

S.No.115

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

CRM-M-41486 of 2019 (O&M)

Date of Decision:26.09.2019

HC Sarwan Singh and another

.....Petitioners

Vs.

State of Punjab

.....Respondent

CORAM:- HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present:- Mr. Shilesh Gupta, Advocate
for the petitioners.

Rajbir Sehrawat, J.(Oral)

The present petition has been filed under Section 438 Cr.P.C for grant of anticipatory bail to the petitioners who are apprehending their arrest pursuant to order dated 20.09.2019 passed by this Court in CRM-M-40382 of 2019 titled as “Kakka Singh v. State of Punjab” pertaining to FIR No.32 dated 02.04.2016 registered under Section 22 of Narcotic Drugs and Psychotropic Substances Act at Police Station Kot Ise Khan, District Moga.

The order dated 20.09.2019, vide which the police persons who were not being produced as witnesses before the Court, were ordered to be taken into protective custody, reads as under:-

“Present petition has been filed for seeking anticipatory bail in FIR No.32 dated 02.04.2016 for the offences punishable under Section 22 of Narcotic Drugs and Psychotropic Substances Act, registered at Police Station Kot Ise Khan, District Moga.

It is contended by learned counsel for the petitioner that in this very case, the petitioner was granted bail pending trial

by the Trial Court vide Order dated 27.03.2017. Thereafter, the petitioner had been appearing regularly before the Trial Court, for atleast, 17 dates only to get an Order from the Trial Court that no PW was present. This was happening despite the fact that all the witnesses in the case happens to be Police Officers. However, on one date, i.e. 12.09.2019 the petitioner could not appear before the Trial Court. Hence, the bail granted to him has been cancelled and warrant of arrest has been issued. Therefore, the petitioner apprehends his arrest. It is further submitted that the absence of the petitioner from the Trial Court was not intentional. In fact, the counsel for the petitioner, appearing before the Trial Court, had wrongly communicated the next date of hearing before the Trial Court to be 16.09.2019; instead of 12.09.2019. Therefore, by this inadvertent mistake, the petitioner could not appear before the Trial Court. Rather the petitioner went to the Court on 16.09.2019 and found that the case was not fixed for that date. Thereafter, the petitioner inquired into the matter and came to know that the bail granted to the petitioner has been cancelled for the reason mentioned above. It is further submitted by the counsel for the petitioner that the petitioner has no intention to flee from the course of justice. He intends to appear before the Trial Court to face further proceedings in accordance with law, as he was appearing earlier. The only prayer is that the petitioner be protected against his arrest.

Notice of motion.

On the asking of the Court, Shri K.S.Aulakh, DAG, Punjab accepts notice on behalf of the State of Punjab and submits that he has no objection if the petitioner appears before the Trial Court.

The objective of the coercive mechanism prescribed under the Code of Criminal Procedure is to ensure that the accused remains present before the Court to receive the orders and punishments as are passed qua the accused. If the accused shows his sincere intention and desire to appear before the Court, then it would not be unjustified to protect him from being arrested.

Adjourned to 18.11.2019.

In the mean-time, the petitioner shall appear before the Trial Court on or before 01.10.2019. In case petitioner so appears before the Trial Court then the petitioner shall be released on interim bail on his furnishing bail bonds/sureties to the satisfaction of the Trial Court.

However, the facts disclosed in the petition and the zimni orders passed by the Trial Court show a very gloomy picture of the police functioning; and their indifferent conduct vis-a-vis the Court proceedings. The petitioner has placed on record atleast 18 orders passed by the Trial Court. Out of those; on about 16 dates the case was adjourned by the Trial Court only for the reasons that the Police Officers/Officials were not

present as witnesses. Not only this, the Orders also reflect that the Trial Court had gone to the extent of stopping the salary of the Police Officers/Officials for their non-appearance. But even qua that no report was submitted to the Trial Court; whether the salary has been so stopped or not. Still further, surprisingly, even the warrants issued by the Trial Court against the Police Officers/Officials were not executed by the concerned police. Therefore, the entire process undertaken before the Trial Court has turned out to be a joke upon the fundamental right of the petitioner; to life and liberty, which can not be scuttled in the casual manner; as is being done by the prosecution in this case. Hence, certain coercive and pre-emptive directions have become imperative in this case; to ensure that the right of the petitioner as a citizen is not trampled by inefficiency and inaction of the police officers/officials.

