
(2009) 05 MP CK 0048
In the Madhya Pradesh High Court

Bheem Singh Bhadoriya

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 12-05-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438, 70
Penal Code, 1860 (IPC) — Section 120B, 204, 420, 467, 468

Citation : (2009) CriLJ 3697

Hon'ble Judges : A.P. Shrivastava, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.P. Shrivastava, J.—This is first application u/s 438 of Cr. P. C. filed by the applicant against the order dated 28-2-2009 passed by the Additional Judge to the Court of First Additional Sessions Judge, Gwalior, in ST No. 210/08.

2. The applicant, earlier, was arrested by Police Station Hujrat Kotwali, under Sections 420, 467, 468, 469, 471 of IPC and was enlarged on bail. By the impugned order, one application filed on behalf of the applicant for exempting the appearance before the Court was rejected. The Court observed that the witness was present and on the last date also the applicant was not present. The presence of the applicant was required for identification of the victim, therefore, the application for exemption was rejected and the Court forfeited the bail bonds of the applicant and issued non-bailable warrant.

3. The question for consideration arose whether in such circumstances the benefit of provision of Section 438 of Cr.P.C. can be extended to the applicant?

4. It is submitted by the counsel for the applicant that due to accident, the applicant could not appear before the Court and as the non-bailable warrant has been issued by the Court, therefore, there is apprehension of arrest. In support of his contention, he relied on various citations out of which Full Bench decision of this Court is referred in the case of Nirbhay Singh and Another Vs. The State

of Madhya Pradesh, in which the ratio is decided in paras 14 and 15 which are as follows:

14. In our opinion, the conflict between an order of anticipatory bail and non bailable warrant has to be met in a pragmatic manner striking a balance between individuals right to personal freedom and the invocation of right of the police and the procedure required to be followed by a Magistrate. Where an order of anticipatory bail is passed after issue of non-bailable warrant of arrest by a Magistrate, the duty of the police officer entrusted with execution of the warrant would be to arrest the person and produce him before the Magistrate who thereupon shall deal with the accused as required by the order of anticipatory bail.

15. In view of what we have indicated above, we are in respectful agreement with the view taken by the High Court of Punjab and Haryana that an application u/s 438, Criminal Procedure Code would be maintainable even after the Magistrate issued process u/s 204 or at the stage of committal of the case to the Sessions Court or even at a subsequent stage, if circumstances justify the invocation of the provision. This is not to say that the jurisdiction u/s 438 of the Code is to be freely exercised without reference to the nature and gravity of the offence alleged, the possible sentence which may be ultimately imposed, the possibility of inference with the investigation or the witnesses and public interest. With great respect, we are unable to agree with the view taken by the High Court of Rajasthan.

5. He has also relied on *Yogendra Singh Vs. State of M.P., and Arun Kumar v. State of M.P.* reported in 2001 (4) MPLJ 449 . It is submitted that both these judgments are of the same Bench.

6. He also relied on *Yuvraj Gaud Vs. State of Madhya Pradesh and Another, .* In case of *Yuvraj Gaud (supra)* the point for issue was different. In that case, the accused charged under Sections 420, 467, 468, 471 and 120B, Indian Penal Code, seeking anticipatory bail. The accused was summoned initially through bailable warrant in a private complaint case and subsequently by a warrant of arrest. Accused was a Government servant. Looking to the allegations in the private complaint, second application for grant of anticipatory bail allowed on certain conditions.

7. Now, I will discuss the case of *Yogendra Singh (supra)* and *Arun Kumar (supra)*. In the case of *Yogendra Singh (supra)*, it was observed by this Court that an application for anticipatory bail in respect of accusation of a non-bailable offence, by a person who was already released on bail or anticipatory bail in respect of accusation of that very non-bailable offence, is not maintainable, when warrant of arrest is issued by a Court against him as he defaulted in appearance while on bail or anticipatory bail. Such person may take steps u/s 70(2) of Cr. P. C. for recall/cancellation of warrant or he may assail the order issuing warrant against him before the higher Courts.

