
(1989) 11 BOM CK 0030

In the Bombay High Court

Case No : Criminal Application No. 947 of 1989

Rambhau Anandrao Kedar and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 18-11-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438

Citation : (1990) 1 BomCR 540

Hon'ble Judges : M.S. Ratnaparkhi, J

Bench : Single Bench

Advocate : V.R. Manohar and S.P. Dharmadhikari, for the Appellant; M.P. Badar, Public Prosecutor, for the Respondent

Judgement

M.S. Ratnaparkhi, J.—An application for anticipatory bail u/s 438 of the Code of Criminal Procedure has been filed by the four petitioners before this Court. The offence springs from the death of one Rekha, who happens to be the sister of the petitioners Nos. 2 and 3. On 6-11-1989 at about 12 noon or so, the body of Rekha was found in the well situated within the compound of the petitioners 2 and 3. It was taken up and from there it was directly taken to the village Patansaongi in a Car. The body came to be cremated at Patansaongi. Initially this death came to be registered as an accidental death, but subsequently the offence came to be registered under sections 302 and 201 read with section 34 of the Indian Penal Code. It is in respect of this offence that anticipatory bail is being sought from this Court.

2. It is the case of the petitioners that they happen to be the close relatives of one Babasaheb Kedar, who is a most influential person and they being his relatives, the political rivals have taken this opportunity to involve them falsely in the present offence.

3. Notice was issued to the State and the learned Public Prosecutor has filed a detailed reply. The affidavit is sworn by Gundle, Police Inspector attached to the Sakkardara Police Station.

4. The learned Public Prosecutor has produced the whole file containing the papers of investigation that has been conducted so far. From the papers the facts which emerge prima facie are as follows.

5. On 6-11-1989 there was a Lunch arranged at the place of Mr. Kedar in connection with the marriage of his son. Rekha, her mother and the petitioners attended that marriage and they also were present at the place on 6th. Rekha, however, left the place and went to her aunt Mrs. Pramila Fukey. From there she is reported to have gone to her own house situated in Raghuji Nagar. As she was not present at the place of marriage, the petitioner no. 2 Rajendra went to bring her. He went to Pramila Fukey's house and from there to his own house in Raghuji Nagar, but he did not find Rekha there. There is a well in his own compound. He just peeped into the well and he found the body of Rekha inside the water.

6. The petitioners Nos. 1 to 4, who were present there, arrange to take the body out of the well. The matter was not reported to the police then. The body was directly taken to the village Patansaongi and there it was cremated (without intimation to the police). The mortal remains were immersed in the river. This was done on the very day. In the night Rajendra Kedar sent a written application to the Police Station contending therein that Rekha committed suicide as she was suffering from some disease connected with the liver and she had also due to this disease lost the balance of her mind.

7. As I have already pointed out initially it was registered as an accidental death, but the enquiry was taken up by police and they found during the enquiry that there were some suspicious circumstances in which the death occurred and the body came to be disposed of. The circumstances that have been collected so far (as is apparent from the papers of investigation, which are made available for my perusal) are :---

(1) That before taking the body of Rekha out of the well, a suggestion was given to the petitioners to call the fire brigade personnel who could take the body out of the well without any difficulty, but this suggestion was not only not heeded to, but on the other hand, this suggestion was not acceptable to the petitioners.

(2) When the body of Rekha was taken out of the well, there was only a Salwar (below the waist) and there was no Khamij above the waist.

(3) That some persons who were present there, notice the burn injuries on the hands, legs, back and front side of the trunk on the person of Rekha.

(4) Knowing fullwell that there was a death (suggested as unnatural death), no information to the police was given.

(5) The dead body was surreptitiously taken to the village Patansaongi, which is near about 30 kilometres from Nagpur.

(6) The villagers of Patansaongi did not know, nor were they made known of the

fact that the dead body of Rekha was brought to the village of Patanasaongi for cremation.

(7) That the dead body was cremated not on the usual cremation ground at village Patansaongi, but it was cremated in the bed of river Kolar.

(8) Within a short period thereafter the mortal remains including the ashes were thrown in the stream of the river, and

(9) That the intimation was thereafter given to the police that Rekha met with an accidental death.

