

(2004) 09 CAL CK 0007

Calcutta High Court

Case No: C.R.M. No. 4290 of 2004

Bhutnath Nayak

APPELLANT

Vs

State of West Bengal and
Another

RESPONDENT

Date of Decision: Sept. 7, 2004

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 437, 438, 439, 439(2)
- Penal Code, 1860 (IPC) - Section 109, 306, 34, 498A

Citation: (2005) 1 CHN 82

Hon'ble Judges: Pranab Kumar Deb, J; Amit Talukdar, J

Bench: Division Bench

Advocate: Manuwar Ali, for the Appellant; Subhendu Sekhar Roy, Kalyan Moitra and Sudipto Moitra, for opposite party No. 2, for the Respondent

Final Decision: Allowed

Judgement

1. Emotions and moralities may make strange appearances in a Criminal Court; Law and logic don't.

2. Assumed with this proposition, and it is only after sterilizing our judicial mind from the ugly nature of the allegation, we log on to the website to download the factual matrix essential for the proper disposal of this application.

Bone of contention:

3. An order dated 29.06.2004 passed by the learned Sub-Divisional Judicial Magistrate, Khatra in G. R. Case No. 30 of 2004 directing that-

"Hence the accused may find bail of Rs. 6,000/- with two sureties of Rs. 3,000/- each of the like amount:

(1) with the condition that she will make herself available for interrogation by a police officer as and when required,

(2) she will 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 the police officer until further order."

Print Out No. 1:

4. Manimala, the only daughter of the unfortunate petitioner was given in marriage with one Tapas Kumar Singha Mahapatra (accused), an Assistant School Teacher of Jambani High School on Ashar 16, 1404 B.S.

Print Out No. 2:

5. Manimala presented a male child, who is aged about five and half years to the accused Tapas.

Print Out No. 3:

6. Sometime after in her jinxed matrimony Manimala much to her horror discovered that her husband Tapas (accused) had a secret illicit affair with the opposite party No. 2. On coming to know about such relationship when she protested she was physically and mentally tortured by her husband, accused Tapas.

Print Out No. 4:

7. Opposite party No. 2 used to spend her nights with accused Tapas in the matrimonial home of Manimala while she was made to sleep in the adjoining room.

Print Out No. 5:

8. Constant torture and harassment by both the accused - Tapas and the opposite party No. 2 who was a Headmistress of a High School.

Print Out No. 6:

9. On 05.2.2004 petitioner came to know Manimala had died and for her death the accused Tapas was responsible; and further the opposite party No. 2 had spent her right in the matrimonial home of deceased Manimala just the day before she died.

Outcome:

10. The grieving father of deceased Manimala (the petitioner) gave a written information before Khatra Police Station which resulted in registration of Khatra Police Station Case No. 0904 dated 07.2.2004 under Sections 498A, 306 and 109 of the Indian Penal Code (for short, IPC).

Logistics:

11. Apprehending arrest in connection with the said case registered against her and accused Tapas she preferred an application u/s 438 of the Code of Criminal Procedure (hereinafter referred to as "the said Code") before the learned Sessions Judge, Bankura. It was registered as Cri. Misc. Application No. 80 of 2004.

12. Learned Sessions Judge by his Honour's Order No. 2 dated 20.2.04 allowed the said prayer on the following terms:-

"Hence the prayer for anticipatory bail for the petitioner is allowed. In the event of her arrest she be released on bail subject to her following conditions. This order will remain in force for the next 30 days from the date of this order:

i) she will make herself available for interrogation by a police officer as and when required,

ii) she will 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."

13. The learned Sessions Judge arrived at his two part findings: Part-1:

"Section 498A IPC is related to the husband or relatives of the husband of a woman subjecting her to cruelty. The petitioner is a school teacher and she is not a relative of the husband of the deceased as such Section 498A IPC is not attracted at least against this petitioner."

Part-II:

".....Section 306 IPC speaks of abatement to suicide. After perusal of the FIR which has been lodged by the father of the deceased I find that there is a story of illicit love affairs between the husband of the deceased and the petitioner. But it has been specifically stated therein that over this incident of death he suspects that his son-in-law Tapas Singha Mahapatra is fully responsible. It has also been stated therein that on the previous night of her daughter's death this petitioner stayed with the husband of the deceased. This petitioner even if on argument's sake is presumed has some love affairs but there is no allegation in the FIR that for that love affairs she instigated the deceased for commission of suicide. Instigation or incitement is the most essential allegation for attracting Section 306 IPC. In absence of any such evidence the petitioner who is a lady and also a school teacher deserves the order of anticipatory bail."

14. Distraught father of Manimala (the petitioner herein) sought to scuttle the said order, which was, however, turned down by the learned Sessions Judge in-Charge in Cri. Misc. Application No. 95 of 2004 by his Honour's Order No. 5 dated 16.3.2004.

