

NARESH KUMAR YADAV
v.
RAVINDRA KUMAR AND ORS.

OCTOBER 23, 2007

**[DR. ARIJIT PASAYAT AND LOKESHWAR SINGH
PANTA, JJ.]**

Code of Criminal Procedure, 1973:

s.438—Protection under—Held: Is for limited duration during which regular Court has to be moved for bail—Applicant has to show that he has 'reason to believe' that he may be arrested in non-bailable offence—Belief has to be founded on reasonable grounds only if there is something tangible to show that his apprehension that he may be arrested is genuine—Direction that applicant be released on bail "whenever arrested for whichever offence whatsoever" should not be issued as it would serve as blanket to protect any and every kind of allegedly unlawful activity—On facts, High Court wrongly noted that accused persons were not named in FIR and granted protection under s.438—Hence, order of High Court not sustainable—Bail—Anticipatory bail.

ss.438 and 439—Distinction between—Discussed.

ss.207 and 208—Object of—Held: Is to enable accused to defend himself properly.

Case diary—Informant and accused, at hearing of bail applications referring to portions of case diary in support of their stand—Held: Legally they could not have access to these official records—Hence, courts to take serious note of the same.

Words and phrases:

'reason to believe'—Connotation of—In the context of s.438 of

A *Code of Criminal Procedure, 1973.*

B The present appeal is filed by the informant challenging the order of High Court allowing the prayer of respondent nos. 1, 2 and 3 for seeking protection in terms of s.438 Cr.P.C. on the ground that while allowing so, the High Court had not kept in view the parameter for granting such protection; that the High Court had preempted the framing of charges and also had wrongly noted that accused persons were not named in the FIR.

Disposing of the appeal, the Court

C HELD: 1.1. The High Court has wrongly noted that the accused persons were not named in the FIR; in fact they were specifically named. [Para 5] [620-E]

D 1.2. The facility which s. 438 Cr.P.C. gives is generally referred to as 'anticipatory bail'. This expression which was used by the Law Commission in its 41st Report is neither used in the section nor in its marginal note. But the expression 'anticipatory bail' is a convenient mode of indication that it is possible to apply for bail in anticipation of arrest. Any order of bail can be effective only from the time of arrest of the accused. 'Bail' is basically release from restraint, more particularly the custody of Police. The distinction between an ordinary order of bail and an order under s.438 of the Code is that whereas the former is granted after arrest, and therefore means release from custody of the Police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. [Para 6] [620-F, G, H; 621-A]

E Gur Baksh Singh v. State of Punjab, [1980] 2 SCC 565, relied on.

F Wharton's Law Lexicon, referred to.

G 2.1. The power exercisable under s.438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty then power is to

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be exercised under s.438. The power being of important nature it is entrusted only to the higher echelons of judicial forums, i.e. the Court of Session or the High Court. It is the power exercisable in case of an anticipated accusation of non-bailable offence. The object which is sought to be achieved by s.438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Court of Session or High Court, he shall be released immediately on bail without being sent to jail.

[Para 6] [621-D, E, F]

Balachand Jain v. State of Madhya Pradesh, AIR (1977) SC 366, referred to.

2.2. The protection in terms of s.438 is for a limited duration during which the regular Court has to be moved for bail. Obviously, such bail is bail in terms of s.439 mandating the applicant to be in custody. Otherwise, the distinction between orders under ss. 438 and 439 shall be rendered meaningless and redundant.

[Para 13] [624-D]

Salauddin Abdulsamad Shaikh v. State of Maharashtra, AIR (1996) SC 1042, relied on.

K.L. Verma v. State and Anr. (1996) 7 SCALE 20; *Nirmal Jeet Kaur v. State of M.P. and Anr.*, [2004] 7 SCC 558; *Sunita Devi v. State of Bihar and Anr.*, [Criminal Appeal arising out of SLP (Crl.) No. 4601 of 2003 disposed of on 6.12.2004] and *Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors.*, AIR (1980) SC 785, referred to.

3. S.438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead innocence, since he is not on the date of application for exercise of power under s.438 convicted for the offence in respect of which he seeks bail. The applicant must show that he has 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' that he may be arrested, in a non-bailable offence, shows that the applicant may be arrested must be founded on reasonable

A grounds. Mere "fear" is not 'belief', for which reason it is not
enough for the applicant to show that he has some sort of vague
apprehension that some one is going to make an accusation against
him in pursuance of which he may be arrested. Grounds on which
B the belief of the applicant is based that he may be arrested in non-
bailable offence must be capable of being examined.