8. Further enquiry revealed something which deepened the suspicion. When the panchanama of the residential house of the petitioner No. 2 was made in the next morning, some pieces of burnt nylon were found in between the house and the well where the dead body of Rekha was found. These pieces have been seized by the police during investigation.

9. One Ishwar Kashiramji Dhawade, who is running the hotel (Maa Durga Bhojanalaya in the vicinity) was informed of these suspicious matters by his servant Moolchand, who saw all these things from the kitchen where he was working. The statement of Moolchand has been recorded by the police. Ishwar sent his application in writing to the Police Station, Sakardara and the Sakardara Police Station received this application at about 4 p.m. and the entry has been taken in the Station Diary regarding this application. It is on this application that the police machinery was put into gear. What they did in the following days has already been stated in details in the preceding paragraphs.

10. Thus what appears from the material collected by the prosecution during investigation is that :---

(1) That Rekha died an unnatural death.

(2) That the information of this death was not given to the police.

(3) That the petitioners Nos. 1 to 4 were at the well and it is they who took out the dead body from the well.

(4) That some burn injuries were found on the person of Rekha and it can reasonably be held that the petitioners 1 to 4 also had an occasion to see those injuries.

(5) The body of Rekha was in the well in a bit unnatural circumstances as there was no Khamij or Kurta on the body.

(6) That having reason to believe that the death was a bit unnatural, the body was directly taken to the village Patansaongi without intimation to the police. (Mr. Manohar however told that Patanasaongi is the ancestral village of these persons and the cremation of the members of Kedar family is ordinarily done at the ancestral place).

(7) The body was cremated not at the ordinary cremation ground in the village, but in the bed of the river which is about four kilometres away from the village.

(8) Intimation to the police is given late in the night after everything was complete and when there was no trace even of the body, knowing fullwell that there is nothing on which the police machinery can proceed.

These are the circumstances which create a dark cloud of suspicion. Suffice it to say that the petitioners Nos. 2 and 3 are the brothers of Rekha. Rekha was residing with the petitioner No. 2 and she was pursuing her college education. The petitioner No. 1 is a close relation of petitioners 2 and 3, whereas the petitioner No. 4 seems to be a friend as well as the relation of the petitioners. It is these persons who are alleged to have removed the dead body surreptitiously in the circumstances which are stated above.

11. The application for anticipatory bail has to be considered on this background. Mr. Manohar, the learned advocate for the petitioners strenuously urged before me that this Court has unlimited powers u/s 438 of the Code of Criminal Procedure and neither section 437 nor section 438 of the Code of Criminal Procedure imposes any artificial limitation on these powers. As far as the powers of this Court u/s 438 of the Code are concerned, nobody can dispute what Mr. Manohar says. The question that arises at this stage is when and under what circumstances these powers are to be exercised by the Court. Section 438 of the Code is a new provision inserted in the Code of Criminal Procedure, 1973 and this is based on the following recommendations of the Law Commission. The Law Commission recommended :---

"The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."

The recommendation of the Law Commission will throw light on the intention of the Legislature in enacting this provision. This was a sort of protection afforded to the persons who were made victims of false accusation. It can be legitimately said that the Court should exercise these powers when such circumstances exist. After all, the Court has to strike a balance between the liberty of the individual and the duties which the investigating machinery are to perform. Arrest is undoubtedly one of the steps which is necessary during the course of investigation. It is the duty of police to arrest a person whenever they find reasonable and acceptable material against him. It is equally for the Courts to see that they do not by their orders hinder the usual course of investigation. The Supreme Court in *Kiran Devi v. State of Rajasthan* and another, 1988 SCC 106 in a very short judgment (of paragraph 1) observed :---

"We are of the opinion that anticipatory bail should not have been granted in the murder case when the investigation was still incomplete. The proper course to adopt was to leave it to the trial Court to do the needful if and when the person concerned was arrested in the light of the record available at that point of time. The order passed by the High Court is therefore set aside. It will be open to respondent No. 2 if and when he is arrested to apply for bail to the appropriate Court which will decide the matter on the basis of the available records in accordance with law."