15. Subsequently, the petitioner herein also moved this Court; but he met with the same fate.

At the Bar:

16. Shri Manuwar Ali, learned Counsel appearing in support of the application has made two-fold submissions. He showed from the order passed by the learned Sessions Judge as well as the learned Magistrate that the order of anticipatory bail as well as regular bail granted in favour of the opposite party No. 2 was absolutely an erroneous order as there were serious allegations against her. According to Shri Ali the FIR contained materials against the opposite party No. 2 and that too in a case of this nature it was not proper to have granted her relief. He further submitted that even if his prayer for cancelling the anticipatory bail was refused earlier, the present application for setting aside the order of regular bail had to be viewed from a different angle and accordingly he prayed for allowing the application.

Per contra:

17. Shri Sudipto Moitra, learned Senior Counsel appearing on behalf of the opposite party No. 2 took a preliminary objection that as the prayer for cancelling the anticipatory bail, granted in favour of the opposite party No. 2, was earlier refused both by the learned Sessions Judge and this Court, the present application was not maintainable as it is nothing else but extended application in a different form covering the same merit which has been adjudicated earlier.

18. Shri Moitra further submitted that since the learned Sessions Judge in his discretion has granted an order of anticipatory bail in favour of the opposite party No. 2 and the said order having been tested in two different Forums unsuccessfully and pursuant thereof the opposite party No. 2 obtaining regular bail the same was not required to be interfered with. Shri Moitra referred to a Division Bench decision of our Court passed in Krishna Murari Singh @ Krishan Murari Singh 2004 CCr.LR (Cal). 808 and submitted that granting or refusing of a prayer for bail is a pure discretion of the Court and cannot be interfered with. As such, the same should be left undisturbed.

19. Shri Moitra, learned Senior Counsel also showed from the order impugned that the learned Magistrate has rightly granted bail in view of the fact that the prayer of the opposite party No. 2 u/s 438 of the said Code was earlier entertained by the learned Sessions Judge and accordingly he has prayed for dismissing the present application.

For the State:

20. Shri Subhendu Sekhar Roy, learned Senior Counsel with Shri Kalyan Moitra could not join issue with Shri Moitra. He submitted that the dice is heavily loaded against Shri Moitra and there are materials in the case diary.

Points of Law:

21. Before entering into the core area of the matter it would be profitable if we refer to the legislative impact of Section 438 of the said Code which has been incorporated by the legislature in their new Code. Section 438 of the said Code reads as follows:

"438. Direction for grant of bail to person apprehending arrest.-(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 fact 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:

Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.

(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)."

22. In other words, a person who apprehends arrest in connection with a non-bailable offence can approach the appropriate Court for relief u/s 438 of the said Code and for all intent and purpose it is nothing else but an insurance from custodial detention. But the said insurance policy is not for life, it is for a particular period.

23. Since the efficacy of the order passed u/s 438 of the said Code by the learned Sessions Judge on 20.2.2004 in Cri. Misc. Application No. 80 of 2004 has been tested

in the Highest Forum we are not competent to delve into the propriety of the same.

24. But, however, we can look into the finer nuances of the perspective import of Section 438 of the said Code in the light of the parent Order No. 2 dated 20.2.2004 passed by the learned Sessions Judge, Bankura in Cri. Misc. Application No. 80 of 2004 which has hit a hornet's nest and resulted in the impugned order dated 29.6.2004 in G. R. Case No. 30 of 2004 passed by the learned Sub-Divisional Judicial Magistrate, Khatra.

25. It is now trite position that an order, obtained u/s 438 of the said Code, from whichever Forum, cannot be of a perpetual nature and has to be of a limited duration and the outer limit of the life span of the order has to be fixed. Thereafter, it is left to the Regular Court (read: the Court of the learned Magistrate) to deal with the matter of a bail on appreciation of the materials placed before it.

26. Neither an order u/s 438 of the said Code can be of any supervening impact upon the learned Magistrate nor can it have any edge in a Magisterial Court in favour of the accused seeking relief u/s 437 of the said Code. The legislative sweep of Section 438 of the said Code cannot endow a person with a permanent immunity and he has to yield to the rigours of Section 437 of the said Code. This position has to be understood in the light of the ratio of the decision of the Supreme Court in [Salauddin Abdulsamad Shaikh Vs. State of Maharashtra](#), where in 3-Judge Bench of the Apex Court held:

"It should be realized that an order of anticipatory bail could even be obtained in cases of serious nature as for example murder and, therefore, it is essential that the duration of that order should be limited and ordinarily the Court granting anticipatory bail should not substitute itself for the original Court which is expected to deal with the offence. It is that Court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail."

