

Gyanchand Jain, S/o. Bhola Ram Jain, Aged about 39 years, R/o. Avasiya Mohalla in front of High School, Jaalbandha, Police Station- Khairagad, District – Rajnandgaon (C.G.)

Versus

State of Chhattisgarh, Through Station House Officer, Police Station-
Jalbandha, Khairagad, District Rajnandgaon (C.G.)

---- Respondent

For Applicant :- Ms. K. Tripti Rao, Advocate.

For Respondent/State :- Mr. Anant Bajpai, Panel Lawyer

Hon'ble Shri Justice Goutam Bhaduri

C.A.V. ORDER

10/02/2016

1. Apprehending arrest in connection with Crime No.249/2015 registered at Police Station- Khairagad, District Rajnandgaon (C.G.) for the offence punishable under Section 34(2) of the Chhattisgarh Excise Act, the applicant has preferred this application under Section 438 of the Code of Criminal Procedure for grant of anticipatory bail.
2. As per the prosecution story, in brief, on 20.07.2015 an information received that the applicant is selling illegal liquor in his shop along-with the co-accused, the shop was raided, at that time, it was found that the applicant was selling the illegal English Goa liquor 14 bottles and 17 bottles of country made plain liquor total 5580 ml. and the applicant when the raid was conducted fled away from the scene. Subsequently, a case was registered against the applicant for the offence u/s 34 (2) of the Excise Act.

3. Learned counsel for the applicant would submit that the applicant has been falsely implicated in this case for the reason that the applicant is a Correspondence & Reporter of the daily newspaper of Haribhoomi & Nai Duniya in the area. It is contended that the applicant in discharge of his duty as a local correspondence of the newspaper had taken out various information under the Right to Information Act and subsequently has raised his voice by the paper publication news highlighting illegal sale of liquor in the area and time and again has reported the matter. The said news were published in the news-paper wherein the allegations were clamped against few of the Panchayat Karmis of the village along-with few Government officers who allowed the illegal sale of liquor in the area. It is further stated that the applicant had also raised voice against the scrap-holders (Kabadi) that they were allowed to do all illegal business without any licence by blocking the roads and report of illegal mining was also highlighted. It is further stated that because of the report and publication made, few of the arrest were made that of the people who were involved in sale of illegal liquor and other illegal activities.
4. Learned counsel further referred to the document filed along-with the application which are bunch of newspaper publication and stated that on 26.06.2014, the applicant had informed the Superintendent of Police about raising concern of his safety since he had made publication of the news of illegal sale of liquor and illegal mining etc., as such, he was given the life threat by the Sarpanch of the Gram Panchayat Jaalbandha and few of the people who were involved in the liquor business. Further, it is submitted that on a report made by the applicant subsequently the police officials by an intimation under Section 155 of Cr.P.C. informed the applicant that the report so made are non-cognizable offence and the issue was closed with an advice

to file the complaint before the competent Court. The counsel further referred to the letter sent to the Superintendent of Police on 30.09.2014, 14.10.2014, 10.11.2014 & 24.01.2015 wherein it was stated that in the backyard of the shop which was being run by the applicant, liquor was placed so as to implicate the applicant. The counsel would further submit that after the first alleged incident took place on 27.09.2014 however no arrest was made and subsequently again the liquor was implanted on the same place on 20.07.2015 whereby another case was registered and it was stated during second incidence the applicant fled away from scene. It is contended that in order to implicate the applicant in false case, the aggrieved persons with the connivance of few of the Police Officers in order to suppress the applicant from reporting and to arrest making the news public has arranged such trap. It is contended after first incident again liquor was implanted at the same place at backyard of the premises of the applicant on 20.07.2015 whereby a separate crime was registered bearing No.249/2015 and the applicant has been falsely implicated.

5. Learned counsel further referred to the case reported in **2004 (4) M.P.H.T. 205 (D), 2007 (1) M.P.H.T. 39 (CG), 2007 (1) C.G.L.J. 8 and 2003 (2) M.P.H.T. 11 (CG)** and submits that the bar of Section 59-A do not completely prohibit the consideration of application under Section 438 of Cr.P.C. in the given set of facts and it is submitted that in the instant case if the documents are considered as a whole, it would lead to show that the applicant has been falsely implicated whereby the provisions of Section 438 of Cr.P.C. can be extended.
6. Per contra, learned State counsel referred to a case law reported in 2015 (2) C.G.L.J. 335 and would submit that in view of the law laid down by this Court, the provisions of Section 438 cannot be

considered and the anticipatory bail cannot be entertained in view of Section 59-A(i) of the Chhattisgarh Excise Act, 1915.