[Para 15] [624-F, G; 625-A]

4. If an application is made to the High Court or the Court of
Session, it is for the Court concerned to decide whether a case has
C been made out for granting the relief sought. The provisions cannot
be invoked after arrest of the accused. A blanket order should not
be generally passed. It flows from the very language of the section
which requires the applicant to show that he has reason to believe
D that he may be arrested. A belief can be said to be founded on
reasonable grounds only if there is something tangible to go by on
the basis of which it can be said that the applicant's apprehension
that he may be arrested is genuine. Normally a direction should not
be issued to the effect that the applicant shall be released on bail
"whenever arrested for whichever offence whatsoever". Such
E 'blanket order' should not be passed as it would serve as a blanket
to cover or protect any and every kind of allegedly unlawful activity.
An order under s.438 is a device to secure the individual's liberty,
it is neither a passport to the commission of crimes nor a shield
against any and all kinds of accusations likely or unlikely. On the
F facts of the case, considered in the background of legal position set
out above, this does not *prima facie* appear to be a case where any
order in terms of s.438 can be passed. [Para 15] [625-B, C, D, E]

Adri Dharan Das v. State of West Bengal, [2005] 4 SCC 303,
relied on.

G 5.1. In view of the principles of law and the factual scenario
involved, respondent is directed to surrender within a period of four
weeks before the concerned Court and seek regular bail. Thus no
opinion is expressed on the merits of the case. Both the accused
and the informant referred to several portions in the case diary. The
H documents in terms of ss. 207 and 208 are supplied to make the

accused aware of the materials which are sought to be utilized against him. The object is to enable the accused to defend himself properly. The idea behind the supply of copies is to put him on notice of what he has to meet at the trial. A

[Paras 17, 18, 21 and 23] [625-F, G; 626-E; 628-B, C]

Noor Khan v. State of Rajasthan, AIR (1964) SC 286 and *Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble and Anr.*, [2003] 7 SCC 749, relied on. B

5.2. It is baffling to note that the accused and informant referred to particular portions of case diary. At the stage the bail applications were heard by the High Court, legally they could not have been in a position to have access to the same. The papers which are to be supplied to the accused have been statutorily prescribed. The Courts should take serious note when the accused or the informant refers to the case diary to buttress a stand. [Para 24] [628-F, G] C D

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1462 of 2007.

From the Judgment and final Order dated 10.7.2006 of the High Court of Judicature at Patna in Cr. Misc. No. 34337 of 2005 with Cr. Misc. Nos. 35682 & 34139 of 2005. E

Sunil Kumar, Rajiv Shankar Dvivedi and Ajay Choudhary for the Appellant.

P.S. Mishra and Ranjit Kumar, Amit Pawan, Gopal Singh and Manish Kumar for the Respondents. F

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is by the informant to the order passed by a learned Single Judge of the Patna High Court disposing of three petitions filed by respondent nos. 1, 2 and 3. By the said petitions, the prayer for protection in terms of Section 438 of the Code of Criminal Procedure, 1973 (in short the Code') was accepted. G H

A 3. Learned counsel for the appellant submitted that while allowing the protection in terms of Section 438 of the Code the High Court has not kept in view the parameters indicated by this Court for granting such protection. Even otherwise, the High Court has pre-empted the framing of charges. It is also pointed out that the High Court has committed several errors on facts, for example it observed that the accused persons were not named in the first information report (in short the 'FIR') though they were specifically named in the FIR.

C 4. Learned counsel for the respondents on the other hand submitted that without any material to show that the accused persons were involved in any conspiracy to do away with the deceased, false implications have been made with *mala fide* intent. The deceased was involved in several cases. It was submitted that the High Court had taken note of the position that the materials so far as the respondents are concerned for alleged conspiracy were contained in paragraphs 39, D 41 and 42 of the case diary. It is submitted that learned counsel for the informant before the High Court had also conceded that they contained the materials relating to the accused persons.

E 5. As rightly contended by learned counsel for the appellant, granting blanket protection under Section 438 of the Code is not envisaged. There is also substance in the submission of learned counsel for the appellant that the High Court has wrongly noted that the accused persons were not named in the FIR, in fact they were specifically named.

