Gujarat High Court
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Nanu Gordhan vs State Of Gujarat on 24 July, 1991
Equivalent citations: (1995) 2 GLR 1698
Author: K Vaidya
Bench: K Vaidya
JUDGMENT

K.J. Vaidya, J.

1. How indeed sometimes even a slight, undreamt of even error due to the lack of desired judicial alertness and the precision on the part of the learned Judge and that too at the fag-end and on just flashing point of passing the final order releasing the accused on bail can simultaneously back-fire resulting into seriously prejudicing and damaging the interest of the poor accused frustrating and virtually writing-off the very order of the bail itself is amply illustrated in the instant case!! There is indeed no doubt whatsoever that the error committed by the learned Judge appears to be quite an inadvertent and bona fide one, which can be even committed sometimes by any one of us! However, the precise unfortunate situation which has surfaced in the instant case and that may also as well arise in some such other cases in future calling immediate attention is - where the illiterate, ignorant, persons reeling under the abject poverty complex is unable to release himself on bail would quite justifiably feel crushed and cursed alleging that the entire system of monetary bail is as if anti-poor and that the law, liberty and justice were the privilege and monopoly of some affluents few and/or at the most for some middle class persons in the society, if indeed urgent due care and circumspection is not evinced in the first place while fixing the bail amount, and in the second place, ordering the surety of the like amount to be furnished by the accused!! Under the circumstances, the most vital and the searching question that stares right into the eyes of this Court and confronts it is the question whether there can be any meaningful guidelines which can reasonably, if not entirely meet with and the salvage such an unsavoury situation, and thereby allay the apprehensions or atleast minimise the same of the poor accused persons! Bearing in mind this vital question, some efforts are being made in the course of this judgment to find out as to how and indeed what best possible can be done by evolving some guidelines to help out utterly poor accused languishing in jail, unable to secure and get released on bail because of the economic disability.

2. Now, turning to the alleged facts of the present case briefly, according to the complainant PS1-S.G Kumpavat, on 23-2-1990 at 18-45 hours, when he alongwith other police constables was patrolling the Bor Talav area, near the gate of Bal-Vatika, he saw one person (the petitioner herein namely Nanu Gordhan) and immediately on getting suspicious over his conduct and movement, stopped and searched him in the presence of the Panchas and in the process recovered five grams of 'Charas', valued at Rs. 80/- only from his pant pocket, for which he had neither any pass nor permit. Accordingly, after this muddamal was seized under the Panchnama and the accused came to be arrested on the spot, on the basis of this allegation, a complaint was filed against him for the alleged offences under Sees. 8 and 27 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short "the Narcotic Act") at "A" Division Police Station, Bhavnagar, which came to be registered as CR No. 93 of 1990. Thereafter, the petitioner-accused who had been sent to the judicial custody from jail made an application dated 4-6-1990 Exh. 1 addressed to the Sessions Court, Bhavnagar inter alia praying for releasing him on bail on the ground that though he was arrested as long back as on 23-2-1990 for the alleged offences under the Narcotic Act, and thereafter about 110 days had passed as an under-trial prisoner, no charge-sheet has been submitted against him. This particular application was forwarded to the Sessions Court, Bhavnagar by the Superintendent, District Prison, Bhavnagar, by a forwaridng letter dated 5-6-1990 vide reference No. 1137 of 1990. On receipt of the said bail application on 6-6-1990 and after the same came to be numbered as Misc. Criminal Application No. 352 of 1990, the learned Sessions Judge, Bhavnagar, issued notice to the learned P.P. fixing the hearing of it on 11-6-1990. Incidentally, it may be stated that on perusal of the record, it appears that the apprehension of the petitioner-accused that the charge-sheet was not filed in the Court within 90 days appears to be not wholly correct, as the same was filed in the Court of the Chief Judicial Magistrate on 8-5-1990 but unfortunately the copies of the same were

received late by the petitioner in jail on 22-1-1991.