8. In the case of Yogendra Singh (supra), the Full Bench decision of this Court reported in Nirbhay Singh and Another Vs. The State of Madhya Pradesh, has also been discussed in detail in paras 3, 7, and 8. The Court also observed that there are stages wherein an accused can apprehend arrest. These would conceptually engulf "subsequent stages" but would not cover a stage where an accused, who has availed the privilege of anticipatory bail or regular bail and fails to appear before the Court on the dates fixed for trial and in a way abuses his liberty. Regarding the stage, in case of Natturasu and Others Vs. The State, (Madras High Court) in which it is observed as under:

92. The above five contingencies involve different stages. As seen earlier, once the person accused of is released on anticipatory bail or on bail at one stage, the operation of the bail continues till the conclusion of trial. Therefore, the person, who is already on bail or anticipatory bail, cannot be entitled to apply for a fresh anticipatory bail in respect of the same accusation, in other stages.

93. For instance, if a person who is already on bail, did not appear before the Court and that therefore, the Court issues warrant of arrest, then the said person will certainly have the apprehension of arrest.

94. But, in such a situation, the accused is not entitled to file an application for anticipatory bail, because he is already on bail or anticipatory bail in respect of the accusation of non bailable offence. He shall, in such circumstance, have to take steps to recall the warrant.

95. Therefore, the application for anticipatory bail would not deal with the situation, wherein the accused had appeared before the Court, in relation to the case in which he already obtained the bail.

96. In other words, the application u/s 438, Cr. P. C. being dealt with only relates to the apprehension of arrest for the accusation of non-bailable offence only one.

9. In case of Arun Kumar (supra), the matter was different. It was observed that when Magistrate takes cognizance in respect of non-bailable warrant and even issues summons, the accused would be entitled to move competent Court for grant of anticipatory bail and the same application would be maintainable.

10. In Adri Dharan Das Vs. State of West Bengal, , it was observed by the Apex Court that the object which is sought to be achieved by Section 438. The power exercisable u/s 438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty then power is to be exercised u/s 438. The use of expression "reason to believe" showing that the apprehension that he may be arrested must be founded on reasonable grounds. Such grounds must be capable of being examined.

11. There is a difference that a person is apprehending arrest in a case when an offence is registered by a police station or cognizance is taken by the Court and

in case of breach of terms of bond and in lieu of that a non-bailable warrant has been issued.

12. In this case, from perusal of the impugned order, it appears that the applicant could not appear on the date of appearance in the case fixed for evidence and on the previous date also he remained absent. Due to this, the trial of the case could not be proceeded due to want of identification and therefore, the Court rejected the application for exemption of appearance and issued the non-bailable warrant.

13. It appears that the applicant purposely avoided to appear in the Court so that the case may be adjourned at evidence stage. In this case the accused was already granted bail and he did not appear before the Court therefore, the Court issued non-bailable warrant which is distinguishable on the fact that when the Court takes cognizance and issues non-bailable warrant of arrest to appear before the Court in that case he has apprehension for arrest and was not on bail prior to the passing of the order of the Court.

14. Hence, in view of the above discussion and relying on the earlier decision of this Court in *Nirbhay Singh and Another Vs. The State of Madhya Pradesh*, was discussed, in the present case the applicant was released on bail and thereafter non-bailable warrant was issued by the trial Court after forfeiting his bail bonds. He has a remedy to approach the Court for recalling the order or may avail other remedy available at law.

15. Therefore, in view of the above discussion, it is not a fit case in which the provision of Section 438 of Cr.P.C. is to be extended to the applicant and hence, the application is rejected. However, it is further directed that if the applicant is brought before the Court in compliance of the non-bailable warrant, or if he surrenders before the Court and moves an application for bail, the Court shall dispose of the same on the same day.

16. With such observation, MCrC stands dismissed accordingly.