In Re: Bejoy Paul

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SooperKanoon Citation : sooperkanoon.com/871595

Court : Kolkata

Decided On : Jan-08-1996

Reported in : (1996)1CALLT59(HC)

Judge : Samir Kumar Mookherjee and ;Rabin Bhattacharyya, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1973; ;Indian Penal Code (IPC), 1860 - Sections 304B and 498A

Appellant : In Re: Bejoy Paul

Advocate for Def. : Kazi Safiulla, P.P. and ;Abhijit Adhya, Adv.

Advocate for Pet/Ap. : M. Ahmed, Adv.

Judgement :

Samir Kumar Mookherjee, J.

1. This is an application for anticipatory bail under Section 438 of the Code of Criminal Procedure. In view of the emphatic submissions made by the learned Public Prosecutor to the effect that in cases where the allegations, ex facie, attract application of section 498A of the Indian Penal Code, the Court, as a routine, must refuse anticipatory bail, we have thought it fit to pass a detailed order, embodying reasons for our dis-inclination to accept the correctness of such submissions.

2. Before adverting to the facts of the present case, it appears to us to be necessary to recall and understand the effect and import of the views of the Apex Court, as expressed in some of its Judgements on such point, to justify our approach as we propose to take hereinafter. In the case of Gurbax Singh Sibbia v. The State of Punjab and Sarbajit Singh v. The State of Punjab, reported in : 1980 CriLJ1125 , a five Judges' Bench of the Supreme Court made, inter alia, the following observations :-

'The amplitude of judicial discretion, which is given to the High Court and the Court of Session to impose such conditions as they may think fit while granting anticipatory bail, should not be cut down by reading into the statute conditions, which are not to be found therein. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant ball if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant'..... 'There is no risk involved in entrusting a wide discretion to the Court of Sessions and the High Court in granting anticipatory bail because firstly these are Higher Courts manned by experienced persons, secondly their orders are not final but are open to Appellate and Revisional scrutiny and above all because discretion has always to be exercised by Courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory ball may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges.' 'This ends of justice will be better served by trusting this Court to act objectively and in consonance with principle governing the grant of bail which are recognized over the years, than by divesting them of their discretion, which the legislators has conferred upon them by laying down inflexible Rules of general application.' (underlining is ours)

3. The Court expressed its reluctance to re-write section 438 of the Code by introducing into it the restrictions Imposed in the matter of grant of bail under Section 437(1) of the Code of Criminal Procedure and thus to prevent expansion of the scope and ambit of the discretion conferred on the High Court and the Court

of Session and also laid down in no unmistakable term that there could be no straight Jacket formula with regard to specified offences where anticipatory bail must have to be refused. The Court, while examining section 438(1), laid down that the only criterion, which makes an application maintainable under the said section, is existence of reasons to believe that the applicant may be arrested for a non-bailable offence and the reasonable belief must be on grounds, which are to or can be examined by Court objectively so that the Court may apply its own mind and decide whether the prayer for anticipatory bail ought to be allowed or rejected, notwithstanding non-filing of a First Information Report. It is pertinent to note that such applications are made at a stage when the applicant is enjoying the benefit or presumption of innocence and is yet to lose his freedom by being arrested-a situation which is strikingly dis-similar from the situation is which a person stands already arrested. The above distinction makes it all the more unjust to make a generalization and to attempt to discover formulae of universal application when facts are bound to differ from one case to the other. We cannot afford to over-look that any other approach would totally frustrate the legislative intend in conferring the discretion and may lead to undue impairment of the freedom of individual and the presumption of innocence, which so strongly holds the field since the origin of criminal jurisprudence. In this connection we feel tempted to quote further paragraph 15 of the judgement of the Supreme Court which runs as follows :-

'Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange, if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the Courts, by devising a formula, which will confine the power to grant anticipatory bail within a straight jacket. While laying down cast iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guidelines and cannot compel blind adherence. In which case to grant bail and in which to refuse it, is in the very nature of things, a matter of discretion. But apart from the fact that the question is

Inherently of a kind, which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to. the discretion of the Court, by providing that it may grant bail 'if it thinks fit'. The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the Courts by law.'

