

E. Joseph and anr. Vs. the Assistant Collector of Customs, Tuticorin

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Court : Chennai

Decided On : Sep-21-1981

Reported in : 1982CriLJ559; 1984(15)ELT84(Mad)

Judge : Swamikkannu, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 437 and 438;
Evidence Act - Sections 27

Appeal No. : Crl. M.P. Nos. 4970 and 4971 of 1981

Appellant : E. Joseph and anr.

Respondent : The Assistant Collector of Customs, Tuticorin

Advocate for Def. : C. Krishnan, Standing Counsel for Central Govt.

Advocate for Pet/Ap. : G. Krishnan, Adv.

Judgement :

ORDER

1. The Customs Act, 1962, is an enactment which contains provisions like Sections 106-A to 110, the underlying principles of which are somewhat not having features, which may be akin to provisions imbedded in Part IV of the Constitution (Fundamental rights), viz., against the testimonial compulsion contemplated under Art. 20 clause (3), which imbibes in itself the principle that an

accused person cannot be compelled to be a witness against himself, and as such starting from *In re Swarna Lingam Chettiar's case* (*Swarnalingam Chettiar v. Asst. Labour Inspector, Karaikudi* AIR 1956 Mad 165 : : AIR1954 Mad785 , (with respect to our agency bus transport he was plying from Devakottai Rly. Station to the town proper) dealt with by Rajamannar C.J. and Rajagopala Iyengar J. which had been followed in a number of cases and subsequently, culminating in decisions of the Supreme Court, dealing about this testimonial compulsion, the decisions held that Art. 20 is not applicable to the procedures that are adopted by an investigating officer who confronts a person who is accused of having contravened the provisions of the Customs Act 1962, because, after his arrest the contraband articles, which are the subject matter of the offence, had been seized as a result of the voluntary statement either recorded at the instance of the person from whom such objects are seized or given in writing if he is a literate person, and certainly, that statement is admissible in evidence. As a matter of fact, a copy of such statement given in writing by the person responsible, has been actually handed over to the accused person soon after the said document is taken on file by the concerned official.

2. The learned counsel appearing for the Customs submits that a statement has been recorded from a person on 8-9-1981, as a result of which two out of twenty foreign Air Conditioners were recovered at Tuticorin port. This court is not concerned with the merits or otherwise of such a statement or regarding the circumstances under which it came into existence at this stage, but it is only for the sake of considering the merits or demerits of the present application, this aspect of the matter has been incorporated in this order.

3. Mr. G. Krishnan, learned counsel for the petitioners submits that even according to the Customs authorities only two out of twenty foreign air conditioners had been recovered as a result of the alleged statement given by one person. He also submits that the petitioners have nothing to do with such seizures and as a matter of fact, this case has been foisted against them with some ulterior motives by the officials.

4. The learned counsel for the Customs submits that the petitioners herein made themselves scarce and only after their apprehension, the Customs authorities may be in a position to say when it may be possible for them to file a complaint against the petitioners. It is further submitted that when the matter is under investigation, it is too immature for this court to think of enlarging the petitioners on bail by invoking the provisions of Section 438 Cri.P.C.

5. Mr. G. Krishnan, learned counsel appearing for the petitioners, on the other hand, fervently submits that the provision of S. 438 Cri.P.C. has to be used in favour of the petitioners herein because the discretionary power vested in court has to be exercised judicially. It is relevant in this connection to note that it is only a statement that has been signed by the counsel for the respondent that has been filed and that counter is bereft of particulars which are absolutely necessary for deciding the merits of the present petition.

6. Now, the point for consideration in these applications is whether anticipatory bail can be granted to the petitioners herein.

7. It has been observed by the Supreme Court in *State of Rajasthan Jaipur v. Balchand, alias Baliary* : 1978 CriLJ195 as follows -

'It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weight with us when considering the question of jail. So also the heinousness of the crime. Even so, the record of the petitioner in this case is that, while he has been on bail throughout in the trial court and he was released after the judgment of the High Court, there is nothing to suggest that he has abused the trust placed in him by the court; his social circumstances also are not so unfavourable in the sense of his being a desperate character or unsocial element who is likely to betray the confidence that the court may place in him to turn up to take justice at the hands of the court. He is stated to be a young man of 27 years with a family to maintain. The circumstances and the social milieu do not militate against the petitioner being granted bail at this stage. At the same time any possibility of the absconsion or evasion or other abuse can be taken care of by a direction that the petitioner will report himself before the police station at Baren once every fortnight.'

