

(2023) 11 AHC CK 0025

Allahabad High Court, Lucknow Bench

Case No: Criminal Misc Anticipatory Bail Application U/S 438 Cr.P.C. No. - 2553 Of 2023

Allama Zamir Naqvi Alias Tahir In
Fir Zameen Naqvi Alias Tahir

APPELLANT

Vs

State Of U.P. Thru. Prin. Secy.
Lko. And Another

RESPONDENT

Date of Decision: Nov. 8, 2023

Acts Referred:

- Constitution Of India, 1950 - Article 20(1)
- Code Of Criminal Procedure, 1973 - Section 161, 164, 437A, 438
- Indian Penal Code, 1860 - Section 302, 354, 452

Hon'ble Judges: Subhash Vidyarthi, J

Bench: Single Bench

Advocate: Prateek Tewari, Parush Kumar Saxena, Raj Nath Singh

Final Decision: Allowed

Judgement

Subhash Vidyarthi, J

1. Heard Sri Prateek Tewari, the learned counsel for the applicant, Sri Jayant Singh Tomar, the learned AGA for the State and perused the records.

2. The instant application has been filed by the applicant seeking anticipatory bail in Case No. 193 of 2016, Crime No.511 of 2014 under Sections 452, 354 IPC, Police Station Unchahar, District Raebareli.

3. The aforesaid case has been registered on the basis of an FIR lodged on 27.04.2014 at 21.30 hours against the applicant and one Hira Lal, stating that both the accused persons had gone to the informant's house on 27.04.2014 and had started molesting her but when she cried the accused persons ran away.

4. In the affidavit filed in support of the application, it has been stated that the applicant is 60 years old and is innocent person, who has falsely been implicated in

the present case. The applicant's involvement in three other cases has been disclosed in para-28 of the affidavit.

5. The anticipatory bail of the applicant has been rejected by the Sessions court, Raebareli on the ground that the incident occurred on 27.04.2014, on which date the provisions of Section 438 Cr.P.C. were not applicable to the State of U.P., therefore, application cannot be entertained as the application under Section 438 Cr.P.C. is prospective and not retrospective.

6. The Code Of Criminal Procedure (Uttar Pradesh Amendment) Act, 2018 (U.P. Act No. 4 Of 2019) was notified on 06.06.2019. The 'Statement Of Objects And Reasons of the Amendment Act' states that Section 438 of the Code of Criminal Procedure 1973, regarding the provision of anticipatory bail, was omitted by the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No. 16 of 1976). There was continuous demand for its revival. The State Law Commission had, in its third report in 2009, recommended for reviving the provisions of the said section. A committee to consider the revival of the provisions of the said section had recommended that the provisions of the said section should be revived with certain modifications. After considering the recommendation of the said committee, it was decided to amend the Code of Criminal Procedure, 1973 in its application to Uttar Pradesh to revive the provisions of section 438 with certain modifications.

7. Section 2 of the Amendment Act provides that In the Code 'of Criminal Procedure, 1973 as amended in its application to Uttar Pradesh, after Section 437-A the following section shall be inserted, namely:-

"438. (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:—

i) the nature and gravity of the accusation;

ii) the antecedents of the applicant including the fact as to whether he 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; and

iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested;

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has

rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended hi such application.

(2) Where the High Court or, as the case may be, the Court of Session,' considers it expedient to issue an interim order to grant anticipatory bail under subsection (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be fmally heard for passing an order thereon, as the Court may. deem fit, and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely:—

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

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

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other Conditions as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

Explanation:—The final order made on an application for direction under sub-section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be fmally heard by the Court.

(4) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (1), within thirty days of the date of such application.

(6) Provisions of this section shall not be applicable,—

(a) to the offences arising out of,—

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."

8. The Court will presume that a law, which affects substantive rights, are meant to have prospective operation only. In the same way, as regards procedural laws or the laws relating to a mere matter of procedure or of Forum, they carry retrospective impact. Declaratory, clarificatory or curative Statutes are allowed to hold sway in the past. The very nature of the said laws involve the aspect of public interest which requires sovereign Legislature to remove defects, clarify aspects which create doubt. The declaratory law again has the effect of the legislative intention being made clear.

