

(1998) 03 BOM CK 0006

In the Bombay High Court

Case No : Criminal Anticipatory Bail Application No. 960 of 1998

Akhalaq Ahmed F. Patel

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 26-03-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 204, 437, 438, 438(1), 438(3)
Penal Code, 1860 (IPC) — Section 302, 306, 34, 498A

Citation : (1998) CriLJ 3969 : (1998) 2 MhLj 932

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

Bench : Single Bench

Advocate : K.R. Sutrale, for the Appellant; R.Y. Mirza, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

S.S. Nijjar, J.—The petitioner was arrested for offences under Sections 498A, 306 and 34 of I.P.C. He was released on bail on 24-1-1996. The petitioner is a Police Constable and now attached to Azad Maidan Police Station and is permanent resident in Mumbai. The deceased, who is the wife of the petitioner suffered burn injuries at her parents house on 10th November, 1995 at around 00.15 hrs. The father of the deceased is said to have come home at 2.00 a.m. The deceased had been removed to hospital. A statement was recorded of the deceased in the presence of the Executive Magistrate wherein she stated that the husband is not responsible. A statement of the father was also recorded. He also stated that the husband was not responsible. However, the father made another statement on 18th November, 1995 wherein he stated that he had come to know from his daughter that the petitioner and his father were having illicit relations with the sister-in-law of the deceased and, therefore, she was feeling insulted and that is why she has committed suicide. On the basis of this, FIR was registered on 18th November, 1995. However, the petitioner was released on bail on 4-1-1996. Subsequent thereto the father of the deceased has filed a complaint before the Additional Chief Metropolitan Magistrate, 24th Court, Borivli, Mumbai. On the

basis of this, the learned Magistrate issued non-bailable warrant. The petitioner came to know about the issue of non-bailable warrant when a newspaper report was published on 10th March, 1998. In view of the above, the petitioner moved an application for anticipatory bail u/s 438 of the Cr.P.C. which has been rejected by the Additional Sessions Judge, Gr. Mumbai by his order dated 30th March, 1998.

2. It was submitted before the learned Additional Sessions Judge that the learned Magistrate has taken cognizance of an alleged offence punishable u/s 302, I.P.C. It was submitted that this is a clear abuse of the process of Court. The petitioner has already been released on bail for offences which are based on the same incident. It was submitted that the petitioner cannot be arrested again and again for the same incident. It was also submitted that the application for anticipatory bail is maintainable before the Sessions Court in view of the fact that non-bailable warrants had been issued. In support of his submission, the learned Counsel has relied on a Full Bench decision of the Andhra Pradesh High Court reported at Sheik Khasim Bi Vs. The State, . It was, however, submitted by Counsel for the State that in view of the judgment of this Court reported in Ambalal Punamchand Rashamwala Vs. State of Maharashtra and another, the Sessions Court had no jurisdiction to entertain the application u/s 438 of the Cr.P.C. In paragraph 6 of the impugned judgment the learned Additional Sessions Judge has held thus :-

The point which needs consideration is whether the apprehension of arrest is at the hand of police or at the instance of Magistrate. The Hon'ble Bombay High Court has clearly ruled that if the arrest is being apprehended in execution of warrant issued by the Magistrate, the provisions of Section 438, Cr.P.C. has no application. Therefore, in my considered opinion the application is misconceived and needs to be rejected.

These observations have been made by the learned Special Judge on the basis of the judgment of this Court. It would be apt to reproduce the whole judgment delivered by A.A. Cazi, J :-

ORDER :- The petitioner seeks (a) an anticipatory bail and (b) order to respondent No. 1 (State of Maharashtra) not to execute the fresh non-bailable warrant which has been issued in Case No. 9/S/81 by the learned Metropolitan Magistrate of Tis Hajari Court, Delhi and to stay execution of that warrant till 18th December, 1991.