7. I have heard learned counsel appearing for the parties and perused the case diary.
8. It would be relevant to state when the case came up for hearing on the earlier date on 07.01.2016, taking into the various report and document filed by the applicant that threats were extended to the applicant that he would be inculpated in the false case, it was directed to the State to clarify it's stand as to what actions were taken by the State on the report so made by the applicant. The State instead of coming out with the reply to the core issue has filed it's reply and enclosed the bunch of statement of the villagers wherein it is stated by the different persons that the applicant is a Reporter of a daily newspaper and he was not involved in the case of sale of illicit liquor. At the same time, covering letter is also filed that pressure is being exerted by the applicant over State to dilute the report made against the applicant.
9. Reading the reply of the State along with the statements which would show that statement favours the applicant to the fact that he is not involved in sale of liquor but the police officer has given the reason and opinion that the report made by the applicant was to exercise pressure on the police. Therefore, the police has bypassed the answer to state as to whether any course of action was adopted by State or not on report of the applicant. As appears the query has been consciously been avoided.
10. Now reverting back to the facts since the Section 34 (1) & (2) of the Chhattisgarh Excise Act, 1915 (hereinafter referred to "Act of 1915") are a part of consideration, it would be relevant to quote the same.

:- Section 34 of the Chhattisgarh Excise Act, 1915 :-

“34. Penalty for unlawful manufacture, transport, possession, sale etc.- (1) Whoever, in contravention of any provisions of this Act, or of any rule, notification or order made or issued thereunder, or of any conditions of a licence, permit or pass granted under this Act,--

(a) manufactures, transports, imports, exports, collects or possesses any intoxicant; or

(b) save in the cases provided for in Section 38, sells any intoxicant; or

(c) cultivates Bhang; or

(d) taps any toddy producing tree/or draws toddy therefrom, or

(e) constructs or works any distillery, brewery or vintnery; or

(f) uses, keeps or has in his possession any materials, still utensil, implement or apparatus whatsoever for the purpose of manufacturing any intoxicant other than toddy; or

(g) removes any intoxicant from any distillery, brewery, vintnery or warehouse licensed, established or continued, under this Act;

(h) bottles any liquor;

shall be subject to the provisions of sub-section (2), be punishable for every such offence with imprisonment for a term [not less than [six months]] which may extend to [two years] and fine which shall not be less than [Ten thousand rupees] but which may extend to [Fifty thousand rupees]:

Provided that when any person is convicted under this section of any offence for a second or subsequent time, he shall be punishable for every such offence with imprisonment for a term [not less than [one year]] but which may extend to [five years] and with fine which shall not be less than [Twenty thousand rupees] but which may extend to [two lac rupees].

(2) Notwithstanding anything contained in sub-section (1), if a person is convicted for an offence covered by clause (a) or clause (b) of sub-section (1) and the quantity of the intoxicant being liquor found at the time or in the course of detection of the offence exceeds [five bulk litre], he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and

with fine which shall not be less than twenty five thousand rupees but may extend to one lac rupees:

Provided that when any person is convicted under this Section for an offence for second or subsequent time, he shall be punishable for every such offence with imprisonment for a term which shall not be less than two years but which may extend to five years and with fine which shall not be less than fifty thousand rupees but may extend to two lac rupees.

(3) When an offence covered by clause (a) or clause (b) of sub-section (1) is Committed and the quantity of liquor found at the time or in the course of detection of such offence exceeds [five bulk litre], all intoxicants, articles implements, utensils, materials, conveyance etc. in respect of or by means of which the offence is committed, shall be liable to be seized and confiscated. If such an offence is committed by or on behalf of a person who holds a licence under the Act for manufacturing or stocking or storing liquor for sale on which duty at the prescribed rate has not been paid then notwithstanding anything contained in Section 31 the licence granted to him shall be cancelled in case he is convicted for the offence as aforesaid.

(4) The seizure or confiscation of the intoxicants, articles, implements, utensils, materials and conveyance and the cancellation of licence as provided under sub-section (2) above shall be in addition and without prejudice to any other action that may be taken under any provisions of the Act or rules made thereunder.

