

Surendra Kumar Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Aug-04-1994

Reported in : 1995CriLJ1517

Judge : U.L. Bhat, C.J. and ;M.V. Tamaskar, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 437, 438 and 439; Indian Penal Code (IPC) - Sections 201, 302, 306, 307 and 506; [Constitution of India](#) - Article 226

Appeal No. : Misc. Criminal Case No. 4758 of 1993

Appellant : Surendra Kumar

Respondent : State of Madhya Pradesh

Advocate for Def. : A. Choudhary, Addl. Adv. General

Advocate for Pet/Ap. : S.C. Datt, Adv.

Judgement :

U.L. Bhat, C.J.

1. This is an application filed by the accused Surendra Kumar in Crime No. 284 of 1993 of Police Station, Sihora, District Jabalpur for grant of anticipatory bail under Section 438 of Code of Criminal Procedure, 1973. The application was opposed by the learned Government Advocate.

2. Learned Judge before whom bail matter came up for consideration at an earlier stage passed an order restraining the petitioner's arrest. One of us who had occasion to deal with the case at a later stage doubted the legality of the interim order restraining the arrest and referred the matter to Division Bench.

3. The petitioner married Mst. Sarojabai. On 25-5-1993, she sustained burn injuries and was taken to the hospital. Police was given information and parents were also informed. A case was registered against the petitioner for offence under Section 306 and Section 201 of the Indian Penal Code. This Court granted him anticipatory bail. Mst. Saroja bai succumbed to the injuries on 3-6-1993. The case was subsequently converted into one involving offence under Section 302 IPC also. This led to the filing of the present application. The Court ordered notice and called for the records and pending consideration of the application restrained the petitioner's arrest.

4. The direction which a Court can issue under Section 438 of the Code is that in the event of arrest of an accused on an accusation of committing a non-bailable offence, he shall be released on bail subject to such conditions as the Court may deem fit to impose. An application under Section 438 of the Code can be moved only by a person who has not already been arrested. Once he is arrested, his remedy is to move the Court either under Section 437 or Section 439 of the Code. In the very nature of the direction which the Court can issue under Section 438 of the Code, it is clear that the direction is to be issued only at the pre-arrest stage. The direction becomes operative only after arrest. The Court in issuing the direction exercises its jurisdiction to protect him from the consequence of arrest leading to custody. The condition precedent for the operation of the direction issued is arrest of the accused. That being so, the irresistible inference is that in an application under Section 438 of the Code, the Court cannot restrain arrest.

5. Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material

facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed; without hindrance, and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well-defined and the jurisdictional scope of interference by the Court in the process of investigation is limited. The Court ordinarily will not interfere with the investigation of a crime or with the arrest of accused in a cognizable offence. This is not because of lack of power in the Court since such a power exists under Article 226 of the [Constitution of India](#) but because of the reluctance of the Court to interfere at that stage. See *State of Haryana v. Bhajan Lal*, AIR 1992 SC 604 : (1992 Cri LJ 527), and *Janata Dal v. H.S. Chowdhary*, AIR 1993 SC 892 : (1993 Cri LJ 600). An interim order restraining arrest, which cannot be passed under Section 438 of the Code, will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code. The Supreme Court also opined that a blanket order of anticipatory bail should not be passed as it would be a serious encroachment into the power of investigation and against public interest (observations - see *Gurbaksh Singh's case*, AIR 1980 SC 1632 : (1980 Cri LJ 1125). The position cannot be different in a case of an order restraining arrest.

6. For the aforesaid reasons, we hold that in exercising the jurisdiction under Section 438 of the Code, the Court cannot pass an interim order restraining arrest. We are supported in this view by a decision of the Division Bench of Patna High Court in *Durga Prasad v. State of Bihar*, 1987 Cri LJ 1200 and a decision of Division Bench of Guwahati High Court to which one of us (Bhat, C. J.) was a party in *Mrs. Neeli Mazumdar v. State of Assam* (1991) 3 Crimes 797.

7. The approach of the Court in considering an application for bail either under Section 438 or Section 439 of the Code is to take into consideration the twin aspects of, concern for personal liberty of the individual and protection of process of investigation and public interest. In the case of a bailable offence, the Police Officer arresting an accused, himself will give bail and if for any reason he fails to

do so, the Court will necessarily give bail. If the offence is non-bailable, further considerations will naturally arise. The Court will consider the nature and seriousness of the Offence, character of the evidence, stage of investigation, the severity of the punishment which is likely to be imposed on the accused if convicted, the need for curtailing the freedom of the accused at that stage, reasonable possibility of the presence of the accused not being secured either for purposes of investigation or for the trial, reasonable apprehension of the accused, if set at liberty, interfering with the witnesses or the course of justice and the larger interest of the public or the State and other relevant aspects. Reference may be made to *State v. Captain Jagjit Singh*, AIR 1962 SC 253 : (1962 (1) Cri LJ 215). In this decision, the Court has also observed that the fact that the accused may not abscond would not itself be sufficient to induce the Court to grant bail in case of serious crimes. The Court is concerned with the liberty of the accused and also with safeguarding course of justice. Reference may be made to *G. Narasimhulu v. Public Prosecutor, AP.*, AIR 1978 SC 429 : (1978 Cri LJ 502) and *Niranjan Singh v. Prabhakar* (AIR 1980 SC 785 : (1980 Cri LJ 426). The decisions referred to are under Section 439 of the Code.