3. The learned Sessions Judge ultimately on going through the police papers and taking into consideration the overall peculiar facts and circumstances of the case as has been stated in para 5 of his judgment viz., (i) that the accused was found in possession of small quantity of 'Charas' worth 5 grams, valued at Rs. 80/- only; (ii) that the investigating agency in its turn also believing that the said muddamal was for his personal use and consumption, had thought it fit to prosecute him under Sections 8 and 27 of the Narcotic Act; (iii) that the punishment provided for the alleged offences under Sections 27(a) and 27(b) of the Narcotic Act were one year or the fine and six months or fine, or both, respectively; (iv) that probably there were no other criminal antecedents against the accused, and (v) that the accused was a person residing within the jurisdiction of the Court and that he was not likely to abscond, if he was so released on bail, etc. etc,, ordered to release him on bail on his executing personal bond of Rs. 5,000/- and furnishing the solvent surety of the like amount with certain other further conditions. Now as the misfortune would have been, the accused despite the fact that he did obtain order of bail in his favour and yet he could not avail of the said benefit due to the curse of his extreme poverty which outrightly prevented him from complying with unrealistical, excessive, harsh and unjust order of furnishing solvent surety of Rs. 5,000/-!! It is under these gruelling circumstances that feeling utterly exasperated, down and dejected over his hard fate that the poor accused by this petition dated 20-6-1991 routed through the Superintendent, District Prison, Bhavnagar, has moved this Court inter alia praying for expeditious trial. The tale of woe depicted in the said application to be recapitulated is to the effect (i) that he is extremely poor and is languishing in jail for last about 19 months by virtue of an allegation and an arrest under the Narcotic Act, (ii) that he is the only bread-winner of family consisting of his wife and small children of tender age, who as a result of his incarceration in jail are rendered destitute and practically put on the street, (iii) that though he was ordered to be released on bail by an order dated 13-6-1990, more than 12 months have been passed and still however, because of his abject poverty he has not been able to furnish the solvent surety of Rs. 5,000/- to come out of the jail!!

4. Now, when on 19-7-1991 this matter came up for admission, in the first instance, while issuing notice to the respondent-State, making it returnable on 22-7-1991, this Court also directed the office to immediately call for R & P of the case from the Sessions Court, Bhavnagar, and in the second instance, simultaneously requested Mr. V.P. Gadhvi, the learned Advocate present in the Court to appear on behalf of the petitioner-accused. This was done simply and precisely with a view to see that in case after examining the police papers, if this Court was to ultimately dismiss this petition on merits then in that case the poor, illiterate accused who has been already embittered and exasperated over the heart-burning experience of the Sessions Court proceedings, which disabled him to get released on bail may not once again labouring under some misconception, the very same poverty complex doubt that in absence of the proper legal aid, whether in the first place, this Court has thoroughly examined his case or not, and in the second place, nursing the hopeless feeling and cursing that in this country the poor persons have neither a right to be properly defended by the learned Advocate and nor thereby even the highest Court of the State was perpared to carefully reconsider his case! This poverty complex of the accused in the opinion of this Court, in the first instance, needs special care, concern and consideration, as in a poor country, most of the accused are coming from the poor strata of the society and that sometimes, it is simply because of their grinding poverty, a lot in which they have misfortune to be borne, sunk and unable to come out which under the compelling circumstance of struggling for survival serves as a breeding ground for all sort of crimes and the criminal offences propelling them to be unvary victim of sheer unfortunate conspiracy of the circumstances against them and in the second instance, thereby rightly or wrongly they are being pushed behind the bars and are groaning and languishing in jail, sometimes for quite a long indefinite period!! Under such circumstances, every Court must remain wholly aware, alert and be sensible, sensitive and sympathetic enough to the feelings of such poor lot of the society who indeed need immediate attention and sympathy for getting legal assistance in the matter of bail/social justice. If this care, concern and consideration by the Court of its own is not entertained and just ignored, the nemesis of such unjust omission to do the right duty at the right time on the part of the Court would surely reflect upon the credibility and viability of the criminal justice system to the poor which constitute quite a sizeable part of the society!! No Court with its eyes wide open should ever risk such grave eventuality!! As observed above,

ultimately, it is the character, command, wisdom and the will of the Court to do justice which alone can keep up and alive the flame of hope, trust and faith of the poor accused in the matter of liberty and justice, by seeing that the same is not flickered off for want of its desired extent and degree of awareness on the part of the Administration of Justice.

