

Court No. - 13

Case :- CRIMINAL MISC ANTICIPATORY BAIL
APPLICATION U/S 438 CR.P.C. No. - 302 of 2023

Applicant :- Jitendra Narayan Tyagi Alias Syed Waseem Rizvi
Opposite Party :- The State Of U.P. Thru. Its Addl. Chief Secy.
Home Deptt. Lko. And 2 Others

Counsel for Applicant :- Pranshu Agrawal, Chandan Srivastava
Counsel for Opposite Party :- G.A., Syed Azizul Hasan Rizvi

Hon'ble Mohd. Faiz Alam Khan, J.

Heard Shri H.G.S. Parihar, learned Senior Counsel assisted by Shri Pranshu Agrawal, learned counsel for the applicant, Shri Syed Azizul Hasan Rizvi, learned counsel representing the complainant/informant as well as learned A.G.A. for the State and perused the record.

The instant anticipatory bail application has been moved by the accused/applicant- **Jitendra Narayan Tyagi Alias Syed Waseem Rizvi** in F.I.R./Crime No.130 of 2021, under Sections 376, 323, 506 and 392 I.P.C., Police Station Saadatganj, District Lucknow with the prayer to enlarge him on anticipatory bail as he is apprehending arrest in the above-mentioned case.

Learned Senior Counsel appearing for the applicant while pressing the anticipatory bail application, submits that the applicant has been falsely implicated in this case only on account of enmity with the husband of the informant/prosecutrix and like persons and he has not committed any offence as claimed by the informant/prosecutrix.

It is further submitted that the first information report has been lodged with a delay of more than five months and six days and the circumstances under which the F.I.R. has been lodged by moving an application under Section 156 (3) Cr.P.C. throws a cloud of suspicion over the whole prosecution story.

It is also submitted that there is no medical evidence in support of the allegations of the victim/informant and the allegations as levelled by the prosecutrix/informant could not be believed in the background of the fact that the applicant has been provided with Y-Plus Security cover by the Government in which 16 police personnels always remain posted with the applicant and as such it is impossible for the applicant to commit the offence in the manner alleged by the informant/prosecutrix.

It is further submitted that applicant has remained the Chairman

of the Shia Central Waqf Board of Uttar Pradesh and having regard to the ideology of the applicant and petitions filed by him in the Hon'ble Supreme Court of India certain fundamentalists are against the applicant and they were instrumental in lodging this false F.I.R. against applicant.

It is also submitted that due to the ideology of the applicant he was being continuously targeted by a section of society, who are annoyed with the applicant and it is known that the driver of the applicant namely Salman Haider has been won over by his enemies and when he (Salman Haider) became a potential threat to the life and liberty of the applicant, the applicant had discontinued his services as his driver and he had also vacated the accommodation provided by the applicant and in retaliation cooked up a false against the applicant.

It is further submitted that after lodging of the first information report, the husband of the informant/prosecutrix had admitted in his talks with one Shri Anjum Askari @ Raju resident of Kashmiri Mohalla, Police Station Saadatganj, District Lucknow that the instant F.I.R. has been falsely lodged by his wife and the said voice recording has been provided to the Commissioner of Police, Lucknow.

It is further submitted that the applicant is a respectable citizen and had enjoyed a very high position of Chairman, Shia Waqf Board and arrest of the applicant in this case shall bring a bad name to his otherwise good reputation and would also injure his liberty. There is no requirement of any custodial interrogation as all the formalities pertaining to the investigation has already been completed by the investigating officer and there is no apprehension that after being released on anticipatory bail he may flee from the course of law or may otherwise be not available for trial.

It is also submitted that criminal history of 31 cases is being alleged against the applicant, however, in majority of the cases the applicant has not been charge sheeted or has been acquitted and the criminal history of the applicant has been adequately explained in a tabular manner placed as Annexure No.4 to the anticipatory bail application and protection from arrest may be granted to the applicant.

