

Nandram Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jul-10-1979

Reported in : 1979WLN373

Judge : K.D. Sharma and; S.N. Deedwania, JJ.

Appeal No. : D.B. Criminal Misc. Bail Application No. 205/1979

Appellant : Nandram

Respondent : State of Rajasthan

Judgement :

1. The following question has been referred to us for decision by a learned single Judge of this Court:

Whether it is open to an accused person to apply for bail under Section 438 Cr PC in a case where the Magistrate has taken cognizance of the offence and has passed order for the issue of warrant for the arrest of the accused person

Before dealing with this question we would like to determine the true scope of Section 438 Cr PC. Section 438 Cr PC reads as follows:

Section 438 Direction for grant of bail to person apprehending arrest.

(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 Sessions for a direction under this section, and that Court may, if it thinks fit direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under Sub-section (1) it may include such condition in such directions in the light of the facts of the particular case as it may think fit including-

(i) a condition that the person shall make himself available (or interrogation by a police officer as and when required;

(ii) a condition that the person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Police Officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court.

(iv) such other condition as may be imposed under Sub-section (3) of Section 437 as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a Police Station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under Sub-section (1).

It will not be out of place to mention that prior to the coming into force of the new Code of Criminal Procedure 1973 there was a divergence of judicial opinion about the power of the Court to grant bail to a person who has not been arrested and who has not surrendered to any custody under an order of arrest. But after the enforcement of the new Code of Criminal Procedure a direction to release a person on bail can be issued by the High Court or the Court of Sessions on his application under Section 438 Cr PC even before he is arrested, provided the person has reason to believe that he may be arrested on an accusation of having

committed a non-bailable offence. The phrase 'reason to believe' occurring in this section is much stronger than the phrase 'reason to suspect'. It is not identical even with the expression 'knowledge'. A person can be held to have reason to believe a thing if he has sufficient cause to believe that thing but not otherwise. A person cannot be said to have reason to believe a thing unless there are such circumstances that any reasonable man will consider certain facts to be probable. Mere ground for suspicion that the thing exists is not equivalent to sufficient cause to believe a certain thing. Therefore, all that Section 438 Cr PC requires is that the circumstances must be such that an ordinarily prudent man should have considered his arrest to be probable upon an accusation of having committed a non-bailable offence irrespective of the fact whether an accusation is likely to be made or it has already been made against him.

2. The next pertinent question that arises for consideration is whether Sub-section (1) of Section 438 Cr.P.C. is controlled by the provisions of Sub-section (3) of this section and no order for anticipatory bail to a person apprehending arrest can be made by the High Court or a Court of Sessions if a Magistrate has taken cognizance of a non-bailable offence against him and has issued a warrant of arrest in the first instance to enforce his attendance in the Court. In our opinion Sub-section (3) of Section 438 Cr.P.C. cannot be said to have an over-riding effect on Sub-section (1) of this section because Sub-section (3) makes provision for working out an order passed by the High Court or the Court of Sessions under Sub-section (1) of Section 438 Cr.P.C. It merely provides that in what manner an order under Sub-section (1) of Section 438 Cr PC shall be given effect to or carried out. It lays down that if any person in whose favour an order under Sub-section (1) of Section 438 Cr.P.C. is made, is arrested afterwards without warrant by an Officer-in-charge of the Police Station on an accusation of having committed a non-bailable offence he shall be released on bail provided he is prepared to furnish bail either at the time of arrest or at any time while in the custody of such officer. It further provides that if a Magistrate taking cognizance of a non-bailable offence decides that a warrant of arrest should issue in the first instance against such person he shall issue a bailable warrant in compliance with the direction of the Court under Sub-section (1) of Section 438 Cr.P.C. The provisions of Sub-section (3) of Section 438 Cr.P.C. cannot be construed to mean that no order for

anticipatory bail to a person can be passed by the High Court or the Court of Sessions under Sub-section (1) thereof if a Magistrate has taken cognizance of a nonbailable offence against such person and has already issued a warrant of arrest. There is thus no force in the contention that Section 438 of the Code cannot be resorted to by a person against whom cognizance of a non-bailable offence has been taken by a Magistrate and a warrant of arrest in the first instance has been issued to compel his attendance in the Court. A similar view has been taken by the Delhi High Court in a case *Suresh Vasudeo v. The State and Anr.* reported in 1978 Criminal Law Journal 677. The relevant observations of the learned Judge who decided this case are quoted below in extenso in support of our view:

