

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.M.C. 1953/2011**

Date of Decision : 10.10.2011

MAHENDER SINGH Petitioner
Through: Mr.Deepak Anand, Adv.

versus

STATE & ANR Respondents
Through: Mr.K.K.Manan, Adv. for the
Respondent no.2.
Mr.Navin Sharma, APP

**CORAM :
HON'BLE MR. JUSTICE V.K. SHALI**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

V.K. SHALI, J. (oral)

1. This is a petition filed by the petitioner under Section 482 r/w Sec. 439(2) and Sec. 397(1) Cr.P.C. assailing the order dated 23.3.2011, passed by the learned ASJ, Saket Courts, New Delhi.
2. Briefly stated the controversy which has been raised by the learned counsel for the petitioner is that by virtue of the

impugned order, the application of the respondent no.2, Ravinder Singh was dismissed as withdrawn, although the learned Sessions Judge directed the respondent no.1 to give the respondent no.2 one week's working notice before arrest and also directed him to join investigation as and when required by the IO.

3. The petitioner happens to be the unfortunate father of the deceased Meena Manpreet Kaur who was married to respondent no.2 /Ravinder Singh on 21.2.2008 according to Sikh rites and rituals. On 23.9.2010, the petitioner was informed on telephone, at about 11.00 am about the death of his daughter at Safdarjung Hospital, New Delhi. On receiving this information, the present petitioner lodged a report with P.S. Mehrauli, under Section 498A/304B IPC vide FIR no.425/2010 as the death had taken place within 7 years from the date of marriage.
4. The allegations which were made in the FIR were that the deceased got married with the respondent no.2, R/o D-755/12, Chattarpur Pahari, Ambedkar Colony, New Delhi as per Sikh custom and the petitioner had given Television, gold ring, ear rings, cooler, bed, washing machine, dressing table, mattress, chairs, utensils and clothes, etc. in the marriage as per his

capacity. Further, one week prior to the death of the deceased, a demand for ₹50,000/- was made by the respondent no.2, which was actually handed over to him in the presence of his mother Smt. Banso Devi, while another son in law named Karnail Singh was also present there. It was alleged that the respondent no.2 and his parents used to subject his daughter to cruelty with a view to demand dowry.

5. On the basis of the aforesaid allegations, an FIR for an offence under Section 498A/304B IPC was registered and the police started the investigation in the matter.
6. The post mortem report given by one Dr.Jatin Bodwal on 24.9.2010 reveals that the death was caused due to hemorrhage shock consequent upon uterine rupture, however, viscera has been preserved to rule out any poisoning/intoxication /medication.
7. The respondent no.2 filed an application for grant of anticipatory bail which came up for hearing before the learned ASJ, Mr.R.Kiran Nath, ASJ-01 (South) on 31.12.2010 and it was disposed of with the observations that the IO is still awaiting the final opinion from the doctors regarding the post mortem and before the arrest of the respondent no.2, a 3 days prior notice shall be given to him.
8. The IO had written a letter to Dr.Jatin Bodwal for giving further

information regarding the cause of the death and the nature of injuries, where upon Dr.Jatin Bodwal gave an opinion that the rupture of the uterus is suggestive of it being damaged by introduction and manipulation of a foreign object/instrument in the uterus. This information was given on 10.2.2011. The respondent no.2 filed a second bail application which was disposed of by the learned Sessions Judge (South) on 19.2.2011 by rejecting the prayer for grant of anticipatory bail. It was observed since the doctors have opined the cause of death of the deceased due to hemorrhage shock consequent upon uterine rupture and the viscera has been preserved to rule out any poisoning/intoxication /medication, therefore, in the opinion of the learned Sessions Judge, the custodial interrogation of the respondent no.2/accused will be required for ascertaining the actual circumstances leading to the death of the deceased. It seems that the learned Sessions Judge while dismissing the application for grant of anticipatory bail was influenced by the fact that the opinion of the doctor is that there was external manipulation/intervention with human anatomy which resulted in the death of the deceased. The IO, without there being any specific order from the Court seems to have

carried an impression that the learned Sessions Judge had orally sought a further clarification from the doctor who had conducted the post mortem, and therefore, the IO approached Dr.Jatin Bodwal who gave another opinion on 11.3.2011 reiterating his earlier opinion but at the same time, adding couple of sentences to observe that though the injury which is purported to have been suffered by the deceased was sufficient to cause death in the ordinary course of nature but in such cases generally, the cause of death is accidental.

