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

+ BAIL APPLN. 958/2020

SHEHZADA KHALID

.... Petitioner

Through: Mr. Hemant Choudhary,
Advocate

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Ashish Dutt, APP for the
State

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGEMENT (ORAL)

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10.06.2020

1. This matter has been taken up for hearing by video conferencing.
2. This is an application under Section 438 of Code of Criminal Procedure (Cr.P.C), 1973 for grant of anticipatory bail.
3. Consequent to the preliminary investigation following a report of a shot having been fired in the Jama Masjid area on 10th March, 2020, an FIR was lodged, on the said date, at PS Jama Masjid, under Section 336 IPC read with Section 25 and 27 of the Arms Act, 1959 (hereinafter referred to as “the Arms Act”).

4. Consequent to issuance of notice in this matter, an undated status report has been filed by the SHO, PS Jama Masjid, in which it is stated that, during the course of investigation, the statement of one Asif was recorded, to the effect that he was threatened by Bilal and the applicant, who are brothers, and that Bilal and the applicant had demanded ₹ 5 lakhs from him as extortion money, whereafter the applicant fired in the air by using his pistol.

5. The report of the SHO states, further, that the said deposition of Asif was supported by another witness, namely Kadir.

6. Consequent to the statements of the said witnesses, Sections 387 and 506 read with Section 34 of the IPC were also added, to the provisions invoked in the FIR.

7. The status report states, further, that CCTV footage of the area indicated that the applicant had fired in the air, whereafter his brother Bilal took away his pistol from him.

8. It appears that, non-bailable warrants against Bilal and the applicant, who are absconding, also stand issued by the learned trial court.

9. It is further alleged, in the FIR, that the applicant is a Bad Character (BC) of PS Jama Masjid. Admittedly, as many as 17 criminal cases are registered against the applicant in PS Jama Masjid and PS Chandni Mahal, though Mr. Hemant Choudhary, learned

counsel for the applicant-petitioner, submits that, out of the total 17 cases, in 11 of the said cases, the applicant stands acquitted and in the remaining 6 cases, which are at the stage of trial, he has been enlarged on bail.

10. A reply has been filed, by the applicant, to the aforesaid status report of the State.

11. There is no denial, therein, whatsoever, of the allegations, in the status report, regarding the statements of Asif or Kadir or the CCTV footage.

12. In fact, all that the reply states, by way of a traversal to the contents of the status report, apart from emphasising the fact that the applicant stands acquitted in 11 cases and enlarged on bail in the remaining 6 cases, is to be found in the following passages:

“That is on the record, that PCR call vide DD No. 5A dated 10.03.2020 regarding BC of PS Jama Masjid has fired in the air in Gali Godne Wali, Kala Mahal, Jama Masjid was received at PS Jama Masjid. On receipt of the above PCR call SI Rakesh Kumar along with staff reached at the spot i.e. at Gali Godne Wali, where one empty cartridge (fired cartridge) was found on the spot which was taken into police possession through seizure memo. No person gave any statement regarding on the basis of PCR call DD No. 5A dated 10.03.2020 and investigation of the case was taken up.

That it is wrong that applicant ever demanded Rs.5 lakh from witness/victim Asif as extortion money from him. It is also wrong that applicant, fired in the air from his pistol. It is also wrong that thereafter co accused Bilal took away the pistol from the applicant. It is pertinent to mention here that the applicant has nothing to with the alleged offence stated in

the FIR, as the applicant on 10.03.2020 the applicant was shooting a TIK TOK video clip in his locality by using a Pistol Cigarette Lighter.”

13. Anticipatory bail, it is well settled, is an exceptional remedy to be granted in exceptional cases. The parameters and considerations, governing grant of anticipatory bail, have been reported by the Supreme Court in case after case and, after a detailed analysis of all precedents relevant to the issue, the Supreme Court has, in its recent judgment in *P. Chidambaram v. Directorate of Enforcement*¹, set out the following principles, governing grant of anticipatory bail:

“**69.** 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 CrPC 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 the 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.

70. On behalf of the appellant, much arguments were advanced contending that anticipatory bail is a facet of Article 21 of the Constitution of India. It was contended that unless custodial interrogation is warranted, in the facts and circumstances of the case, denial of anticipatory bail would amount to denial of the right conferred upon the appellant under Article 21 of the Constitution of India.