Learned Senior Counsel has also relied on a decision of the Hon'ble Supreme Court passed in S.L.P. (Criminal) No. 3304 of 2022 (Jitendra Narayan Tyagi alias Vasim Rizvi vs. State of Uttarakhand and others), arising out of impugned final judgment and order dated 08.03.2022 in F.B.A. No. 161 of 2022 passed by the High Court of Uttarakhand at Nainital pertaining

to the applicant whereby the liberty of the applicant has been protected even after considering his criminal history. A decision of the Hon'ble Supreme Court in '**State of Madhya Pradesh vs. Pradeep Sharma**' (2014) 2 SCC 171 has also been relied by learned counsel for the applicant in order to show that the issuance of non-bailable warrants against the applicant will not be a hurdle in grant of facility of anticipatory bail.

Shri Syed Azizul Hasan Rizvi, learned counsel representing the complainant/informant submits that the applicant is accused of committing heinous offence and keeping in view the manner in which the offence has been committed, the applicant is not entitled for anticipatory bail.

It is further submitted that the applicant is an absconder and enjoying a very high position and is a person having resources and it is under the influence of the applicant the investigation is being delayed and in this regard the informant/prosecutrix was compelled to approach this Court by filing a Writ Petition (M/B) No. 30880 of 2021, whereby certain directions were given by the Division Bench of this Court and having regard to the security threat to the informant/complainant, the Commissioner of Police, Lucknow was also directed to take appropriate decision with regard to the security of victim.

It is also submitted that complainant/prosecutrix is being regularly threatened by the stooges of the applicant and in this connection he had filed an application under Section 156 (3) Cr.P.C. which has been treated as a complaint by the Additional Chief Judicial Magistrate-III, Lucknow and is pending for disposal.

It is further submitted that when the police failed to apprehend the applicant the prosecutrix/complainant moved an application for issuance of process under Section 82 Cr.P.C. to the Court Additional Chief Judicial Magistrate-III, Lucknow and in this regard a report has been summoned by the Court from the concerned police station as the investigating officer was not able to arrest the accused in compliance of Non-bailable warrants issued by the Magistrate and it appears that applicant has become an absconder.

Learned counsel for the complainant/informant also relied on Sub-section 376 (2)(n) of the I.P.C. and submits that as the rape has been committed with the prosecutrix by the applicant repeatedly, he is liable for enhanced rigorous imprisonment and keeping in view the fact that he is an absconder and is not appearing before the investigating officer, his application for grant of anticipatory bail be rejected.

Having heard learned counsel for the parties and having perused the record, it is evident that the first information report pertaining to the commission of rape by the applicant with the informant/victim/prosecutrix was lodged by the prosecutrix herself on 15.07.2021. It has been alleged in the first information report that the applicant at the relevant point of time was having his office at 'Shia Yateem Khana ' situated at Kazmain Road, Lucknow and was also residing there with his second wife. It is also stated in the F.I.R. that the applicant has also provided a quarter for the residence of the husband of the prosecutrix near Shia Yateem Khana where the prosecutrix was residing with her husband and children. It is also a case of the prosecution that the husband of the prosecutrix was occasionally sent by the applicant out of Lucknow and about five months ago when the husband of the prosecutrix was sent out of Lucknow by the applicant, the applicant had entered into her house at about 10:00 pm. and committed rape on her after intimidating the prosecutrix of the life of her children. It is also stated that thereafter the applicant used to commit rape with the prosecutrix occasionally, after sending her husband outside Lucknow and she remained silent as she was threatened and was also apprehended and intimidated. It is also alleged that on 11th June, 2021 when informant had informed her husband about all the misdeeds of the applicant he approached the applicant to protest about his misdeeds but he was threatened by the applicant and under apprehension husband of the informant had vacated the residence provided by the applicant and since then the prosecutrix is living under apprehension and threat and anything bad may happen to her.

It is also submitted that the allegations of the F.I.R. has been supported by the prosecutrix in her statement recorded under Section 161 and 164 Cr.P.C. The criminal history of 35 criminal cases has also been alleged against the applicant.

