

(2010) 08 BOM CK 0177

In the Bombay High Court

Case No : Criminal Application No"s. 2320 and 2321 of 2010

Shivraj Gandge

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 18-08-2010

Acts Referred:

Constitution of India, 1950 — Article 21

Criminal Procedure Code, 1973 (CrPC) — Section 167(2), 437, 438, 438(1), 438(2)

Evidence Act, 1872 — Section 27

Citation : (2011) CriLJ 122 : (2011) 7 RCR(Criminal) 2167

Hon'ble Judges : A.V. Potdar, J

Bench : Single Bench

Advocate : S.P. Katneshwarkar, for the Appellant; P.P. More, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.V. Potdar, J.—By these applications, the applicant has challenged the orders dated 18.05.2010, passed below Exhibit10 in Criminal Misc. Application No. 47/10 and below Exhibit8 in Criminal Misc. Application No. 49/10 on the file of Ad hoc Additional Sessions Judge, Latur, by which the applications moved by the prosecution to keep the applicant present at the time of hearing of anticipatory bail applications moved by him, without granting interim relief, came to be allowed.

2. Heard Counsel for the applicant in both these applications. Today, the applicant is present before the Court as per the directions of this Court. Also heard learned A.P.P. for RespondentState.

3. During the course of submissions across the bar, it is the only grievance put forth by the Counsel for the applicant that as no interim protection was granted in favour of the applicant, the Court cannot insist presence of applicant at the time of hearing of anticipatory bail applications, even though there is a State amendment to Section 438 of the Code of Criminal Procedure, which speaks that

on the application of the prosecution, if the presence of the applicant - alleged accused is required at the time of hearing of anticipatory bail application, the Court to pass necessary order to that effect and secure presence of the applicantaccused at the time of hearing of the anticipatory bail application. Section 438(4), as per the State amendment, reads as follows:

(4) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

4. In view of this State amendment, whether the presence of applicantaccused is required as a mandate at the time of hearing of anticipatory bail application or not, is decided by this Bench in the matter of Ashik Rameshchandra Shah and Ors. v. State of Maharashtra reported in 2010 (2) LJSOFT (URC) 45, wherein it is observed that:

6. After having heard the learned Senior Counsel appearing on behalf of applicants and the learned APP appearing on behalf of the State and after taking into consideration various judgments on which reliance is placed by the learned Senior Counsel appearing on behalf of applicants and from the conspectus of cases which have been cited before this Court, I am of the view that Section 438 lays down the manner and method and circumstances under which order of prearrest can be passed or not passed. In that sense it is a selfcontained Code and a scheme in itself and these provisions, therefore, have to be read as a whole and it cannot be said that provisions of subsections (3) & (4) of Section 438 are mutually exclusive and operate in different ways. The Apex Court in Gurubaksh Singh Sibbia (supra) has observed in paragraphs 7, 26, 19, 16, 17, 42 and 43 as under:

(7) The facility which Section 438 affords is generally referred to as "anticipatory bail", an expression which was used by the Law Commission in its 41st Report. Neither the section nor its marginal note so describes it but, the expression "anticipatory bail" is convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. Any order of bail can, of course, be effective only from the time of arrest because, to grant bail, as stated in Wharton's Law Lexicon is to "set at liberty a person arrested or imprisoned, on security being taken for his appearance". Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognisance, suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested."

The distinction between an ordinary order of bail and an order of anticipatory bail

is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is a inevitable concomitant of arrest for nonbailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a postarrest order of bail, it is pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word of action". A direction u/s 438 is intended to confer conditional immunity from his "touch" or confinement.

(26) We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An overgenerous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein.

19. A great deal has been said by the High Court on the fifth proposition framed by it, according to which, inter alia, the power u/s 438 should not be exercised if the investigating agency can make a reasonable claim that it can secure incriminating material from information likely to be received from the offender u/s 27 of the Evidence Act. According to the High Court, it is the right and the duty of the police to investigate into offences brought to their notice and, therefore, courts should be careful not to exercise their powers in a manner which is calculated to cause interference therewith. It is true that the functions of the judiciary and the police are in a sense complementary and not overlapping. As

observed by the Privy Council in AIR 1945 18 (Privy Council) .

Just as it is essential that every one accused of a crime should have free access to a court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry The functions of the judiciary and the police are complementary, not overlapping, and the combination of the individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function,. . ."