11. It would further be relevant to produce Section 59-A which reads as under :

Section 59-A. Certain offence under the Act to be non-bailable. -

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (No. 2 of 1974) or Section 59 of the Act,

- (i) no application for an anticipatory bail shall be entertained by any court in respect of a person accused of an offence punishable under Section 49-A or in respect of a person not being a person holding a licence under the Act or rules made thereunder who is accused of an offence covered by clause (a) or clause (b) of subsection (1) of Section 34 with quantity of liquor found at the time or in the course of detection of such offence exceeding [five bulk litre].

(ii) a person, accused of an offence punishable under Section 49-A or a person not being a person holding a licence under the Act or rules made thereunder who is accused of an offence covered by clause (a) or clause (b) of sub-section (1) of Section 34 with quantity of liquor found at the time or in the course of detection of such offence exceeding [five bulk litre] shall not be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity to oppose the application for such release and in case such an application is opposed by the Public Prosecutor, unless the court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that no court shall order for detention of such person in custody during the course of investigation for total period exceeding 60 days where it relates to an offence covered by clause (a) or clause (b) of sub-section (1) of Section 34 with quantity of liquor found at the time or in the course of detection of the offence exceeding fifty bulk litres and 120 days where it relates to an offence under Section 49-A and on the expiry of such period of 60 days or 120 days, as the case may be, and in the event of the report of complaint not being filed the accused shall be released on furnishing bail.

(iii) the limitations for grant of bail specified in clause (ii) are in addition to limitations prescribed under the Code of Criminal Procedure, 1973 (No. 2 of 1974) or any other law for the time being in force regarding grant of bail.

12. Reading of Section 59-A of the Act of 1915 primarily gives out an impression that the Court shall not grant anticipatory bail to a person accused of an offence punishable under Section 49-A or an offence covered by clause (a) or clause (b) of sub-section (1) of Section 34 when the quantity of liquor found at the time or in the course of detection of such offence exceeds five bulk litre, unless the Public Prosecutor has been given an opportunity to oppose the application for such release and in case if the Court is satisfied that there are reasonable grounds for believing. However, the Court on being

satisfied that there are reasonable ground for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail, the Court may grant the bail. Therefore, it is always open to accused to show that no offence involving Section 59-A of the Act of 1915 is made out as the basic ingredients are absent.

13. In a law laid down in case of ***Sujesh Kumar Turkar v. State of Chhattisgarh***, reported in **2007 (1) M.P.H.T. 39 (CG)**, this Court while entertaining an application under Section 438 of Cr.P.C. has laid down that almost similar provisions, as under Section 18 in the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is there, whereby the applicability of Section 438 of Cr.P.C. has been taken away. Even thereafter many decisions have been rendered granting anticipatory bail has not been stopped. The Division Bench of the M.P. High Court in the case of ***Naresh Kumar Lahria v. State of M.P. & Others***, reported in **2004 (4) M.P.H.T. 205 (DB)** has held that merely because Section 438 is not applicable to certain categories of offences, the Court is not bereft of power only because in the FIR the said offences are mentioned; therefore, it can not be stated with certitude that if the accused can putforth a case or make out of a case, though the offences which have been mentioned under Section 59-A of the Act do find mention in the FIR, but essentially and factually the case does not fall under the said provision to Division Bench. Further, it is stated that if the accused can, by clarificatory means with substantial material putforth and bring it to the notice of the Court that the offences under Section 59-A is really not made out and the accused has been roped in falsely and sought to be arrested then in such case the ambit of umbrellas of Section 438 of the Code can be extended.

14. Likewise again in case of ***Joginder Singh v. State of Chhattisgarh*** reported in **2003 (2) M.P.H.T. 11 (CG)** and in ***Lakhan Sahu v. State of Chhattisgarh*** reported in **2007 (1) C.G.L.J. 8**, this Court had entertained the application under Section 438 of Cr.P.C. while holding the fact that when basic ingredients of the offences referred to in Section 59-A are not made out then in such case keeping in to the fact of individual case, the Court can entertain the application under Section 438. Further, the entire reading of the judgment referred by the State counsel in case of ***Pankaj Samundre v. State of Chhattisgarh*** reported in **2015 (2) C.G.L.J. 335** would show that this Court has held that the entertainment of anticipatory bail is not completely barred in Excise Act. At para 10 of the judgment, the Court has reproduced the proposition of the Division Bench of M.P. High Court and reiterated the fact that in the given facts of the particular case, the Court can entertain the application under Section 438 of Cr.P.C. Therefore, I have no hesitation to hold that the facts of each case has to be individually appreciated with the documents produced and Section 59-A of the Act do not create an absolute bar to entertain Section 438 of Cr.P.C. Each case has to be adjudicated on its own facts and Section 59-A of the Act of 1915 can not assume a blanket bar for consideration of Section 438.
15. In view of such proposition, now the facts of this case are examined. As has been observed, that despite the State being directed to come out with the facts as to what actions were taken on the reports of the applicant, who appears to be a Journalist of Haribhoomi and Nai Duniya daily news-paper, the core question remains unanswered by State police. Therefore, the case diary and the documents place by the applicant are examined.