Even the Court went on the record that an application for anticipatory bail cannot be said to deserve rejection unless the accusation was shown to be false and declined to record its agreement with the observations of another Bench of the Apex Court in the case of Balchand Jain v. The State of Madhya Pradesh (AIR 1977 S.C. 366) except to extent that the grant of anticipatory bail should be made with due care and circumspection.

4. The case of Samunder Singh v. The State of Rajasthan and Ors. reported in : (1986)ILLJ290SC , has been strongly relied upon by the learned Public Prosecutor for imparting sustenance to his submission, which we have already taken note of hereinabove. We would like to point out that the facts of that particular case not being available from the judgement, it is not possible to decipher the magnitude and seriousness of the matter therein which appeared to have weighed with the Court in refusing anticipatory bail. The said judgement nowhere lays down any principle Or proposition that in all cases where allegations attract the application of Section 498A of the Indian Penal Code, the prayer for anticipatory bail must have to be rejected and we are emboldened to say so more because, the Court recorded that the matter in the cited case became infructuous. A careful reading of the judgment of the Division Bench of the Supreme Court, in the said case, does not appear to take a contrary view but appears to have followed the same principle of leaving the question to the Courts discretion which was propounded by the five Judges' Bench in the earlier case as referred to by us hereinabove.

5. In the case before us, the applicant is stated to be the elder brother of the husband of the deceased lady; there are assertions on behalf of the applicant that the deceased lady and her husband separated from the family though living in the same house whereas the applicant has his own family living in separate mess in

the ground floor or the same premises. It has further been pleaded on behalf of the applicant that on the date of the incident he went to his father-in-law's house for distribution of Invitation Cards for the marriage of his brother-in-law and that the suicidal note left by the deceased has been taken charge of by the police but not mentioned in the seizure list and that his wife was enlarged on bail on 8th December, 1995, by a Division Bench of this Court. From the papers, made available to Court by the learned public Prosecutor, it stands confirmed that specific incidents of torture as mentioned by makers of statements under section 161 of the Code of Criminal Procedure, related to the husband only and that at the time of detection of death the applicant was not present; the case diary shows the arrest of the applicant though a prayer for issue of warrant/proclamation for arrest has been made because of the failure of repeated attempts to arrest the applicant. The body of the deceased as per postmortem report had only one deep legature mark high up in the neck on the right side. In our view, the said materials do not satisfy criteria required to be fulfilled under section 498A and section 304B of the Indian Penal Code, prima facie, as to leave no room for a defence that such criteria did not exist. In particular, section 304B requires that it has to be shown that the death of the woman was caused by the reasons mentioned therein. This 'showing' must appear from the materials available to Court and the Supreme Court has already indicated and laid down that even before filing of a First Information Report, an application for anticipatory bail is entertainable. It cannot be forgotten that we are dealing with a matter of criminal offence where the proof required to establish such offence even, prima facie, is higher in degree than that in civil cases (vide Gurbachan Singh v. Satpal Singh, : 1990 CriLJ562). For the distinctive features of fact which we have indicated with regard to the present case, we are of the view that there is no reason for us to refuse the prayer for anticipatory bail as made, on behalf of the applicant, and, accordingly, we allow the anticipatory bail by allowing the application as made before us on the following conditions :-

(i) that the petitioner shall make himself available for interrogation by a police officer as and when required.

(ii) that the petitioner shall not directly or indirectly make any inducement, threat or premises 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.

We keep on record, however, that the views expressed above have been so expressed only for the purpose of dealing with the instant application and should not have bearing on future stages of the case.

R. Bhattacharyya, J.

6. I agree.