he was arrested pursuant to the action initiated u/s 390 of the said Code of 1973. Reliance was placed on the decision of the Division Bench in the case of Bapu Pandu Mali (supra). Paragraphs 3 and 4 of the said decision read thus:

3. This is a sorry state of affairs in which not only the prosecuting agency but also the Courts are involved. This is a reflection on our own system, which needs to be corrected. A person, who is acquitted of the charges by a Court of law, should not remain in jail even for a day after acquittal, unless the order of acquittal is reversed by an appellate Court. Even if the acquittal of the respondent were to be set aside by this Court today, even then, we cannot justify his detention after his acquittal by the Sessions Court till date.

4. We have perused Section 390 of the Criminal Procedure Code, which section only lays down a mechanism by which it is ensured that an acquitted person does not abscond while an appeal is filed against his acquittal. Therefore, we do not feel that there should be any impediment for the Courts to release the persons who are acquitted during the pendency of the appeals against acquittal.

5. In paragraphs 5 and 6 of the Judgment, the Division Bench issued following directions :

5.That in case of a warrant u/s 390, the Sessions Judge, on production of the persons, shall immediately offer him bail on conditions which are just and proper, and in appropriate cases, the Sessions Judge may also consider release of such persons on personal bond. However, if the learned Sessions Judges are of the view that the surety is not produced or surety is not sufficient, they would remand the persons to the prison. In that case, they should inform the High Court immediately that the person has been remanded to the custody because originally, the warrants are issued by the High Court.

6. We are told that such directions were given in year 2004 also, but the learned Sessions Judges have not been following these directions. Therefore, in case, in future, any Sessions Judge is found not to follow the directions, besides taking departmental action against such learned Sessions Judge, he shall also be liable for contempt of this Court.

(Emphasis added)

6. We find that the view taken in the case of Bapu Pandu mali (supra) has been followed by another Division Bench in the case of Farooq Abdul Gani Surve v. The State of Maharashtra, [(2012) ALL MR (Cri) 271]. In the said decision, the Division Bench issued similar directions.

7. Section 390 of the said Code of 1973 reads thus:

390. Arrest of accused in appeal from acquittal. When an appeal is presented u/s 378, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail.

(Emphasis added)

Section 390 of the said Code of 1973 confers discretion on this Court of issuing a warrant for arrest of the accused when an Appeal against an order of acquittal is presented u/s 378 of the said Code of 1973. The word used in the Section is "may" and therefore, it is not necessary that in every case, while admitting the Appeal against the acquittal, the High Court should initiate action u/s 390 of the said Code of 1973 of issuing warrant directing the arrest of the accused. Moreover, on a plain reading of Section 390 of the said Code of 1973, the action can be ordered to be taken at any stage of the appeal against acquittal. After the action is ordered to be taken and the accused is brought before the concerned Court, the Section confers discretion on the Court before which the Accused is brought either to commit him to prison pending disposal of the appeal or to admit him to bail. The Section specifically confers the power on the Court before which the Accused is brought to commit the Accused to prison pending disposal of the Appeal. On plain reading of the Section 390, it confers power on the Court to decline the bail.

8. In the case of Amin Khan (supra), the High Court had admitted an Appeal against the acquittal and had summoned the Accused through aailable warrant. The State filed an Application for revoking earlier order and for a direction to commit the Accused to prison after summoning him through non-ailable warrant. The High Court accepted the prayer and issued non-ailable warrant for committing the Accused to the prison. The Apex Court considered Section 390 of the said Code of 1973 and observed that the said Section corresponds to Section 427 of the Code of Criminal Procedure, 1898 and observed that the High Court has power to re-arrest the Accused pending the Appeal against acquittal. Therefore, the Apex Court confirmed the decision of the High Court.

9. The decision of the High Court in the case of State of U.P. (supra) is by a Constitution Bench. The Bench considered the following question which was referred to it:

Whether the Supreme Court while granting Special Leave to appeal under Article 136 of the Constitution, against an order of acquittal on a capital charge, has the power to issue a non-ailable warrant for the arrest and committal to prison of the accused-respondent who had been acquitted by the High Court?.