12. The Division Bench of this Court in Pankaj Vidhyasagar Gupta Vs. State of Maharashtra, on reference from the Single Judge has held that "the ratio laid down in the case of Kiran Devi (supra) does not prohibit the grant of anticipatory bail. The Single Judge of this Court observed that the ratio laid down in Pokar Ram Vs. State of Rajasthan and Others, and Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, are conflicting and, therefore, the matter was referred to the Division Bench. The Division Bench held that there is in fact no conflict as contemplated. That is no doubt a correct view of the matter. The Supreme Court does not create an impediment or a prohibition in the way of granting of an anticipatory bail. What the Supreme Court has held is that in a given case it is not proper to release the accused on anticipatory bail. The Division Bench of the Orissa High Court in Bhagirathi v. State, Criminal Law Journal 1975, page 1681 has given some guidelines. In paragraph 8 the Orissa High Court observed:-

"(a) nature and seriousness of the accusation.

(b) nature of the evidence in support of the accusation.

(c) severity of the punishment which the conviction will entail.

(d) the character, behaviour and standing of the accused.

(e) a reasonable possibility of the presence of the accused not being secured at the trial.

(f) the danger of the alleged offence being continued or repeated.

(g) the danger of the witnesses being tampered with.

(h) the larger interest of the public or the State, and similar other considerations."

provide the tests in deciding whether anticipatory bail should be granted or not.

13. In paragraph 9 of the judgment, the Orissa High Court further observed :-

"The exercise of the power to grant anticipatory bail should be restricted to exceptional case, whose facts satisfy the above conditions Ordinarily, the Judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The power to interfere with the discretion of the police at the very earlier stages of an

investigation would, therefore, required to be exercised with utmost care. Merely because it is alleged that the petitioner apprehends arrest on a false accusation and that such arrest will be a cause of disgrace and dishonour to him, the Court will not be justified in granting anticipatory bail. The Court has both a right and a duty to satisfy itself that the apprehension is reasonable. If the Court chooses to accept the allegations made in the petition without applying its mind and examining the materials available with the police, the Court will be failing to discharge its duty. In order to ensure that the provisions of section 438 Cr.P.C. are not put to abuse at the instance of unscrupulous petitioners, notice of the application for anticipatory bail should be given to the Public Prosecutor though the section in terms does not say so."

14. The criteria for grant of anticipatory bail thus are well settled by judicial decision. The principle that anticipatory bail should be granted in exceptional cases is also accepted.

15. On this background, we have now to consider whether the petitioners deserve anticipatory bail which they have prayed. It is not necessary to repeat the material collected by the prosecution so far. The material is sufficient to lead a conclusion that a dark cloud of suspicion is hanging over. There is also a possibility of the implication of the petitioner because (1) it is they who took out the dead body out of the well, (2) it is they who had an occasion to examine the dead body and come to the conclusion that the death was otherwise than natural, (3) it is they who took upon themselves the responsibility of taking the dead body to the village Patansaongi, (4) it is they who have consigned the dead body to flames not at the ordinary cremation ground, but in the bed of the river, (four kilometres away from the village) the place which is not normally used as a cremation ground, (5) it is they who have kept a secret that the dead body of Rekha was brought to the village for cremation, (6) it is only after everything was complete that an application is sent to the Police Station that Rekha died an accidental death, (7) care and precaution has been taken to see that the police get this information after everything is over so that they will have no opportunity to examine the dead body.

16. The question which arises at this stage is whether the petitioners deserve anticipatory bail. As I have already pointed out, there is a dark cloud of suspicion roaming large. All the four petitioners are under that cloud. This is, therefore, a proper case where the investigating machinery should investigate the case freely without any impediment from any other authority. The petitioners say that they have an apprehension of arrest. The law regarding the arrest is well-settled. It is the duty of the police to arrest a person if during the course of investigation they find that there is sufficient material justifying their arrest. It would, therefore, be proper in the circumstances to allow the investigating machinery to proceed further and to allow them to do their duties freely without any impediment.

17. According to me, this is not a case fit for granting anticipatory bail. The application for anticipatory bail is, therefore, rejected.