F 6. The facility which Section 438 of the Code gives is generally referred to as 'anticipatory bail'. This expression which was used by the Law Commission in its 41st Report is neither used in the section nor in its marginal note. But the expression 'anticipatory bail' is a convenient mode of indication that it is possible to apply for bail in G anticipation of arrest. Any order of bail can be effective only from the time of arrest of the accused. Wharton's Law Lexicon explains 'bail' as 'to set at liberty a person arrested or imprisoned, on security being taken for his appearance.' Thus bail is basically release from restraint, more particularly the custody of Police. The distinction between an H ordinary order of bail and an order under Section 438 of the Code is

[PASAYAT, J.]

that whereas the former is granted after arrest, and therefore means release from custody of the Police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. (See: *Gur Baksh Singh v. State of Punjab*, [1980] 2 SCC 565). Section 46(1) of the Code, which deals with how arrests are to be made, provides that in making an arrest the Police Officer or other person making the same “shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action”. The order under Section 438 of the Code is intended to confer conditional immunity from the touch as envisaged by Section 46(1) of the Code or any confinement. This Court in *Balachand Jain v. State of Madhya Pradesh*, AIR (1977) SC 366 has described the expression ‘anticipatory bail’ as misnomer. It is well-known that bail is ordinary manifestation of arrest, that the Court thinks first to make an order is that in the event of arrest a person shall be released on bail. Manifestly there is no question of release on bail unless the accused is arrested, and therefore, it is only on an arrest being effected the order becomes operative. The power exercisable under Section 438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty then power is to be exercised under Section 438. The power being of important nature it is entrusted only to the higher echelons of judicial forums, i.e. the Court of Session or the High Court. It is the power exercisable in case of an anticipated accusation of non-bailable offence. The object which is sought to be achieved by Section 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Court of Session or High Court, he shall be released immediately on bail without being sent to jail.

7. Sections 438 and 439 operate in different fields. Section 439 of the Code reads as follows:

“439. (1) A High Court or Court of Session may direct -

(a) that any person accused of an offence and *in custody be released on bail*, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which

A it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by the Magistrate when releasing any person on bail be set aside or modified.”

B (underlined for emphasis)

C 8. It is clear from a bare reading of the provisions that for making an application in terms of Section 439 of the Code a person has to be in custody. Section 438 of the Code deals with “Direction for grant of bail to person apprehending arrest”.

9. In *Salauddin Abdulsamad Shaikh v. State of Maharashtra*, AIR (1996) SC 1042 it was observed as follows:

D “Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realised that when the Court of Sessions or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. *It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted*”.

G (Emphasis supplied)

10. In *K.L. Verma v. State and Anr.*, (1996) 7 SCALE 20 this Court observed as follows:

H “This Court further observed that anticipatory bail is granted

in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed. It was, therefore, pointed out that it was necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted. By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. *In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher court, if they so desire.*”

(Emphasis supplied)

11. In *Nirmal Jeet Kaur v. State of M.P. and Anr.*, [2004] 7 SCC 558 and *Sunita Devi v. State of Bihar and Anr.*, Criminal Appeal arising out of SLP (Crl.) No. 4601 of 2003 disposed of on 6.12.2004 certain grey areas in the case of *K.L. Verma's* case (supra) were noticed. The same related to the observation “or even a few days thereafter to enable the accused persons to move the Higher Court, if they so desire”. It was held that the requirement of Section 439 of the Code is not wiped out by the above observations. Section 439 comes into operation only when a person is “in custody”. In *K.L. Verma's* case (supra) reference was made to *Salauddin's* case (supra). In the said case there was no such indication as given in *K.L. Verma's* case (supra), that a few days can be granted to the accused to move the higher Court if they so desire. The statutory

A requirement of Section 439 of the Code cannot be said to have been rendered totally inoperative by the said observation.

12. In view of the clear language of Section 439 and in view of the decision of this Court in *Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors.*, AIR (1980) SC 785, there cannot be any doubt that unless a person is in custody, an application for bail under Section 439 of the Code would not be maintainable. The question when a person can be said to be in custody within the meaning of Section 439 of the Code came up for consideration before this Court in the aforesaid decision.

13. After analyzing the crucial question is when a person is in custody, within the meaning of Section 439 of the Code, it was held in *Nirmal Jeet Kaur's* case (supra) and *Sunita Devi's* case (supra) that for making an application under Section 439 the fundamental requirement is that the accused should be in custody. As observed in *Salauddin's* case (supra) the protection in terms of Section 438 is for a limited duration during which the regular Court has to be moved for bail. Obviously, such bail is bail in terms of Section 439 of the Code, mandating the applicant to be in custody. Otherwise, the distinction between orders under Sections 438 and 439 shall be rendered meaningless and redundant.