¹ (2009) 9 SCC 24

71. Article 21 of the Constitution of India states that no person shall be deprived of his life or personal liberty except according to procedure prescribed by law. However, the power conferred by Article 21 of the Constitution of India is not unfettered and is qualified by the later part of the Article i.e. "...except according to a procedure prescribed by law". In *State of M.P. v. Ram Kishna Balothia* [(1995) 3 SCC 221: 1995 SCC (Cri) 439], the Supreme Court held that the right of anticipatory bail is not a part of Article 21 of the Constitution of India and held as under: (SCC p. 226, para 7)

"7. ... We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code. The Law Commission in its 41st Report recommended introduction of a provision for grant of anticipatory bail. It observed:

'We agree that this would be a useful advantage. Though we must add that it is in very exceptional cases that such power should be exercised.'

In the light of this recommendation, Section 438 was incorporated, for the first time, in the Criminal Procedure Code of 1973. Looking to the cautious recommendation of the Law Commission, the power to grant anticipatory bail is conferred only on a Court of Session or the High Court. *Also, anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21.*"

(emphasis supplied)

72. We are conscious of the fact that the legislative intent behind the introduction of Section 438 CrPC is to safeguard the individual's personal liberty and to protect him from the possibility of being humiliated and from being subjected to

unnecessary police custody. However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights—safeguarding the personal liberty of an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights conferred upon the appellant under Article 21 of the Constitution of India.

73. The learned Solicitor General has submitted that depending upon the facts of each case, it is for the investigating agency to confront the accused with the material, only when the accused is in custody. It was submitted that the statutory right under Section 19 of PMLA has an in-built safeguard against arbitrary exercise of power of arrest by the investigating officer. Submitting that custodial interrogation is a recognised mode of interrogation which is not only permissible but has been held to be more effective, the learned Solicitor General placed reliance upon *State v. Anil Sharma* [(1997) 7 SCC 187 : 1997 SCC (Cri) 1039] ; *Sudhir v. State of Maharashtra* [(2016) 1 SCC 146 : (2016) 1 SCC (Cri) 234: (2016) 1 SCC (L&S) 48] ; and *Directorate of Enforcement v. Hassan Ali Khan* [2011] 12 SCC 684 : (2012) 2 SCC (Cri) 612] .

74. 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 v. Anil Sharma* [(1997) 7 SCC 187 : 1997 SCC (Cri) 1039], the Supreme Court held as under: (SCC p. 189, para 6)

“6. We find force in the submission of 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 informations 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.”

75. Observing that the arrest is a part of the investigation intended to secure several purposes, in *Adri Dharan Das v. State of W.B. [(2005) 4 SCC 303 : 2005 SCC (Cri) 933]* , it was held as under: (SCC p. 313, para 19)

“19. Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well defined and the jurisdictional scope of interference by the court in the process of

investigation is limited. The court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code.”

76. In *Siddharam Satlingappa Mhetre v. State of Maharashtra [(2011) 1 SCC 694: (2011) 1 SCC (Cri) 514]*, 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.

77. After referring to *Siddharam Satlingappa Mhetre [(2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514]* and other judgments and observing that anticipatory bail can be granted only in exceptional circumstances, in *Jai Prakash Singh v. State of Bihar [(2012) 4 SCC 379 : (2012) 2 SCC (Cri) 468]*, the Supreme Court held as under: (SCC p. 386, para 19)

“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 enroled in the crime and would not misuse his liberty. (See *D.K. Ganesh Babu v. P.T. Manokaran [(2007) 4 SCC 434 : (2007) 2 SCC (Cri) 345]*, *State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain [(2008) 1 SCC 213: (2008) 1 SCC (Cri) 176]* and *Union of India v. Padam Narain Aggarwal [(2008) 13 SCC 305: (2009) 1 SCC (Cri) 1]*)”

14. Applying the above principles, to the facts at hand, I am of the opinion that no case, for grant of anticipatory bail, to the petitioner, can be said to be made out, especially, in view of statement of Asif, allegedly supported by Kadir, and the allegation that the CCTV footage of the incident revealed that the applicant had, indeed, fired in the air with his pistol.

15. Resultantly, the application for anticipatory bail is dismissed.

16. Needless to say, all observations, in this matter, relate only to the applicant's prayer for anticipatory bail, and may not be treated as an expression of opinion, even, *prima facie*, regarding the allegations of the prosecution, the correctness whereof would have to be determined during the trial.

17. Copy of this judgement be uploaded on the website of this Court as soon as possible, and also forwarded to learned counsel for the parties via email.

C. HARI SHANKAR, J.

JUNE 10, 2020

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