The Apex Court considered Section 427 of the Code of Criminal Procedure, 1898 which corresponds to Section 390 of the said Code of 1973. The Apex Court considered the decisions of various Courts rendered even prior to the enactment of

Section 427 of the Code of Criminal Procedure, 1898. In Paragraph 8, the Apex Court observed thus:-

8. Viewed in this perspective, it is clear that even before the enactment of this provision, the High Court had the power to cause, in its discretion, the arrest and detention in prison of the accused-respondent or his enlargement on bail pending disposal of the appeal against his acquittal. This power was ancillary to and necessary for an effective exercise of its jurisdiction in an appeal against an order of acquittal, conferred on the High Court by the Code.

(Emphasis added)

In Paragraph 10, the Apex Court proceeded to observe as under:

10. This is the rationale of Section 427. As soon as the High Court on perusing a petition of appeal against an order of acquittal, considers that there is sufficient ground for interfering and issuing process to the respondent, his status as an accused person and the proceedings against him, revive. The question of judging his guilt or innocence in respect of the charge against him, once more becomes subjudice.

(Emphasis added)

The Apex Court ultimately held that while granting special leave to appeal against order of acquittal, the Apex Court has the same power which the High Court has u/s 427 of the Code of Criminal Procedure, 1898. In paragraph 13 of the said decision, the Apex Court held thus:

13. Thus, there can be no doubt that this Court while granting special leave to appeal against an order of acquittal on a capital charge is competent by virtue of Article 142 read with Article 136, to exercise the same powers which the High Court has u/s 427. Whether in the circumstances of the case, the attendance of the accused respondent can be best secured by issuing a bailable warrant or non bailable warrant is a matter which rests entirely in the directions of the Court. Although, the discretion is exercised judicially, it is not possible to computerize and reduce into immutable formulae the diverse considerations on the basis of which this discretion is exercised. Broadly speaking, the Court would take into account the various factors, such as, "the nature and seriousness of the evidence, circumstances peculiar to the accused, possibility of the absconding, larger interest of the public and State" see [The State Vs. Captain Jagjit Singh](#), . In addition, the Court may also take into consideration the period during which the proceedings against the accused were pending in the Courts below and the period which is likely to elapse before the appeal comes up for final hearing in this Court.

10. As observed earlier, from the language of Section 390 of the said Code of 1973 and from the plain meaning thereof, a power is conferred on the Court before which the Accused is brought after action u/s 390 of the said Code of 1973 to even direct

that the Accused be committed to prison pending the disposal of the Appeal. The Apex Court has held that after the Appeal against the order of acquittal is admitted, the status of the Respondent in Appeal as the Accused is revived and the question regarding his guilt or innocence again becomes subjudice. That is the reason why Section 390 confers power on the Court before which the Accused is brought after action u/s 390 of the said Code of 1973 either to direct that the Accused be committed to prison pending the disposal of the Appeal or to admit the accused to the bail.

11. Prima facie, for the reasons recorded above, we are of the view that the direction contained in Paragraph 5 of the decision of the Division Bench in the case of Bapu Pandu Mali (supra) and paragraph 12 of the decision of another Division Bench in the case of Farooq Abdul Gani Surve (supra) is contrary to the express language as well as the scope and ambit of the provisions of Section 390 of the said Code of 1973 as well as the law laid down by the Apex Court in the case of State of U.P. (supra). We also find that the binding precedents of the decisions of the Apex Court in the cases of State of U.P. (supra) and Amin Khan (supra) were not brought to the notice of the Division Bench of this Court when the case of Bapu Pandu Mali (supra) was decided. The decisions of the Division Bench virtually hold that when the Respondent in appeal against acquittal is brought before the Court after the action u/s 390, the Court has no option but to grant bail. We are of the view that the proposition of law laid down by the Division Bench in the case of Bapu Pandu Mali (supra) and Abdul Gani Survey (supra) will need reconsideration. We are of the considered opinion that the issue needs to be heard by a larger bench of this Court.

12. The Division Bench has also directed in both the decisions that if any Sessions Judge does not follow the directions issued by the Division Bench, such learned Sessions Judge shall be liable for contempt of this Court. It is well settled that the jurisdiction of this Court to punish a person for contempt is discretionary. The jurisdiction is to be exercised very sparingly. In the aforesaid two decisions, a direction has been issued that noncompliance by the learned Sessions Judge of the directions issued under the said judgments will make him liable for contempt of Court. It is well settled that a breach of an order of a Court is a Civil Contempt provided the breach is deliberate or wilful. Every breach is not a civil contempt. With greatest respect to the view taken, we are of the prima facie opinion that every breach of a direction issued by this Court committed by the Sessions Judges cannot amount to contempt unless it is proved that it was wilful. This is so especially when a discretion has been conferred by Section 390 on the Court either to admit the accused to bail or to commit him to prison till the decision of the Appeal. We are of the view that even this question needs to be dealt with by a larger bench. The said question will be as under:

Whether this Court can direct that every breach committed by Sessions Judge of the direction issued by this Court will always constitute contempt of this Court?

