
(2008) 01 MP CK 0065
In the Madhya Pradesh High Court

Fazilat Mohammad

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 08-01-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437, 438, 439, 44, 70
Penal Code, 1860 (IPC) — Section 380, 457

Citation : (2008) ILR (MP) 7

Hon'ble Judges : A.K. Saxena, J

Bench : Single Bench

Judgement

A.K. Saxena, J.—The applicant Fazilat Mohammad has filed this application for anticipatory bail u/s 438 of the Code of the Criminal Procedure, 1973 (hereinafter referred to as "the Code") in connection with Crime No. 278/05 (Criminal Case No. 959/06 pending in the Court of Additional Chief Judicial Magistrate, Khandwa) registered with Police Station City Kotwali, Khandwa, under Sections 457 and 380 of the Indian penal Code, 1860.

2. The facts of the matter are briefly stated as under:

3. After registration of the crime by Police Station City Kotwali, Khandwa, the applicant Fazilat Mohammad moved an application u/s 438 of the Code before the Sessions Court and the same was rejected by IIIrd Additional Sessions Judge (Fast Track) vide order dated 9.12.2005. Thereafter, another application for anticipatory bail was filed by the applicant before the Sessions Court and the Ist Additional Sessions Judge allowed that application vide order dated 28.9.2006. Then the State moved an application under Sub-section (2) of Section 439 of the Code for cancellation of anticipatory bail on the grounds that the applicant had failed to disclose that it was his second bail application and instead, he had disclosed that it was his first bail application for anticipatory bail. The Ist Additional Sessions Judge found that correct facts have been concealed by the applicant in respect of number of application and the anticipatory bail, granted to the applicant, was cancelled vide order dated 25.11.2006. Thereafter, the

applicant filed the anticipatory bail application before this Court with an interim application No. 12519/06 for grant of ad-interim anticipatory bail which was allowed vide order dated 21.12.2006 passed in M.Cr.C. No. 11134/06. This order was confirmed by this Court vide order dated 12.1.2007 and the applicant was granted anticipatory bail with these conditions that the anticipatory bail order shall remain in force till the next 60 days and in the meanwhile, if the applicant so desires, may move an application for regular bail before the competent Court, which shall be considered by that Court in accordance with law.

4. After this anticipatory bail order, according to allegations and facts, the applicant tried to furnish bail bonds before the police, but concerned police officer refused to accept the bail bonds. Then an application under Sections 44(2) 70(2) read with Section 437 of the Code was moved before the Court of Additional Chief Judicial Magistrate, but the same was rejected vide order dated 19.1.2007. Thereafter, an application u/s 438 of the Code was also filed before the Sessions Court, but that application was rejected vide order dated 4.4.2007 by the I st Additional Sessions Judge on the grounds that the period of 60 days, granted by the High Court, has already been elapsed and the applicant took the bail order from the Sessions Court by not disclosing the correct facts. Now, this application has been filed for anticipatory bail before this Court.

5. During consideration of anticipatory bail application in hand, this Court found that contradictory stand has been taken by the Additional Chief Judicial Magistrate and the Incharge Police Station, City Kotwali, Khandwa. The Additional Chief Judicial Magistrate, while considering the application filed under Sections 44(2) 70(2) read with Section 437 of the Code, came to this conclusion that the police do not want to arrest the applicant because the applicant cannot be implicated as an accused without seizure of theft property and in view of the above aspect of the case, the request of surrender of the applicant was not accepted by the Court and it was observed that it is duty of the police to arrest the applicant. It has been further observed that since the police do not want to arrest the applicant and the Court does not need the applicant as an accused in connection with Criminal Case No. 959/06 because no charge-sheet was filed against him, therefore, the application filed under Sections 44(2) 70(2) read with Section 437 of the Code cannot be allowed and, therefore, it was rejected. The Additional Chief Judicial Magistrate and the Incharge Police Station, City Kotwali, Khandwa submitted their replies and according to Incharge Police Station, City Kotwali, Khandwa, it was not disclosed before the Court in the objection filed before the trial Court that the police do not want to arrest the applicant. On the other hand, the Additional Chief Judicial Magistrate stated in his reply that on the basis of oral request of police officer, it was disclosed in the order sheet that the police do not want to arrest the applicant without seizure of the theft property and this order sheet was dictated in the presence of District Prosecution Officer.

6. On a perusal of replies submitted by the Additional Chief Judicial Magistrate and Incharge Police Station City Kotwali, Khandwa, it is apparent that

explanation given by the Additional Chief Judicial Magistrate was not proper and it was totally against the order passed by him on 19.1.2007 in which it has been categorically stated that according to police report, the police do not want to arrest the applicant because, he cannot be impleaded as an accused without seizure of the theft property. This Court found in this matter that no such objection was raised by the police. On a perusal of objection filed before the trial Court by the police, I found that the police wanted to seize the theft property from the applicant. So, it has wrongly been mentioned by the Additional Chief Judicial Magistrate in his explanation dated 28.11.07 that on the basis of oral information given by the police officer, it was mentioned in the order sheet that the police do not want to arrest the applicant without seizure of the theft property and the above fact is totally against the order dated 19.1.07 passed by the Additional Chief Judicial Magistrate. It is very unfortunate that the concerned Additional Chief Judicial Magistrate tried to give an explanation which is not supported by any documentary evidence and that too, which is against his own order. If the Magistrate had committed a bonafide mistake, it should have been accepted by him without any explanation.

