(1999) 09 MP CK 0037

Madhya Pradesh High Court

Case No: Miscellaneous Criminal Case No. 5921 of 1999

Yogendra Singh		APPELLANT
	Vs	
State of M.P.		RESPONDENT

Date of Decision: Sept. 6, 1999

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 173, 173(8), 204, 209, 319
- Penal Code, 1860 (IPC) - Section 307, 326, 394
- Prevention of Food Adulteration Act, 1954 - Section 16(1), 7

Citation: (2001) ILR (MP) 1610 : (2000) 1 MPHT 409

Hon'ble Judges: Dipak Misra, J

Bench: Single Bench

Advocate: J.N. Tripathi, for the Appellant; G.S. Ahaluwalia, Government Advocate, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Dipak Misra, J.
Maxwell in his treatise on Interpretation of Statute (tenth edition) page 284 in his inimitable style postulated thus :

"The tendency of modern decisions, upon the whole is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more attentive regard to the language and criminal Statutes with a more rational regard to the aim and intention of the legislature, than formerly. It is unquestionable right that the distinction should not be all together erased from the judicial mind, for it is required by the spirit of our free Institutions that the interpretation of all Statutes should be favourable to personal liberty."

The purpose of referring to the aforesaid passage is due to the fact that the learned counsel for the petitioners have impressed upon this Court to interpret Section 438 of the Code of Criminal Procedure (hereinafter referred to as ''Code'') in such a manner so that it would be ''favourable to personal liberty''. Their submission, in essence, is that in absence of any rider in the language of Section 438 of the Code, it should be allowed to have free play without any confines and circumscription. It is well accepted that individual liberty is a priceless treasure, a well cherished ideal and a ripened gift of a cultured and progressive society to the individual. But the question that falls for consideration in the present case is whether a person who takes liberty with liberty can lean upon the provisions of Section 438 of the Code to seek liberty contending that it is the panacea for all malady and the Court should not introduce any limitations which are non-existent being not provided for by the Legislature. Mr. Ahaluwalia, learned Govt. Advocate, combating the aforesaid conceptual-liberty oriented argument has proponed that Section 438 of the Code does provide an umbrella protecting the liberty of an individual but that does not necessarily mean that it confers an immunity to the accused and the parade of anticipatory bail would continue covering all stages till trial is concluded.

2. The debate, in detail. Yogendra, the applicant in MCrC No. 5921/99 was arrested for an offence punishable u/s 394 of the Indian Penal Code (in short the ''IPC''). He was admitted to bail and thereafter, he faced trial in Criminal Case No. 397/88 before the Judicial Magistrate First Class, Nagod in the Distt. of Satna. As averred in the petition he used to appear on each date when the case was posted for hearing. However, due to his ill health he could not appear on 4-7-1998 and through his counsel an application for condonation of his absence and for representation was filed. The said application was rejected and a non-bailable warrant of arrest was issued. In this backdrop he moved the learned Additional Sessions Judge for grant of anticipatory bail who negatived the prayer. Being dissatisfied he has approached this Court for grant of said relief. Many a justification has been enumerated explaining the absence of the petitioner on 4-7-1998 and number of grounds have been put forth for grant of anticipatory bail.

3. In MCrC No. 6061/99 Shankarlal was taken into custody for the offences punishable u/s 7 read with Section 16(1)(a) of Prevention of Food Adulteration Act, 1954. He was facing trial before the chief Judicial Magistrate, Betul in Criminal Case No. 417/91. The petitioner remained absent on 12-4-1996 and he instructed his counsel to file an application for exemption from appearance. As the impugned order of rejection would show, a non-bailable warrant of arrest was issued on 12-4-1996. It is averred that the petitioner had met with an accident and was in a state of coma for nine days. It is also putforth that his wife was ailing for the last four years and hence, the petitioner could not attend the Court. In this background he filed applications u/s 438 of the Code on two occasions which have been rejected by the learned Second Additional Sessions Judge, Betul. His prayer for grant of anticipatory bail having been negatived he has visited this Court for grant of said

privilege.