9. The main grievance which has now been raised by the learned counsel for the petitioner is twofold. The first objection is that the learned Sessions Judge had directed the IO to give one week's notice to the respondent no.2/accused with the direction that he shall join investigation as and when required by the IO while as the application was dismissed as withdrawn. This shows that a contradictory order was passed by the learned Sessions Judge. On one hand, the application was dismissed as withdrawn, yet the benefit of grant of interim bail against the arrest and joining investigation has been passed. A subsidiary argument raised is that there is no provision of law which authorizes the learned Sessions Judge to curtail the power of the

police in arresting the accused in a cognizable offence where he has the power to arrest without warrant. The learned counsel has relied upon the judgment of the learned Single Judge of this Court in case titled **Department of Customs Vs. Arvinder Singh** in CrI.M.(M) No.1710/2002, wherein the learned Single Judge has placed reliance on the two orders passed by the Supreme Court in CrI.A. No.555/2000 against an order passed by Punjab and Haryana High Court requiring service of 7 days notice before effecting arrest of the respondent which was set aside and by another order dated 18.11.2003 in CrI.A. No.1399/2003, the Supreme Court, against a similar order observing that notice before effecting arrest was not warranted in law and accordingly, the said condition was set aside.

10. As against this, the learned counsel for the respondent no.2 has justified the service of 7 days notice by referring to various orders passed by the learned Single Judge of this Court in cases under Section 498A/406 IPC and it is contended that this is a normal practice that a reasonable notice which varies from 7 to 10 days is being given by the High Court as well as by the Court of Sessions before the arrest of an accused is carried out. Reliance in this regard is placed on two orders of this Court in

case titled **Prem Wati Vs. State (NCT of Delhi)** 93 (2001) DLT 646 and **Sanjiv Kohli & Ors. Vs. State** 2005 (1) JCC 510.

11. It has been contended by the learned counsel for the respondent no.2 that in case titled **CBI Vs. Chandraswami @ Nemi Chand Jain, CBI Vs. K.N.Aggrawal @ Mamaji** and **CBI Vs. Vikram Singh** (1997) 3 SCC 214, all the 3 connected Criminal appeals which came to be decided by a common order, the apex Court while considering the question of grant of bail by the High Court to the respondents in the said cases had not set aside the order passed by the High Court regarding grant of 3 days notice prior to the date of arrest of the respective respondents in those cases. Thus it was contended that there was nothing improper much less illegal in giving a reasonable notice to the accused before the arrest of the accused is considered as an imperative by the IO.
12. The second submission made by the learned counsel for the petitioner is that the impugned order which was assailed by the present petitioner was passed on the third bail application for the grant of anticipatory bail while as the second bail application was rejected by a speaking order and the respondent no.2 could not have filed the third bail application without there being any

change in circumstances. Therefore, the impugned order dated 23.3.2011 which was passed on the third bail application was not proper more so when there was accusations against the respondent no.2 of having caused the death of his wife and the daughter of the present petitioner.

13. The learned counsel has referred to the judgment of the Division Bench of Calcutta High Court in case titled **Kalidas Mitra Vs. The State XII-1989 (3) Crimes** wherein a distinction has been drawn between the provisions of Sections 439 and 438 Cr.P.C. and the Division Bench has expressed serious reservations regarding the grant of anticipatory bail in the cases of dowry deaths by placing reliance on the judgment of the Apex Court in **Samunder Singh Vs. State of Rajasthan**, 1987 Cri L.J.705 observing that the grant of anticipatory bail in such like cases causes obstruction in the investigation.
14. So far as the learned APP is concerned, he has also supported the submissions that there is no provision which requires the grant of advance notice before any arrest in a cognizable offence.
15. I have carefully considered the submissions made by the respective sides and gone through the record.