5. Once again coming back to the facts of the present case, on perusal of the present petition, it appears that the only grievance of the petitioner-accused appears to be towards that part of the bail order wherein he has been insisted upon to furnish the solvent surety to the tune of Rs. 5,000/-!! In fact, the prayer of the petitioner-accused in the petition is to the effect that his trial may be expedited to put an end to the matter as he is unable to furnish the solvent surety to the tune of Rs. 5,000/ - due to his extreme poverty. Now the very fact that the petitioner-accused had to remain in jail despite the bail order in his favour for more than 12 months (that is to say, for a period more than the sentence prescribed!) that itself shows that because of his poverty, he has been unable to furnish the solvent security of Rs. 5,000/-. In this view of the matter, there is no difficulty at all in holding that the impugned order insisting upon the solvent surety of Rs. 5,000/- being "unrealistically excessive, harsh and unjust", the same deserves to be deleted at once. To ask a poor man who is hand-to-mouth to furnish solvent surety and that too to the extent of Rs. 5,000/- is indeed asking for an impossible task to be performed by him. In fact, virtually, it is as good as refusing bail, without saying so to that effect!! Such an order more or less is tantamount to put it proverbially 'showing the moon in the palm' of the petitioner-accused, and therefore, a cruel joke on his poverty which in turn is ultimately towards the justice/judicial system!! On going through the papers, it further appears that no efforts whatsoever have been made by the learned Judge to assess and test the financial strength and capacity of the petitioner as to whether he was in a position to satisfy the condition of bail amount to the extent of Rs. 5,000/-. Had infact the learned Judge been little discreet and inquired whether the accused was in a position to furnish the solvent surety of Rs. 5,000/-, this Court is indeed quite sure that he would have certainly at once expressed his total inability in this regard and as a result, on the Court passing just and reasonable order, he would not have been subjected to suffer in jail for such a long period, on account of his poverty!! In this view of the matter, since the impugned order of the learned Judge insisting upon the accused to furnish a solvent surety to the tune of Rs. 5,000/- as a condition precedent before he could be released on bail is on the face of it quite "unrealistically excessive, harsh and unjust" the same is hereby ordered to be deleted immediately in order to make the bail order effective so as to bring it within the reach of the poor petitioner.

6. Now, the judgments in such types of matters can never be permitted to rest as it is by just confirming or merely simply reversing it! The quite shocking revealing eye-opener facts of this case has rather given an opportunity to all of us to be aware of, alert, and accordingly reflect and apply afresh to the lesson held out by this case, viz., that in future for want of money the poor is not condemned to the pre-trial punishment on account of his ignorance, grinding poverty and precisely more that too because of the want of judicial awareness on the said count !! Accordingly, it appears to this Court that while releasing the accused on bail, the extent and degree of care, concern and consideration, the Court ordinarily undertakes at the time of assessing the merits of the case at the end of the full-dressed trial, the very same care, concern and consideration should also be further taken in the first place, while at the time of fixing up the bail amount and in the second place, deciding over and above the personal bond of the accused, whether additional condition of furnishing the solvent surety of the like amount was absolutely necessary or not? For this purpose, (i) first of all, whenever the accused is not represented by the Advocate and is found to be prima facie ignorant and poor, then in that case, at the time of hearing of the bail application, irrespective of any request being made by the accused concerned to give him free-legal aid (which at times because of his utter ignorance may not be knowing even and therefore, may not ask for), it is the duty of the Court to see to it that he is properly represented and legally assisted by asking some competent member of the Bar to appear for such accused to assist the cause of justice as has been done by this Court in the present case; (ii) that thereafter some efforts must expeditiously be made both by the prosecution as well as by the learned Advocate (Appointed) for the accused to place before the Court some material if available on the basis of which financial strength of the accused can be assessed for determining the bail amount and/or for ordering to furnish the solvent surety of the like amount; (iii) even despite compliance with the aforesaid two directions, sometimes to meet with some

unforeseen exceptional eventuality whereby for whatever reason, the accused who has been ordered to be released on bail is unable to get himself so released and as a result was suffering in jail, then in that case, the Court passing the order of bail should specifically so order the Jail Authority in the bail order itself to report back whether the accused has been able to release himself on bail or not; (iv) that in case on report back by the jail authority, it is found that for whatever reason the accused have not been able to get released himself on bail, the concerned Court of its own should recall the matter on the board, direct the jail authority to produce the concerned poor accused before the Court and after hearing in the first instance, the accused regarding his difficulties in getting bail and thereafter the learned Public Prosecutor, suitably review and modify the earlier order as far as possible to enable the accused to get released on bail; (v) Over and above the aforesaid guidelines all the criminal Courts while considering the bail applications, would be further well advised if they keep in forefront before their mental eyes, two landmark decisions of the Supreme Court which contain guidelines in the matter of bail to poor, helpless accused persons. They are: (1) Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar reported in AIR 1979 SC 1360 and (ii) Moti Ram and Ors. v. State of Madhya Pradesh reported in AIR 1978 SC 1594. For the sake of convenience and ready reference, the relevant paragraphs of the said two Supreme Court decisions are reproduced as under:

