

Vinod Kumar Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Jan-14-1998

Reported in : 1998(2)MPLJ689

Judge : Dipak Misra, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 438, 439 and 439(1)

Appeal No. : M. Cri. C. Nos. 6431, 6443 to 6445 and 7067 of 1997

Appellant : Vinod Kumar

Respondent : State of M.P.

Advocate for Def. : Anurag Choudhary, Panel Lawyer in Misc. Cri. C. No. 7067 of 1997 and ;S.K. Gangrade, Panel Lawyer in Misc. Cri. C. Nos. 6431, 6443 to 6445 of 1997

Advocate for Pet/Ap. : Surendra Singh and ;Jagsher Singh, Advs. in Misc. Cri. C. No. 7067 of 1997 and ;Sunil Sinha, Adv. in Misc. Cri. C. Nos. 6431, 6443 to 6445 of 1997

Disposition : Application allowed

Judgement :

ORDER

Dipak Misra, J.

1. As common questions of law are involved in the present bunch of applications they were heard analogously and are disposed of by this common order.
2. For better appreciation of the issue of law emerging out of obtaining factual matrix it is essential to state the facts of the cases. The petitioners in M.Cr.C. Nos. 6431/97, 6443/97, 6444/97 and 6445/97 are the same, and because of institution of various crime numbers they have preferred four applications. M.Cr.C. No. 7067/97 relates to a different petitioner and the factual scenario is also different.
3. The facts as unfurled in M.Cr.C. No. 7067/97 are that the petitioner apprehending arrest in Crime No. 584/93 registered for offences punishable Under Sections 467, 468 of the Indian Penal Code had approached this Court Under Section 438 of the Criminal Procedure Code (in short 'the Code') for grant of anticipatory bail. The allegations relate to the incident which had taken place sometime in August, 1987. Taking into consideration the fact that the petitioner is working as Stenographer to the Collector at and other circumstances, this Court extended the privilege of anticipatory bail to the petitioner directing that in the event of his arrest he would be released on bail of Rs. 10,000/- with one surety for the like amount to the satisfaction of arresting officer and the said order would remain effective for a period of six weeks within which the petitioner was required to move the competent Court for grant of regular bail. After the said order was passed, on 24-10-1997 the petitioner moved an application Under Section 439 of the Code before the competent Court but the said Court rejected the application on the ground that the petitioner was already on ad-interim anticipatory bail by virtue of the protective order passed by this Court and he being not in custody, the application Under Section 439 of the Code was not maintainable.
4. The petitioners in M.Cr.C. No. 6431/97 and other connected applications, apprehending arrest for the offences punishable Under Sections 409, 420, 466, 467 and 471 of the Indian Penal Code pertaining to various crimes registered at P. S., Ramanujganj, Distt. Rewa had approached this Court Under Section 438 of the Code for grant of anticipatory bail. Considering the facts and circumstances of the case, this Court directed that in the event of arrest of the petitioners in connection

with the aforesaid crimes they would be released on bail of Rs. 20,000/- each with one surety each for the like amount to the satisfaction of the arresting officer, with a further stipulation that the said protective order would remain in force for a period of two months within which they were to move the competent Court for regular bail. Later on, an extension was granted till 29-9-1997 by this Court by order dated 2-9-1997. On the basis of the order of extension passed by this Court the petitioners filed an application before the learned Magistrate for grant of regular bail but the same was rejected on merits. Feeling aggrieved by the order of rejection the petitioners moved the learned Sessions Judge for grant of regular bail which came to be disposed of by the learned First Additional Sessions Judge, Ambikapur who by his order dated 29-9-1997 rejected the application Under Section 439 of the Code on the ground that the petitioner was under the protective order of this Court passed Under Section 438 of the Code, and therefore, he was not in custody. On the basis of such conclusion the application was rejected as not maintainable.

The aforesaid orders are the subject-matter of challenge in these applications.

5. Challenging the defensibility of the order passed by the competent Court Mr. Surendra Singh, learned senior counsel for the petitioner in M.Cr.C. No. 7067/97 has contended that the said Court has committed gross illegality in his interpretation of the term 'custody' inasmuch as when the petitioner had appeared before the said Court and moved for grant of regular bail it should have been held that he was in custody and the prayer for bail should not have been rejected on the ground that the petitioner was under the protective order passed by this Court. To buttress his submission he has referred to the decisions rendered in the cases of Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667; K. L. Verma v. State and Anr., 1996(7) SCALE (SP) 20; Niranjana Singh and Anr. v. Prabhakar Rajaram Kharot and Ors., AIR 1980 SC 785 and Swami Sunderdas Mahant Anantshri Sukhramji Trust and Ors. v. State of Rajasthan and Ors., 1997(3) Crimes 394.