Next I come to analyse the provisions of Sub-section (3) of Section 438. Sub-section (3) of this section starts with the proposition 'if'. It does not start with the proposition 'when'. The use of the proposition 'if' at the start of the Sub-section (3) indicates that Section 438(1) is not dependent on the provisions of Sub-section (3) of this section.

The expression 'if such person is thereafter arrested without warrant by an officer in charge of a Police Station' merely illustrates the case of working out an order for anticipatory bail granted under Section 438(1) in respect of a cognizable offence but that does not mean that Section 438(1) is limited to the apprehended arrest only in a cognizable offence or arrest only by an officer-in-charge of a Police Station. Sub-section (3) of Section 438 is really what may be termed as 'machinery section' for working out an order under Sub-section (1) of Section 438 by way of an illustration.

In D.B. Criminal Reference No. 29 of 1976 *Ghanshyam v. State of Rajasthan* reported in *Rajasthan Criminal Cases* 1977 page 19, the Division Bench of this Court also made the following observations which lend support to some extent to the view taken by us:

If a person who moves an application under Section 438 has reason to believe that he is going to be arrested for a cause for which, he thinks there is no foundation then the protection extended to him under the said provision cannot be

withdrawn simply because a warrant has been procured against him from a competent court for his arrest or an entry has been made under Section 55(1) for his arrest. A careful perusal of the Orissa and Calcutta authorities make it abundantly clear that these decisions hardly go to assist the learned Public Prosecutor to strengthen his argument. It would be pertinent to note that applications under Section 438 Cr PC filed by the accused in those cases were ultimately allowed and the directions were issued by the Court as required under the law.

Hence it cannot be safely held that Section 438 Cr PC is inapplicable 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. It does not appear from the language used in Section 438 Cr PC that the legislature while enacting the section intended that the power of granting anticipatory bail to a person conferred on the High Court or the Court of Sessions would be restricted to those cases only where the Magistrate has not taken cognizance of a nonbailable offence against such person and has not issued warrant for his arrest. We, therefore, cannot subscribe to the view that in a case where the Magistrate has taken cognizance of a nonbailable offence and had issued a warrant for the arrest of such person, the protection given by the legislature to such a person by enacting Section 438 Cr PC shall cease to exist, because if such a view is taken even a person who is falsely implicated by his rivals in a nonbailable offence for the purpose of disgracing him or for the purpose of getting him detained in jail for some days and who genuinely believes that he is likely to be arrested shall have no remedy and shall have to submit to custody and remain in prison for some days and then to apply for bail. Section 438 Cr PC can be invoked even when the arrest of a person is certain in execution of a warrant of arrest issued by a Magistrate after taking cognizance of a nonbailable offence against him. The expression 'take cognizance of an offence' simply means that taking notice of an offence by a Court, competent for the purpose in a judicial capacity with a view to the initiation of judicial proceedings against the accused in respect of that offence after applying its mind to the facts constituting the offence. It does not affect the powers of the Court to grant or refuse bail or anticipatory bail to such person. Even the person against whom cognizance has been taken by a

Magistrate and a warrant of arrest in the first instance has been issued for his arrest may be released on bail under Section 437 Cr PC by the Magistrate himself or under Section 439 Cr PC by the High Court or the Sessions Judge after he appears or is arrested or brought before the Court. Hence the mere taking of cognizance against a person and issuing a warrant for his arrest does not debar the High Court or the Sessions Judge to consider the application of such person for anticipatory bail if such person genuinely apprehends that he is likely to be arrested in execution of the warrant and if the High Court or the Court of Sessions is satisfied after applying its mind to the materials available that if anticipatory bail is refused an irreparable wrong or injustice may result which it is desirable to avoid. The question referred to us is answered accordingly. The application for anticipatory bail filed by Nandram may be put up before the learned Single Judge for orders.