7. The applicant had filed an application under Sections 44(2) 70(2) read with Section 437 of the Code for surrender and regular bail in the Court of Additional Chief Judicial Magistrate. This application should have been disposed of by the Court concerned after perusal of the case diary. It was not proper on the part of Magistrate to consider the bail application partly and that too, without perusal of the case diary and specially when the High Court granted anticipatory bail to the applicant after perusal of the case diary.

8. It has been laid down in the case of *Rajul Rajendranath Dubey v. State of M.P.* 2006(3) MPHT 65 that if a person is granted anticipatory bail for a limited duration and during the period granted by the higher Court, an application for regular bail is filed in the lower Court, it is not at all necessary that the applicant shall remain present before the Court at the time of filing of regular bail application, or he must be in actual custody. In these circumstances, when the application was filed for surrender and regular bail before the Court of Additional Chief Judicial Magistrate, it was his duty to call for the case diary and to see as to whether the applicant was entitled for regular bail or not and if not, then only the applicant could have been taken into custody, but the learned Additional Chief Judicial Magistrate failed to consider this aspect of the case and rather disposed of the bail application in a casual manner without considering the facts of the case which could have been available only in the case diary and not in the report of police submitted in form of objection before him. The Magistrate has also failed to peruse the anticipatory bail order passed by this Court on 12.1.07 in which it was categorically mentioned that within the period of sixty days, if the applicant files an application for regular bail, the same shall be considered by the competent Court in accordance with law. The concerned Magistrate has totally failed to comply with this order. It was duty of the Magistrate to consider the regular bail application on merits in accordance with law whereas he failed to

pass any order on the relief of regular bail and disposed of the application on the matter of surrender only. The Magistrate has also failed to consider this aspect that earlier, the Sessions Court (though order was cancelled) and thereafter, the High Court passed an order of anticipatory bail in favour of the applicant after perusal of the case diary. Even if, there was an oral submission that the police do not want to arrest the applicant, how can an application for regular bail be rejected without perusal of the case diary, this fact has not been considered by the Magistrate. Here, the Magistrate has committed a grave mistake. Apart from that, it cannot be a condition precedent for consideration of a bail application that first of all, the theft property should be seized and thereafter, a person can be impleaded as an accused. A person can be impleaded as an accused even before the seizure of theft property in several circumstances. Therefore, the learned Magistrate has failed to appreciate the facts of the case in proper perspective. But considering all the facts, this Court is of the opinion that no further action is needed against the concerned Additional Chief Judicial Magistrate either on judicial side or on administrative side.

9. On a perusal of all the facts and circumstances which have been narrated hereinbefore, I found that the applicant could not get the relief claimed u/s 437 of the Code because of casual approach of the Magistrate in dealing with the matter. Though, this Court has laid down that if an application for anticipatory bail is allowed and the regular bail application is rejected then, an anticipatory bail application would not be maintainable in the higher Court. But this is not the position here because the application filed u/s 437 of the Code, was neither rejected nor allowed by the learned Additional Chief Judicial Magistrate and instead, only the prayer of surrender was rejected. In these circumstances, the anticipatory bail application could have been considered by the Sessions Court itself, but the Sessions Court also failed to consider the above aspects of the matter.

10. In the above peculiar circumstances of the matter, I am of the opinion that the anticipatory bail application filed u/s 438 of the Code, can be allowed and the period of anticipatory bail can be extended as the application is maintainable in this Court. Since the Magistrate failed to consider the application filed u/s 437 of the Code on merits and the Sessions Court also failed to consider the anticipatory bail application in view of the peculiar circumstances of the matter created by the Magistrate, therefore, this Court has to pass an order of anticipatory bail in favour of the applicant by extending the period of anticipatory bail and the applicant cannot be sent to jail for the error committed by the Courts below.

11. Considering all these facts, the application filed u/s 438 of the Code, is allowed and it is directed that the order passed on 11.10.2007 in respect of ad-interim anticipatory bail in this matter, shall remain in force till the next 45 (Forty five) days and in the meanwhile, if the applicant Fazilat Mohammad so desires, may move an application for regular bail before the competent Court , which

shall be considered by that Court in accordance with law. The applicant shall abide by the conditions enumerated in Sub-section (2) of Section 438 of the Code.

12. Now, it is expected that in view of the principles laid down by the High Courts and the Apex Court in respect of bail matters in several cases, the application of regular bail of the applicant will be considered by the Court below on merits.