

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

928 CRIMINAL WRIT PETITION NO.563 OF 2022

YASHWANT SAMBHAJI WANKHEDE

VERSUS

THE STATE OF MAHARASHTRA

...

Mr. D.M. Shinde, Advocate for the petitioner

Mr. B.V. Virdhe, APP for the sole respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 05th JULY, 2022

ORDER :

1 By invoking the constitutional powers of this Court under Article 227 of the Constitution of India and inherent powers under Section 482 of the Code of Criminal Procedure, 1973 the petitioner, who is the original accused, intends to challenge the order passed by learned Additional Sessions Judge, Hingoli in Criminal Bail Application No.99/2022 dated 06.04.2022, whereby by exercising powers under Section 439(2) of the Code of Criminal Procedure the learned Additional Sessions Judge, Hingoli has cancelled bail granted by learned Judicial Magistrate First Class, Kalamnuri to the present petitioner in Crime No.26/2022, for the offence punishable under Section

376(2)(n), 506 of the Indian Penal Code, 1860, registered with Kalamnuri Police Station. The present petitioner was directed to surrender before learned Judicial Magistrate First Class, Kalamnuri on 20.04.2022.

2 Heard learned Advocate Mr. D.M. Shinde for the petitioner and learned APP Mr. B.V. Virdhe for the sole respondent.

3 It has been vehemently submitted on behalf of the petitioner that on the basis of First Information Report lodged by the prosecutrix, who was aged 32, against the petitioner the said offence came to be registered under Section 376, 506 of the Indian Penal Code. The petitioner came to be arrested on 20.01.2022 and thereafter he filed application for bail on 25.01.2022 under Section 437 of the Code of Criminal Procedure. The prosecution took strong objection and submitted that since it is the offence which is exclusively triable by the Court of Sessions, the accused cannot be released on bail. The learned Judicial Magistrate First Class, Kalamnuri by giving a detailed order allowed the said application on 31.01.2022, by imposing certain conditions. However, the prosecution filed application under Section 439(2) of the Code of Criminal Procedure vide Criminal Miscellaneous Bail Application No.99/2022. The petitioner objected to the same. However, the learned Additional Sessions Judge, Hingoli allowed that

application and set aside the order of granting bail to the petitioner passed by learned Judicial Magistrate First Class, Kalamnuri. The learned Additional Sessions Judge, Hingoli failed to consider that there was no embargo to learned Judicial Magistrate First Class, Kalamnuri to consider the bail application under Section 437 of the Code of Criminal Procedure. Perusal of the First Information Report lodged by prosecutrix, aged 32, would show that she was married to some another person in the year 2006 itself and she was having son aged 11 years. She got acquaintance with the petitioner who was a Teacher in a school. He developed the acquaintance and then there was proposal by him after saying that he loves her and they would perform marriage. However, it was refused by the prosecutrix, but then she states that by giving threats time and again she started talking and loving to the petitioner. According to her, the physical relationship developed since January, 2017 and she has then twisted by saying that the sexual acts which were done by the petitioner with her were against her wish. She has then stated that there was divorce between her and her husband and thereafter also the physical relations between them continued from 2017 to February, 2021. She has also then stated that though it was promised to her that he would perform marriage to her, the petitioner had performed marriage with another lady in 2018 itself. Taking into consideration all these facts the learned Magistrate has held that the case appears to be that of consensual sex

and no offence of rape can be said to have been committed by the petitioner and then he granted the application. No illegality or wrong was ever committed by the learned Judicial Magistrate First Class, Kalamnuri but the learned Additional Sessions Judge, Hingoli has wrongly inferred that learned Judicial Magistrate First Class has unnecessarily exercised his jurisdiction. It was not considered by the learned Additional Sessions Judge that the learned Judicial Magistrate First Class, Kalamnuri had relied on **Pralhad Singh Bhati vs. NCT, Delhi and another, (2001) 4 Supreme Court Cases 280**, wherein it has been held that the Magistrate may, in his wisdom, refrain from exercising the said jurisdiction but then in the said case itself it has been observed that there was no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by the Court of Sessions. The learned Magistrate in this case had made endeavour to consider the entire First Information Report and has also considered as to how it is a case of consensual sex and not of a “rape”. Learned Additional Sessions Judge ought not to have interfered that the order of grant of bail by learned Judicial Magistrate First Class, especially under Section 439(2) of the Code of Criminal Procedure, when under that provision it ought to have been shown by the prosecution that grave prejudice has been caused. When bail is granted and liberty was restored to the petitioner, it ought not to have been so taken away under Section 439(2) of the Code of Criminal Procedure.

4 Per contra, the learned APP strongly opposed the petition and supported the reasons given by the learned Additional Sessions Judge, Hingoli. He also submitted that if the Courts of Magistrate are allowed to dissect the First Information Report disclosing the offences exclusively triable by Court of Sessions, then, it will lead to chaos. No doubt, there is no legal bar as such, but, any Magistrate can exercise this jurisdiction only in extreme cases wherein from the facts of the case apparent as they are, no offence which can be said to be a triable by the Court of Sessions are transpiring. Even as regards the bail applications under Sections 438 and 439 of the Code of Criminal Procedure are concerned, there are governing principles which are to be adhered to by the Courts before whom such applications can be filed. Under such assumed jurisdiction any Magistrate cannot be allowed to travel beyond his/her powers.

