

(1996) 10 BOM CK 0091

Bombay High Court

Case No: Criminal Application No. 1975 of 1996 with Criminal Writ Petition No. 821 of 1996

Union Territory of Dadra and
Nagar Haveli and etc.

APPELLANT

Vs

Fatehsinh Mohansinh Chauhan
and another

RESPONDENT

Date of Decision: Oct. 15, 1996

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 10, 10(3), 167(2), 439
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 171, 302

Citation: (1997) CriLJ 1976

Hon'ble Judges: S.S. Parkar, J

Bench: Single Bench

Advocate: M.S. Mohite, for the Appellant; R.M. Agrawal, Mrs. Jyoti S. Pawar and N. S. Manudhane, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. The above criminal application and the criminal writ petition are filed challenging the order of release of the accused-Fatesinh Mohansinh Chauhan on bail on 7-5-96 by the order passed by the Chief Judicial Magistrate, Dadra & Nagar Haveli, Silvassa and for cancellation of the bail order passed in favour of the aforesaid accused Fatesinh. The criminal application is filed by the Union Territory of Dadra and Nagar Haveli for cancellation of bail while criminal writ petition is filed by the complainants impugning the same order dated 7-5-1996 releasing the said accused on bail.

2. These applications for cancellation of bail arise in the following manner.

At the time of the General Elections to Parliament elections were to be held on 2nd May 1996. The complainants' party belonged to one political party while the

accused party belonged to another political party. The incidents of rioting and murder and other offences had taken place on 29th April 1996 at about 5.30 p.m. in the evening due to political rivalry.

3. It appears from the prosecution case that the accused who are in large number came in several jeeps and intercepted the jeeps in which the complainant-party were going and one Bapji Bhoya was killed and one injured eye-witness by name Jalal was injured. The accused party being in large number they intercepted the jeeps in which the complainant party was coming and started assaulting party was coming and started assaulting them. One person by name Bapubhai from the complainant party escaped and reported the matter orally to the Police stating that there was violence at the place of incident and, therefore, the Police should rush to the place of the incident. Accordingly Police came on the scene. In the meantime one Bapji was killed and another person by name Jalal was injured. Some of the accused persons were arrested. The others absconded. The names of the nine persons were mentioned in the FIR which was filed by one Damabhai Choudhari. That FIR came to be filed at about 8.30 p.m. on the same evening. There are about seven eye-witnesses whose evidence was recorded. Many accused persons were armed with swords, guptis and iron bars. The accused Fatehsinh was not armed with any weapon but he was instigating his co-accused to assault and kill the complainant party.

4. This accused Fatehsinh filed an application for anticipatory bail before the Chief Judicial Magistrate, Dadra and Nagar Haveli on 1st May 1996 by filing application being Anticipatory Bail Application No. 8 of 1996. That Court passed an interim order granting anticipatory bail on the same day i.e. 1st May, 1996. The State, therefore, challenged that order in this Court on 2nd May, 1996 by filing Criminal Writ Petition No. 1143 of 1996. This Court on 2nd May, 1996 stayed the interim anticipatory bail order passed by the Chief Judicial Magistrate. That order was challenged in this Court, inter alia, on the ground that the Chief Judicial Magistrate was not empowered to grant anticipatory bail application, which power is vested in the Sessions Court and the High Court. As the High Court stayed that interim order the accused Fatehsinh came to be arrested on 2nd May, 1996. He filed an application for bail on 6th May, 1996 before the Chief Judicial Magistrate which came to be granted by the said Court on 7th May 1996. Besides this accused there are other accused persons and the prosecution was busy opposing several proceedings adopted by different accused in different Courts in the meantime and ultimately the present criminal application came to be filed by the Union Territory in this Court on 2nd August 1996.

5. Mr. Manudhane appearing for the respondent-accused Fatehsinh raised preliminary objection that the writ petition filed by the complainant for cancellation of bail is not maintainable.

6. The said writ petition was filed on 5th August, 1996 in this Court after filing of the criminal application by the Union Territory. Since the Union Territory has also filed the application challenging the impugned order and also for cancellation of bail, the criminal writ petition filed on behalf of the complainant is not of much significance, and, therefore, this objection raised by Mr. Manudhane will not be of any help to the accused. I have however heard both Mr. Agrawal as well as Mr. Mohite who have challenged the order of release of this accused on bail.

7. The first contention raised on behalf of the petitioners is that the Chief Judicial Magistrate of Dadra & Nagar Haveli had no power to release the accused on bail as that power is vested in the Sessions Court or the High Court and the Chief Judicial Magistrate is not empowered to release such accused on bail u/s 439 of the Criminal Procedure Code. Section 439 of the Criminal Procedure Code. Section 439 of the Cr.P.C. empowers only the High Court and the Sessions Court release the person accused of offences punishable with death or imprisonment for life only. In other words no Court other than the Court of Session and High Court, is empowered to release such person on bail. The learned Chief Judicial Magistrate while granting the accused bail has purported to act as an In Charge Sessions Judge, Dadra and Nagar Haveli, Silvassa. That power seems to have been derived by him on the basis of the power delegated to him by the Sessions Judge by the order dated 18/19th April 1984. This delegation of power is apparently made by virtue of Section 10(3) of the Criminal Procedure Code. It is argued on behalf of the petitioners that the said power conferred u/s 10(3) of the Cr.P.C. had lapsed long ago because the then Sessions Judge who had delegated that power had ceased to be the Sessions Judge long ago and ultimately he had retired also. Looking to the wording of Section 10(3) of the Cr. P.C. and the order delegating this power by the then Sessions Judge which is quoted hereinbelow leaves me in no manner of doubt that that power was delegated by then Sessions Judge during his absence at Silvassa and the same had elapsed after the said Sessions Judge had ceased to be the Sessions Judge. The said delegation of power is in the following words :-

"ORDER

In exercise of the powers conferred by sub-section (3) of Section 10 of the Criminal Procedure Code 1973, the Sessions Judge, Dadra and Nagar Haveli, Silvassa, is pleased to empower Chief Judicial Magistrate, Dadra and Nagar Haveli Silvassa to dispose of any urgent application of Sessions Court, Silvassa, during his absence at Silvassa.

