

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

Reserved on : 19.02.2021

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Pronounced on : 03.03.2021

+ **BAIL APPLN. 326/2021**

ATUL BIDHURI

..... Petitioner

Through: Mr. Jatan Singh and Mr. Saurav Joon,
Advocates.

versus

THE STATE, GOVT. OF NCT OF DELHI

..... Respondent

Through: Mr. Mukesh Kumar, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

ORDER

RAJNISH BHATNAGAR, J.

1. By way of this order, I shall dispose of the present petition filed under Section 438 read with section 482 Cr.P.C. on behalf of the petitioner for grant of anticipatory bail in case FIR No. 422/2020 U/s 279/186/353/307/332 IPC registered at Police Station Sarita Vihar.

2. Briefly stated, the facts of the case are that in the intervening night of 3-4 November, 2020, Ct. Jitender No. 2299/SE and Ct. Ankur No. 1741/SE were on patrolling duty on service bike with regd. No.

DL1SAA3168 and No. DL1SAA 9203 respectively. At about 12:05 a.m., both police officials reached at H-Pocket market, Sarita Vihar. They saw that one BMW car bearing regd. No. HR 51 BU 0059 was parked near PNB ATM. There was a cake on the said car and few boys were making noise. Ct. Jitender and Ct. Ankur asked them not to make noise and requested to go their homes. They did not leave the said place and even started arguing and abusing with police officer and said *“HUM YAHA KE LOKAL HAI, HAME KAUN ROK SAKTA HAI. AUR HUM YHAHI KHULE ME JANAM DIN PARTY KARENGE.* Thereafter, Ct. Ankur called ERV staff of PS Sarita Vihar. On seeing ERV vehicle, they ran towards Janta Flats, Madanpur Khadar. They were followed by ERV. Offending car took a turn near K-Pocket divider and ran towards ABC pocket, Sarita Vihar. Ct. Jitender and Ct. Ankur signaled them to stop but car driver tried to hit Ankur, who jumped and saved himself. Thereafter car driver, hit the car bearing No. HR51BU0059 to Ct. Jitender and ran over the car upon him which crushed his both legs and ran away. Thereafter, the said car was found hitting a juice corner near Umer Masjid, Khadar Mode. One person was also found injured on this spot too. On inspecting the car, it was found that door of the car was open. Beer bottle and namkeen was also lying inside the car. In this regard a case U/s 279/186/353/332/307/427/34 IPC was registered. The alleged vehicle i.e. BMW car and

one i-phone was taken into possession and deposited in Malkhana of police station.

3. During investigation MLC of Ct. Jitender was deposited at Apollo Hospital, on which doctor opined the nature of injury as grievous. During the course of investigation, accused Kuldeep Bidhudi S/o Ved Prakash was arrested and during interrogation, he stated that 04.11.2020 was his birthday. He went to Nawada village Faridabad in his Scorpio car to his cousin home Satish Bhadana at about 8 p.m and taken BMW car from him and left his Scorpio car there. Thereafter he picked petitioner from Sundar Public School, Madanpur Khadar in his car and reached at H-Pocket, Market, Sarita Vihar. Thereafter their other friends also joined them and they started celebrating his birthday party. All friends consumed liquor and were bursting fire crackers on the road.

4. During investigation, notice U/s 41 A Cr.P.C. was served on the petitioner/accused to join the investigation but he did not join and despite the best efforts, the petitioner/accused could not be arrested as he was not found residing at his address and intentionally hiding himself. On 03.12.2020, NBW issued by the Court of Ms. Deepali Srivastva, Ld. MM, Saket Court against petitioner/accused and other associates but the same remained unexecuted as all the accused are still

at large and evading their arrest. Further on 14.12.2020, proclamation U/s 82 Cr.P.C of petitioner was issued by the Court.

5. The petitioner/accused filed anticipatory bail application before the ASJ Court and the court directed him to join investigation. Accordingly on 06.01.2021, he joined the investigation and during interrogation, he stated that on 03.11.2020 at about 11:30 p.m., he had gone alone on foot to H-pocket market to celebrate Kuldeep Bidhuri birthday. He was neither driving nor sitting in BMW car. After the birthday party, he went straight alone to his house on foot.

