

147, 148, 149, 323, 324, 326, 504, 506 of the Indian Penal Code (for short "IPC"). The First Information Report (for short "FIR") was lodged on 3rd October, 2019.

2. The case of the prosecution is that on 12th September, 2019, son of the complainant Suraj went to the shop. Since he did not return for quite some time, the complainant went in search of him. He noticed that the accused were abusing and assaulting him. Applicant No.1 was armed with stick. Applicant No.2 was armed with iron rod and applicant No.3 was armed with belt. All of them assaulted the injured. Applicant No.1 has assaulted the injured by stick on head, Applicant No.2 had assaulted by iron rod on back, applicant No.3 assaulted by belt and applicant No.4 had assaulted by kick and fist blows. One Mahesh Ganje was assaulted by kick and fist blows by Nilesh Patil and Khandu Ganje was assaulted by Mahesh Patil with fist blows. Injured Suraj was taken to the Hospital for treatment.

3. Applicants were arrested and they were remanded to custody. They preferred application for bail before the Court of learned J.M.F.C. The said application was allowed by order dated 20th October, 2019. On 23.10.2019, report was submitted that section 307 IPC has been added. Investigation proceeded and on completing the investigation charge sheet was filed before the J.M.F.C. for the offences under sections 143, 144, 147, 148, 149, 307, 324, 504, 506 IPC on

12.08.2020 and the case is numbered as RCC No. 137 of 2020. Learned JMFC issued summons to the applicants and other accused. Since section 307 IPC was invoked, the applicants and the co accused apprehended that they may be taken into custody on their appearance before the learned JMFC. In view of this apprehension, all of them had preferred application for anticipatory bail before the Court of Sessions. The application was partly allowed. Some of the accused were granted bail whereas application preferred by the applicants herein was rejected vide order dated 16.02.2021.

4. In view of the order rejecting application for anticipatory bail, the applicants have approached this court seeking relief under section 438 Cr.P.C.

5. Learned counsel for the applicant submitted that initially, offences were registered under sections 323, 324, 326 IPC and other offences. The applicants were arrested. On completing the investigation they were granted bail. It is submitted that section 307 IPC was invoked subsequently. Except the fact that there is addition of Section 307 IPC, there is no other new circumstance to subject the applicants to custodial interrogation. The learned Magistrate, while granting bail to the applicants, had taken into consideration various aspects and on certain conditions, bail was granted to them. The learned Sessions Judge had allowed the application for anticipatory bail

preferred by some of the accused while the application of the applicants was rejected.

6. Learned A.P.P. submitted that although the offences were primarily registered under sections 323, 324, 326 etc. of IPC, the investigation revealed that offence under section 307 IPC is made out. Hence charge sheet is submitted to the Court on 12.08.2020 with additional charge under section 307 IPC. The offence is of serious nature. Statement of injured Suraj Ganje was recorded on 11.11.2019. Injury certificate of injured was collected. The injured was taking treatment. The applicants are not entitled for anticipatory bail. Learned Sessions Judge has rightly rejected the application of the applicants for anticipatory bail. Son of the first informant was assaulted by stick, iron rod and belt. The injured sustained injury to head. The applicants would tamper with the evidence. There is likelihood of pressurizing the witnesses. It is submitted that there is strong evidence against the applicants. All of them were attributed specific overt act. Statements of witnesses were recorded. Injury certificate shows that the injured was admitted to the Hospital in unconscious state with history of assault. Learned Magistrate, while granting bail, has not considered seriousness of the offence. Section 307 was not invoked at that point of time. Hence this application may be rejected.

7. Learned A.P.P. pointed the decision of Apex Court in the case of Pradeep Ram Vs. State of Jharkhand & another [(2019) 17 Supreme

Court Cases 326] and order dated 20th July, 2021 passed by this Court in Criminal Writ Petition No. 221/2021 to contend that it was not mandatory to cancel bail on addition of graver offence.

8. Learned counsel for the complainant submitted that the accused have committed offence of attempt to commit murder. Accused were members of unlawful assembly and they assaulted the injured by stick, iron rod and belt. Serious injury is caused to the head of the injured. Statement of injured could not be recorded immediately due to state of his condition. Custodial interrogation of the accused is necessary for investigating the offence under section 307 IPC. Investigation is not completed. There is head injury and stitches on the head of son of the first informant. Bail for offence under section 307 IPC is never granted. Offence under section 307 IPC is punishable with imprisonment for life. The learned Sessions Judge has rightly rejected the application for anticipatory bail.