Mr. G.S. Ahaluwalia, learned Govt. Advocate has raised a preliminary objection with regard to the maintainability of the applications on the ground that an accused who has jumped bail is not entitled in law to prefer an application u/s 438 of the Code inasmuch as he has already been arrested and released on bail. Elaborating his stand he has contended that it may be understandable in a given case that if a person is initially arrested u/s 326 of IPC and released on bail but later on the offence is converted to Section 307 of IPC he may, if there is apprehension of his arrest, move for grant of anticipatory bail and again after recording of evidence if the person is arraigned as an accused u/s 319 of the Code and a non-bailable warrant of arrest is issued for his arrest he may be entitled to move the Court for grant of anticipatory bail but an accused who has been released on bail either u/s 438 or 439 of the Code and after appearing on some dates does not appear thereafter and his application for representation is rejected, at his instance, an application for anticipatory bail would not be maintainable.

Per contra, Mr. P.S. Das and Mr. Tripathi, learned counsel for the petitioners/applicants have contended that there are no fetters in exercising jurisdiction u/s 438 of the Code and this Court should interpret the said provision in ''favour of liberty''. They have placed strong reliance on the decision rendered by Full Bench of this Court in the case of Nirbhay Singh and Anr. v. State of Madhya Pradesh 1995 MPLJ 296.

4. The heart of the matter is whether at the instance of an accused who has jumped bail an application u/s 438 of the Code is maintainable ? How far the concept of liberty be stretched to ostracise all fetters from the language employed by the Legislature in Section 438 of the Code ? Is the Court justified for infusion of some confines to the same ?

5. To appreciate the rival contentions raised at the Bar, it is apposite to refer to Section 438 of the Code which reads as under :

"438. (1) When any person has reason to believe that he may be arrested on an 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; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under Sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including

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

(ii) a condition that the person 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) a condition that the person shall not leave India without the previous permission of the Court;

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

(3) If such person is thereafter arrested without warrant by an officer-in-charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under Sub-section (1)."

6. Scanning the anatomy of the aforesaid provision, it is submitted by the learned counsel for the petitioners that the power conferred on the High Court or the competent Court of Session is unbriddled and unfettered and therefore, nothing should be added to the same except the obligation on the Court to decide the application on objective assessment of the factual scenario. Emphasis is laid on the silence of the language employed by the Legislature with regard to any rider or qualifier. It is canvassed by them that if narrow interpretation is given to Section 438 of the Code, it would cause violence to the language and there is no justification to infuse conditions which are not patent in Section 438 of the Code.

7. To substantiate the aforesaid submissions heavy reliance is placed on paragraph 15 of the decision rendered in the case of Nirbhay Singh (supra), I may profitably refer to the relevant portion of the said paragraph :

"15. In view of what we have indicated above, we are in respectful agreement with the view taken by the High Court of Punjab and Haryana that an application u/s 438, Criminal Procedure Code would be maintainable even after the Magistrate issued process u/s 204 or at the state of committal of the case to the Sessions Court or even at a subsequent stage, if circumstances justify the invocation of the provision."

Enormous emphasis is laid on the words "or even at a subsequent stage". It is submitted by the learned counsel for the petitioners that subsequent stage would encompass any stage or any circumstance under which a non-bailable warrant of arrest is issued and there is reasonable apprehension in the mind of the accused that he would be arrested and taken into custody.

8. It is well settled in law that a decision is regarded as a precedent for what it decides and not what can be inferred from it. In the case of Nirbhay Singh (supra) their Lordships were dealing with the proposition whether an application for anticipatory bail is maintainable after the Magistrate has issued process u/s 204 of the Code. In that factual backdrop their Lordships laid down as has been spoken in paragraph 15 of the judgment. It is also settled law that a judgment has to be read

in entirety and a line from here or there should not be read out of context to deduce a proposition of law. Purpose of stating so is that the above quoted portion of paragraph 15 of Nirbhay Singh (supra) cannot be read in isolation. In fact, the ratiocination finds place in paragraph 11 of the decision. It is appropriate to reproduce in entirety paragraph 11. It is as under :

