

(1985) 12 OHC CK 0006

In the Orissa High Court

Case No : Criminal Miscellaneous Case No"s. 188 and 250 of 1985

Santosh Kumar Padhan and Others

APPELLANT

Vs

Lalbihari Behera alias Fitia and Another
 Lalbihari
Behera alias Jati Vs State of Orissa and Others

RESPONDENT

Date of Decision : 20-12-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 200, 202, 202(1)
Defence and Internal Security of India Rules, 1971 — Rule 184
Penal Code, 1860 (IPC) — Section 302

Citation : (1986) 61 CLT 239

Hon'ble Judges : G.B. Patnaik, J;B.N. Misra, J

Bench : Division Bench

Advocate : H.B. Swain, in Criminal Misc. Case No. 188/85 and L. Mohapatra, in Criminal Misc. Case No. 250/85, for the Appellant; L. Mohapatra in Criminal Misc. Case No. 188/85, A.S.C. and H.B. Swain in Criminal Misc. Case No. 250/85, for the Respondent

Final Decision : Dismissed

Judgement

G.B. Patnaik, J.—These two cases are heard together since common facts are involved and both the cases are being disposed of by this common judgment.

2. G.R. Case No. 284 of 1984 was registered on the basis of a First Information Report lodged by the Sub-Inspector of Police Shri C.M. Sahu on 5-9-1984. The said First Information Report indicated that Kedar Behera, the deceased, was stabbed by one Pramode Kumar Tripathy. The said Pramode was arrested on 8-9-1984 and made a confessional statement which was recorded u/s 164 of the Code of Criminal Procedure (hereinafter referred to as the "Code") on 9-9-1984 implicating himself as the assailant. Three or four witnesses were examined both u/s 161 as well as u/s 164 of the Code whose statements reveal that it is Pramode who had stabbed the deceased and on completion of investigation, the police submitted a charge-sheet against Promode u/s 302, Indian Penal Code, on 1-12-1984 and cognisance was taken against him u/s 302, Indian Penal Code, by

order dated 3-12-1984.

3. The case diary of the said G.R. Case, however, contained statements recorded u/s 161 of the Code of some other witnesses including Lalbihari according to whom it is Santosh who was the real assailant and further Trinath Saraff. Balakrishna Tripathy and Pramode Kumar Tripathy had also shared the common intention in furtherance of which they committed murder of deceased Kedar Behera. After filing of the charge-sheet in the G.R. Case against Pramode, Lalbihari filed a complaint case against Santosh Kumar Padhan, Trinath Saraff, Balakrishna Tripathy as well as Pramode which was numbered as ICC Case No. 113 of 1984. In the said complaint case, it was alleged that while the deceased was moving on the P.W.D. road adjacent to the market, the accused persons called him and when the deceased went near them, accused No. 2 Trinath caught hold of one hand of the deceased and accused No. 3 Pramode caught hold of the other hand of the deceased. It was further alleged that accused No. 4 Balakrishna caught hold of the neck of the deceased from back-side and accused No. 1 Santosh stabbed the deceased on the chest and abdomen with the help of a knife. It was further alleged in the said complaint petition that the complainant had orally reported the matter to the S. I. of Police at Titilagarh Police Station, who along with some constables and the complainant rushed to the spot and found the deceased lying unconscious with bleeding injuries whereafter the deceased was carried to the hospital and he was declared dead at the hospital. According to the allegations made in the complaint petition, investigation was not carried on properly and promptly and on political pressure the investigating agency suppressed the truth as a result of which the real accused persons/were allowed to remain behind the screen and only charge-sheet was filed against Pramode.

On receipt of the aforesaid complaint petition the learned Magistrate called for the case diary in G.R. Case No. 284 of 1984 and ultimately by order dated 9-1-1985 directed to hold an inquiry u/s 202 of the Code. In the said inquiry conducted u/s 202, complainant Lalbihari was examined and five other persons supposed to be the eye witnesses to the occurrence were examined. On consideration of these materials the learned Magistrate passed an order on 19-2-1985 taking cognisance u/s 302, Indian Penal Code, against accused Santosh, Trinath and Balakrishna and further directed that the complaint case be clubbed together with G.R. Case No. 284 of 1984 u/s 210 of the Code. It is this order of the learned Magistrate which is being impugned by accused Santosh, Trinath and Balakrishna in Criminal Miscellaneous Case No. 188 of 1985 invoking the inherent jurisdiction of this Court u/s 482 of the Code.