9. FIR was registered by Shivaji Ganje on 3rd October, 2019. Alleged incident had occurred on 12th September, 2021. Complainant's son was allegedly assaulted by the accused. Applicant No.1 was holding stick, Applicant No.2 was holding iron rod and applicant No.3 was holding belt. It is alleged that applicant No.1 had assaulted by stick on head and applicant No.2 had assaulted by iron rod on back. Applicant No.3 assaulted by belt and applicant No.4 assaulted by kick and fist blows. Mahesh Ganje was assaulted by kick and fist blows by Nilesh

Patil. Khandu Ganje was assaulted by Mahesh Patil with fist blows and first informant was assaulted by fist blows by applicant No.4. The applicants were arrested on 17.10.2019 for the offence under sections 307, 143, 144, 147, 148, 149, 323, 324, 326, 504, 506 IPC. They were produced before the concerned Court for remand. The applicants were remanded to police custody on 1st November, 2019. Subsequently, on 19.10.2019, they were remanded to Magisterial custody. The applicants preferred an application for bail before the Court of J.M.F.C., Tuljapur. It was allowed by order dated 20th October, 2019.

10. In the application for bail it was contended by the accused that allegations in the FIR are vague. There is delay of 21 days in registering the FIR. Weapons were recovered. The accused are ready to cooperate with investigation. They will not abscond. They do not have antecedents. The prosecution had opposed the bail on the ground that the offences are serious in nature. Investigation is incomplete. The accused are likely to commit similar offences. There is possibility of tampering with prosecution witnesses. Learned Magistrate, while allowing the application, had observed that as far as contention of the learned APP that there is possibility of tampering prosecution witnesses, condition can be imposed on the accused to that effect. The accused are ready to abide by any condition and in case of breach of any condition, the Court can cancel the bail. Offence under section 326 IPC is punishable with life imprisonment or 10 years imprisonment.

11. Charge sheet is filed against the accused for the offences under section 143, 144, 147, 148, 149, 307, 324, 323, 504 and 506 IPC. The Court took cognizance of the charge sheet and issued summons to the applicants. Since charge sheet was filed under section 307 IPC, the applicants apprehended that they might be taken in custody if they appear before the Court of learned Magistrate. In this scenario, the applicants preferred application for anticipatory bail before the Court of Sessions. The application was preferred by about 21 accused including the applicants on 02.02.2021. In the application it was contended that charge sheet is filed and section 307 is added in the charge sheet. The applicants had received summons from the court of Magistrate. As the offence under section 307 is exclusively triable by the Court of Sessions, there is sufficient apprehension of arrest by the Lower Court and since the Lower Court had no power to release the applicants on bail, they might be remanded to custody when they appear before the Court.

12. The application for anticipatory bail was opposed by the prosecution. It was contended that the offence is serious and the informant was assaulted with weapons resulting in injury. The learned Sessions Judge, while adjudicating the said application, had considered the factual aspects of the matter and role attributed to the accused, injuries sustained by the injured and punishment prescribed under section 307 IPC and rejected the application preferred by the applicants

on the ground that they do not deserve to be released on anticipatory bail under section 438 Cr.P.C. It is also relevant to note that considering the role attributed to the other accused it was observed that there was no need of custodial interrogation of the remaining accused for the offence punishable under section 307 IPC and they were granted relief under section 438 IPC. From the order it is apparent that the learned Sessions Judge has considered the submissions of the prosecution that the custodial interrogation of the applicants is necessary.

