

(2012) 12 BOM CK 0005

In the Bombay High Court

Case No : Criminal Application (Main) No. 239 of 2012

Kashinath Jairam Shetye

APPELLANT

Vs

Ramakant Mahadev Sawant and Others

RESPONDENT

Date of Decision : 20-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438
Penal Code, 1860 (IPC) — Section 334, 34, 406, 439(2)

Citation : (2013) 2 ABR 11 : (2013) ALLMR(Cri) 861 : (2013) 1 BomCR(Cri) 782

Hon'ble Judges : U.V. Bakre, J;A.P. Lavande, J

Bench : Division Bench

Advocate : Prema Mathkar, for the Appellant; D. Pangam, A.N.S. Nadkarni, Advocate General and D. Lawande, Assistant Public Prosecutor, for the Respondent

Judgement

A.P. Lavande, J.—Heard Ms. Mathkar for the applicant, Mr. Pangam for respondent No. 1 and Mr. Nadkarni, learned Advocate General appearing on behalf of respondents Nos. 2 and 3. Rule, By consent heard forthwith.

2. By this application, the applicant seeks cancellation of bail granted to respondent No. 1 by the Sessions Judge, North Goa, Panaji by order dated 23rd August, 2012. The applicant has also sought further relief to the extent of holding an inquiry against the learned Sessions Judge for not disposing of the matter expeditiously.

3. Since the issue regarding delay in disposal of the anticipatory bail was raised in the application, we deemed it appropriate to take up the matter although the application seeking only cancellation of bail or anticipatory bail would lie before learned single Judge in terms of the Bombay High Court, Appellate Side Rules. Moreover, learned single Judge before whom the matter was placed, ordered that the same be placed before Division Bench. Even Mr. Pangam, learned counsel appearing for respondent No. 1 stated that he has no objection if we take up the matter and lay down some guidelines regarding disposal of the anticipatory bail

applications filed before the Sessions Courts.

4. Briefly, the facts leading to the filing of the present application are as under:--

An FIR No. 113/2009 dated 24.7.2009 was registered at Pernem Police Station at the instance of Assistant Director of Education u/s 406 r/w Section 334 of Indian Penal Code. In the said report, respondent No. 1 and other members of the erstwhile School Managing Committee of Durga English School were shown as accused. The allegation was that an amount of Rs. 18.00 lakhs sanctioned by the Directorate of Education for the purpose of upkeep and maintenance of the school was misappropriated and in the said misappropriation, the said accused were involved.

The applicant herein filed Criminal Writ Petition No. 41/2012, inter alia, making a grievance that investigation was not being carried out properly by the investigating agency. In the course of hearing, we noticed that the investigation was not being carried out properly as it ought to have been carried out and issued directions to file affidavit by the Inspector General of Police and accordingly, affidavits were filed. Ultimately, by judgment dated 5th September, 2012. the writ petition was disposed of, and the statement made by the learned Public Prosecutor that the investigation would be completed within a period of 3 months was accepted.

5. Respondent No. 1 herein filed an application seeking anticipatory bail before the learned Sessions Judge on 29th March, 2012.

6. Since a grievance has been made that there has been an inordinate delay in disposal of the bail application, we deem it appropriate to refer in some detail to various dates to which the said application was adjourned.

7. On 29.3.2012. respondent No. 1 filed anticipatory bail application in respect of FIR No. 113/09. On the same day, notice was issued to the respondent returnable on 31st March, 2012, on which date, respondent/State sought time and on 3.4.2012 reply was filed on behalf of the respondent and arguments were also heard. Thereafter, the matter was fixed on 7.4.2012 for order. However, the order could not be passed and the matter was adjourned to 18.4.2012. At that stage, an intervention application came to be filed by the present applicant, of which reply was sought on 21.4.2012. Reply was accordingly filed. Ultimately, the application came to be allowed by order dated 11.5.2012. It appears that the learned Sessions Judge was transferred to the South Goa, Margao from June, 2012.

8. The bail application was placed before the new incumbent on 27.6.2012, on which date, the learned Sessions Judge was on leave and, as such, it was adjourned to 12.7.2012, on which day, the matter was adjourned for re-arguments. On 20.7.2012, arguments were heard and the matter was fixed on 24.7.2012 for order by directing the intervenor to file written arguments, if any. Thereafter, the matter was adjourned from time to time for order, and ultimately,

by the impugned order dated 23rd August, 2012, the learned Sessions Judge allowed the application on certain terms and conditions.