9. In *T. Barai v. Henry Ah Hoe*, (1983) 1 SCC 177, the Hon'ble Supreme Court held that: -

"22. It is only retroactive criminal legislation that is prohibited under Article 20(1). The prohibition contained in Article 20(1) is that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence prohibits nor shall he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. It is quite clear that insofar as the Central Amendment Act creates new offences or enhances punishment for a particular type of offence no person can be convicted by such ex post facto law nor can the enhanced punishment prescribed by the amendment be applicable. But insofar as the Central Amendment Act reduces the punishment for an offence punishable under Section 16(1)(a) of the Act, there is no reason why the accused should not have the benefit of such reduced punishment. The rule of beneficial construction requires that even ex post facto law of such a type should be applied to mitigate the rigour of the law. The principle is based both on sound reason and common sense. This finds support in the following passage from Craies on Statute Law, 7th Edn., at pp. 388-89:

"A retrospective statute is different from an ex post facto statute. "Every ex post facto law..." said Chase, J., in the American case of *Calder v. Bull* "must necessarily be retrospective, but every retrospective law is not an ex post facto law. Every law that takes away or impairs rights vested agreeably to existing

laws is retrospective, and is generally unjust and may be oppressive; it is a good general rule that a law should have no retrospect, but in cases in which the laws may justly and for the benefit of the community and also of individuals relate to a time antecedent to their commencement: as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law *ex post facto* within the prohibition that mollifies the rigour of the criminal law, but only those that create or aggravate the crime, or increase the punishment or change the rules of evidence for the purpose of conviction.... There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal and punishing it as a crime."

23. To illustrate, if Parliament were to reenact Section 302 of the Penal Code, 1860 and provide that the punishment for an offence of murder shall be sentence for imprisonment for life instead of the present sentence of death or imprisonment for life, then it cannot be that the courts would still award a sentence of death even in pending cases.

24. In *Rattan Lal v. State of Punjab*, the question that fell for consideration was whether an appellate court can extend the benefit of Probation of Offenders Act, 1958 which had come into force after the accused had been convicted of a criminal offence. The Court by majority of 2: 1 answered the question in the affirmative. Subba Rao, J. who delivered a majority opinion, concluded that in considering the question, the rule of beneficial construction required that even *ex post facto* law of the type involved in that case should be applied to reduce the punishment.

10. Therefore, the Criminal Procedure Code (Uttar Pradesh Amendment) Act, 2018 merely restores the benefit of anticipatory bail to persons apprehending arrest, which benefit was available to similarly situate persons in the rest of India immediately before enactment of the aforesaid Amendment Act and which benefit was available to the persons in the State of U.P. also before enactment of Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976. This being a beneficial legislation, it cannot be restricted in its operation to offences committed subsequent to enactment of Act, 2019 and it will be available to all the persons 'apprehending arrest' after enactment of the Amendment Act, 2018, even if the offence was committed prior to enactment of the Amendment Act, 2018. Therefore, the reason given by the learned Session court for rejection of the anticipatory bail application is incorrect.

11. Having considered the aforesaid facts and circumstances of the case and keeping in view the fact that there is an old animosity between the parties regarding which two FIRs had been filed on previous occasions; that besides the version of the informant, there is no other material to support the allegations; there is some variance in the version of the incident and in the statement of victim recorded under

Sections 161 Cr.P.C. and 164 Cr.P.C. and that the applicant is 60 years old person and without making any observations which may affect the outcome of the case, I am of the view that the aforesaid facts are sufficient for making out a case for granting anticipatory bail to the applicant.

12. In view of the above, the anticipatory bail application of the applicant is allowed. In the event of arrest/ appearance of applicant-Allama Zamir Naqvi Alias Tahir before the learned Trial Court in the aforesaid complaint case, he shall be released on anticipatory bail on his furnishing personal bond and two solvent sureties, each in the like amount, to the satisfaction of S.H.O./Court concerned on the following conditions and subject to any other conditions that may be fixed by the Trial Court:

(i). That the applicant shall appear before the trial court on each date fixed, unless personal presence is exempted;

(ii). That the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

(iii). That the applicant shall not pressurize/ intimidate the prosecution witness.

13. Let a copy of this order be sent to the Sessions court for being brought to the notice of the Presiding Officer who has passed the order dated 15.02.2023.