

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**Criminal Misc. No. M-40202 of 2015
Date of decision: 08.02.2016**

Hemant

..Petitioner

Versus

State of Punjab

..Respondent

CORAM: HON'BLE MRS. JUSTICE DAYA CHAUDHARY

- 1. Whether reporters of local newspapers may be allowed to see judgment? Yes**
- 2. To be referred to reporters or not? Yes**
- 3. Whether the judgment should be reported in the Digest? Yes**

Present: Mr. Saurabh Dalal, Advocate
for the petitioner.

Mr. Rupam Aggarwal, DAG, Punjab.
for the respondent – State.

Mr. Rajat Malhotra, Advocate
for the complainant.

Daya Chaudhary, J.

This petition has been filed under Section 438 Cr.P.C. for grant of anticipatory bail to petitioner-Hemant in case FIR No.49 dated 21.05.2015 registered under Sections 366, 376 and 120-B of Indian Penal Code at Police Station Haibowal, Ludhiana.

While issuing notice of motion on 03.12.2015, following contentions of learned counsel for the petitioner was recorded: -

*“Learned counsel for the petitioner submits that
earlier petition filed by the petitioner was dismissed
as withdrawn as some of the documents were not*

available. The petitioner has falsely been implicated in the case at the instance of father of the prosecutrix whereas it is clear from the call details of the petitioner's phone that all the calls and SMS have been done by the prosecutrix only and even a single call or SMS was not done by the petitioner. The prosecutrix has also filed suit before the Civil Court, which was withdrawn by the prosecutrix. The husband of the prosecutrix has filed a petition under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. Even from the photographs of the marriage of prosecutrix and her husband Goldy, it is apparent that it was not a case of forced marriage. Nothing is to be recovered from the petitioner as all the documents are in possession of the Department and the petitioner is ready to cooperate with the investigation and to hand over the document, if any, required by the Investigating Officer. The petitioner is ready to join investigation and to abide by all terms and conditions to be imposed by this Court or by the Investigating Officer."

Learned counsel appearing for the complainant submits that the petition filed by co-accused, namely, Kashish Mehta for grant of anticipatory bail before the Additional Sessions Judge, Ludhiana

was dismissed as the supplementary statement made by the daughter of the complainant (hereinafter called as 'prosecutrix') was considered wherein certain new facts came to the notice of the Court. The petitioner has not only committed rape but compelled the prosecutrix to get marry with one Goldy. Learned counsel also submits that a compelling situation was created by keeping the prosecutrix under fear as she was threatened that obscene photographs will be exposed to the public.

The aforesaid FIR was registered on the basis of statement made by Anil Kumar, who is father of the prosecutrix, stating that his younger daughter, whose date of birth is 09.05.1985, was not found in the house. Many efforts were made to search but it was recollected as it was earlier informed by his daughter that she was harassed by one Hemant as he was having evil eye upon her. It was also mentioned that accused-Hemant might have eloped with his daughter with an intention to marry her.

As per supplementary statement, both the accused clicked her indecent and obscene photographs and thereafter, she was sold to one Goldy. The statement of the prosecutrix was recorded under Section 164 Cr.P.C. wherein she has stated that about 8 months ago, she was invited by her junior i.e., one Monika Nautiyal to her house where both the accused were present. She was served cold drink and after taking it, she became unconscious. A video of the prosecutrix was prepared in objectionable position. Thereafter, she was

blackmailed on the basis of said video. Even the money was also extracted from the prosecutrix. Thereafter, under threat, she was left with one Goldy for making preparation of Court marriage. The prosecutrix was kept in the custody by said Goldy at Karnal from where, she managed to flee on 03.06.2015. The prosecutrix narrated the whole story to the Additional Sessions Judge, Ludhiana as has been mentioned in para No.15 of the order passed while declining bail to the accused, which is reproduced as under: -

“15.The prosecutrix then appeared in the court on 17.9.2015 and expressed her desire to narrate the entire facts before this Court. She also requested that her mother be sent outside the court while she narrates the entire story. While narrating her tale, the prosecutrix stuck to her earlier version that she was called to her house by Monika Nautiyal, sister of Hemant Nautiyal on the pretext that it was her birth day. When the prosecutrix reached there, she did not find anyone present there and asked Monika Nautiyal as to why she has called the prosecutrix there. In the meanwhile, Hemant Nautiyal and Kashish Mehta reached there and Monika served cold drink laced with intoxicants to the prosecutrix and she became unconscious.