6. Mr. Sunil Sinha, learned counsel for the petitioners in M.Cr.C. No. 6431/97 and other connected matters has contended that the learned Additional Sessions

Judge has erred in law in his interpretation of the term 'custody' and his finding with regard to the same is vulnerable. Learned counsel has further submitted that when this Court had granted an extension till 29-9-1997 and the petitioners had surrendered before the Judicial Magistrate, First Class and moved for bail and the same was rejected on merits and they had moved for bail before the learned Additional Sessions Judge, the same should have been heard on merits and should not have been rejected on the ground of maintainability.

7. Before I deal with the concept of custody in its generic essence and connotative magnitude, it is essential to refer to the ratio of the cases of Salauddin Abdulsamad Shaikh (supra) and K. L. Verma (supra) as the later case explains the ratio of the earlier one. It is pertinent to mention here that both these cases deal with nature of order required to be passed Under Section 438 of the Code and the jurisdiction of the Court while dealing with such an application. In the case of Salauddin the Apex Court while considering the pregnability of an order passed by the High Court Under Section 438 of the Code expressed thus :

'Under Section 438 of the Code of Criminal Procedure when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the High Court or the Court of Session may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail and in passing that order, it may include such conditions having regard to the facts of the particular case, as it may deem appropriate. Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular Court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date of its expiry directed the petitioner to move the regular Court for bail. That is the correct procedure to follow because it must be realised that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the Court granting anticipatory bail should leave it to the regular Court to deal with the matter on an appreciation of evidence placed before it after

the investigation has made progress or the charge-sheet is submitted.

3. It should be realised that an order of anticipatory bail could even be obtained in cases of a serious nature as for example murder and, therefore, it is essential that the duration of that order should be limited and ordinarily the Court granting anticipatory bail should not substitute itself for the original Court which is expected to deal with offence. It is that Court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail.'

The aforesaid observation was clarified in the case of K. L. Verma (supra) wherein the Apex Court registered the view as under :

'To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher Court, if they so desire. This decision was not intended to convey that as soon as the accused persons are produced before the regular Court the anticipatory bail ends even if the Court is yet to decide the question of bail on merits. The decision in Salauddin's case, has to be so understood.'

In the aforesaid case the Apex Court modified the order passed by the High Court by directing to the following effect:

'We modify the order by directing that the anticipatory bail will enure till the regular Court decides the question of grant of bail and for a week thereafter so that if the regular Court refuses bail, the accused persons can, if so advised, move the higher Court.'

In the case of Swami Sunderdas Mahant Anantshri Sukhramji Trust and Ors. (supra) the High Court of Rajasthan while dealing with the legal validity of the conditions imposed by a learned Sessions Judge while granting anticipatory bail passed the following order :

'Now, coming to the grant of bail only till filing of the challan, I am of the opinion that this condition requires modification and the same is modified to the extent that the anticipatory bail granted to the petitioners will continue even after presentation

of the challan till the bail application, if any, filed by the petitioner, is decided. If the trial Court refuses the bail to the petitioners then the accused petitioners will not be arrested for a period of ten days thereafter so that they may approach the High Court for the grant of bail. The trial Court will decide the bail application without being prejudiced by the order granting anticipatory bail or the order passed by the High Court.'

8. The orders passed by this Court Under Section 438 of the Code and the extensions granted should be understood against the backdrop of the ratio of the aforesaid decisions. In M.Cr.C. No. 7067/97 the Court while granting protection for a period of six weeks had permitted the petitioner to move the competent Court for regular bail. In M.Cr.C. No. 6431/97 and other connected matters the petitioners surrendered before the learned Magistrate and moved an application for grant of regular bail. The same having been rejected they moved the learned Additional Sessions Judge but the said application was rejected on the ground that the petitioners were not in custody.