6. According to the prosecution, the petitioner joined the investigation but had not co-operated in the investigation and just in order to make a ground for bail he had come to the police station but has given evasive answers. According to the prosecution CDR of the petitioner was analyzed which indicated that at the time of the incident he was present at the spot and after committing the crime he had run away from their and wandered around all the night and talked to his friends on phone and never went to his house as stated by him during his interrogation.

7. I have heard the Ld. counsel for the petitioner, Ld. APP for the State and perused the records of the case.

8. It is submitted by the counsel for the petitioner that the petitioner is not named in the FIR and the offending vehicle did not belong to him. He further submitted that the petitioner had joined the investigation in pursuance to notice U/s 41 A Cr.P.C. and he was granted interim protection vide order dated 29.12.2020. He further submitted that the mobile phone and SIM card of the petitioner has been seized by the police and no further recovery is to be effected from him. He further submitted that the petitioner has left the spot prior to the alleged incident and his custodial interrogation is not required. He further submitted that the petitioner has clean past antecedents and some of the co-accused have been released on regular bail and some of the co-accused have been granted anticipatory bail. Ld. counsel for the petitioner has relied upon Siddharam Satlingappa Mhetre Vs. State of Maharashtra, Criminal Appeal No. 2271 of 2010 (Arising out of SLP (Crl.) No. 7615 of 2009) decided on 02.12.2010 by the Supreme Court and Santosh Vs. The State of Maharashtra, Criminal Appeal No. 1759 of 2017 (Arising out of S.L.P. (Criminal) No. 8439 of 2016) Decided on 10.10.2017.

9. On the other hand, it is submitted by the Ld. APP for the state that the allegations against the petitioner are grave and serious in nature. He is the person who was driving the offending vehicle. It is further submitted by the Ld. APP that during the intervening night of 3/4 November 2020, Ct. Jitender and Ct. Ankur were on patrolling duty

on their bikes and when they reached at H-Pocket Market, Sarita Vihar, they saw one BMW car bearing registration No. HR 51 BU0059 parked near PNB ATM on the bonnet of which cake was kept and some boys were making noise. It is further submitted by the Ld. APP that when the police officials objected to their behaviour those boys including the petitioner started abusing them. It is further submitted by the Ld. APP that petitioner was driving the offending vehicle and when ERV staff was called by Ct. Ankur then all the boys present there started running and the petitioner/applicant drove the offending vehicle towards Sarita Vihar and tried to hit constable Ankur.

10. It is further submitted by the Ld. APP that Ct. Ankur somehow saved himself but the petitioner hit Ct. Jitender and crushed both his legs and thereafter he drove away the offending vehicle. He further submitted that when the offending vehicle was chased, it hit against a juice corner near Umer Masjid . It is further submitted by the Ld. APP that on inspecting the car one beer bottle and packet of namkeen was found inside it. It is further submitted by the Ld. APP that the petitioner has no respect for the law of land and he was disturbing the peace and tranquility of the area. He further submitted that the petitioner alongwith his friends was also bursting crackers at the mid of night which is against the orders of the Supreme Court. He further submitted that the injured had sustained grievous injuries at the hands of the petitioner who was driving the offending vehicle. He further

submitted that since the petitioner was under interim protection, he did not co-operate during the interrogation and his TIP is to be conducted.

11. At this stage it may be noted that in the case of **Bhadresh Bipinbhai Sheth Vs. State Of Gujarat & Another** (Criminal Appeal Nos. 1134-1135 Of 2015 Arising Out Of Special Leave Petition (Crl.) Nos. 6028-6029 Of 2014), Hon'ble SC discussed and reviews the law relating to section 438 Cr.P.C.

12. A judgment which needs to be pointed out is a Constitution Bench Judgment in the case Gurbaksh Singh Sibbia and Other vs. State of Punjab (1980 AIR 1632; 1980 SCR(3) 383), 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:

“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.”