"11. Section 438 speaks of a person having reason to believe that he may be arrested on an ''accusation''. There may be an accusation even before a case is registered by police. After the registration of the case, filing of charge-sheet or filing of the complaint or taking cognizance or issuance of warrant, the accusation will not cease to be an accusation. At the later stage, there may be stronger accusation or more evidence. Nevertheless, the accusation survives or continues. Section 438 speaks of apprehension and belief that he may be ''arrested''. There is no limitation in the language employed the legislature indicating that the arrest contemplated is an arrest by the police of their own accord or that arrest by the police on a warrant issued by the Court will not attract Section 438. The language used is clear and unambiguous, namely, apprehension of "arrest on an accusation". Considering the legislative purpose underlying the provision and the clarity of the language used in the section, we do not find any justification to import anything extraneous into the interpretation so as to restrict the scope or vitality of the provision. It is not as if circumstances justifying an application u/s 438 would disappear once a Magistrate takes cognizance of the offence or even after he passes an order committing the case to the Sessions Court. Even at such stages, there may be circumstances warranting invocation of the special jurisdiction u/s 438. A person may file a private complaint and produce before the Magistrate a few witnesses who will provide a consistent version of an imaginary occurrence. At that stage, the Magistrate will not be in a position to appreciate the evidence or go behind the same. If the material is such that he is satisfied that there is sufficient ground for proceeding he is bound to take cognizance and issue process. This may happen even if the story putforth by the complainant is more imaginary than real or may be hopelessly exaggerated. Such a situation may arise at the stage of committal where the Magistrate is concerned only with one aspect, namely, whether the material disclosed commission of the offence exclusively triable by the Court of Session. At neither stage is he required to go into the truth or otherwise of the material before him. It cannot, therefore, be said that at such stages the justification for invocation of Section 438, Criminal Procedure Code no longer exists. In this view, the scope of Section 438 should not be restricted by reading into it words to the effect-- "when any person has reason to believe that he may be arrested solely at the instance of the police and not as per warrant issued by a competent Magistrate". The clear purpose underlying the language employed by the legislature precludes any justification for reading such words into the statute."

9. On a fair and proper reading of the reasonings given in the aforesaid decision, it is luminously clear that their Lordships were dealing with stage relating to issue of

process, stage of committal or the stage after the matter is committed to the Court of Session. It is hereby made clear that I am not deciding the issue whether in case of conversion of an offence to a graver one by the police or by the Magistrate, the accused who has been given the privilege of anticipatory bail or concession of regular bail in respect of lesser offence, would be entitled to maintain an application u/s 438 of the Code; or whether an application u/s 438 of the Code would be maintainable by a person when he is impleaded as an accused u/s 319 of the Code and sought to be arrested pursuant to issuance of a non-bailable warrant of arrest, as those issues do not arise in the present petition. The present factual matrix is quite different. The accused persons were released on bail. They appeared in the Court and as per the conditions in the bail bond they were required to appear before the Court which was inseisin of the matter. In this context, I may profitably refer to Section 441 of the Code, which reads as under:

"441. (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and when he is released on bail, by one or more sufficient sureties conditions that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case ma} be.

(2) Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition.

(3) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

(4) For the purpose of determining whether the sureties are fit or sufficient, the Court may accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties, or, if it considers necessary, may either hold an inquiry itself or cause an inquiry to be made by a Magistrate subordinate to the Court, as to such sufficiency or fitness."

The aforesaid provision contemplates that an accused is required to appear before the Court to answer charge levelled against him. It is imperative for the accused to do so. When an order of bail is passed the accused gets back his liberty from the custody on a condition that he would be present during trial. He is not totally free. His liberty is conditional. I am conscious of the fact that the Full Bench has used the words ''subsequent stages'', but I have already indicated that the same should be read in context of paragraph 11 of the judgment. At this juncture, I may usefully refer to a decision rendered in the case of Natturasu and Ors. v. The State 1998 CrLJ 1762, wherein a learned Single Judge of the Madras High Court enumerated stages when apprehension of arrest arises. It is useful to produce the same :

"91. When apprehension of arrest arises ? The apprehension of arrest for a non-bailable offence, one can have at different stages, namely:

(a) during the period of investigation by the police after registration of FIR and before filing of the final report u/s 173, CrPC;

(b) during further investigation u/s 173(8) CrPC even after filing of the charge-sheet u/s 173 CrPC;

(c) after taking cognizance by the Magistrate, summoning the accused u/s 204 CrPC through warrant;

(d) while the Magistrate committing the Sessions case to the Court of Session u/s 209 CrPC and remanding the accused to custody;

(e) during the enquiry or trial, if the Court, on the basis of the evidence let in, impleads a person as an accused u/s 319 CrPC for the purpose of summoning or detaining him u/s 319(2) and (3) CrPC."