In Siddharam Satlingappa Mhetre Vs State of Maharashtra and Ors., MANU/SC/1021/2010 Hon'ble Supreme Court has laid down parameters for consideration of anticipatory bail prayer of an applicant in the following words:-

"1 The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society. The law of bails dovetails two conflicting interests, namely, on the one hand, the requirements of shielding society from the hazards of those committing crimes and potentiality of repeating the same crime while on bail and on the other hand, absolute adherence to the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty.

122 . The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or the other offences.

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of Sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

123 . The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

124. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

125. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualize all situations and circumstances

in which a person may pray for anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available.

126 . Irrational and Indiscriminate arrest are gross violation of human rights. In Joginder Kumar's case (supra), a three Judge Bench of this Court has referred to the 3rd report of the National Police Commission, in which it is mentioned that the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails.

127. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.

The Apex Court in the Constitution Bench judgment of **Sushila Aggarwal and Ors. Vs. State (NCT of Delhi) and Ors., MANU/SC/0100/2020** framed following two questions for its consideration and has answered these questions as follows:-

"91. This Court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications Under Section 438, Code of Criminal Procedure:

*(1) Consistent with the judgment in **Shri Gurbaksh Singh Sibbia and Ors. v. State of Punjab MANU/SC/0215/1980 : 1980 (2) SCC 565**, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.*

(2) It may be advisable for the court, which is approached with an application Under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the public prosecutor and obtain facts, even while granting limited interim anticipatory bail.

(3) Nothing in Section 438 Code of Criminal Procedure, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for

grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified - and ought to impose conditions spelt out in Section 437(3), Code of Criminal Procedure [by virtue of Section 438(2)]. The need to impose other restrictive conditions, would have to be judged on a case by case basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

(4) Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

(5) Anticipatory bail granted can, depending on the conduct and behavior of the Accused, continue after filing of the charge sheet till end of trial.

(6) An order of anticipatory bail should not be "blanket" in the sense that it should not enable the Accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

(7) An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

(8) The observations in Sibbia regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the Accused to separately surrender and seek regular bail. Sibbia (supra) had observed that "if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya.

(9) It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction Under Section 439(2) to arrest the Accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the

investigation or trial, etc.

(10) The court referred to in para (9) above is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.

(11) The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the state or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. (See *Prakash Kadam & Etc. Etc v. Ramprasad Vishwanath Gupta and Anr.* MANU/SC/0616/2011 : (2011) 6 SCC 189; *Jai Prakash Singh (supra) State through C.B.I. v. Amarmani Tripathi* MANU/SC/0677/2005 : (2005) 8 SCC 21). This does not amount to "cancellation" in terms of Section 439(2), Code of Criminal Procedure.

(12) The observations in *Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.* MANU/SC/1021/2010 : 2011 (1) SCC 694 (and other similar judgments) that no restrictive conditions at all can be imposed, while granting anticipatory bail are hereby overruled. Likewise, the decision in *Salauddin Abdulsamad Shaikh v. State of Maharashtra* (MANU/SC/0280/1996 : 1996 (1) SCC 667) and subsequent decisions (including *K.L. Verma v. State and Anr.* MANU/SC/1493/1998 : 1998 (9) SCC 348; *Sunita Devi v. State of Bihar and Anr.* MANU/SC/1032/2004 : 2005 (1) SCC 608; *Adri Dharan Das v. State of West Bengal* MANU/SC/0120/2005 : 2005 (4) SCC 303; *Nirmal Jeet Kaur v. State of M.P. and Anr* MANU/SC/0695/2004 : 2004 (7) SCC 558.; *HDFC Bank Limited v. J.J. Mannan* MANU/SC/1923/2009 : 2010 (1) SCC 679; *Satpal Singh v. the State of Punjab* MANU/SC/0413/2018 and *Naresh Kumar Yadav v. Ravindra Kumar* MANU/SC/8067/2007 : 2008 (1) SCC 632) which lay down such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.