8. It is also laid down in *Balchand Jain v. State of Madhya Pradesh*, AIR 1977 SC 366 : 1977 Cri LJ 225 as follows -

'On a reading of Section 438 Cr.P.C. and Rule 184, it can be laid down (1) that Section 438 of the Code has not been repealed or overruled by Rule 184 of the Rules but the two have to be read harmoniously without interfering with the spheres contemplated by each of those provisions. In fact, Rule 184 of the Rules is only supplemental to Section 438 of the Code and contains the guidelines which have to be followed by the Court in passing orders for anticipatory bail in relation to cases covered by Rule 184 of the Rules.

(2) that there is no real inconsistency between Section 438 of the Code and Rule 184 of the rules;

(3) that Section 438 of the Code is an extraordinary remedy and should be resorted to only in special cases. It would be desirable if the Court before passing an order under Section 438 of the Code issues notice to the prosecution to get a clear picture of the entire situation; and

(4) that in cases covered by rule 184 of the Rules, the court exercising power under Section 436 or Section 438 of the Code has got to comply with the conditions mentioned in clauses (a) and (b) of Rule 184 and only after the court has complied with those conditions that an order under any of these sections of the Code in respect of such offence could be passed. There does not appear to be any direct conflict between the provisions of Rule 184 of the Rules and Section 438 of the Code. However, the conditions required by Rule 184 of the rules must be impliedly imported in Section 438 of the Code so as to form the main guidelines which have to be followed while the court exercises its power under Section 438 of the Code in offences contemplated by Rule 184 of the rules. Such an interpretation would meet the ends of justice avoid all possible anomalies and would at the same time ensure and project the liberty of the subject which appears to be the real intention of the legislature in enshrining Section 438 as a new provision for the first time in the Code. There is no real inconsistency between S. 438 of the Code and Rule 184 of the Rules and therefore, the non obstante clause cannot be interpreted in manner so as to repeal or override the provisions of

Section 438 of the Code in respect of cases where rule 184 of the Rules applies.

The scope of Rule 184 of the Rules is wider than that of Section 438 of the Code, inasmuch as while Section 438 can be invoked only in cases of non-bailable offences and not in cases of bailable offences, Rule 184 of the Rules would apply not only to non-bailable offences but also to bailable offences and in these circumstances, therefore, the conditions mentioned in Rule 184 would have to be impliedly imported into Section 436 of the Code, which deals with orders for bail regarding bailable offences. In other words, the position is that where a person who is an accused for offences contemplated by Rule 184 of the Rules and which are bailable, yet he cannot get bail as a matter of right under Section 436 of the Code unless the court complies with the conditions laid down in Rule 184 clauses (a) and (b). So far as the question of anticipatory bail is concerned that does not apply to bailable offences at all.

The rule of prudence requires that notice should be given to the other side before passing a final order for anticipatory bail so that wrong order of anticipatory bail is not obtained by a party by placing incorrect or misleading facts or suppressing material facts. In future the courts will exercise this power keeping these observations in view. In emergent cases, the courts may make an interim order of anticipatory bail before issuing notice to the other side. It is clear that the intention of the Legislature in enshrining the salutary provision in Section 438 of the Code which applies only to non-bailable offences was to see that the liberty of the subject is not in jeopardy on frivolous grounds at the instance of unscrupulous or irresponsible persons or officer who may sometimes be in charge of prosecution.'

9. It was laid down in *Mahanthagouda v. State of Karnataka*, , as follows -

'On the ground that the name of the first petitioner is not in the complaint and the F.I.R. and the second petitioner could not have committed the alleged offence as he was being treated by a doctor on the date of offence, the petitioners claimed anticipatory bail.