I am in respectful agreement that these are the stages wherein an accused can apprehend arrest. These would conceptually engulf ''subsequent stages'' but would not cover a stage where an accused who has availed the privilege of anticipatory bail or regular bail and fails to appear before the Court on the dates fixed for trial and in a way abuses his liberty. The learned Single Judge in the case of Natturasu (supra) has further held as under :

"92. The above five contingencies involve different stages. As seen earlier, once the person accused of is released on anticipatory bail or on bail at one stage, the operation of the bail continues till the conclusion of the trial. Therefore, the person, who is already on bail or anticipatory bail, cannot be entitled to apply for a fresh anticipatory bail in respect of the same accusation, in other stages.

93. For instance if a person, who is already on bail, did not appear before the trial Court and that, therefore, the Court issues warrant of arrest, then the said person will certainly have the apprehension of arrest.

94. But, in such a situation, the accused is not entitled to file an application for anticipatory bail, because he is already on bail or anticipatory bail in respect of the accusation of non-bailable offence. He shall, in such circumstance, have to take steps to recall the warrant.

95. Therefore, the application for anticipatory bail would not deal with the situation, wherein the accused had appeared before the Court, in relation to the case in which he already obtained the bail.

96. In other words, the application u/s 438 CrPC, being dealt with only relates to the apprehension of arrest for the accusation of non-bailable offence only one."

10. I have quoted in extenso from the aforesaid decision, as I am in respectful agreement in the law laid down therein. I may hasten to add that emphasis has to be given not only on stage but also on self same accusation. To elaborate if initially the accused is being sought to be arrested for an offence punishable u/s 326 of IPC and has been granted anticipatory bail but later on Section 307 of IPC is added and the Magistrate issues summons to him and he has an apprehension that he may be arrested once he surrenders before the Court an application u/s 438 of the Code at his instance may stand in a different footing but supposing an accused who has been granted benefit of anticipatory bail after a warrant of arrest has been issued u/s 319 of the Code and he after availing the privilege and obtaining the concession of bail does not appear during trial and jumps bail and the Court issues a non-bailable warrant of arrest for his production, in that case the apprehension may ensure but that will not give him right to approach the Court for grant of anticipatory for the simple reason, at his behest an application for anticipatory bail would not lie. The concept of ''Ex paritate rationis'' will not be attracted inasmuch as the first limb, the apprehension of arrest exists, but the second limb ''self-same accusations'' is not amputated. No accused should forget the basic principle that he who seeks liberty must conduct himself with propriety as liberty blossoms in an atmosphere of composite restraint and collective good. Section 438 of the Code can not be given an interpretation to guillotin other provisions of the Code. It is hereby made clear that it would be open to him to take appropriate steps u/s 70(2) of the Code for recall/cancellation of the warrant so issued against him or, he may, if he so chooses, assail the order issuing warrant as illegal or improper by preferring appropriate application before the higher Courts, wherein the propriety of issuance of warrant may be gone into. The justifiability or the defensibility of the order would be a matter of scrutiny by the Court exercising power and that is a different arena altogether.

11. Before I part with the case, I may state that the goddess of liberty is to be worshipped because without liberty there is no moon, no stars, no light, no life but he who intends to have the light must light the candle and look at the stars with humility so that stars shall reveal themselves and the moon shall shine. He cannot be allowed to kick the goddess of liberty and then cry at the altar for mercy. It should not be forgotten that the longevity of liberty is dependent upon a healthy mind which devoutly obeys the law.

12. In view of my preceding analysis, I am of the considered view, that the applications u/s 438 of the Code, are not maintainable. Accordingly the applications filed by the petitioners are dismissed.