But these remarks, may it be remembered, were made by the Privy Council while rejecting the view of the Lahore High Court that it had inherent jurisdiction under the old Section 561A, Criminal Procedure Code, to quash all proceedings taken by the police in pursuance of two first information reports made to them. An order quashing such proceedings puts an end to the proceedings with the inevitable result that all investigation into the accusation comes to a halt. Therefore, it was held that the court cannot, in the exercise of its inherent powers, virtually direct that the police shall not investigate into the charges contained in the FIR. We are concerned here with a situation of an altogether different kind. An order of anticipatory bail does not in any way, directly or indirectly; take away from the police their right to investigate into charges made or to be made against the person released on bail. In fact, two of the usual conditions incorporated in a direction issued u/s 438(1) are those recommended in subsection (2)(i) and (ii) which require the applicant to cooperate with the police and to assure that he shall not tamper with the witnesses during and after the investigation. While granting relief u/s 438(1), appropriate conditions can be imposed u/s 438(2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery u/s 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery.

Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in the principle stated by this Court in State of U.P. Vs. Deoman Upadhyaya, to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed so have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody u/s 167(2) of the Code is made out by the investigating agency.

16. A close look at some of the rules in the eightpoint code formulated by the

High Court will show how difficult it is to apply them in practice. The seventh proposition says:

The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion u/s 438 of the Code should not be exercised.

17. How can the court, even if it had a third eye, assess the blatantness of corruption at the stage of anticipatory bail? And will it be correct to say that blatantness of the accusations will suffice for rejecting the bail, if the applicant's conduct is painted in colours too lurid to be true? The eighth proposition rule framed by the High Court says:

Mere general allegations of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless.

Does this rule mean, and that is the argument of the learned Additional Solicitor General, that anticipatory bail cannot be granted unless it is alleged (and naturally, also shown, because mere allegation is never enough) that the proposed accusation are mala fide? It is understandable that if mala fides are shown, anticipatory bail should be granted in the generality of cases. But it is not easy to appreciate why an application for anticipatory bail must be rejected unless the accusation is shown to be mala fide. Thus, truly, is the risk involved in framing rules by judicial construction. Discretion, therefore, ought to be permitted to remain in the domain of discretion, to be exercised objectively and open to correction by the higher courts. The safety of discretionary power lies in this twin protection which provides a safeguard against its abuse.

42. There was some discussion before us on certain minor modalities regarding the passing of bail orders u/s 438(1). Can an order of bail be passed under the section without notice to the Public Prosecutor ? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed u/s 438(1) be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail u/s 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

43. During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a

person by imposing conditions set out in Section 438(2)(i), (ii) and (iii). The court has, in addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made u/s 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the FIR in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The appellants who were refused anticipatory bail by various courts have long since been released by this Court u/s 438(1) of the Code.

Therefore, the Apex Court has laid down the power and scope of the power which has to be exercised by the Courts u/s 438. The Apex Court also has observed that the Court has power to grant interim protection when it comes to the conclusion that it is not possible to decide the case immediately and during such time appropriate interim orders can be passed.

5. As it is observed in the matter of Ashik Rameschandra Shah and Ors. v. State of Maharashtra, in para 6, as referred supra, now the situation is made clear by this Bench in that order, that this mandate to follow if interim protection is granted, otherwise not. Considering this aspect, prima facie, the orders impugned in these applications are not sustainable.

6. Today, when the applications came up for final hearing, Counsel for the applicant submitted across the bar, tomorrow these applications are listed for final hearing before the Ad hoc Additional Sessions Judge, Latur. Hence, if protection is granted till tomorrow to the applicant, the applicant will appear before the Ad hoc Additional Sessions Judge, Latur, during the hearing of those Criminal Misc. Applications for anticipatory bail.

7. Bearing in mind these aspects, both the applications succeed. The orders dated 18.05.2010, passed below Exhibit10 in Criminal Misc. Application No. 47/10 and below Exhibit8 in Criminal Misc. Application No. 49/10, are hereby quashed and set aside. Both these applications now deserve for the following order:

ORDER

(a) Both the Applications are allowed.

(b) Interim protection granted to the applicant in the event of his arrest in connection with CR Nos. 7/09 and 6/09, registered in Chakur Police Station, District Latur, the applicant be released on bail on furnishing solvent surety in the sum of Rs. 15,000/ (Rs. Fifteen thousand) and on executing P.R. Bond in the like

amount.

(c) This protection is granted till Criminal Misc. Applications No. 47/10 and 49/10 are finally decided and disposed of by the concerned Ad hoc Additional Sessions Judge, Latur.

(d) It is hereby made clear that these orders are not passed on the merits of those applications, but are passed on purely technical aspect, whether presence of the applicant is required, if no interim protection is granted, at the time of hearing of anticipatory bail application.

(e) Both the Applications stand disposed of accordingly.

(f) Parties to act on the authenticated copy of this order duly signed by the Associate of this Court.