14. If the protective umbrella of Section 438 is extended beyond what was laid down in *Salauddin's* case (supra) the result would be clear bypassing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies upto higher Courts, the requirements of Section 439 become dead letter. No part of a statute can be rendered redundant in that manner.

15. Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead, innocence, since he is not on the date of application for exercise of power under Section 438 of the Code convicted for the offence in respect of which he seeks bail. The applicant must show that he has 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' shows that the applicant may be 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 vague apprehension that some one is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief of the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the Court concerned to decide whether a case has been made out for granting the relief sought. The provisions cannot be invoked after arrest of the accused. A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant’s apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail “whenever arrested for whichever offence whatsoever”. Such ‘blanket order’ should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under Section 438 is a device to secure the individual’s liberty, it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. On the facts of the case, considered in the background of legal position set out above, this does not prima facie appear to be a case where any order in terms of Section 438 of the Code can be passed.

16. These aspects have been highlighted in *Adri Dharan Das v. State of West Bengal*, [2005] 4 SCC 303.

17. In view of the principles of law as set out above and the factual scenario involved, we direct that within a period of four weeks from today the respondents shall surrender before the concerned Court and shall seek regular bail.

18. We make it clear that we are not expressing any opinion on the merits of the case. When the bail application is moved in terms of Section 439 of the Code before the concerned Court the same shall be considered in its proper perspective in accordance with law. If an application for bail is moved, the concerned Court would do well to

- A dispose it of on the day it is filed. Learned counsel appearing for the State has undertaken that all relevant records shall be produced before the Court dealing with the bail application and no adjournment shall be asked for on the ground of non-availability of records if the accused-respondents intimate the date on which they purpose to surrender three days in
B advance.

19. It is to be noted that apprehension of the appellant that framing of charge pre-empted is based on the following observations of the High Court:

- C “If upon the completion of the investigation charge sheet is submitted against the petitioners on material other than noticed presently, the petitioners shall have their remedies in accordance with law.”

- D 20. So far as filing of the charge sheet and framing of charge concerned, needless to say that charge sheet shall be submitted on the basis of materials collected during investigation and while considering the charge sheet filed the concerned Court shall take note of the relevant factors and decide as to whether on the materials on record framing of charge against the accused persons is warranted. We make it clear that
E we have expressed no opinion in that regard.

21. Before we part with the case, we feel it necessary to indicate that both the accused and the informant referred to several portions in the case diary.

- F 22. Sections 207 and 208 of the Code deal with documents which are commonly known as police papers, which are to be supplied to the accused. The said sections read as follows:

- G “*Section 207- Supply to the accused of copy of police report and other documents: In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-*

(i) the police report;

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(ii) the first information report recorded under Section 154; A

(iii) the statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of Section 173; B

(iv) the confessions and statements, if any, recorded under Section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173: C

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused: D

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court. E

Section 208- Supply of copies of statements and documents to accused in other cases triable by Court of Session- Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under Section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:- F

(i) the statements recorded under Section 200 or Section 202, or all persons examined by the Magistrate; G

(ii) the statements and confessions, if any, recorded under Section 161 or Section 164; H

A (iii) any documents produced before the Magistrate on which the prosecution proposes to rely;

B Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.”

23. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilized against him. The object is to enable the accused to defend himself properly. C The idea behind the supply of copies is to put him on notice of what he has to meet at the trial. The effect of non-supply of copies has been considered by this Court in *Noor Khan v. State of Rajasthan*, AIR (1964) SC 286 and *Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble and Anr.*, [2003] 7 SCC 749. It was held that non-supply is not necessarily prejudicial to the accused. The Court has to give a definite finding about the prejudice or otherwise. Even the supervision notes cannot be utilized by the prosecution as a piece of material or evidence against the accused. If any reference is made before any court to the supervision notes, as has noted above they are not to be taken note of by the concerned court. As many instances have come to light when the parties, as in the present case, make reference to the supervision notes, the inevitable conclusion is that they have unauthorized access to the official records. D E

F 24. Further, it is baffling to note that the accused and informant referred to particular positions of case diary. At the stage the bail applications were heard by the High Court, legally they could not have been in a position to have access to the same. The papers which are to be supplied to the accused have been statutorily prescribed. The Courts should take serious note when the accused or the informant refers to the case diary to buttress a stand. G

25. The appeal is disposed of accordingly.

D.G.

Appeal disposed of.