

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.81677 of 2019

Arising Out of PS. Case No.-211 Year-2019 Thana- MUFFASIL District- Aurangabad

1. MD. SARFARAZ @ MD. SAMFRAJ Son of Md. Moein Miyan
2. Md. Jamshed @ Md. Jamshed Alam Son of Md. Moein Miyan
3. Md. Murtuza @ Md. Murtuj Son of Jamil Miya
4. Md. Maquebool @ Md. Kabul @ Maquebool Son of Ajmudin Miya
5. Md. Ejaz @ Md. Ejaj Alam Son of Md. Shamim
6. Md. Mahboob @ Md. Mahbub Son of Azamuddin Miyan
7. Md. Raja @ Noor Hasan S/o Late Md. Basir Shaikh @ Late Basir Miyan All Resident of Village - Nehuta, P.S.- Mufassil, Distt.- Aurangabad.

... .. Petitioner/s

Versus

THE STATE OF BIHAR

... .. Opposite Party/s

Appearance :

For the Petitioner/s : Mr.Nivedita Nirvikar, Advocate
For the Opposite Party/s : Mr.Sanjay Kumar Tiwary, APP

CORAM: HONOURABLE THE CHIEF JUSTICE
ORAL ORDER

3 18-12-2019 Instant petition under Section 438 of Criminal Procedure Code has been moved for grant of anticipatory bail in FIR No. 211 of 2019 dated 07.09.2019 registered at Police Station Mufassil under Sections 147, 148, 323, 302, 307 and 506 of the Indian Penal Code.

I have heard learned counsel for the petitioners and learned Additional Public Prosecutor for the State. I have also gone through the relevant record of the case, necessary for adjudication of this petition.

Having heard learned counsel for the parties as also



perused the records so made available, this Court is not inclined to grant the privilege of pre-arrest bail. Serious allegations involving complicity of all the accused persons stand made. Before this Court it could not be disputed that the petitioners were present on the spot.

Be that as it may, it is the case of the prosecution that co-villagers including the bail-applicants, in a pre-meditated state of mind, with an intent to kill the deceased, assaulted with iron rod. As a result of said blows, one Md. Alamgir sustained injuries and died. The injuries were given on the vital part of the body i.e. head and the shoulders. It is not that the crime took place on the spur of the moment. Investigation conducted thus far does reveal prima facie complicity of the petitioners in the crime.

The application is also seriously opposed by the learned Additional Public Prosecutor as also the State.

Normally, it cannot be said that the accused has made any of the tests, much less triple test, laid down by the Apex Court for grant of bail.

The allegation against the present petitioners appears to be serious in nature.

Learned counsel for the petitioners submits that the



petitioners are innocent and have falsely been implicated in the present case.

Learned Additional Public Prosecutor vehemently opposes the instant bail application.

It is settled law that the grant to bail is the discretion of the court but the discretion must be exercised not in opposition to, but in accordance with the well established principles of law.

The law laid down in Gudikanti Narasimhulu Versus public prosecutor, (1978) 1 SCC 240 by Justice Krishna Iyer explains the judicial discretion as- the unspoken but inescapable, silent command of our judicial system, and those who exercise it will remember that discretion when to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor, it must not be arbitrary, vague and fanciful, but legal and regular.

The Apex court in case titled- Vaman Narain Ghiya v. State of Rajasthan, (2009) 2 SCC 281 and State of U.P through CBI v. Amar Manik Tripathi, (2005) 8 SCC 21 decided It is well settled that the matter to be considered in an application for bail are....

(A) Whether there is any prima facie or reasonable



ground to believe that the accused had committed the offence

(B) Nature and gravity of the charge-sheet

(C) Severity of the punishment in the event of conviction.

(D) danger of the accused absconding or fleeing if released on bail

(E) Character, Behaviour, means, position and standing of the accused

(F) Likelihood of the offence being repeatedly reasonable apprehension of the witnesses being tampered with and

(G) danger, of course, of justice being thwarted by grant of bail.

Grant of bail though being a discretionary order- but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the court and facts however, do always vary from case to case. While placement of the accused in the society, though may be considered by that by itself cannot be a guiding factor in the matter of grant of bail



and the same should and ought always to be coupled with other circumstances was ranting the grant of bail. The nature of the offence is one of the basis consideration for the grant of bail – more heinous is the crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.