4. While the inquiry u/s 202 of the Code was proceeding before the learned Magistrate and evidence having been led in the said inquiry apprehending arrest the three accused persons Santosh Trinath and Balakrishna filed an application for grant of anticipatory bail u/s 438 of the Code before the learned Sessions Judge, Bolangir, on 29-1-1985. The learned Sessions Judge by his order dated

30th of January, 1985 granted all three of them anticipatory bail directing that in case any police officer arrests any of them then he shall be released on bail of Rs. 5,000/- with one surety for the like amount to the satisfaction of the police officer and further the Magistrate issuing warrant of arrest shall issue a bailable warrant in conformity with Sub-section (3) of Section 438 of the Code. In view of the aforesaid order of anticipatory bail passed by the learned Sessions Judge, the Magistrate while taking cognisance on 19th of February, 1985, issued bailable warrants of arrest of Rs. 5,000/- with one surety for the like amount against the accused persons. It is this order of grant of anticipatory bail which is being impugned in Criminal Miscellaneous Case No. 250 of 1985 at the instance of the informant, Lalbihari.

5. Mr. H.B. Swain, the learned Counsel appearing for the Petitioners in Criminal Miscellaneous Case No. 188 of 1985 contends that cognisance is taken of an offence and not against the offender. Cognisance having been taken of the offence u/s 302, Indian Penal Code, in G.R. Case No. 284 of 1984, against accused Pramode Kumar Tripathy, the Magistrate is incompetent to take fresh cognisance of the same offence in the complaint case and, therefore, the impugned order taking cognisance must be quashed. The learned Counsel further contends that the learned Magistrate committed gross error in ordering clubbing of the two cases u/s 210 of the Code, inasmuch as the said provision has no application. He further submits that the prosecution version in the G.R. Case and the story unfolded in the complaint case being materially different are mutually exclusive and, therefore, it is not permissible to club both the cases as has been directed by the learned Magistrate.

Mr. Mohapatra, the learned Counsel appearing for the complainant though concedes that the provisions of Section 210 of the Code in terms may not have any application yet submits that in the facts and circumstances of the present case, the spirit of the said provision should apply. Mr. Mohapatra further submits that at any rate, the procedure provided for in the G.R. Case being more beneficial to an accused and the accused not being prejudiced in any manner, the order of the learned Magistrate directing clubbing should not be interfered with in exercise of inherent jurisdiction of this Court. On the question of cognisance the learned Counsel submits that no doubt, it is true that cognisance is taken of an offence, but in the eye of law a complaint case is different from the case instituted on a police report and even after filing of charge-sheet in the police case if a complaint is filed, then a Magistrate has to follow the procedure laid down in Section 200 of the Code and there is no prohibition on the power of the Magistrate to take cognisance of the offences alleged in the complaint petition against the offenders if he is satisfied as to the existence of prima facie material. In this view of the matter, the order of cognisance cannot be quashed by this Court in exercise of the inherent jurisdiction.

6. We would examine the question of the legality of taking cognisance in the complaint case first. A complaint made to a Magistrate has to be disposed of in

accordance with the procedure laid down in Chapter-XV. A complaint filed before a Magistrate can be dismissed by the Magistrate in accordance with Section 203 of the Code and that is when the Magistrate is of the opinion that there is no sufficient ground for proceeding. On the other hand on examination of the complainant and the witnesses produced by him and where a Magistrate directs an inquiry u/s 202 of the Code, then after taking into consideration the materials produced during the said inquiry, if the Magistrate is satisfied that sufficient ground exists for taking cognisance and for issuing of process, then, he shall take cognisance of the offence and act in accordance with the provisions contained in Section 204 of the Code. In view of the aforesaid statutory provisions contained in the Code, a Magistrate will not be empowered to dismiss a complaint merely because on the self-same facts police did investigate into the case and a charge-sheet has been filed against some of the accused persons. This being the position of law, we do not find any illegality in the order of the learned Magistrate taking cognisance in the complaint case and we do not find any substance in the contention of Mr. Swain, the learned Counsel for the Petitioners in Criminal Miscellaneous Case No. 188 of 1985. At any rate as has been held in several decisions of this Court as well as of the Supreme Court, the inherent jurisdiction of the Court has to be very sparingly exercised and it must be exercised with circumspection when there is reason to believe that the process of law is being abused or misused. See *Madhu Limaye Vs. The State of Maharashtra*, ; *Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Mohan Singh and Others*, , *Satrughana Dalabehera and Ors. v. State* 56 (1983) C.L.T. 405 and *Madan Mohan Agarwala v. State of Orissa* 58 (1984) C.L.T. 552. Applying the tests laid down in the aforesaid cases and examining the facts and circumstances of the present case, we are not in a position to come to the conclusion that the complaint case has been instituted illegally or vexatiously nor are we of the opinion on that interest of justice demands quashing of the order of cognisance. On the materials placed on record in course of inquiry u/s 202 of the Code, we cannot hold that there is no case against the Petitioners and, therefore, this case does not satisfy the test that the materials even if accepted to entirety do not constitute the offence as alleged. We also do not find any apparent legal bar in the institution or continuance of the complaint case. We would, therefore refuse to exercise our inherent jurisdiction to quash the order of cognisance and consequently Mr. Swain's contention on this score must be rejected.