Accordingly, it is further ordered that against all the prosecution witnesses, who has not been examined so far the Trial Court shall issue non-bailable warrants within three days from the date of receipt of certified copy of this Order. Superintendent of Police, Moga shall ensure that all the said witnesses are taken into custody within next seven days therefrom and shall report to the Trial Court in this regard. Thereafter all those persons shall be kept in protective custody at District Jail/Sub-Jail Moga, till their examination and cross-

examination is complete.

The SHO, Police Station Kot Ise Khan, District Moga shall remain present in the Court on the next date of hearing; with the detail of the Police Officials who were entrusted with the duty of execution of the warrants issued by the Trial Court; which were not executed by them.

Let the copy of this Order be sent to the Trial Court for necessary compliance.

The counsel for the petitioners has submitted that petitioner No.1 was never summoned as a witness, whereas, the petitioner No.2 though was summoned twice, yet even he was not served by the serving agency. Therefore, they do not deserve to be kept in custody.

However, even the present petitioners have placed on record the order passed by the trial Court. Not only the orders now placed on record by the present petitioners confirm the facts pleaded by the petitioners/accused, in CRM No.M-40382 of 2019, rather these orders go a little bit further. In that case, the accused had pointed out that it was on 16 dates, that the police persons had not been produced or appeared as witnesses. The orders placed on record today by the present petitioners show that, in fact, it were not the 16 dates, rather were 20 dates since 23.12.2016, when the police persons had not been produced or appeared as witnesses and only because of this the trial was not proceeding further for the past more than 2½ years. As per the record, the accused does not appear to be responsible for any delay in trial. He had not even objected to the application of the prosecution moved under Section 311 Cr.P.C., despite the

fact that the prosecution was not examining even the cited witnesses; in the first instance. Even on 2-3 dates, when he sought exemption from personal appearance, he had not taken any objection to the examination of any witnesses in his absence and two witnesses were, in fact, examined in his absence. An accused cannot be expected to do anything more to ensure smooth proceedings of the trial. In the present trial, it is the prosecution and its witnesses, who had virtually blocked the proceedings of the trial, caring in the least, for the liberty of the accused in the trial. It is only the non-production and non-appearance of the witness of the prosecution, which had unduly prolonged the eclipse upon the liberty of the accused; in a totally unjustified manner. Right to life and liberty of a person, even when he is accused of an offence is, in no manner, less precious than that of any witness of prosecution. Hence if the right of an accused is being curtailed by a procedure, which by no means can be categorized as fair and reasonable, then it is a duty cast upon the Court to ensure the course correction, so as to minimise the damage to such right. Hence, the order dated 20.09.2019 has been passed by this Court only to ensure that all the witnesses are available for examination and cross-examination before the trial Court, without fail and without any excuse, real or virtual.

A perusal of the above said order dated 20.09.2019 shows that the trial Court has been directed to issue warrants of arrest against all the witnesses including the present petitioners; who happen to be un-examined witnesses in the case, in their capacity as witnesses and not as any accused. The provision of Section 438 Cr.P.C is exclusively meant for a person, who is apprehending his arrest on account of accusation of a non-bailable

offence. Since, the warrants have been ordered to be issued against the petitioners as witnesses and not as any accused of an offence, therefore, the present petition under Section 438 Cr.P.C is not maintainable.

In view of the above, the petition is dismissed as non-maintainable.

September 26, 2019
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(RAJBIR SEHRAWAT)
JUDGE

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No