13. The investigating agency had invoked section 307 IPC during the course of investigation and filed charge sheet under section 307 IPC. Section 307 IPC was added on 23.10.2019. Charge sheet was filed on 12.08.2020. Thus, the investigating agency had never sought custody of the applicant during investigation and after filing of the charge-sheet for the offence under section 307 IPC alongwith other offences. When the application was preferred by the applicants under section 438 Cr.P.C., it was contended by the prosecution that the applicants have committed serious offence. The learned Sessions Judge committed error while observing that anticipatory bail cannot be granted to the applicants in view of offence punishable under section 307 IPC. For co-accused, it was observed that considering their minor role there is no need of custodial interrogation of the remaining accused. Thus, from the order, it can be inferred that the court was of the opinion that applicants custody is necessary. The learned Magistrate had already

taken cognizance of the charge-sheet and issued summons. It is only in peculiar circumstance, the applicants were required to approach the Sessions Court. It is obvious that while the applicants had appeared before the Court of Magistrate, the prosecution could have advanced the same submission which could have resulted in subjecting the applicants to custody by the learned Magistrate.

14. Initially the applicants were in police custody and subsequently in magisterial custody. The learned Magistrate had considered the role attributed to the accused and the objections of the prosecution and granted bail. Except adding section 307 IPC on the basis of injuries, there is no other change in factual matrix of the case. Charge sheet was already filed against the applicants. Hence, by way of abundant caution, the applicants had preferred an application for anticipatory bail. The statement of injured Suraj Ganje was recorded on 11.11.2019. The version is similar to first informant. He has stated that he regained consciousness on 18.09.2019. He was discharged from hospital on 07.10.2019. He continued to take treatment in CNS Hospital. Bail was granted on 20.10.2019

15. The decision in the case of **Pradeep Ram (Supra)** is in different context. One of the question therein was whether it is necessary to cancel the bail granted to the accused where further cognizable and non-bailable offences are added. In paragraph 31 of the said decision it was observed that after grant of bail to an accused, further cognizable

and non-bailable offences are added, the accused have different options such as (i) the accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can be arrested. The investigating agency can seek order from the court under section 437(5) or 439(2) Cr.P.C. for arrest of the accused and his custody. The Court, in exercise of power under 437(5) or 439(2) Cr.P.C., can direct for taking into custody the accused who was already been granted bail after cancellation of bail. The Court in exercise of power under 437(5) or 439(2) Cr.P.C. can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-cognizable offences which may not be necessary always with order of cancelling of earlier bail. It was also observed that in a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it need to obtain an order to arrest the accused from the Court which had granted the bail.

16. In the present case, it is not contention of applicants that before arrest in present case, their regular bail ought to have been cancelled. The investigating agency had not sought their arrest on invoking section 307 IPC. In the present case, offence under section 307 was added and charge sheet was filed. The investigating agency was not seeking custody for the purpose of investigation. The

investigating agency had not sought any order under section 437(5) or 439(2) Cr.P.C. for arrest of the accused and their custody. The court, in exercise of powers under section 437(5) or 439(2) Cr.P.C. did not direct for taking into custody of the accused who were granted bail after cancellation of first bail. The court had not directed in exercise of powers under section 437(5) or 439(2) Cr.P.C. that the person who is already on bail to be arrested and committed to custody on account of graver and non-bailable offence. The Investigating agency, on addition of offence did not obtain any order to arrest the accused from the court which had granted bail. It is apparent that the investigating agency was not interested in arresting the accused and thus filed charge-sheet with graver offence without seeking their rearrest.

17. The aforesaid observation would indicate that it is not that it is mandatory to cancel the bail granted earlier when graver offence is registered. However, the other options stipulated in the decision were also not opted by the investigating agency. In the circumstance, the applicants cannot be subjected to custody. The applicants were caught up in such a situation that by way of abundant caution to prevent them from being arrested for the offence under section 307 IPC, they approached the Court under section 438 Cr.P.C. It would be relevant to note that their application under section 438 Cr.P.C. was opposed by prosecution. The learned Sessions Judge rejected the application on

the basis of overt act of applicants. For the reasons stated herein above and considering factual aspects of the case, I pass the following order :-

ORDER

- i. Anticipatory Bail Application No. 201 of 2021 is allowed;
- ii. In the event of arrest of the applicants in C.R. No.91/2019 registered with Tamalwadi Police Station, Tq. Tuljapur, District Osmanabad, the applicants be released on bail on executing PR bond in the sum of Rs. 25,000/- each, with one or more sureties in the like amount;
- iii. The anticipatory bail application stands disposed of accordingly.

(PRAKASH D. NAIK, J.)

JPC