Sd/-

(R. G. Shindhakar)

District & Sessions Judge,

Dadra & Nagar Haveli, Silvassa."

8. It would also be desirable to quote sub-section (3) of Section 10 of Cr.P.C. which is as follows :-

"10(3). The Sessions Judge may also make provision for the disposal of any urgent application, in the event of his absence or inability to act, by an Additional or Assistant Sessions Judge or, if there be no Additional or Assistant Sessions Judge, by the Chief Judicial Magistrate, and every such Judge or Magistrate shall be deemed to have jurisdiction to deal with any such application."

9. Section 10(3) of Cr.P.C. empowers the Sessions Judge to delegate his powers to the Chief Judicial Magistrate and others for the disposal of any urgent application "in the event of his absence or inability to act". The provision itself empowers to delegate the power temporarily in the event of his absence or inability to act when he is Sessions Judge and is otherwise empowered to act as Sessions Judge and not to apply after he ceases to be Sessions Judge. Accordingly, this power was delegated to the Chief Judicial Magistrate of Dadra and Nagar Haveli by the then Sessions Judge to operate during the absence of the Sessions Judge and that Sessions Judge having himself ceased to have power of Sessions Judge his delegate cannot be said have the power which the delegating authority itself had ceased to have.

10. It is amazing that in spite of the objection raised in that behalf by the Union Territory before this Court in Criminal Writ Petition No. 1143 of 1996 in which the earlier order granting anticipatory bail on 1st May, 1996 was stayed by this Court, the said Chief Judicial Magistrate had no hesitation in passing yet another order under that delegation of power in April, 1984 and grant bail after arrest to Fatehsinh on 7th May, 1996.

11. Mr. Manudhane appearing on behalf of accused Fatehsinh contended that the Chief Judicial Magistrate had the power to release the accused on bail in case it appeared to the Court that the accused was not guilty of offence punishable with death or imprisonment for life. He relies on the observations made by the lower Court in the judgment where it is stated "I have already pointed that there is hardly anything placed before this Court to have the reasonable belief that the accused was guilty of such offence punishable by death or life imprisonment." Although these observations are made by the learned Judge he does not give reasons as to why there was no ground for reasonable belief that the accused was guilty of any offence punishable by death or life imprisonment. The lower Court has only discussed that the statement of complainant Damabhai cannot be treated as FIR since it was filed 3 and 1/2 hours after the time of incident and before that the information about the violence was given to the Police by a person by name Bapubhai. Mr. Manudhane also reiterates those observations of the lower Court and in addition contends that the FIR does not disclose any offence against this accused for which he could be punished with death or imprisonment for life.

12. The aforesaid observations of the lower Court so also the argument of Mr. Manudhane raised on behalf of the accused cannot be accepted. Firstly the earlier information which was given to the Police pursuant to which the Police had come on the scene was only a cryptic one informing the police that some violence is resorted to at the place of incident and, therefore, when the another eye-witness, who was witness to the whole incident, gives his statement that can very well be treated as FIR. Secondly even if the statement of the complainant is not treated as FIR it is a version given by an eye-witness whose presence at the place of incident is not challenged. The FIR mentions the role of the accused who investigated. The accused party was large in number and they are alleged to have committed offences under Sections 147, 148, 149, 341, 302, 323, 506 and 171 of IPC.

13. The next question which requires to be dealt with is whether the application for cancellation of bail could be entertained unless the prosecution has shown that the accused have contravened the conditions of bail or have held out threats to the witnesses or otherwise tampered with the evidence or are likely to abscond, which are in general the criteria for cancelling the bail already granted, rightly or wrongly. In this connection Mr. Agrawal, learned Advocate appearing on behalf of the petitioners Union Territory brought to my notice the judgment of the Division Bench of this Court delivered in the case of [Miss Rohini Mahavir Godse Vs. The State of Maharashtra and Others](#), . In that case the accused had to be released on bail under the provisions of Section 167(2) of Cr.P.C. as the charge-sheet was not filed within the prescribed 90 days. It appears that the charge-sheet was not filed by the Police because the same was not accepted on the erroneous view that it was not accompanied by the property of Muddemal. The Division Bench of this Court in the aforesaid case set aside the order refusing to accept the charge-sheet within the prescribed period u/s 167(2) also was set aside. In my view the ratio of the above decision is squarely applicable to the facts of this case and although the prosecution has not shown that the conditions for cancellation of bail exist yet when the order of grant of bail was passed by the Judicial Officer having no power in law will have to be set aside as the impugned order was passed without jurisdiction and, therefore, is void and is non est.

14. I, therefore, allow the Criminal Application No. 1975 of 1996 and set aside the impugned order dated 7th May, 1996 passed by the Chief Judicial Magistrate, Dadra and Nagar Naveli, Silvassa purporting to act as the In Charge Sessions Judge of the said Union Territory in Criminal Misc. Application No. 10 of 1996. Since the order granting accused bail is set aside he is liable to be arrested. In view of the order passed in Criminal Application No. 1975 of 1996, no separate order need be passed in Criminal Writ Petition No. 821 of 1996 and the same stands disposed of.

15. Order accordingly.