13. Though the Court observed that the principles which govern the grant of ordinary bail may not furnish an exact parallel to the right to anticipatory bail, still such principles have to be kept in mind, namely, the object of bail which is to secure the attendance of the accused at the trial, and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. The Court has also to consider whether there is any possibility of the accused tampering with evidence or influencing witnesses etc. Once these tests are satisfied, bail should be granted to an under trial which is also important as viewed from another angle, namely, an accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. Thus, grant or non-grant of bail depends upon a variety of circumstances and the cumulative effect thereof enters into judicial verdict. The Court stresses that any single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail. After clarifying this position, the Court discussed the inferences of anticipatory bail in the following manner:

“31. In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the

applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in *The State v. Captain Jagjit Singh*, AIR 1962 SC 253 : (1962) 3 SCR 622 : (1962) 1 Cri LJ 216, which, though, was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the

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

14. It is pertinent to note that while interpreting the expression “may, if it thinks fit” occurring in Section 438(1) of the Code, the Court pointed out that it gives discretion to the Court to exercise the power in a particular case or not, and once such a discretion is there merely because the accused is charged with a serious offence may not by itself be the reason to refuse the grant of anticipatory bail if the circumstances are otherwise justified. At the same time, it is also the obligation of the applicant to make out a case for grant of anticipatory bail. But that would not mean that he has to make out a “special case”. The Court also remarked that a wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use.

15. Another case which can be referred to is *Siddharam Satlingappa Mhetre v. State of Maharashtra and Others* (SLP(CRL.) 7615/2009 DATED 02-12-2021). This case lays down an exhaustive commentary of Section 438 of the Code covering, in an erudite fashion, almost all the aspects and in the process relies upon the aforesaid Constitution Bench judgment in *Gurbaksh Singh's* case. In the very first para, the Court highlighted the conflicting

interests which are to be balanced while taking a decision as to whether bail is to be granted or not, as is clear from the following observations:

“1.This appeal involves issues of great public importance pertaining to the importance of individual's personal liberty and the society's interest. Society has a vital interest in grant or refusal of bail because every criminal offence is the offence against the State. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society. The law of bails dovetails two conflicting interests, namely, on the one hand, the requirements of shielding society from the hazards of those committing crimes and potentiality of repeating the same crime while on bail and on the other hand, absolute adherence to the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty.....”

16. The principles which can be culled out 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. 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 plentitude 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) 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 over implication 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.

17. It has been rightly pointed out by the Ld. APP that the case of the petitioner is different from the case of the accused persons who have been released on bail. As per the case of the prosecution, the petitioner alongwith his co-accused were making merry, drinking and were also bursting crackers on the road in the intervening night of 3-4 November, 2020 at about 12:05 a.m. In the process, they were disturbing the peace and tranquility of the area. When two police constables namely Ct. Jitender and Ct. Ankur objected and questioned their such behaviour, they started arguing with them. When the said constables called for enforcement, the accused persons started escaping from the spot.

18. While the petitioner was escaping from the spot alongwith his co-accused Kuldeep Vidhuri in his BMW car, Ct. Jitender tried to stop him, but the petitioner ran over Ct. Jitender and crushed his both legs as he was not able to save himself from the charging car unlike Ct. Ankur, who was able to save himself. As per the MLC of injured Ct. Jitender, the injuries have been opined to be grievous in nature. When the BMW car was seized after it had rammed a juice corner, namkeen and beer bottles were found lying in the car.

19. The conduct of the petitioner shows that he has no respect for the law enforcing agency i.e. police in the instant case. Such offences where the law enforcing agencies are at the receiving end are on considerable rise these days. These types of incidents have put a question mark on the fundamental rights to life, liberty and fearless movement of general public. The allegations against the petitioner are grave and serious in nature. No ground for anticipatory bail is made out. The application is, therefore, dismissed.

20. Nothing stated hereinabove shall tantamount to the expression of any opinion on the merits of the case.

RAJNISH BHATNAGAR, J

MARCH 03, 2021

Sumant