8. Various decisions of the Supreme Court have considered the legislative history of Section 438 of the Code, the recommendations in the 41st report of Law Commission and 48th report of Law Commission as well as statement of objects and reasons of the Bill seeking to introduce Section 438. The power under Section 438 of the Code is not an ordinary power but an extraordinary one. This, however, does not mean that the power can be exercised only in very special cases. Observation to the effect in *Balchand v. State of M.P.* AIR 1977 SC 366 : (1977 Cri LJ 225) has not been approved by the Constitution Bench in *Gurbaksh Singh v. State of Punjab*, AIR 1980 SC 1632 : (1980 Cri LJ 1125). The Supreme Court has indicated that Section 438 of the Code is an assurance against police custody following arrest and to relieve the accused from harassment, intimidation, social ridicule which may follow upon detention. While the petitioner is not required to make out any 'special case', he is required to make out a 'case' under Section 438 of the Code. The Supreme Court has repeatedly stressed that the matter is within the judicial discretion of the Court but the judicial discretion has to be used with due care and caution, being aware of the context and reasonably foreseeable

consequences. In paragraph 31 of the judgment by the Constitution Bench, it is observed :

'If the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee, from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; unless the proposed accusation appears to be actuated by mala fides; and equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the Court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with the 'the larger interests of the public or the State' or some of the considerations which the Court has to keep in mind while deciding an application for anticipatory bail'.

9. We may also advert to some illustrative cases. In *Pokar Ram v. State of Rajasthan*, AIR 1985 SC 969: (1985 Cri LJ 1175), the Court took the view that in a case of murder where investigation is in progress, unless very compelling circumstances are made out, an order of anticipatory bail will not be granted. That was a case registered under Section 307 of the IPC and subsequently converted into one under Section 302 IPC. The Court observed that if an order granting anticipatory bail is allowed to stand, faith of public in administration of justice is likely to be considerably shaken. In *Kiran Devi v. State of Rajasthan*, 1987 Suppl. SCC 549, which related to a case of murder the investigation of which was not complete, the Court held that anticipatory bail order should be passed and the

proper course is to leave it to the trial Court to do the needful, if and when the accused is arrested, in the light of the record available.

10. There appears to be a tendency for persons accused of commission of non-bailable offence not involving sentence of death or imprisonment for life to rush to Court with applications under Section 438 Cr.P.C. Such applications also are required to be dealt with in the light of the considerations referred to earlier. At the same time, the Court must also bear in mind that registration of every case should not lead to prayer for anticipatory bail. The accused can very well surrender to Court and move for regular bail and if deemed necessary, for interim bail. The Supreme Court in *Niranjan Singh v. Prabhakar*, AIR 1980 SC 785 : (1980 Cri LJ 426), which was a case under Section 439 of the Code, had to deal with an accused who surrendered in Sessions Court and moved an application under Section 439 of the Code. The Court observed that when the accused surrendered in Sessions Court, he is deemed to be in custody and he is entitled to move for bail and the Court acquires jurisdiction to consider his bail application. Mechanical granting of bail and mechanical rejection of bail - both are equally undesirable and untenable.

11. We see a tendency among the Magistrates and Sessions Judges to reject applications for bail under Sections 437 and 439 respectively without regard to the facts and circumstances of the case and merely on the basis of the section of the Indian Penal Code quoted in the F.I.R. While considering an application for bail, the Court must have regard not only to the nature and character of the offence but also the severity of the sentence which is likely to be imposed on conviction. There are offences for which sentence upto seven years or ten years or more are prescribed. In such cases, the Court must have regard to the sentence of imprisonment which normally is likely to be imposed and not go merely by the maximum sentence provided. The possibility of the accused absconding or tampering with witnesses depends to some extent on the severity of the sentence. To give an illustration, Section 506 IPC which is in two parts, prescribes imprisonment for a term which may extend to seven years under Part II. This is a non-bailable offence in this State. The Magistrate dealing with the case certainly has jurisdiction to grant bail under Section 437 of the Code to an accused facing

accusation under Section 506 Part II IPC. The Sessions Judge acting under Section 439 of the Code has jurisdiction to grant bail. There is a general complaint that Magistrates and Sessions Judges decline to exercise jurisdiction . merely because the offence is non-bailable in the State and carries a maximum sentence of imprisonment for 7 years and without examining the facts and circumstances of the case. That would be abdication of jurisdiction and responsibility. This tendency has led to the very unfortunate consequence of accused who are likely to be sentenced to imprisonment for a period of one or two years or even less than one year being compelled to rush to the High Court for relief. It is necessary that such injustice which also does not serve administration of justice or public interest is avoided.

12. We turn to the facts of the case. Mst. Sarojabai sustained burn injuries on 25-5-1993 and succumbed to the injuries on 3-6-1993. She is alleged to have given different versions about the cause of injuries at different stages. The petitioner was granted anticipatory bail while the case related to offence under Sections 306 and 201 IPC. He was arrested and released. Charge-sheet was filed in October, 1993. The case was committed to the Sessions on 13-6-1994. According to the petitioner, it is a false and motivated case. We understand that recording of prosecution evidence has commenced. We think it quite unnecessary and unwarranted at this stage to pass any order of anticipatory bail in favour of the petitioner. He may surrender to the Sessions Court and move for bail under Section 439 of the Code. We have no doubt that the Sessions Court will consider all relevant circumstances in passing an order. With this observation, the petition is dismissed and the interim order restraining arrest is vacated.