9. Ms. Mathkar, learned counsel appearing for the applicant who is intervenor in the said application, submitted that having regard to the nature of the offence alleged against respondent No. 1 and other accused, the learned Sessions Judge ought not to have granted the relief u/s 438 of Cr. P.C. to respondent No. 1. According to the learned counsel, the offence was of grave nature and in the facts and circumstances of the case, learned Sessions Judge was not justified in granting the relief u/s 438 of Cr. P.C. to respondent No. 1. According to the learned counsel, respondent No. 1 was the main accused who was involved in the misappropriation of huge amount belonging to the State and, as such, respondent No. 1 should not have been released on anticipatory bail-According to the learned counsel, the investigation was at the preliminary stage and considering that the misappropriation was of public funds, the impugned order is clearly not justified. Ms. Mathkar placed reliance upon unreported order dated 12.3.2012 passed by the learned single Judge at Aurangabad in Mohd. Rafiuddin Rehan Siddiqui v. The State of Maharashtra and others (Criminal Application No. 578/2012 with connected matters.) Learned counsel further submitted that there is inordinate delay in disposal of the anticipatory bail application.

10. On the other hand, learned counsel Mr. Pangam, appearing for respondent No. 1 submitted that absolutely no case was made out by the applicant for cancellation of the anticipatory bail granted to respondent No. 1 inasmuch as the impugned order cannot be said to be patently illegal or perverse and there are no supervening circumstances, warranting cancellation of the anticipatory bail. According to the learned counsel, there are irrelevant pleadings, both in the main application, as well as in the rejoinder. In any case, according to Mr. Pangam, the applicant has not even urged the grounds on which custodial interrogation of respondent No. 1 is warranted. Mr. Pangam further pointed out that even the State has not challenged the said order by filing appropriate proceedings before this Court. According to Mr. Pangam, considering the nature of the offence alleged and the punishment prescribed under the Indian Penal Code, no fault can be found with the learned Judge in passing the impugned order. Mr. Pangam pointed out that the maximum punishment provided for the offence punishable u/s 406 of IPC is 3 years imprisonment and hence, the said offence cannot be said to be serious offence, warranting custodial interrogation of respondent No. 1 and that too after a period of three years from the date of registration of the FIR. Mr. Pangam pointed out that the FIR was registered on 24.7.2009, whereas the impugned order was passed on 23.8.2012. Lastly, Mr. Pangam submitted that absolutely no interference is warranted with the impugned order. Mr. Pangam submitted that at times the disposal of anticipatory bail applications are delayed by prolix and/or irrelevant submissions made by the first informant/complainant. Mr. Pangam placed reliance upon the following judgments:--

(1) Hazari Lal Das Vs. State of West Bengal and Another, : and

(2) Sanjay Chandra Vs. CBI, .

11. Mr. Nadkarni, learned Advocate General appearing on behalf of respondents Nos. 2 and 3 fairly submitted that having regard to the materials available before the learned Sessions Judge, no fault can be found with the impugned order. Mr. Nadkarni invited our attention to the Order dated 5.9.2012 passed by the Division Bench of this Court in Criminal Writ Petition No. 41/2012. in which this Court clearly took note of the negligent and lackadaisical manner in which the investigation was carried out till notices were issued by this Court in the said writ petition. However, Mr. Nadkarni submitted that the State reserves its right to file proceedings for cancellation of the anticipatory bail granted, if situation demands. Learned Advocate General submitted that the parameters to be considered by the Court while considering an application for anticipatory bail have been clearly laid down by the Apex Court in the case of Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others, .

12. We have carefully considered the submissions made by the learned counsel for the parties and the learned Advocate General, as also the judgments relied upon. We have also perused the original record in the anticipatory bail application No. 115/2012.