27. The ratio of the said decision of Salauddin Abdulsamad Shaikh (supra) has been followed by the subsequent decision in [K.L. Verma Vs. State and Another](#), where A. M. Ahmadi, C.J. and J. S. Verma, J. (as the learned Chief Justice of India then was) further clarified the position that-

"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."

28. What the learned Magistrate did was not in tune with either the legislative impact of the provisions of law or within the framework of the ratio of the decisions of Salauddin Abdulsamad Shaikh (supra) and K. L. Verma (supra).
29. We appreciate the agony of the learned Magistrate. He was caught in a Catch 22 Situation. Faced with the order of a Superior Court of the learned Sessions Judge as also the Highest Court of the State endorsing the order of the learned Sessions Judge originally allowing the prayer u/s 438 of the said Code, we can never find any fault with him.
30. But the fact remains that all did not end with the passing of the order of the learned Sessions Judge on 20.2.2004 in Cri. Misc. Application No. 80 of 2004 by way of entertaining the prayer of the opposite party No. 2 u/s 438 of the said Code. We find that after the order was passed on 20.2.2004 there were several series of statements reflecting a gaudy nature of allegations which were recorded by the investigating agency against the opposite party No. 2 on 25.2.2004 at the post-stage of the grant of anticipatory bail by the learned Sessions Judge. This was a posterior position subsequent to the order passed by the learned Sessions Judge u/s 438 of the said Code and was definitely a new circumstance, which escaped the notice of the learned Magistrate.
31. The learned Magistrate under no circumstances was bound by the order passed by the learned Sessions Judge u/s 438 of the said Code; apart from the rigours of the ratio of the decision of Salauddin Abdulsamad Shaikh (supra). That way the order impugned dated 29.6.2004 passed by the learned Sub-Divisional Judicial Magistrate, Khatra cannot be sustained.
32. That apart, we find from the order passed by the learned Sessions Judge on 20.2.2004 while allowing the prayer of the opposite party No. 2 in respect of the petition u/s 438 of the said Code it appears that -
- "This order will remain in force for the next 30 days from the date of this order."
33. By that analogy the order of the learned Sessions Judge, which was passed on 20.2.2004 by necessary implication died its natural death on and from 22.3.2004. Thereafter there was no valid order existing u/s 438 of the said Code in favour of the opposite party No. 2.
34. On the date (i.e. on 29.6.2004) on which the opposite party No. 2 chose to surrender before the learned Magistrate according to her own whims and fancy there was no order in her favour from any Court of Law and the order No. 2 dated 20.2.2004 in Cri. Misc. Application No. 80 of 2004 was absolutely non est in the eye of law. So the learned Sub-Divisional Judicial Magistrate, Khatra should not have been guided by the said order while accepting her surrender. That way also the said order was erroneous.

35. Not only, we cannot lose sight of the fact - that exercise of power under Sections 438 and 439 of the said Code are quite different aspects and although not mutually exclusive of each other, cannot have the same trapping, but in a post-stage of grant of an anticipatory bail the sphere is quite different and has to be based on the subsequent developments.

36. True the fate of the order passed in favour of the opposite party No. 2 on 20.2.2004 by the learned Sessions Judge was tested by the petitioner before both the learned Sessions Judge as also this Court and on both the occasions it proved abortive for him.

37. However, will that act is a mileage in favour of the opposite party No. 2 ?

38. We are afraid, certainly it is not so in view of the discussions we have held just hereinabove.

39. The argument of Shri Moitra, learned Senior Counsel for the opposite party No. 2 that at the first instance, on a preliminary point that as earlier two applications for cancellation of the anticipatory bail granted in favour of the opposite party No. 2 having been turned down by the two different Forums on two different occasions the impugned order which flowed from the original order of anticipatory bail cannot be disturbed as it acts as an estoppel to the same, in our view, is not an apposite proposition and does not meet with the approval of the legal position which we have seen in the foregoing paragraphs.

40. First of all, the Forums are different, so also is the cause of action and it cannot be said that refusal to cancel an order of anticipatory bail can have any binding effect for cancelling an order of regular bail as they are quite different aspects altogether; though are the offsprings of a common lineage but cannot have the same identity being distinct in nature.

41. We have carefully considered the decision of Krishna Murari Singh @ Krishan Murari Singh (supra) referred to by Shri Moitra where one of us was a party (Amit Talukdar, J.). It is true that grant or refusal of bail by a Court is purely a matter of discretion and cannot be interfered with lightly and has to be decided very carefully within the guidelines laid down by the catena of decisions of the Supreme Court that grant of bail is one thing and cancellation of the same is quite different; there has to be overwhelming and cogent reasons to do so.