16. Perusal of the case diary, documents and photographs would show that wherefrom the liquor was seized, it is a backyard of the shop wherefrom the applicant used to run the fair price shop. The map, document and the case diary shows that the roof of the shop is not there as it is absent and the wall is of 8 feet height. The seizure was made on 27.09.2014 and prima facie it shows that the applicant who is not a resident of the village wherein the shop is being run and when he came in morning at that time the seizure was made after opening of shop from the backyard room, where the roof is missing. The case diary shows that various statements have been recorded on 26.09.2014 which leads to show that applicant a day before went back to his house at Durg and thereafter when he came back on the next date, liquor was seized in the presence of Khuman Verma and Surendra Verma. The various case diary statement recorded by the police shows that on 26.09.2014, the applicant closed the shop and went back to his house and all the statement recorded of villagers shows the involvement of applicant in the commission of crime of sale of liquor is being denied and stated that he is a Reporter.
17. Admittedly, this fact is not in dispute that the applicant is a Reporter of Haribhoomi & Nai Duniya newspaper. The documents filed alongwith the bail application and the documents filed as additional documents with the photographs shows that the seizure of liquor wherefrom it was made, it is in the backyard of the shop which had no roof on the upper part and first part of the shop is of the tiles. The various reports and the news clippings which have been filed speaks of the complaint made by the applicant complaining of illegal sale of liquor, illegal mining and illegal sale of scrape etc. The State despite the direction has not come out fairly as to what actions were taken on the report of the applicant. Two crimes were registered against the applicant as

one incident is stated to be of 27.09.2014 and another incident was stated to be of 20.07.2015 wherein also it is alleged that the liquor was seized from the shop of the applicant and one of the co-accused was arrested while the applicant fled away from the scene.

18. The first incident was of 27.09.2014 and the case diary would show that the applicant was thereafter was set at large and was not arrested immediately. Subsequently, on 20.07.2015 when the alleged sale of liquor again took place and the shop was raided, it is alleged that the applicant fled away from the scene, which prima facie do not inspire confidence. One of the seizure witness Khuman Verma is common in both the cases, which also raises a prima facie doubt. The situation of backyard without the roof, the possibility of implanting liquor can not be ruled out in given set of facts. Taking the totality of the facts in the background of the applicant that he is a Journalist who appears to have made several complaint of illegal liquor trade and mining; further taking into fact that the applicant is not a resident of the vicinity wherefrom the shop is being run and place of seizure of liquor from the backyard of the shop, it can also lead to infer that any person can easily climb the wall and implant liquor in such place. Further considering the fact that the applicant used to lock the shop and go away to his residence and in the subsequent morning when he came the seizure was made, the conduct of applicant appears to draw inference that the liquor if any actually possessed may not have been kept in such manner in open sky which could have been taken away at village. Therefore, prima facie, it appears that the seizure so made raises the questions of doubt. Consequently, I find it to be a fit case to extend the benefit of Section 438 of Cr.P.C to the applicant.
19. Accordingly, the anticipatory bail application is allowed.

20. It is directed that in the event of arrest of the applicant in connection with the aforesaid offence, he shall be released on bail by the officer arresting him on furnishing a personal bond to a sum of Rs.25,000/- with one surety in the like sum to the satisfaction of the concerned Investigating Officer. The applicant shall also abide by the following conditions :

- (i) that the applicant shall make himself available for interrogation before the investigating 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/her from disclosing such facts to the Court or to any police officer;
- (iii) that the applicant shall not act, in any manner, which will be prejudicial to fair and expeditious trial; and
- (iv) that the applicant shall appear before the trial Court on each and every date given to him by the said Court till disposal of the trial.

21. It is further observed that the trial Court at the time of trial shall not be influenced by the observation made in this order while framing of charge and while adjudication of the case on merit.

Certified copy as per rules.

Sd/-
(Goutam Bhaduri)
Judge