2. As far back as 10 years ago in 1981 a criminal case was filed by Respondent No. 2, Bashir Beg, against the present petitioner. It appears that the applicant has attended that Court several times and has even engaged Advocate Dinesh Chawla from Delhi to conduct his defence. The matter in the Delhi Court was fixed on 9th September, 1991 and has pointed out various reasons as to why he could not attend the Delhi Court on that date. As regards his Advocate not attending the Court he has pointed out that the Advocates to Tis Hajari were on

strike. Thereafter the petitioner received a letter dated 10th October, 1991 from his surety. Shri Shyam Sunder informing the petitioner that the learned Metropolitan Magistrate had issued a fresh non-bailable warrant against the petitioner because of his absence in the Court and had now fixed the next date as 18th December 1991 for trial. The petitioner also received a letter dated 5-10-1991 from his Advocate informing him that as the Advocates were on strike he had not appeared in the Court of the learned Metropolitan Magistrate and therefore the learned Metropolitan Magistrate had issued a fresh non-bailable warrant against the petitioner and had adjourned the case to 18th December, 1991. The petitioner says that he had already booked a ticket for 14th December, 1991 and he would leave Bombay on 14th December 1991 by Paschim Express by 11 a.m. and that he would go to Delhi and then he would get the non-bailable warrant cancelled and he undertakes to remain present in the Tis Hajari Court of the learned Metropolitan Magistrate, Smt. Sangita Dhingra on 18th December 1991 to face the trial.

3. The present application is clearly misconceived. No such anticipatory bail can be granted after a Magistrate has issued a warrant. The application is dismissed.

3. It is submitted by Mr. Sutrale, appearing for the petitioner, that the observations relied upon by the learned Additional Sessions Judge of Greater Bombay are contrary to the judgments given by Full Bench of the Andhra Pradesh High Court noticed above, Division Bench of the Calcutta High Court reported in 1996 (2) Crimes 555 P.V. Narasimha Rao Vs. State (Central Bureau of Investigation), , Full Bench of the Madhya Pradesh High Court reported in Nirbhay Singh and Another Vs. The State of Madhya Pradesh, and a Division Bench judgment of the Punjab and Haryana High Court reported in Puran Singh Vs. Ajit Singh and Another, . A perusal of the judgment of Cazi, J. given in the case of Ambalal Punamchand Rashamwala Vs. State of Maharashtra and another, shows that there is absolutely no discussion whatsoever of the relevant provisions of the Criminal Procedure Code or the principles governing the grant or refusal of anticipatory bail. The learned Judge has merely expressed an opinion to the effect that no anticipatory bail can be granted after a Magistrate has issued a warrant. These observations in my view cannot be treated as a ratio which is legally binding. They can at best be treated as obiter dicta being observations without consideration of the relevant provisions of law. On the other hand the Full Bench decision of the Andhra Pradesh in the case of Sheik Khasim 1986 Cri LJ 1303 (supra) considered the various provisions of the Criminal Procedure Code and the whole gamut of case law on anticipatory bail. The Full Bench notices the off quoted judgment of the Supreme Court in the case of Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, . In the aforesaid case the Supreme Court observed as follows (Paras 33 and 38) :

We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction u/s 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The

ends of justice will be better served by trusting these Courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application.

Then coming to the modalities regarding the passing of bail orders u/s 438(1), Cr.P.C. the Supreme Court held as follows :

But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed u/s 438(1) be limited in point of time? Not necessarily. The Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail u/s 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

After noticing the aforesaid observations the Full Bench has held that similar modalities can also be applied in the case of granting anticipatory bail u/s 438(1) even in a case where the Criminal Court takes cognizance and issues the warrant. Thus the question has been specifically answered after considering the various provisions of the Criminal Procedure Code. In paragraph 13 the Full Bench observed as follows :

13. For all the aforesaid reasons we hold that the filing of a charge-sheet by the police and issuing of a warrant by the magistrate do not put an end to the power to grant bail u/s 438(1) Cr.P.C. and on the other hand we are of the view that the High Court or the Court of Session has power to grant anticipatory bail u/s 438(1) to a person after the criminal Court has taken cognizance of the case and has issued process viz. the warrant of arrest of that accused person. Therefore, the decision of the Division Bench in Jeeth Kaur and Others Vs. P. Kondalamma and Another, , upholding the view taken by Madhusudhan Rao J. in N. Dasaratha Reddy's case (1975) 2 APLJ 214 (supra) and by Ramachandra Raju, J. in Cr.M.P. 884 of 1981 does not lay down the correct legal position and consequently all these rulings are overruled.