9. The question that falls for determination is whether the petitioners while under protection of the order of this Court had appeared before the competent Court and moved for regular bail and interim protection granted by this Court continued thereafter, it would be construed that they were in custody. In this context, I may refer to Section 439 of the Code which lays down as a condition precedent that an accused is entitled to take recourse to the said provision if he is in custody. Section 439(l)(a) reads as follows:

'439(1) (a) A High Court or Court of Session may direct -(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that Sub-section;'

From the aforesaid provision it is luminously clear that an application Under Section 439 of the Code by a person who is not in custody is not entertainable. The Apex Court in the case of Niranjana Singh (supra) considered the conceptual essentiality of the term 'custody' and expressed, thus :

'When is a person in custody within the meaning of Section 439 Criminal Procedure Code? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the Court having been remanded by judicial order, or having offered himself to the Court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who he is under the control of the Court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in Court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubiotics are unfair evasions of the straight forwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.

8. Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail Under Section 438) is physical control or at least physical presence of the accused in Court coupled with submission to the jurisdiction and orders of the Court.

9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions. In the present case, the police officers applied for bail before a Magistrate who refused bail and still the accused, without surrendering before the Magistrate, obtained an order for stay to move the Sessions Court. This direction of the Magistrate was wholly irregular and maybe, enabled the accused persons to circumvent the principle of Section 439, Criminal Procedure Code. We might have taken a serious view of such a course, indifferent to mandatory provisions, by the subordinate magistracy but for the fact that in the present case the accused made up for it by surrender before the Sessions Court. Thus, the Sessions Court acquired jurisdiction to consider the bail application. It could have refused bail and

remanded the accused to custody, but, in the circumstances and for the reasons mentioned by it, exercised its jurisdiction in favour of grant of bail. The High Court added to the conditions subject to which bail was to be granted and mentioned that the accused had submitted to the custody of the Court. We, therefore, do not proceed to upset the order on this ground. Had the circumstances been different we would have demolished the order for bail. We may frankly state that had we been left to ourselves we might not have granted bail but, sitting under Article 136, do not feel that we should interfere with a discretion exercised by the two Courts below.'

The High Court of Orissa in the case of *The State v. Maguni Charan Sahu and Ors.*, 1983 Cr.LJ. 1212 relying on the observations of the Apex Court in the case of *Niranjan Singh* (supra) held as under :-

'The decision in *Niranjan Singh's* case (AIR 1980 SC 785 = 1980 Cri.L.J. 426) clearly indicates that the Court was considering directly whether the accused were in custody or not and while examining that question, the Court held that 'custody' in the context of Section 439 of the Code was physical control or at least physical presence of the accused in Court coupled with submission to jurisdiction and orders of the Court. The Court further indicated that the accused can be in custody not merely when the police arrested him, produced him before a Magistrate and got a remand to judicial or other custody. He could also be stated to be in judicial custody when he surrendered before the Court and submitted to its directions. In *Niranjan Singh's* case, the learned Judges had, therefore, clearly laid down that whether the accused had been taken into custody by being arrested or had been remanded to judicial custody on being produced before a Magistrate or had surrendered before the Court and had submitted to its directions entitled him to ask for bail. All the three situations referred to above were, therefore, considered as amounting to 'custody' within the meaning of Section 439(1) of the Code.'

From the principles laid down in the aforementioned cases it is clearly discernible that the term 'custody' as has been understood, in its essential, characteristic and connotative conceptuality engulfs and takes within its sweep various broad spectrums which can satisfy the prerequisite as contemplated Under Section

439(1) of the Code. It is to be borne in mind that the accused-petitioners were under the protection of order of anticipatory bail passed by this Court. Allowance was given to the petitioners to move the competent Court for regular bail within a stipulated period. As laid down by the Apex Court in the case of K. L. Verma (supra), an order of anticipatory bail may extend to a period beyond the dismissal of the application for regular bail Under Section 437 to enable the accused person to file a bail application before the higher Court as enjoined Under Section 439 of the Code. This Court having fixed a specified duration even if the accused could not have been remanded to custody in the eventuality of his rejection of bail it was incorrect on the part of the competent Court to hold that the application Under Section 439 of the Code was not maintainable as the accused were not in custody. As observed by the Apex Court in the case of K. L. Verma (supra) the Court granting anticipatory bail can permit the accused to move within such time and also pass a direction allowing the order to remain effective for some time even after the refusal of regular bail. This being the position the inability on the part of the Court rejecting the application to remand the accused to custody does not affect his jurisdiction to deal with the application on merits. At this juncture, I may refer to the decision rendered by the High Court of Orissa in the case of Indrajeet Roy v. Republic of India, (1997) 84 CLT 692 wherein P. K. Misra, J considering the decisions rendered in the cases of Niranjana Singh (supra), the State v. Maguni Charan Sahu and Ors. (supra) and referring to the recent decisions on anticipatory bail and the meaning of expression 'custody' as explained in Black's Law Dictionary by Henry Compell Black, M. A. (sixth Edn.) held as follows :