6.1 In the case of Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar (supra), the Supreme Court held that,

even under the law as it stands today, the Courts must abandon the antiquated concept under which pre-trial release is ordered only against bail with sureties. That concept is outdated and experience has shown that it has done more harm than good. The new insight into the subject of pre-trial release which has been developed in socially advanced countries and particularly the United States should now inform the decisions of our Court in regard to pre-trial release. If the Court is satisfied, after taking into account, on the basis of information placed in the community and is not likely to abscond it can safely release the accused on his personal bond. To determine whether the accused has his roots in the community which would deter him from fleeing, the Court should take into account the following factors concerning the accused:

1. The length of his residence in the community;

2. His employment status, history and his financial condition;

3. His family ties and relationship;

4. His reputation, character and monetary condition;

5. His prior criminal record including any record or prior release on recognizance or on bail;

6. The identity of responsible members of the community who would vouch for his reliability;

7. The nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non-appearance, and

8. Any other facts indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear.

If the Court is satisfied on a consideration of the relevant factors that the accused has his ties in the community and there is no substantial risk of non-appearance, the accused may, as far as possible, be released on his personal bond. But even while releasing the accused on personal bond it is necessary to caution the Court that the amount of the bond which it fixes should not be based merely on the nature of the charge. The decision as regards the amount of the bond should be an individualized decision depending on the individual financial circumstances of the accused and the probability of his absconding. The amount of the bond should

be determined having regard to these relevant factors and should not be fixed mechanically according to a schedule keyed to the nature of the charge. The enquiry into the solvency of the accused can become a source of great harassment to him and often result in denial of bail and deprivation of liberty and should not, therefore, be insisted upon as a condition of acceptance of the personal bond.

6.2 Similarly, in the case of Moli Ram and Ors. v. State of Madhya Pradesh (supra), the Supreme Court in following paragraphs after stating few facts of the case has held as under:

Facts:

The petitioner, a poor mason from M.P., pending his appeal in the Supreme Court, obtained an order for bail in his favour "to the satisfaction of the Chief Judicial Magistrate". The direction of the Supreme Court did not spell out the details of bail, and so the Magistrate ordered that a surety in a sum of Rs. 10,000/ - be produced. The petitioner could not afford to procure that huge sum or manage a surety of sufficient prosperity. Further, the Magistrate demanded sureties from his own district. He refused to accept the suretyship of the petitioner's brother because he and his assets were in another district. The petitioner moved the Supreme Court again to modify the original order "to the extent that the petitioner be released on furnishing surety to the tune of Rs. 2,000/- or on executing a personal bond or pass any other order or direction" deemed fit and proper.

Held: Bearing in mind the need for liberal interpretation in areas of social justice, individual freedom and indigent's rights, bail covers both release on one's own bond, with or without sureties. When sureties should be demanded and what sum should be insisted on are dependent on variables.

Even so, poor men, young persons, infirm individuals and women are weak categories, and Courts should be liberal in releasing them on their own recognizance put whatever reasonable conditions they may. It shocks one's conscience to ask a mason like the petitioner to furnish sureties for Rs. 10,000/-. The Magistrate must be given the benefit of doubt for not fully appreciating that our Constitution, enacted by 'We, the People of India', is meant for the butcher, the baker, the candlestick maker, the bonded labour and pavement dweller.

7. In the result, the order dated 12th June, 1990 releasing the petitioner-accused on bail in sum of Rs. 5,000/- by furnishing the personal bond is confirmed. Accordingly, the petitioner-accused shall be so released on bail forthwith on executing his personal bond in sum of Rs. 5,000/-. However, the rest of the order insisting upon the solvent surety of the like amount is hereby quashed and set aside. The petitioner-accused shall himself report at "A" Division Police Station, Bhavnagar fortnightly on every Monday between 10-00 a.m. and 12-00 noon and shall not involve himself in similar Narcotic activities. Compliance of this order of releasing the accused on bail be immediately intimated to this Court.

Office is directed to (i) communicate the order passed by this Court immediately on telephone to the learned Sessions Judge, Bhavnagar and (ii) send a copy of this order alongwith R & P of the case immediately.