The aforesaid observations leave no manner of doubt that the Sessions Court as well as the High Court have powers to grant anticipatory bail even in cases where warrant has been issued by the Magistrate. The aforesaid view of the Andhra Pradesh Full Bench has been reiterated by a Full Bench of the Madhya Pradesh High Court in the case of Nirbhay Singh and Another Vs. The State of Madhya Pradesh, . In that very case the Division Bench judgment of the Punjab and

Haryana High Court given in the case of Puran Singh Vs. Ajit Singh and Another, has also been approved. Referring to the decisions of the Division Bench of the Punjab and Haryana High Court and the Full Bench of the Andhra Pradesh High Court it has been observed as follows:

5. A Division Bench of the Punjab and Haryana High Court took a contrary (sic) view in Puran Singh v. Ajit Singh. In that case, chargesheet was filed against the accused named in the F.I.R. after exonerating one of them. A private complaint was filed against the excluded person and the Magistrate ultimately issued non-bailable warrant. The Sessions Court rejected an application moved u/s 438, Cr.P.C. on the ground that it was not maintainable. A similar application was filed in the High Court and the Division Bench considered the matter though the trial was almost over, since the question has been referred to by a learned single Judge. A learned single Judge of the Punjab and Haryana High Court had taken a view against the maintainability of such an application in Ramlal v. State of Punjab. The Division Bench held that jurisdiction u/s 438 is not dependent on whether the Magistrate acting u/s 204 has issued bailable or non-bailable warrant, that the arrest may be at the instance of the police or at the instance of the Magistrate who has issued the warrant and in either case it may give rise to an apprehension in the mind of the accused that he : may be arrested and such apprehension, if it arises in relation to a non-bailable offence, entitles ; him to move for anticipatory bail. The Court held that the Court may refuse to give relief if the i warrant is a bailable one since it has the same ?"effect as an order u/s 438.

6. The Sheikh Khasim Bi v. State 1996 Cri LJ 1303 a Full Bench of the Andhra Pradesh High Court agreed with the view taken by the Punjab and Haryana High Court after elaborate consideration of the legislative history of the provision. The Court held that the provisions in Section 438(3) do not have the amplitude of the provisions in Section 438(1) and the filing of charge-sheet does not put an end to the power u/s 438. The Full Bench relied on a Division Bench decision of this Court in Ramsewak and Others Vs. State of M.P., . The Court considered the contention that there may be conflict between non-bailable warrant issued by a Magistrate and an order of anticipatory bail granted by the Sessions Court or High Court and held that in such a case the police shall execute the warrant by arresting the accused and produce him before the Magistrate and shall thereafter release the accused on bail as per the order granting anticipatory bail.

The Division Bench of Delhi High Court in the case of P.V. Narasimha Rao Vs. State (Central Bureau of Investigation), has also approved the judgment of the Punjab and Haryana High Court given in Puran Singh Vs. Ajit Singh and Another, . In this case, however, the proposition canvassed was converse. It was argued that since only summons had been issued there may be no apprehension of arrest. Considering the submissions made by the Counsel, the Division Bench of Delhi High Court has observed as follows :

8. It is thus crystal clear from above that the power u/s 438, Cr.P.C. to grant

anticipatory bail is of an extraordinary character in as much as the bail is granted only after arrest whereas an order of anticipatory bail is to be passed only before arrest. It is of a wider amplitude. It is without any strings and fetters attached to it except those referred to above. The legislators in their wisdom have chosen not to impose any sort of checks, restrictions and impediments in the way of the Courts to grant bail in cases where the Courts come to the conclusion that it is a fit case for them to do so. They will be free to do so without any let or hindrance.