13. Coming to the merits of the application filed by the applicant seeking cancellation of anticipatory bail, it is pertinent to note that the FIR was registered on 24.7.2009 and practically for a period of almost two and half years hardly any investigation was carried out by the investigating officers, who were in-charge of Pernem Police Station. Moreover, from a perusal of the judgment dated 5.9.2012, in Criminal Writ Petition No. 41/2012, it is evident that the investigation carried out in Crime No. 113/2009 was lethargic and lackadaisical and in this factual background, we accepted the statement made by the learned Public Prosecutor that the investigation would be carried out in right earnest and would be completed within a period of three months which period, of course, has been extended by a further period of three months pursuant to the order passed by this Court. Thus, it is evident that for a period of almost two and half years, hardly any investigation was carried out in Crime No. 113/2009 and no arrest was effected by the investigating agency of any of the accused, including respondent No. 1 who were very much available for interrogation and for effecting arrest, if warranted. In addition, as rightly pointed out by Mr. Pangam, for the offence alleged against the accused u/s 406, read with Section 34 IPC, the maximum punishment is three years imprisonment.

14. A perusal of the impugned order dated 23.8.2012 which is assailed by the applicant, discloses that the learned Sessions Judge has taken into consideration the legal position emanating from several judgments of the Apex Court, including the judgment in the case of Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others, . The learned Sessions Judge has further observed that though the offence was registered in July, 2009, there was no allegation that respondent No. 1 had not co-operated with the investigating agency. Moreover, in

the intervening period, respondent No. 1 had reported to the police station and his statement was recorded. Learned Sessions Judge, therefore, held that it was not a fit case for custodial interrogation. The learned Sessions Judge also held that there was no possibility of respondent No. 1 absconding or thwarting the course of justice. What transpires from the findings recorded by the learned Sessions Judge is that the findings were based on material placed before the learned Sessions Judge and, therefore, the impugned order granting anticipatory bail to respondent No. 1 cannot be faulted and in any case, cannot be termed as perverse, warranting interference by this Court.

15. It is well settled by a catena of decisions of the Apex Court that bail or anticipatory bail granted to the accused can be interfered in two circumstances. Firstly such bail can be cancelled on account of supervening circumstances like tampering with evidence, non-co-operation with the investigating agency, breach of conditions, etc., and in such a case, it is necessary to approach the same Court for cancellation of bail/anticipatory bail granted by that Court. However, if the order granting bail/anticipatory bail passed by the Sessions Judge is patently illegal or perverse, the only option available to the investigating agency or the person having locus to challenge the said order is to approach this Court u/s 439(2) and seek cancellation of such bail; (See *Puran Vs. Rambilas and Another* etc. etc., . Considering the material available before the learned Sessions Judge at the time of passing of the impugned order, we are of the considered opinion that no fault can be found with the impugned order, granting anticipatory bail to respondent No. 1. We do not deem it necessary to refer to the various judgments relied upon on behalf of the applicant, as well as respondent No. 1, having regard to the findings given hereinabove. Moreover, the parameters to be considered by the Court while considering the anticipatory bail by now are well settled in view of the judgment of the Apex Court in the case of *Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others*, .

16. In the case of *Joginder Kumar Vs. State of U.P. and others*, , a Three Judge Bench of the Supreme Court, after considering the guidelines laid down by the Third Report of the National Police Commission, held that no arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing and the justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person and it would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief, both as to the person's complicity and even so as to the need to effect arrest. The maximum sentence prescribed for the offence punishable u/s 406, I.P.C. is three years imprisonment. Having regard to the principles laid

down in the case of Joginder Kumar Vs. State of U.P. and others, , we are of the considered opinion that the findings of the learned Sessions Judge cannot be faulted.

17. Coming to the aspect of delay in disposal of the anticipatory bail application by the learned Sessions Judge, what transpires from the record is that the application was filed on 29.3.2012 and the same was disposed of on 23.8.2012 i.e. almost after five months. The record also discloses that the application was fixed for passing orders before the learned Sessions Judge and before any order could be passed, an application for intervention was filed by the present applicant and, thereafter, the matter was adjourned on several occasions for one reason or the other, including transfer of the incumbent to South Goa, as the Principal District and Sessions Judge. We find merit in the submission made by the learned counsel for the applicant that the applications for anticipatory bails have to be decided expeditiously. When an application for anticipatory bail is filed, the learned Judge dealing with the same, while passing order, has to balance the right of the applicant of his liberty and the right of the investigating agency to carry out proper investigation, having regard to the nature of the offences alleged against the accused. Needless to mention that an application for anticipatory bail deals with liberty of an accused ordinarily at the stage of investigation and, therefore, it is expected of the investigating agency to render all assistance to the Sessions Judge dealing with the application for its early disposal. At times, in applications for anticipatory bail replies are not filed for quite some time, thereby jeopardizing the interest of the applicant, more particularly when interim order is not passed in favour of the applicant. In the present case also it is to be noted that no interim protection was granted to respondent No. 1 and an order came to be passed almost after a period of five months. We are conscious of the fact that at times, several bail/anticipatory bail applications are on the daily board of learned Sessions/Additional Sessions Judge and it may not be possible for the learned Judge to dispose of all such applications on the same day. But, it is surely expected of the Sessions/Addl. Sessions Judges to deal with such applications on priority basis and dispose of the same, expeditiously. However, it is not possible to fix outer time limit for disposal of anticipatory bail applications, since it would depend upon the number of matters which come up before the learned Judge on a particular day and the facts and circumstances of each case.