7. Though we have refused to quash the order of cognisance yet we find sufficient force in the contention of Mr. Swain that the order of clubbing cannot be sustained. There cannot be any manner of doubt that Section 210 of the Code has no application in terms since by the time the complaint case was instituted, charge-sheet in the case instituted on police report had already been submitted and, therefore no investigation by the police was in progress in relation to the said offence at that point of time. The question of clubbing of a G.R. Case and a complaint case came up for consideration before the Supreme Court in the case of *Harjinder Singh Vs. State of Punjab and Others*, . The Supreme Court in the

said case held the order of clubbing to be had in Jaw in no uncertain terms than saying:

...The complaint presents a different picture altogether. The prosecution case as set out in the complaint is at complete variance with that in the police challan. In our judgment it is not permissible for the Court u/s 223 of the Code to dub and consolidate the case on a police challan and the case on a complaint where the prosecution versions in the police challan case and the complaint case are materially different, contradictory and mutually exclusive.

Having examined the allegations in the complaint as well as the evidence recorded in the proceeding u/s 202 of the Code as also the F.I.R. and the charge sheet filed in the G.R. Case, we are of the opinion that the aforesaid observations of the Supreme Court apply with full force to the facts and circumstances of the present case and in that view of the law, the order of the learned Magistrate directing clubbing of the two cases cannot be sustained. We would, therefore, set aside that part of the order dated 19-9-85 whereby the learned Magistrate had directed the clubbing of the cases and following the directions given by the Supreme Court in Harjinder Singh Vs. State of Punjab and Others, , referred to supra, we would hold that the proper course to adopt would be that the two cases should be tried together by the same Sessions Judge but should not be consolidated, that is to say, the evidence would be recorded separately in both the cases one after the other except to the extent that the witnesses for the prosecution where common to both the cases be examined in one case and their evidence be read as evidence in the other. The learned Trial Judge should, after recording the evidence of prosecution witnesses in one case withhold his judgment and then proceed to record the evidence of the witnesses in the other case and thereafter he shall proceed to simultaneously dispose of the cases by two separate judgments taking care that the judgment in one case is not based on the evidence in the other case.

8. Before parting with this case, we would like to observe another factor, that is, the effect of the proviso to Section 202(2) of the Code. Undoubtedly, the complaint case is a case triable exclusively by the Court of Session and in that event in an inquiry under Sub-section (1) of Section 202, the proviso to Sub-section (2) also must be complied with. We are not in a position, on the existing materials, to come to a conclusion whether the said provision has been duly complied with or not. The learned Trial Judge while framing charge against the accused persons could act in accordance with law bearing in mind whether the aforesaid provision of Section 202 of the Code has been duly complied with or not.

In the result, therefore, this Criminal Miscellaneous Case No. 188 of 1985 is allowed in part, as indicated above.

9. Coming to the Criminal Miscellaneous Case No. 250 of 1985, which is an application for cancellation of anticipatory bail granted by the learned Sessions

Judge, Mr. Mohapatra, the learned Counsel for the Petitioner submits that the impugned order of the learned Sessions Judge suffers from two infirmities which make the order vulnerable. According to Mr. Mohapatra, the power u/s 438 of the Code in this case has been exercised sub silentio as to reasons and, therefore, to avoid miscarriage of justice this Court must interfere with the said order. In support of this contention, the learned Counsel places reliance on the decision of the Supreme Court in the case of Pokar Ram Vs. State of Rajasthan and Others, , Mr. Mohapatra then submits that the application u/s 438 having been filed apprehending arrest because of materials coming against the accused persons in the complaint case, the learned Sessions Judge committed gross abuse of process in exercising his power u/s 438 without applying his mind to the materials which had been collected in the said complaint case against the accused persons and on that ground alone, the order is liable to be interfered with.

