

Suresh Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Dec-13-1999

Reported in : 2000(2)WLN475

Judge : Shiv Kumar Sharma, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 70(2), 71 and 438;
[Indian Penal Code \(IPC\), 1860](#) - Sections 376; Indecent Representation of Women
(Prohibition) Act, 1986 - Sections 6

Appeal No. : S.B. Criminal Misc. Bail No. 5183 of 1999

Appellant : Suresh

Respondent : State of Rajasthan

Advocate for Pet/Ap. : D.G. Chaturvedi, Adv.; Ajay Purohit,; Rekha Dhakar,

Judgement :

ORDER

Sharma, J.

(1). The accused petitioner Suresh has moved this bail application under Section 438 Cr.P.C. in a case under Section 376 IPC read with Section 6 of Indecent Representation of Women (Prohibition) Act, 1986. The allegations against the petitioner are that he committed rape with the prosecutrix and threatened her to

make public her nude photographs. During the course of arguments following three questions emerged.

(1) Whether a Judicial Magistrate in exercise of powers under Section 71 Cr.P.C. can convert warrant of arrest into bailable warrant in a case triable by me Sessions Court ?

(2) Whether the provisions contained in Section 71 Cr.P.C. are applicable only to the witnesses ?

(3) What is the scope of sub-section (3) of Section 438 Cr.P.C. ?

(2). Learned advocate of the Bar who were invited to assist the court made their respective submissions.

(3). In Gurubaksh Singh Sibbia vs. State of Punjab (1), their Lordships of the Supreme Court indicated that the High Court and the court of Sessions to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit to do so on the particular facts and circumstances of the case and on such conditions as the case may warrant.

(4). The Division Bench of this Court in Ghanshyam vs. State of Rajasthan (2) observed that the provisions contained in Section 438 Cr.P.C. are applicable to a case where cognizance of a non- bailable offence has been taken by a Magistrate against any person and a warrant of arrest has been issued to compel his attendance.

(5). Similar view was taken in Nand Ram vs. State of Rajasthan (3) by the Division Bench of this Court.

(6). Mr. S.K. Gupta, learned counsel invited my attention towards the provisions contained in Section 438 Cr.P.C. and canvassed that the view taken by the Division Bench of this Court in Ghanshyam vs. State of Rajasthan (supra) is not correct and matter may be referred to Larger Bench. I am unable to persuade myself to agree with the submissions of Mr. Gupta. In order to attract the

provisions contained in sub-section (3) of Section 438 Cr.P.C. issuance of directions under sub-section (1) of Section 438 is necessary. Sub-Section (3) of Section 438 Cr.P.C. provides that after issuance of directions under sub-section (1) of Section V Cr.P.C. if a person is arrested without warrant by police officer and if such person is prepared at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on and in case where the Magistrate took cognizance and issue warrant of arrest against such person in whose favour directions under sub-section (1) of Section 438 were issued the Magistrate shall issue bailable warrant in conformity with the direction of the court under sub-section (1) of Section 438 Cr.P.C. whereas in *Ghanshyam vs. State* (supra) situation was quite different. It was held that anticipatory bail could be granted even though the Magistrate had taken cognizance of non-bailable offence and issued warrant of arrest.

(7). In so far as interpretation of Section 71 Cr.P.C. is concerned, I am of the view that a Judicial Magistrate under this section can convert warrant of arrest into bailable warrant. The word 'person' used in this section can be attracted to the accused as well as the witnesses. This court had occasion to interpret Section 70(2) of Cr.P.C. in *Santu Ram vs. State of Rajasthan* (4) and it was indicated that in sub-section (2) of Section 70 Cr.P.C. the Magistrate had all the powers to reconsider the orders with regard to issue of non-bailable warrants.

(8). In *Duli Chand & Anr. vs. State of Rajasthan* (5), it was held that order of issuance of warrant of arrest can be converted into bailable warrants.

(9). In *Surindra Singh vs. State of Rajasthan* (6), it was observed that the Magistrate has jurisdiction to cancel the warrant of arrest issued by him under sub-section (2) of Section 70 Cr.P.C.

(10). Necessary corollary of the above is that Section 71 Cr.P.C. shall be read with sub-section (2) of Section 70 Cr.P.C. and the Magistrate in his discretion has wide powers to convert warrant of arrest into bailable warrants.

(11). Now coming to the facts of this case, it is to be seen as to whether the petitioner is entitled to a direction under sub-section (3) of Section 438 Cr.P.C.

(12). I have closely scrutinised the allegations levelled against the petitioner. It appears that application under sub-section (3) of Section 438 Cr.P.C. was filed by the petitioner before the learned Additional Sessions Judge Deeg Bharatpur. As already stated the provisions of sub-section (3) of Section 438 Cr.P.C. are not attracted as no direction under sub-section (1) of Section 438 Cr.P.C. was issued in favour of the petitioner by the learned court below. But in view of the ratio indicated in Gurubaksh Singh vs. State (supra), Ghanshyam vs. State (supra) and Nand Ram vs. State (supra) the application seeking anticipatory bail was otherwise maintainable as non-bailable warrants were issued against the petitioner. Looking to the serious allegations levelled against the petitioner I am not inclined to grant him the benefit of Section 438 Cr.P.C. The learned Additional Sessions Judge Deeg has rightly exercised the discretion vested in him under Section 438 Cr.P.C. in refusing anticipatory bail to the petitioner. I find no merit in the bail application, it is accordingly dismissed. The interim orders passed by this court are vacated.