When the prosecutrix regained consciousness after some time, Kashish showed the video film to the prosecutrix in which both Kashish Mehta and Hemant Nautiyal were seen committing rape upon the prosecutrix. The photographs of prosecutrix were also clicked by them in unconscious state. Thereafter on the strength of the said video and on the threat that they will upload the video on the Internet, the said boys committed rape with the prosecutrix. Monika even went to the extent of snatching jewellery and books from the prosecutrix on the threat of making the video public. The accused also used the Wagon R car of Kashish Mehta for committing rape upon the prosecutrix and from the month of August 2014 to January 2015, both the said persons namely, Hemant Nautiyal and Kashish Mehta kept on taking with the prosecutrix on her mobile number. In the month of January, 2015, both the said boys went for training. The prosecutrix called them and requested them to return her video, failing which, she would disclose the entire facts to her parents.”

The marriage of the prosecutrix was arranged with one Goldy on the promise to return video prepared by both the accused. It was also brought to the notice of the lower Court that since she had already suffered at the hands of the accused, namely, Hemant Nautiyal and Kashish Mehta and she was ready to marry with Goldy just to show in public that marriage has been solemnized with Goldy. She was under the threat that in case, marriage was not solemnized, her video will be shown in public and to her parents. From the statement made by the prosecutrix, it appears that not only she was physically exploited by both the accused but was also threatened and blackmailed. A rosy picture of Goldy was also shown that he was running a business and is a qualified businessman.

For grant of anticipatory bail, the nature, gravity of offence as well as role of the accused is to be seen. There are certain factors, which are to be considered while granting bail under Section 438 Cr.P.C. Hon'ble the Apex Court in a judgment rendered in ***Bhadresh Bipinbhai Sheth Vs. State of Gujarat and another 2015 (8) JT 125*** has summarized certain factors to be taken into consideration while granting anticipatory bail, which are reproduced as under:

“The principles which can be culled out, for the purposes of the instant case, can be stated as under:

(i) The complaint filed against the accused needs to be thoroughly examined, including the

aspect whether the complainant has filed a false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.

(ii) The gravity of charge and the exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases, the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.

(iii) It is imperative for the courts to carefully and with meticulous precision evaluate the facts of

the case. The discretion to grant bail must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined the investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided. A great ignominy, humiliation and disgrace is attached to arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.

(iv) There is no justification for reading into Section 438 CrPC the limitations mentioned in Section 437 CrPC. The plenitude of Section 438 must be given its full play. There is no requirement that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 CrPC to a dead letter. A person seeking anticipatory

bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.

(v) The proper course of action on an application for anticipatory bail ought to be that after evaluating the averments and accusations available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor the court may either reject the anticipatory bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of anticipatory bail. The Public Prosecutor or the complainant would be at liberty to move the same court for cancellation or modifying the conditions of anticipatory bail at any time if liberty granted by the court is misused. The anticipatory bail granted by the court should ordinarily be

continued till the trial of the case.

(vi) It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the Public Prosecutor or the complainant, on finding new material or circumstances at any point of time.

(vii) In pursuance of the order of the Court of Session or the High Court, once the accused is released on anticipatory bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

(viii) Discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under Section 438 CrPC should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations.

(ix) No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with legislative intention, the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case.

(x) We shall also reproduce para 112 of the judgment wherein the Court delineated the following factors and parameters that need to be taken into consideration while dealing with anticipatory bail:

(a) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(b) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(c) The possibility of the applicant to flee from justice;

(d) The possibility of the accused's likelihood to repeat similar or other offences;

(e) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(f) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(g) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution, because overimplication in the cases is a matter of common knowledge and concern;

(h) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to free, fair and full investigation, and there should be prevention of harassment, humiliation and unjustified

detention of the accused;

(i) The Court should consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(j) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

Keeping in view the conduct of the petitioner and the serious allegations levelled against him, no ground is made out to grant anticipatory bail to the petitioner and the petition being devoid of any merit is hereby dismissed.

08.02.2016
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(DAYA CHAUDHARY)
JUDGE