Section 438 Cr.P.C. is an extraordinary remedy and should be resorted to only in special cases. It is desirable if the court before passing an order under the Section

issues notice to the prosecution to get a clear picture of the entire situation. Section 438 should be read in conjunction with other provisions of law and the grant of blanket anticipatory bail cannot be read into the provision. The said power is not unguided or uncanalised, but all the limitations imposed in Section 437 are implicit therein and must be read into Section 438 as well. In addition to limitations imposed in Section 437, the petitioner must further make out a special case for the exercise of the power to grant anticipatory bail. He must prove that the charge levelled against him is mala fide and stems from ulterior motive. Mere allegation of mala fides by an offender and a vehement claim of innocence put forward by him are manifestly insufficient (to arrive) at such a conclusion by the court. The burden of establishing the mala fides is on the person alleging it and it is for him to prima facie substantiate his allegation that the charge of serious non-bailable offence against him has been levelled mala fide. In respect of non-bailable offences, all the conditions imposed by Section 437 of the Code are implicitly contained in Section 438 as well. Where the nature of the charge is so serious as to be punishable with death or imprisonment for life, it would normally be inapt to exercise the power of the grant of anticipatory bail at the very threshold of the investigation unless the court at that very stage is satisfied that such a charge is false or groundless. Where the person is charged with an offence punishable with death or imprisonment for life and he does not establish that the said charge is groundless or that it is inspired by mala fides, bail cannot be granted normally under Section 437 Cr.P.C. and therefore, anticipatory bail cannot be granted to such a person.'

10. In *Gurbaksh Singh Sibia v. State of Punjab* ILR (1978) Punjab&Har; 109 : , it was held as follows -

'The normal application of the provisions of Section 438 of the Code would be to cases where the charge itself is of a frivolous nature. A case of this kind would be a fit one to exercise jurisdiction in order to needlessly prevent the humiliation of the offender. Similarly the source from which such a charge stems has been considered of significance and where it has been levelled by unscrupulous or irresponsible persons, that would itself be a ground for consideration in the exercise of the power. Where the court can on adequate material come to a firm conclusion that the charge is totally false, it may nevertheless resort to Section

438, however, serious be the nature of the crime. Section 438 of the Code is in the nature of a shield for protecting entirely innocent persons from malicious humiliation, if the necessary conditions for its exercise are satisfied. Care had to be taken that this provision does not become a sword in the hands of the unscrupulous persons to gain time for destroying the incriminating evidence against them and to mock at the legitimate investigative processes authorised by the law.

The power under Section 438 is not to be exercised in a vacuum, but only on the satisfaction of the conditions spelled out in the section itself. The jurisdictional fact for the exercise of the power under Section 438 is the co-existence of the two conditions, namely, an existing accusation (or in any case an accusation which reasonably arises from the existing facts) and a reasonable apprehension of arrest on the basis of such an accusation. It is thus plain that the exercise of power under Section 438 is with regard to a specific accusation and cannot be extended in a blanket fashion to cover all offences with which the petitioner may come to be charged. Therefore, no question of the grant of anticipatory bail can arise with regard to an accusation not yet levelled or in respect of an offence yet not committed.

A person lawfully released on bail either on his own bond or with sureties cannot thereafter be deemed in fact or by any legal fiction as being in the custody of a police officer for the purpose of Section 27 of the Evidence Act, 1872.

Mere allegation of mala fides by an offender and a vehement claim of innocence put forward by him are manifestly insufficient for arriving at a conclusion by the court that the charge levelled against him is mala fide and stems from ulterior motive. There is hardly any case where a person seeking bail on a serious charge does not plead innocence and further does not allege some reason for his alleged false implication. If the allegations by themselves are to be accepted at their face value, then virtually in every case the power under Section 438 would have to be exercised. Therefore, what indeed is an extraordinary power for exceptional circumstances would in fact become routine and common place. That is not the intent of the law. A mere claim of innocence and liberal allegations of mala fide