'When the accused person surrenders before the Magistrate and moves for bail Under Section 437, and his bail is rejected, he has got a right to approach the Court of Session Under Section 439, provided he is in custody. Except in cases where an accused person is under the protection of an order anticipatory bail for a period beyond the date of dismissal of the application Under Section 437, the accused is bound to remain in custody and in cases where he is under the protection of an anticipatory bail, till a date beyond the date of rejection, he is deemed to be in judicial custody. It cannot be said that the petitioner was not in 'custody' merely because, the lower Court felt that the accused could not have been remanded if his bail petition would have been eventually rejected. An

accused released on anticipatory bail for a limited duration must be deemed to be a person 'in custody'.'

The learned Judge further proceeded to register the view as under :

'The Court granting anticipatory bail for limited duration may, depending upon the facts and circumstances of a particular case, grant interim bail till the date of surrender of the accused before the Magistrate, or till the date of disposal of such application Under Section 437 before the Magistrate, or even till a date beyond the date of such disposal of the Magistrate. In the first two cases, there cannot be any dispute that the Magistrate gets ample jurisdiction to remand the accused if bail application is rejected, but in a case where the duration of limited anticipatory bail is for a period beyond the date of disposal of the application Under Section 437, though the Magistrate rejects the bail petition, the accused cannot be remanded, because he remains under the umbrella of anticipatory bail. Such an order can be passed indicating that period of anticipatory bail is to continue for a particular period from the date of disposal of the application for regular bail Under Section 437, as had been done by the Supreme Court or by fixing a particular date till which it had to remain in force with the direction that the application for regular bail is to be disposed of by the Magistrate by a particular date, as had been done in the case of present petitioner in his previous application Under Section 438, Criminal Procedure Code. But, in either case, it cannot be said that the application Under Section 437 is not to be considered, or would be incompetent as the accused is not in custody. If such an application Under Section 437 is competent, it is axiomatic that an application for bail Under Section 439 before the higher Court would also be competent notwithstanding the fact that the accused may not be in actual custody and notwithstanding the further fact that neither the Magistrate considering the application Under Section 437, nor the higher Court considering the application Under Section 439 would be in a position to remand the accused to actual custody till the expiration of the duration of the limited anticipatory bail. If such an application Under Section 439 was maintainable at the time of filing the application, such application is bound to be considered notwithstanding the fact that at the time of consideration of the bail application, or even at the time of passing the final order, the accused still continues to be under

the umbrella of anticipatory bail valid till a particular future date.'

10. I am in respectful agreement with the aforesaid view. Thus, it is lucidly clear that while an accused remaining under the protective umbrella of the anticipatory bail order appears before the competent Court and moves for regular bail it would be deemed that he is in custody and his bail application can be considered on merits. Even if his application for grant of regular bail is rejected at the Court of first instance he can move the higher Court Under Section 439 of the Code and he would be deemed to be in custody if the protective order passed Under Section 438 of the Code is in continuance.

I may hasten to add that Mr. S. K. Gangrade, learned P. L. for the State has vehemently urged that while the regular bail application is moved, considered and disposed of either Under Section 437 or 439 of the Code, the accused-petitioner is bound to remain physically present before the competent Court. Needless to emphasize that even if the accused is under the protective order of anticipatory for a limited duration, while moving for regular bail under the provision of the Code he has to remain present. In absence of physical appearance in Court on the dates fixed for hearing of the bail application prayer for regular bail is not entertainable.

11. In view of the preceding analysis the impugned orders passed by the Courts below are indefensible and deserve to be set aside and accordingly I set aside them. The competent Courts were required to consider the bail application on merits, as at the time the bail applications were moved, the petitioners were under the umbrella of anticipatory bail passed by this Court. In fact, at the relevant time they were in custody as understood in law. As they should not suffer for the illegal orders passed by the competent Courts, I am inclined to direct that the interim protection granted in their favour on earlier occasions in all five applications would remain effective till 7-2-1998 within which they shall appear physically before the competent Court and move for regular bail and the competent Court shall decide the matter of regular bail on their own merits as expeditiously as possible.

12. In the result, the applications are allowed.