Mr. Swain, the learned Counsel for the accused persons on the other hand, submits that it is true that the learned Sessions Judge would have done well in calling for the records of the complaint case to find out the materials and then pass the order, but merely on that score it cannot be said that the order of the Sessions Judge granting anticipatory bail u/s 438 of the Code is without jurisdiction. The learned Counsel further submits that keeping in view the materials already on record, namely, the materials collected during investigation in the G.R. Case as well as the materials collected during inquiry in the complaint case, and keeping in view the fact that the accused persons have been granted anticipatory bail since 30th of January, 1985, and there has been no adverse report against the accused persons, this would not be a fit case for cancellation of the said order.

10. In order to test the correctness of the rival sub-missions, it would be necessary to examine the law on the subject in a more detailed manner. Section 438 of the Code was not there in the Code of Criminal Procedure of 1898 and was newly added on the recommendation of the Law Commission. The Law Commission felt that it was necessary to have such a provision to prevent undue harassment since very often influential persons tried to implicate their rivals in false cases for disgracing them and according to the report of the Commission such tendency showed steady sign of increase because of accentuation of political rivalry. It was with this object, provision of Section 438 was introduced into the Code of Criminal Procedure. But that does not mean that Section 438 confers untrammelled powers on the Courts to grant anticipatory bail in each and every case. There have been quite a number of authorities of different High Courts and the Supreme Court by now laying down the principles and the pre-conditions for exercise of power u/s 438 of the Code. A Bench of this Court considered the ambit and scope of Section 438 in the case of Bhagirathi Mohapatra and Ors. v. State 41 (1975) C.L.T. 619. In paragraph-8 of the said judgment, it was held:

Normally the Courts apply the following tests while considering applications for

bail in case of non-bailable offences:

- (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.

These tests are to be applied by the Court while considering an application for anticipatory bail. In addition, the Court must be satisfied that the arrest and detention of the Petitioner would be not from motive of furthering the ends of justice in relation to the case, but from some ulterior motive and with the object of injuring the Petitioner.

It was further held in the aforesaid case:

The exercise of the power to grant anticipatory bail should be restricted to exceptional cases, 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 earliest stages of an investigation would, therefore, require 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, Code of Criminal Procedure are not, put to abuse at the instance of unscrupulous Petitioners, notice of the application for anticipatory ban should be given to the Public Prosecutor, though the section in terms does not say so.

Thus, at the stage of considering an application for anticipatory bail, the Court is concerned with the existence of the materials against the accused and not as to whether such materials are credible or not. As has been held in the aforesaid decision of this Court, the Court must be satisfied that the arrest and detention of the accused would be not from motives for furthering the ends of justice in relation to the case, but from some ulterior motive and with the object of injuring the Petitioner.

In the case of Balchand Jain v. State of Madhya Pradesh AIR 1977 S.C. 366, the Supreme court was considering the scope and ambit of Section 438 of the Code vis-a-vis Rule 184 of the Defence and Internal Security of India Rules, 1971. Fazl Ali, J. in that context quoted in paragraph 15 of the judgment portions of the Statement of Objects and Reasons of the said section and then held:

...It would thus appear that while the Law Commission recommended that provision for an order of anticipatory bail to be effective when a person is arrested should be made, at the same time it stressed that this being an extraordinary power should be exercised sparingly and only in special cases. It also recommended that this power should not be exercised without giving notice to the other side. We think this is why the Legislature has entrusted this power to high authorities like the Sessions Judge and the High Court and we also feel that in the interests of justice it would be desirable if a final order is made only after hearing the prosecution. Although this condition is not mentioned in Section 438 of the Code but having regard to the setting in which the section is placed and the statement of the objects and reasons which is actually based on the recommendations of the Law Commission, we think that rule of prudence requires that notice should be given to the other side before passing a final order for anticipatory bail so that wrong order of anticipatory bail is not obtained by a party by placing incorrect or misleading facts or suppressing material facts. We hope that in future the Courts will exercise this power keeping our observations in view.