In Prasanta Kumar Sarkav Vs Ashish Chatterjee, (2010) 14 SCC 496, the Hon'ble Supreme Court has summarized the basic principles laid down in catena of judgments on the point of granting bail. The Hon'ble Supreme Court proceeded to enumerate the following factors:

“... among other circumstances, the factors (which are) to be borne in mind while considering an application for bail are :

- (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
- (ii) nature and gravity of the accusation;
- (iii) severity of the punishment in the event of conviction;
- (iv) danger of the accused absconding or fleeing, if released on bail;
- (v) character, behaviour, means, position and standing



of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger of course of justice being thwarted by grant of bail.”

In the case titled- State of Orissa v. Mahimananda Mishra JT, 2018 (9) SC 186 it was held that at the time of considering the bail application, the court must take into account certain factors such as the existence of prima facie case against the accused, gravity of the allegations, position and status of the accused, the likelihood of the accused fleeing from justice and repeating the offence, the possibility of tampering of the witnesses and obstructing the court as well as the criminal antecedents of the accused. It is also well settled that the court must not go deep into merits of the matter while considering an application for bail. All that needs to be established from the record is the existence of the prima facie case against the accused.

Hon’ble Apex court in Cr. Appeal No. 1340 of 2019, titled Shri P. Chidambaram Versus Directorate of



Enforcement, decided on 05.09.2019, relevant paragraphs whereof are reproduced hereinafter:-

"67. Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 Cr.P.C. is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.

72. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information



leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. In State Rep. by the CBI versus Anil Sharma (1997) 7 SCC 187, the Supreme Court held as under:-

"6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful information's and also materials which would have been concealed.

Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can



be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

74. In *Siddharam Satlingappa Mhetre v. State of Maharashtra and Others*, (2011) 1 SCC 694, the Supreme Court laid down the factors and parameters to be considered while dealing with anticipatory bail. It was held that the nature and the gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made and that the court must evaluate the available material against the accused very carefully. It was also held that the court should also consider whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

75. After referring to *Siddharam Satlingappa Mhetre* and other judgments and observing that anticipatory bail can be granted only in exceptional circumstances, in *Jai Prakash Singh v. State of Bihar and another* (2012) 4 SCC 379, the Supreme Court held as under:-



"19. Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enrope in the crime and would not misuse his liberty.

In 2016 (1) SCC 152, titled as Bhadresh Bipinbhai Sheth vs. State of Gujarat and another, Hon'ble Apex Court, held thus:-

"21. Before we proceed further, we would like to discuss the law relating to grant of anticipatory bail as has been developed through judicial interpretative process. A judgment which needs to be pointed out is a Constitution Bench Judgment of this Court in the case of Gurbaksh Singh Sibbia and Others v. State of Punjab. The Constitution Bench in this case emphasized that provision of anticipatory bail enshrined in Section 438 of the Code is conceptualised under Article 21 of the Constitution which relates to personal liberty.

Therefore, such a provision calls for liberal



interpretation of Section 438 of the Code in light of Article 21 of the Constitution. The Code explains that an anticipatory bail is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore, effective at the very moment of arrest. A direction under Section 438 is therefore intended to confer conditional immunity from the 'touch' or confinement contemplated by Section 46 of the Code. The essence of this provision is brought out in the following manner: (Gurbaksh Singh case, SCC p. 586, para 26) "26. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual,



who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."

In *Vilas Pandurang Pawar Versus State of Maharashtra*, (2012) 8 SCC 795 also it was held that while considering



application for bail, scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of evidence on record.

The present case has been registered under Section 148, 323, 302, 307 and 506 of the Indian Penal Code. Considering the gravity of the offence and finding that prime facie there are sufficient materials on record, I find no merits in the petition.

In view of the above discussion, I am not inclined to allow the petition by granting anticipatory bail to the applicants/accused. The petition of the applicants/accused is hereby dismissed.

Any observation made herein shall not be construed to be an expression on the merits of the matter.

The petition stands disposed of.

(Sanjay Karol, CJ)

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