18. Be that as it may, the Sessions Judge dealing with such applications has to make endeavour to dispose of the applications at the earliest. As stated above, the investigating agency to whom the notice is given by the Sessions Judge is expected to be ready with reply at the earliest point of time and to cooperate with the Sessions Judge for early disposal of the application inasmuch as pendency of such applications for considerable length of time seriously prejudices the investigating agency in case interim order is granted and prejudices the applicant in case no interim protection is granted. Therefore, the investigating agency and the concerned Public Prosecutor appearing in the matter are

expected to ensure that reply to anticipatory bail application is filed within a shortest possible time, so as to enable early disposal of such application.

19. Coming to the aspect of intervention in an application seeking anticipatory bail filed by the accused, learned single Judge of this Court in the case of Vinay Poddar Vs. The State of Maharashtra, after considering several judgments of the Apex Court, as well as of the High Courts, in paragraph 13 observed that when an application for anticipatory bail is considered, the police may not place all factual details before the Court as the investigation in most of such cases is at a preliminary stage and, therefore, some role can be played by the complainant by pointing out factual aspects. The learned single Judge further held that the complainant or the first informant can appear before the Court and claim right of hearing in the said anticipatory bail application. But the said right cannot be allowed to be exercised in a manner which would delay the disposal of an application for anticipatory bail and the delay in disposal of such application may adversely affect the investigation. The learned single Judge further held that the complainant/first informant has a right to make oral submissions pointing out factual aspects of the case during the course of hearing of such application and such a right can be exercised either by himself or through his counsel. Learned single Judge further held that though the complainant or the first informant has such a right, but it is not necessary for the learned Judge to issue notice either to the complainant or the first informant.

20. In the course of hearing, Mr. Pangam submitted that at times the disposal of anticipatory bail applications are delayed on account of prolix and/or irrelevant lengthy submissions made by the first informant/complainant appearing in person who is not well versed with the legal provisions, which also ultimately delay disposal of such applications. In our view, although the complainant/first informant is entitled to be heard in an anticipatory bail application filed by the accused his rights are not unfettered and cannot be construed as giving him liberty to make submissions for any length of time. In our view, the interest of justice would be served if the complainant/first informant is called upon to file his say, in writing containing facts and legal submissions pointing out as to why the anticipatory bail should not be granted to the accused. If such; a course is adopted, the same would save valuable time of the Court. No doubt, the complainant/first informant is entitled to make oral submissions, but in the event the complainant/first informant files his say pointing out the material available with him against the accused/the applicant seeking relief, the Sessions Judge would be in a position to restrict the oral hearing to be given to the applicant/intervenor, having regard to the material placed by the investigating agency against the accused. Moreover, the accused would also be in a position to meet the case set up by the complainant/first informant. Therefore, although we are in respectful agreement with the view taken by the learned single Judge in the case of Vinay Poddar Vs. The State of Maharashtra, , that the complainant/first informant is entitled to be heard in an application for anticipatory bail filed by the accused, the same has to be understood in the light of the observations made

above, so that the disposal of the anticipatory bail application is not delayed, thereby causing no prejudice either to the applicant or to the investigating agency.

21. With the above observations, the present application stands disposed of. Prayer Clauses (i) and (ii) stand rejected. The application stands accordingly disposed of.

22. Considering the importance of the issue involved in the matter, we deem it appropriate to direct the Registrar (Judicial) to circulate copies of this order to the Principal District and Sessions Judges, both North and South Goa Districts who shall, in turn, circulate the same to the Additional Sessions Judges, functioning within their jurisdiction. The original record in Bail Application No. 115/2012 be sent expeditiously to the learned Sessions Court, North Goa, Panaji.