92. The reference is hereby answered in the above terms."

Hon'ble Supreme Court in the case of "**P. Chidambaram vs. Directorate of Enforcement**" reported in **MANU/SC/1209/2019** has held as under:-

"67. Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the Accused but several other purposes. Power Under Section 438 Code of Criminal Procedure is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of Applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of Rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.

70. We are conscious of the fact that the legislative intent behind the introduction of Section 438 Code of Criminal Procedure is to safeguard the individual's personal liberty and to protect him from the possibility of

being humiliated and from being subjected to unnecessary police custody. However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights-safeguarding the personal liberty of an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights conferred upon the Appellant Under Article 21 of the Constitution of India.

72. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the Accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the Accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. In State Rep. By The CBI v. Anil Sharma MANU/SC/0947/1997 : (1997) 7 SCC 187, the Supreme Court held as under:

6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order Under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third degree methods need not be countenanced, for, such an argument can be advanced by all Accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

Thus, the application of the applicant for grant of anticipatory bail is to be disposed off in the light of law placed herein-above.

Perusal of the case diary which has been supplied by the State would reveal that the first information report of this case could only be lodged after an order passed by the Magistrate under Section 156 (3) Cr.P.C. It is also evident that affidavits have also been given by the husband of the informant as well as by the informant stating that he is being pressurized to withdraw the case and the informant/victim is also apprehending threat to her life. It is also evident that on various applications moved by the informant/victim, the Additional Chief Judicial Magistrate, Lucknow vide orders dated 08.11.2021, 06.01.2022, 13.01.2022, 11.02.2022, 19.02.2022, 15.04.2022 and 13.12.2022 has directed the investigating officer to conclude the investigation in a fair manner and with expedition. The

Magistrate vide its order dated 13.01.2022 had also directed the investigating officer to conclude the investigation within 15 days. It is also evident that during the course of investigation the investigating officer has recorded the statement of witnesses Hasan Jafar, Sartaj Alam, Syyed Ali Ammar Rizvi, Zafar Abbas, Hasan Raza, who have stated that they have seen the applicant on many occasions, going towards the quarter of the informant in absence of her husband.

Perusal of the case diary would also reveal that it was on 20.12.2022 the investigating officer for the very first time started searching the whereabouts of the applicant and thereafter on various occasions the applicant was searched but his whereabouts could not be traced.

It is also evident that vide order dated 30.01.2023 non-bailable warrants have also been issued against the applicant by the Additional Chief Judicial Magistrate, Lucknow. It is vehemently submitted on behalf of the informant/victim that applicant is an influential person and it is on account of his influence he could not be traced and he has also not co-operated in the investigation and it is under his influence the investigation of the case has been delayed. Having regard to the various orders passed by the Magistrate directing the investigating officer to conclude the investigation at the earliest, prima facie there is substance in the apprehension of informant/victim. The State in its instructions has mentioned a long criminal history of the applicant comprising of 35 cases starting from the year 1994 till 2022 and in the considered opinion of this Court, criminal antecedents and conduct of the accused is a relevant factor at the time of consideration of plea of anticipatory bail.

Having regard to all the facts and circumstances of the case and for the reasons placed above, I do not find any good ground to provide protection from arrest to the instant applicant. Thus, the anticipatory bail application moved by the applicant- **Jitendra Narayan Tyagi Alias Syed Waseem Rizvi** is, hereby, **rejected**.

It is noticed that despite various orders passed by the Magistrate the investigating officer has not concluded the investigation. It is expected from the investigating officer to conclude the investigation without any further delay and submit report under Section 173 (2) Cr.P.C., at the earliest.

Let a copy of this order be communicated to the concerned investigating officer through Commissioner of Police, Lucknow, forthwith for necessary action.

Case diary of the case be immediately returned to learned
A.G.A.

Order Date :- 16.2.2023

Praveen