Thereafter the Division Bench of the Delhi High Court adverted to the circumstances which led to the incorporation of Section 438 into the body of the Criminal Procedure Code. Again the Delhi High Court also noticed the judgment of the Supreme Court in the case of Gurbaksh Singh Sibbia. The judgment of the Division Bench of the Punjab and Haryana High Court in *Puran Singh Vs. Ajit Singh and Another*, was approved as follows :

24. A situation very much akin to the situation in hand arose before the Punjab and Haryana High Court in the case of *Puran Singh Vs. Ajit Singh and Another*, . While dealing with the said situation it was observed. . . "The main governing factor for the exercise of jurisdiction u/s 438, Cr.P.C. is the apprehension of arrest by a person accused of the commission of a non-bailable offence. The section makes no distinction whether the arrest is apprehended at the hands of the police or at the instance of the Magistrate. The issuance of a warrant by the Magistrate against a person, to my mind justifiably gives rise to such an apprehension and well entitles a person to make prayer for his anticipatory bail. The High Court or the Court of Session may, however, decline to exercise its powers u/s 438(1), Cr.P.C. keeping in view the fact that the Magistrate has summoned the accused through bailable warrant i.e. a relief almost similar to what can be granted by the Court u/s 438(1), Cr.P.C. yet that does not mean that the Court has no jurisdiction to grant anticipatory bail to such an accused person. The grant of bail u/s 438(1) by the High Court or the Court of Session is, to my mind, dependent on the merits of a particular case and not the order of the Magistrate choosing to summon an accused through bailable or non-bailable warrant.

Thereafter the ratio of the judgment is in paragraph 26 which is as follows :-

26. The above view which we are taking also finds support from the observations of the Andhra Pradesh High Court (Full Bench) in *Sheik Khasim Bi Vs. The State*, . For all the aforesaid reasons we hold that the filing of a charge-sheet by the police and issuing of a warrant by the Magistrate do not put an end to the power to grant bail u/s 438(1), Cr.P.C. and on the other hand we are of the view that the High Court or the Court of Session has power to grant anticipatory bail u/s 438(1) to a person after the criminal Court has taken cognizance of the case and has issued process viz. the warrant of arrest of that accused person.

The Division Bench of Calcutta High Court in the case of *Pankaj Lochan Sahoo v. State* (1996) 2 Crimes 555 also notices the judgment of the Supreme Court in

Gurbaksh Singh Sibbia's case. In view of the aforesaid enunciation of law by various Courts of this Country it is not possible to hold as a proposition of law that Sessions Court or the High Court will have no power to entertain the application for anticipatory bail where either summons or warrants have been issued against the accused. The Court has the jurisdiction to grant anticipatory bail on being satisfied that the accused apprehends arrest in a non-bailable offence. It is difficult, therefore, to appreciate the reasoning of the learned Additional Sessions Judge to the effect that the application for anticipatory bail is inconceivable because the applicant is liable to be arrested on the basis of the directions issued by the Magistrate rather than the police. This reasoning, in my view,, does not conform with the provisions of Section 438 of the Criminal Procedure Code.

4. On merits admittedly on the basis of the same incident an FIR has been registered against the applicant on 18th Nove. 1995. It is also a matter of record that in the said case the petitioner has been released on bail by order dated 4-1 -96, The present complaint has been lodged before the Court after a period of two and half years. The petitioner is in Government service. There is hardly any apprehension of the petitioner absconding. At this late stage it can hardly be said that the petitioner is likely to tamper with the evidence or interfere with the witnesses. In view of the above I find this to be a fit case in which the petitioner deserves to be granted anticipatory bail.

5. In view of the above, it is ordered that in the event of the arrest of the petitioner on the basis of: the non-bailable warrant issued by the Magistrate, 24th Court, Borivli, Mumbai in case No. 170/W/ 98 he shall be released on bail on his furnishings PR Bond in the sum of Rs. 5,000/- with one surety in the like amount to the satisfaction of the learned Metropolitan Magistrate, 24th Court, Borivli. The petitioner is entitled to deposit cash till the surety is furnished to the satisfaction of the Magistrate, 24th Court, Borivli, Bombay. Application is allowed.

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