16. There is no dispute about the fact that the grant of anticipatory bail in cases under Section 304B IPC, as has been observed by the Division Bench of Calcutta High Court, may cause a serious impediment in the fair and proper investigation of the matter but one does not have to lose sight of the fact that merely because the death has taken place within 7 years of marriage is not sufficient to deprive the exercise of discretion in appropriate cases where the prosecution has failed to show to the Court that there was proximate nexus between the demand made by the accused and the date of death.
17. I do not subscribe to the view of the learned counsel for the petitioner that the accused person cannot file more than one application for grant of anticipatory bail in a given factual matrix if there is a change in the circumstances.
18. The contention of the learned counsel for the petitioner in the present case is that after the second bail application of the respondent no.2/accused was rejected on merits, the respondent no.2 was not entitled to file the third bail application as there was no change in circumstances.
19. The learned counsel for the respondent no.2 has drawn the attention of the Court to para 10 of the second bail application,

wherein it was averred that the second bail application was taken up by the Court inadvertently and the order of rejection of the bail was passed despite the IO seeking an adjournment on the ground that in the meantime, he will get the Viscera report. Copy of the bail order passed on 19.2.2011 was annexed along with the application.

20. It is contended since the order dated 19.2.2011 was attached along with the application and the said order was passed despite the IO seeking time to obtain Viscera report, therefore, this was not an order which would have come in the way of the respondent no.2 to have a fresh consideration by the learned Sessions Court of his third application.
21. I have seen the application as well as the order dated 19.2.2011, I do not agree with the contention of the learned counsel for the respondent no.2 that a request for adjournment was made by the IO and yet the learned Sessions Judge rejected such request and proceeded ahead to decide the application. Moreover, the order dated 19.2.2011 specifically show the presence of the learned counsel for the respondent no.2, therefore, I tend to agree and accept the contention of the learned counsel for the petitioner that there was no change in circumstances of the

respondent no.2 to have filed the third application for grant of anticipatory bail, but this point as on date has lost its significance in the light of the fact that the doctor who had conducted the post mortem has given 3 different reports, each subsequent reports improving over other & thereby adding to the confusion. This is more so, as no Viscera report from FSL, Rohini has been received, despite the sample having been send long back. No serious efforts seem to have been made by the IO in procuring the Viscera report by personally approaching the concerned officials.

22. The question of filing of successive bail applications has been settled not in one, but in catena of cases, wherein it has been laid down that successive bail applications are maintainable by an accused provided that there is a change in circumstance (Refer to **Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav** AIR 2005 SC 921). Since in the instant case, the second bail application was rejected by the learned Sessions Court on merits and the third one was also filed before the same Court without there being any change in circumstances, I feel that it was not proper for the respondent no.2 to have filed such an application much less for the learned Sessions Judge to have

passed the direction that one week's working notice be given to the applicant/accused when the application for grant of anticipatory bail was being withdrawn. To that extent, the order does not seem to be sustainable in law. This deals with the second submission of the petitioner.

23. The first submission which has been raised by the learned counsel for the petitioner with regard to the grant of notice, I feel that there is a considerable merit in the same. The power of grant of anticipatory bail is a concurrent power, which has been conferred on the Court of Sessions as well as the High Court.
24. The registration of an FIR is not a sine qua non for grant of anticipatory bail and if there is a reasonable apprehension in the mind of a person that he will be falsely implicated in a cognizable offence, the Court will be well within its power to enlarge the accused on anticipatory bail. (Refer to **Shri Gurbaksh Singh Sibbia & Ors. Vs. State of Punjab** AIR 1980 SC 1632 and **Siddharam Satlingappa Mhetre Vs. State of Maharashtra & Ors.** AIR 2011 SC 312).
25. In the instant case, the FIR was registered by the petitioner for an offence under Section 304B/498A IPC. The word 'cognizable offence' has been defined in Section 2(c) Cr.P.C. as an offence

where the police has the power to arrest without warrant, therefore, the question which arises is that in a case where the police has the power to arrest the accused without warrant, can the Court place an impediment on the power of the police without there being any legislative sanction, by directing the IO or the arresting officer that it must give 3 days or 7 days or 10 days notice before arresting the person.

