

Sawai Singh Vs. the State

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Court : Rajasthan

Decided On : Dec-19-1975

Reported in : 1975(8)WLN739

Judge : P.D. Kudal, J.

Appeal No. : S.B. Criminal Misc. Bail application No. 596 of 1975

Appellant : Sawai Singh

Respondent : The State

Disposition : Application dismissed

Judgement :

P.D. Kudal, J.

1. This application for anticipatory bail under Section 438(1) Cr.P.C. 1973 has been moved on behalf of Sawaisingh. Similar application moved before the learned Sessions Judge, Pali was dismissed on 8-11-75.

2. The facts of the prosecution case, as disclosed in the First Information Report are that at about 6.30 a.m. on 3.9.1975, a report was lodged with the police by Heeralal to the effect that Khivsing son of Ganeshsing was attacked by the applicant Sawaisingh and one Ramsingh is alleged that Ram Sin caused two injuries by axe on the head of Kbivsingh while Sawaisingh dealt lathi blows on

Khivsingh resulting in fracture of 8th to 12th ribs, of Khivsingh. Khivsingh was medically examined, and the injuries of his head caused by in accused Ram Singh were found to be simple, while the injuries caused by lathi strokes by Sawaisingh were found to be grievous.

3. Ramsingh was apprehended by the police, and at his instance, an axe was recovered. As application for bail was moved on his behalf, and he was enlarged on bail by the orders of the learned Sessions Judge, Pali dated 12th October, 1975. The applicant Sawaisingh could not be apprehended by the police, but he, in turn, moved an application under sec 438, Cr.P.C. before the learned Sessions Judge, Pali, which was rejected on 8.11.75, on the ground that if a direction is issued at this stage, it might adversely hamper the investigation of the case, and the chances of the recovery of the alleged weapon of offence i.e. lathi, will be marred. Feeling aggrieved against this order of the learned Sessions Judge, Pali, the present bail application has been filed.

4. On behalf of the applicant, it was contended that Section 438, Cr.P.C., 1973 is a new provision enabling a High Court or a Court of Sessions to issue a direction under Section 438(1), Cr.P.C. to enlarge the accused on bail there he is apprehended. It was further contended that this provision has been incorporated with a view to avoid unnecessary harassment, humiliation and disgrace to the accused persons who have been involved in false and frivolous criminal cases. It was further contended that the purpose of the bail is to secure the attendance of the accused for the purpose of investigation and trial when the occasion arises. The learned Counsel for the applicant strenuously argued that the object of the Legislature could be a guiding principle to ascertain in what cases a direction, as contemplated under Section 438(1), Cr.P.C., 1973, could be issued.

5. On behalf of the State the application has been seriously opposed. It has been contended that the provision of Section 438, Cr. P.C. are not intended to give a short-cut to the conversions. It was also contended that the intention of the Legislature in enacting Section 438, Cr.P.C. is totally different. It was also contended that there is a presumption in law that the investigating agency would abuse its powers while dealing with the accused-applicant. It was also contended that in the

myth case, the accused applicant is avoiding arrest despite the fact that warrant for his arrest under Section 56(1) has been issued long ago. He was, therefore, contended that it is not a fit case in which a direction under Section 438(1), Cr.P.C. could be issued.

6. The contentions of the learned Counsel for the accused applicant and the learned Public Prosecutor have been considered, the case diary and the order of the learned Sessions Judge have been perused. The learned Counsel for the parties relied on *Jubar Mal v. State* 1955 RLW 87, wherein it was held that neither the High Court nor the subordinate Court has power under the Code of Criminal Procedure to grant bail to a person seeking bail if he has not been arrested or detained in custody or brought before them, or a warrant of arrest or even an order in writing for his arrest under Section 56, Cr.P.C. has been issued against him. The mere fact, that a report of a canasta offence, has been made against him before the police and is under investigation, and he may be arrested by the officer in charge of the police station without a warrant and perhaps disgraced, does not empower the court to grant him bail, as under these circumstances, there is no actual danger of restraint to the person concerned. Reliance was also placed on Rule 323(1) of the High Court Rules. At the very best, it can be said that Rule 321(1) of the High Court Rules and the case reported in *Jubar Mal v. State of Rajasthan* 1955 RLW 87, have got no relevancy to facts of the present case, because there is no provision similar to Section 438, Cr.P.C., 1973 incorporated in the old Criminal Procedure Code.

7. The learned Counsel for the parties also relied on a decision in the case of *Sawaisingh v. State* (SB) Criminal Bail Application No. 1304 of 1974 under Section 438, Cr.P.C. 1973 decided on October 8, 1974. The learned Counsel for the applicant also relied on the observations made in the case of *Khinvdan v. State* 1975 WLN 132.

8. Section 438(1), Cr.P.C., 1973 reads as under:

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section, and that Court

may, if it thinks a for, direct that in the event of such arrest, he shall be released on bail.

9. The discretion vested in the High Court and the Court of Sessions is an unfettered discretion. If the Court of Sessions or the High Court thinks fit, a direction as contained in Section 438(1), Cr.P.C. may be issued in appropriate cases. The Legislature in its wisdom thought it proper not to lay down any condition whose exercise in the discretion may be exercised or may be declined. It goes without saying that the Courts have to exercise their discretion in a judicious manner. The purpose and intent of introducing this new section, whereby the provisions of anticipatory bail have been made, can be gathered from Clause 447 of the Bill which provides for anticipatory bail.

10. The framers of Code observed as under:

As recommended by the Commission, a new provision is being made enabling the superior courts to grant anticipatory bail, i.e. direction to release a person on bail even before the person is arrested. With a view to avoid the possibility of hampering the investigation, special provision is being made that the Court granting anticipatory bail may impose such conditions as it thinks fit. These conditions may be that a person shall make himself available to the investigation officer as & when required & shall not do anything to hamper investigation.

11. The following are the observations contained in the Law Commission's report recommending the provisions for anticipatory bail:

The necessity for granting anticipatory bail arises mainly because sometime influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.

12. These observations may act only as guidelines for interpreting the provisions of Section 438 Cr.P.C. The basic question for consideration is, whether the provisions of 438. Cr.P.C. whereby the procedure for obtaining anticipatory bail has been incorporated, circumvent the provisions contained in Section 437 and 439, Cr.P.C. regarding the enlargement on bail of an accused person. Having given my most anxious consideration to the question involved I have no hesitation in holding that the ordinary rule of arrest and enlargement on bail shall continue to function during the investigation or trial of cases, but when it is brought to the notice of the Court that the investigating agency is being exploited, or that the process is likely to be misused, the High Court or the Court of Sessions has been given the discretion to issue a direction in appropriate cases for releasing the accused on bail when ever he is apprehended. This would mean that the provisions of Section 438 Cr.P.C. are to be utilized when either the investigating agency misdirects itself or from the perusal of the case diary it appears that innocent persons are likely to be harassed, or entangled in false and frivolous cases. In the present case, the First Information Report was lodged with the police that Ramsingh and line present applicant Swassingh have assaulted Khivnisgh with axe and lathi Ram singh was arrested, and was also enlarged on bail the weapon of offence used by him was an axe Siwaisingh has been avoiding arrest, and has not made himself available to the police for investigation and interrogation. Having carefully perused the case diary, there are no reasons to believe that the investigating agency is in any way going out of its way to implicate an innocent person in a false or frivolous criminal case. Under such circumstances, looking to the facts, as disclosed in the police diary, no occasion arises for issue of a direction under Section 438, Cr.P.C.

13. Hence, the application filed by the applicant for a direction under Section 438(1) Cr.P.C., 1973 is hereby dismissed.