motives invariably laid at the door of the investigating agency by the offender is not enough. The court has to be independently satisfied about the prima facie falsity of the charge and the ulteriorness of the motive for levelling the same. Section 438 of the Code invariably operates at the very initial stage of the investigation and even the most competent prosecutor may not then be in a position to put before the court conclusive material to bring the charge home against the person accused. To put the prosecutor to proof at the very inception of the investigation appears as running counter to the whole scheme of investigation into cognisable cases as laid down in Chapter XII of the Code. This indeed is not the stage for invoking the known maxim of the Criminal Law that the burden of proof rests upon the prosecution. That stage arrives at the end of the investigation and in the course of the trial itself. The inception of the investigation is not a trial. Thus the petitioner must show (and the court must be wary that mere allegations of mala fides by the petitioner are inadequate) and the court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusations appear to be false and groundless. It is difficult to unravel the crimes of corruption. It is harder to detect the same when it is committed by what is now a well known category of white-collar criminals. However, it is the hardest to bring to book when such crime stems from the corridors of executive power and the niches of high offices. Therefore, the courts must ever remain wary of throttling and in any way impeding the legitimate investigative process in such cases. In cases of serious economic offences involving blatant corruption at the higher rungs of executive and political power, the larger interest of the public and the State demand that the extraordinary power under Section 438 of the Code be not exercised in favour of the offenders at the very threshold of the investigation.

From a reading of the relevant provision of the Code together, it is plain that in a serious cognisable offence, the Code authorises the arrest and detention in custody of the offender for the first twenty four (hours) without the interposition of the Magistracy and further police custody up to a period of 15 days with the authority of the Magistrate. It is clear that the arrest and interrogation in police custody for cognisable crime is not only visualised but expressly authorised by the Code. Therefore, a mere joining of a person in the course of the investigation whilst an anticipatory bail is no substitute for investigation in custody in all these

case where his personal interrogation may be legitimately required. There is hardly any case where a party seeking bail would not zealously offer to join the investigation thereof and to similarly undertake not to tamper with the witnesses, this by itself were to be sufficient then the provision of S. 167(2) of the Code need hardly be ever resorted to.

There is nothing in Section 438 itself or in its legislative history which could give the least indication that the provisions was intended to override the legitimate procedure of investigation into serious crime which has been prescribed by the Code itself in Chapter XII of which Section 167(2) forms the material part. Indeed, in the event of a conflict the discretionary grant of anticipatory bail must give way to the statutory rights and duties under Section 167(2) of the Code.'

11. In *Gurbakh Singh Sibbia v. State of Punjab*, : 1980 CriLJ1125 , the Supreme Court has held as follows -

'No one can accuse the police of possessing a healing touch nor indeed does any one have misgivings in regard to constraints consequent upon confinement in police custody. But society has come to accept and acquiesce in all that follows upon a police arrest with a certain amount of sang froid, in so far as the ordinary rut of criminal investigation is concerned.

The legislature has conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail, because it evidently felt firstly that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail.

It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non-bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, in so far as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail is generally sought

brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the court or can be called for by it, in the light of which it can grant or refuse relief and while granting it modify it by the imposition of all or any of the conditions mentioned in Section 437.

Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has 'reason to believe' that he may be arrested for a non-bailable offence. The use of the expression 'reason to believe' shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief'. For which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore cannot be invoked on the basis of vague and general allegation, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crime nor a shield against any and all kinds of accusations likely or unlikely.

Secondly, if an application for anticipatory bail is made to the High Court, or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the magistrate concerned under Section 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438.

Thirdly, the filing a first information report is, not a condition precedent to the exercise of the power under S. 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an F.I.R. is not yet filed.

Fourthly, anticipatory bail can be granted even after an F.I.R. is filed, so long as the applicant has not been arrested.

Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of anticipatory bail to an accused who is under arrest involves a contradiction in terms, in so far as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.'

12. Though the principles laid down in the above decisions were with respect to penal offences contemplated under the Penal Code, yet this court feels that the principles imbedded therein can be equally applicable to the offences contemplated under the Customs Act 1962, also and as such, the provisions of Section 438 CrI.P.C. can certainly be applied with respect to a position that exists in this case.

13. On a careful and anxious consideration of the entire submissions that have been made with respect to the various allegations made in the petition as well as the counters, this court feels that at this stage the petitioners can be enlarged on bail, of course by imposing some stringent conditions.

14. The petitioners in CrI.M.P. 4970 and 4971 of 1981 will be enlarged on bail in the event of their arrest, on their each executing a bond for Rs. 5000/- each with two sureties for alike sum to the satisfaction of the Sub-Divisional Judicial Magistrate, Tuticorin, on condition that they should report themselves before the respondent viz, the Assistant Collector of Customs. Tuticorin, daily during office hours, till the filing of the complaint. An order is passed accordingly.

15. Order accordingly.

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