13. What should be the consideration for considering the prayer for bail u/s 390 of the said Code of 1973 is a different issue. As observed by the Apex Court in the case of State of U.P. (supra), the Court has to take into consideration the period during which the proceedings were pending against the accused before the Trial Court and the period which is likely to elapse before the Appeal comes up for final hearing. The learned APP relied upon a decision of the Division Bench of Gujarat High Court in the case of [Koli Bhima Hari and Others Vs. The State of Gujarat](#), wherein the High Court observed that the Court can always fix an early date of hearing of such Appeal. The fact that there is a large pendency of Appeals against acquittal in the High Court will be also a relevant consideration especially in case of this Court where the pendency of the Appeals against acquittal is from the year 1992-93. The fact that the order of acquittal further strengthens the presumption of innocence will be also one of the considerations.

14. In normal course, before deciding the Application on merits, we would have directed that the papers of the Application should be placed before the Hon'ble Chief Justice in terms of Rule 7 of Chapter I of the Bombay High Court (Appellate Side) Rules, 1960. However, it will be unjust to keep the bail application pending till larger bench decides the issue, as in the facts of the case, we find that the Applicant has made out a case for grant of bail.

15. Perusal of the order passed by the Sessions Court shows that the only objection raised by the prosecution was that the Applicant was not a permanent resident of Mumbai and was residing at Ratnagiri and, therefore, he may not remain present before this Court on the date of hearing. A true copy of the report submitted by the PSI of Gamdevi Police Station on 23rd January, 2012 before the Sessions Court has been annexed to the Application. This was the only objection raised by the Police in the report. Even in the order of the Sessions Court, only one submission of the learned APP has been noted that if the Applicant is released on bail, he will abscond. The ground on which the bail is denied is that the Applicant was residing at his native place at Ratnagiri and there is no document produced on record to show that he is a permanent resident of Mumbai.

16. Perusal of the impugned judgment in the Appeal shows that the case is based on the circumstantial evidence. The finding of the Court below is that the circumstances brought on record were not of conclusive nature and that it is not shown that in all probability, the act must have been done by the Applicant. Moreover, considering the huge pendency, it is not possible to fix a preemptory date of hearing of the Appeal. The Appeal is not likely to be decided in near future. In any event, only a limited objection was raised by the Police to the grant bail. The learned counsel appearing for the Applicant pointed out that the Applicant is willing to furnish his detailed address of place of residence. Considering the objection raised by the prosecution, the Applicant can be directed to furnish local sureties and he can be directed to mark attendance with the concerned local Police Station.

17. Hence, we pass the following order:

ORDER:

- (i) The Applicant shall be enlarged on bail in the sum of Rs. 20,000/with two local sureties in the like amount;
- (ii) The bail is granted subject to further condition that the Applicant shall report to the concerned local Police Station having the jurisdiction over the area in which he will be residing after being enlarged on bail. The Applicant shall report to the Police Station once in the first week of every calendar month till the disposal of the Appeal;
- (iii) The Applicant shall be enlarged on bail only after he furnishes to the concerned Jail Superintendent a detailed address of his place of residence where he intends to stay after being enlarged on bail;
- (iv) In case of change of the address in future, the Applicant shall inform the changed address to the concerned local Police Station and shall also inform the address to the Registrar (J1) of this Court;
- (v) We are of the view that the following questions need to be decided by a larger bench of this Court:
 - (a) When in an appeal against acquittal an action of issuing warrant for arresting the accused is directed in accordance with Section 390 of the Code of Criminal Procedure, 1973, whether the Accused is entitled to bail as a matter of right and whether the learned Sessions Judge before whom the Accused is brought has no power to direct that the Accused shall be committed to prison till disposal of the Appeal?
 - (b) Whether this Court has power to direct that every breach committed by Sessions Judge of the direction issued by this Court will always constitute contempt of this Court?
- (vi) We direct the Registrar (Judicial-I) to place the papers of this application before the Hon"ble Chief Justice for passing necessary orders in accordance with Rule 7 of Chapter I of the Bombay High Court (Appellate Side) Rules, 1960.