In Pokar Ram Vs. State of Rajasthan and Others, the Supreme Court again considered the scope of Section 438 and observed:

Relevant considerations governing the court's decision in granting anticipatory bail u/s 438 are materially different from those when an application for bail by a person who is arrested in the course of investigation as also by a person who is convicted and his appeal is pending before the higher court and bail is sought during the pendency of the appeal. These situations in which the question of granting or refusing to grant bail would arise, materially and substantially differ from each other and the relevant consideration on which the courts would exercise its discretion, one way or the other, are substantially different from each other. This is necessary to be stated because the learned Judge in the High Court unfortunately fell into an error in mixing up all the considerations, as if all the three become relevant in the present situation.

In paragraph-II of the said Judgment, the learned Judges held:

...Unquestionably, no case was made out for granting anticipatory bail in this case. Let it be made distinctly clear that status in life, affluence or otherwise, are hardly relevant considerations while examining the request for granting anticipatory bail. Anticipatory bail to some extent intrudes in the sphere of investigation of crime and the court must be cautious and circumspect in exercising such power of a discretionary nature. This case amply illustrates that

the power was exercised sub silentio as to reasons or on considerations irrelevant or not germane to the determination.

Recently, in another case of Bhagirathi Padhan v. Pachila Rout and Ors. 1985 (2) C.L.R. 605, we have dealt with this aspect and have quashed an order granting anticipatory bail where the Sessions Judge without considering any materials had exercised his power u/s 438 merely on the concession of the Public Prosecutor and the law on the subject has been dealt with in the said decision.

11. The legal position which emerges from the aforesaid decisions that the power u/s 438 must be exercised sparingly and with caution; the Court before exercising the same must be satisfied on the materials on record that the apprehended arrest or detention of the accused would be not from motives of furthering the ends of justice in relation to the case, but from some ulterior motives and with the object of injuring the accused; the Court must in each case pass the final order only after issuing notice to the Public Prosecutor so that the entire materials against the accused can be placed by the Public Prosecutor for the perusal of the Court, though in extraordinary emergent circumstances the Court may grant ex parte, interim anticipatory bail till the materials are produced before the Court and the Court must also indicate the reasons which prompted it to exercise power u/s 438 so that the higher forum would be able to appreciate whether the order has been passed in furtherance of justice or there has been a miscarriage of justice.

12. Applying the aforesaid principles to the present case, we find that the learned Sessions Judge passed the impugned order granting anticipatory bail even without having before him the materials which were brought out in the complaint case. The application for anticipatory bail had been filed by the accused persons dearily indicating therein that they were apprehending arrests because of the accusations made against them in the complaint case. In our opinion, the learned Sessions Judge was not at all justified in disposing of the application filed u/s 438 of the Code without even perusing the materials which had been brought out against the accused persons in the complaint case. That apart, the learned Sessions Judge has also not indicated the reasons as to why he is exercising his discretion in granting the anticipatory bail u/s 438. Therefore, the order of the learned Sessions Judge granting anticipatory bail suffers from the aforesaid infirmities.

13. Mr. Swain, the learned Counsel for the accused persons, however, contends that even if this Court finds the order of the Sessions Judge to be vulnerable, yet in the facts and circumstances of this case, the order need not be interfered with for two reasons, firstly, that the materials on record disclose that it is a case where circumstances for exercise of power u/s 438 exist and secondly, that the impugned order is dated 30th of January, 1985, and in the meantime, nearly a year has elapsed and no adverse report is there against the accused persons and, this is also a vital consideration for this Court while considering whether the impugned order should be interfered with or not. We find sufficient force in the

contention of Mr. Swain, the learned Counsel appearing for the accused persons. As we find, the accused persons having been enlarged on bail since January, 1985, are free at large for last one year and yet nothing adverse has been brought to our notice against them. There has been no allegation of high-handedness or tampering with the evidence in relation to the case in hand, by any of these accused persons. Then again, the materials on record namely, the records of the complaint case contain allegations against these accused persons which are at complete variance with the materials those had been collected by the police in course of investigation into the G.R. Case in relation to the self-same concurrence. Taking all these factors into consideration, we do not think it appropriate to order cancellation of the bail that has been granted in favour of the accused persons, though we have taken the trouble of reiterating the legal position for exercise of power u/s 438, since it has come to our notice that the Sessions Judges are exercising the said power even without caring to know what are the materials against the accused.

In the result, therefore, we decline to interfere with the order of the learned Sessions Judge dated 30-1-1985.

14. In the ultimate result, therefore, Criminal Miscellaneous Case No. 188 of 1985 is allowed in part and Criminal Miscellaneous Case No. 250 of 1985 is dismissed.

B.N. Misra, J.

15. I agree.