26. I am cognizant of the fact that such practice has been prevalent both in the learned Sessions Court as well as in this Court. But I do not subscribe to the view that such an impediment should be placed on the power of the IO or the Arresting Officer which in my view does not have any, prima facie, legislative sanction, as it means that the Courts are imposing restriction on the powers of the investigating agency to arrest an accused where it has to be given a free hand to arrest and to investigate into the offence which is cognizable. This is only subject to the controls which are prescribed under Chapter XII Cr.P.C., dealing with the investigation or subject to the provisions of bail as enunciated in Chapter XXXIII. The Court, instead of directing the giving of a notice, will be well within its power to insulate the liberty of a person by passing appropriate orders other than giving notice, if

it feels that he is sought to be falsely implicated. To direct the IO or the Arresting Officer to give notice of arrest to the accused, in my view will not be in accordance with the provisions of law. I find support, to this view, in the order of the learned Single Judge of this Court in case titled **Department of Customs Vs. Arvinder Singh (supra)**, wherein two orders of the Apex Court have been referred to, where the condition of 7 days notice in the facts of those cases, which were somewhat similar to the present one, was not approved of by the Apex Court. I am cognizant of the fact that there are some orders passed by this Court as well as the observations passed by the Apex Court in Chandra Swami's case (supra), to which the learned counsel for the respondent no.2 has referred to convass a point to the contrary and justify the giving of a notice before arrest. So far as the Chandra Swami's case is concerned, there was no issue involved directly with regard to the question as to whether the grant of 3 or 7 days notice was valid or not. Therefore, the facts of that case are slightly distinguishable from the facts of the present case wherein the petitioner has raised the question of legality of the service of seven days notice itself, before effecting arrest and more so when the bail application

was being withdrawn. This leaves us only with number of orders of the learned Single Judge of this Court where prior notice have been given for carrying out arrest in an appropriate case. The learned counsel for the respondent no.2 has submitted, since this Court has taken a view different than the one which has been taken in the number of other cases, it would be better if this matter is referred to a Larger Bench for adjudication.

27. I have considered the submissions of the learned counsel. I feel that in an appropriate case, this may be done but in the present case as the issue before this Court is limited only with regard to the grant of prior notice before arrest and the learned counsel for the petitioner has persisted with early disposal of the petition which has also been supported by the learned counsel for the respondent because of the stay operating against them, I feel that no useful purpose would be served by referring the said issue in the present case to the Hon'ble the Chief Justice for consideration of the issue by a Larger Bench. This may be done in an appropriate case where a conflicting stand is taken.
28. For the reasons mentioned above, I feel that the order dated 23.3.2011, so far as the grant of 7 days prior notice to the respondent by the IO before carrying out his arrest is concerned,

that is totally unjustified and illegal and does not have the legislative sanctions, more so when the petition itself was withdrawn. However, in order to balance the equities, as the petitioner has not only invoked Section 482 but also Section 397 (1) Cr.P.C., keeping in view the fact that the doctor has given 3 different opinions from time to time including an opinion wherein he has stated that the death is on account of hemorrhage in such cases is generally because of accident also, I feel, it will be meeting the ends of justice in case the respondent no.2 is permitted one final opportunity to file a fresh bail application before the Court of Sessions to consider the entire matter in totality and take a view as to whether the petitioner is entitled to grant of anticipatory bail in the facts and circumstances of the present case or not. This shall be done by the learned Sessions Court without being influenced by any of the observations passed hereinbefore.

29. With these directions, the petition stands allowed and the application for grant of anticipatory bail shall be filed by the respondent no.2 within ten days from today. In the meantime, the petitioner may not be arrested.

30. The IO is directed to visit FSL personally and collect the Viscera report within a week from today.

31. Dasti.

V.K. SHALI, J

OCTOBER 10, 2011
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