Finding:

42. At the outset we have sterilized our judicial conscience from the ugliness of the profile of the crime and without being least swayed by the allegations, if we act on simple logjam we see that the opposite party No. 2, who was a Headmistress of a high school had gone astray leading an immoral life with the husband of deceased Manimala and in a consorted effort contributed to her death. The husband of Manimala, who was an Assistant Teacher of the said high school, it is revealed from

the materials in the case diary, led an absolute immoral life with the opposite party No. 2, who was also a Headmistress of the said high school and even they were together on the night when Manimala died.

43. Profile of the crime is very nasty and offends the collective conscience of the society. We, for a moment, cannot persuade ourselves to the finding of the learned Sessions Judge that the opposite party No. 2 was not related to the husband of the deceased Manimala; as such, she could not be arrayed in the list of the accused in respect of the offence of Section 498A, IPC.

44. We were shocked to read the same. Even if the opposite party was not a relative of the husband of the deceased Manimala by virtue of Section 109 read with Section 34, IPC she was very much within the purview of the said section. It was a complete misreading of the correct import of the provisions of law.

45. The observation of the learned Sessions Judge in respect of the offence of Section 306, IPC is equally shocking. We find there are plethora of evidence against the accused and the opposite party No. 2. Lest it may prejudice the accused during the course of the trial we refrain ourselves from outlining the same.

46. Suffice it to say not only that the materials in the case diary disclose a case of abatement of suicide but also systematic cruelty and torture thereby attracting the mischief of both the Sections 498A and 306, IPC. Just a plain reading of the statement of the son of the deceased at page 15 of the case diary shows the direct culpability of the opposite party No. 2 in the crime.

47. It is true that exercise of power u/s 438 of the said Code is a question of pure discretion. But, how this discretion has been exercised ?

48. At the present juncture we are not here to say about the same in view of the position shown above; but, all we can say that we would have thought twice, thrice and umpteen number of times before acceding to the prayer of the opposite party No. 2 for anticipatory bail, who is an accused of such dastardly nature of crime being a Headmistress of a high school leading a totally immoral life with the husband of the deceased Manimala, who was also an Assistant Teacher of the said high school and not only was the queen architect of the jinxed matrimony of the deceased Manimala but overtly contributed to her death which is reflected from the statements recorded by the investigating agency even after the order of Sessions Judge on 20.2.2004 granting the anticipatory bail.

49. Lest it may even unconsciously have any telling effect on the merit of the trial we do not wish to plunge further. But just a plain reading of the postmortem report at page 108 of the case diary, prepared by the Autopsy Surgeon, Dr. S. Batabyal who is no less a person than the Associate Professor & Head, Department of Forensic & State Medicine, Bankura Sanmellani Medical College, Bankura shows something else.

50. We wonder ! Was the said report ever perused by the learned Sessions Judge ? Who can say that if at all it was a case of Section 306, IPC ?

51. There is another attending situation which cannot be lost sight of. Shri Ali for the petitioner has referred to the accompaniments in his application -Annexure - "D" collectively in pages 19 and 20, showing that on 12.7.2004 and 13.7.2004 the petitioner had lodged a complaint with the Simlipal Police Station that the opposite party No. 2 along with some of her associates had threatened the petitioner to withdraw the case; otherwise he will meet with dire consequence. The said position goes absolutely uncontroverted as Shri Moitra has not used any affidavit to requidate the said allegation and this is certainly a cogent circumstance operating against the opposite party No. 2. Other overwhelming situation appears from pages 46,48, 49, 53, 55, 57 of the case diary showing a clear picture of threat given at the instance of the opposite party No. 2. Even after this, should the order of bail sustain ? As it would not be conducive in the interest of a fair trial it has to be set aside.

Conclusion:

52. From an overall assessment of the entire materials, the legal position and the factual aspect we feel that the order impugned dated 20.6.2004 passed by the learned Sessions Judge, Khatra cannot be sustained even for a moment on account of the law and logic without being swayed away by the grisly nature of the allegations. We have done what a Court of Law should do on the basis of the materials.

Verdict:

53. Accordingly, the order dated 29.6.2004 passed by the learned Sub- Divisional Judicial Magistrate, Khatra in G. R. Case No. 30 of 2004 is forthwith set aside and the bail granted by the learned Magistrate is cancelled.

54. The opposite party is directed to surrender immediately to her bail bond, which stands cancelled, within a week from this date. In default, the learned Sub-Divisional Judicial Magistrate, Khatra will initiate amongst other steps so as to secure her attendance before the Court will also issue a non-bailable warrant of arrest against her.

55. Bail bond furnished by the opposite party before the learned Sub- Divisional Judicial Magistrate, Khatra on 29.6.2004 stands cancelled. ,

56. Application is accordingly allowed.

57. Return the case diary.

58. By consent of the parties ground No. 1 of the petition stands deleted.