5 At the outset, it is to be noted that on the basis of the First Information Report lodged by the prosecutrix offence that was registered was under Section 376, 506 of the Indian Penal Code, which was exclusively triable by Court of Sessions. The bail application which was filed before the Magistrate was under Section 437 of the Code of Criminal Procedure by the accused. We will have to consider the ratio laid down in **Pralhad Singh Bhati** (supra) -

“5. Chapter XXXIII relates to the provisions as to bails and bonds. Section 436 provides that when any person accused of a bailable offence is arrested or detained without warrant by an officer in charge of the police station, or appears or is brought before a court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person shall be released on bail. Under Section 437 of the Code when a person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court, he may be released on bail by a court other than the High Court and Sessions subject to the conditions that he does not reasonably appear to have been guilty of an offence punishable with death or imprisonment for life. The condition of not releasing the person on bail charged with an offence punishable with death or imprisonment for life shall not be applicable if such person is under the age of 16 years or is a woman or is sick or infirm, subject to such conditions as may be imposed. It does not, however, mean that persons specified in the first proviso to sub-section (1) of Section 437 should necessarily be released on bail. The proviso is an enabling provision which confers jurisdiction upon a court, other than the High Court and the court of Sessions, to release a person on bail despite the fact that there appears reasonable ground for believing that such person has been guilty of an offence punishable with death or imprisonment for life. There is no gainsaying that the discretion conferred by the Code has to be exercised judicially. Section 438 of the Code empowers the High Court and the Court of Sessions to grant anticipatory bail to a person who apprehends his arrest, subject to the conditions specified under sub-section (2) thereof.

6. *Even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a court of Sessions yet it would be proper and appropriate that in such a case the Magistrate directs the accused person to approach the Court of Sessions for the purposes of getting the relief of bail. Even in a case where any Magistrate opts to make an adventure of exercising the powers under Section 437 of the Code in respect of a person who is, suspected of the commission of such an offence, arrested and detained in that connection, such Magistrate has to specifically negativate the existence of reasonable ground for believing that such accused is guilty of an offence punishable with the sentence of death or imprisonment for life. In a case, where the Magistrate has no occasion and in fact does not find, that there were no reasonable grounds to believe that the accused had not committed the offence punishable with death or imprisonment for life, he shall be deemed to be having no jurisdiction to enlarge the accused on bail.*

7. *Powers of the Magistrate, while dealing with the applications for grant of bail, are regulated by the punishment prescribed for the offence in which the bail is sought. Generally speaking if punishment prescribed is for imprisonment for life and death penalty and the offence is exclusively triable by the Court of Sessions, Magistrate has no jurisdiction to grant bail unless the matter is covered by the provisos attached to Section 437 of the Code. The limitations circumscribing the jurisdiction of the Magistrate are evident and apparent. Assumption of jurisdiction to entertain the application is distinguishable from the exercise of the jurisdiction.*

8. *The jurisdiction to grant bail has to be exercised on the basis of*

well settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not excepted, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

Thus, at the cost of repetition, it can be said that the Hon'ble Supreme Court has laid down that the limitation circumscribing jurisdiction of the Magistrate should be borne in mind by the Magistrate and generally speaking, if punishment prescribed is for imprisonment for life or death penalty and the offence is exclusively triable by the Court of Sessions, the Magistrate has no jurisdiction to grant bail, unless the matter is covered by the provisos attached to Section 437 of the Code. One may say that the present petitioner's case may be covered in the first proviso to sub-section (1)

of Section 437 of the Code of Criminal Procedure, but it is to be noted that while describing it further Hon'ble Supreme Court has observed that if such Magistrate opts to make an adventure of exercising the powers under Section 437 of the Code of Criminal Procedure, then, he has to specifically negate the existence of reasonable ground for believing that such an accused is guilty of an offence. While doing this kind of exercise, definitely, there are limitations and *Laxman rekha* for the Magistrate to have dissection of the First Information Report.

6 Here, in this case, for the said assumed jurisdiction under the proviso to Section 437(1) of the Code of Criminal Procedure the learned Judicial Magistrate First Class, Kalamnuri has exceeded his limits and went on to make observations as to how the case is in fact of a consensual sex. At the cost of repetition, it has to be stated that learned Judicial Magistrate First Class has literally done postmortem of the contents of the First Information Report without even hearing the prosecutrix. In para No.14 he has taken note of the facts in the First Information Report and from para Nos.15 to 21 he goes on analyzing those facts. The critical analysis has also been made as to what has not been stated by the informant. The learned Magistrate was not supposed to analyze those facts in such a way that why she had not made complaint after the first intercourse and went on to infer that it was due to

the love relationship and then directly jumping to the conclusion that she has voluntarily consented to the same. The fact that has been taken note of was that the said relationship was with knowledge that the prosecutrix is married. Belated First Information Report could not have been the matter of consideration by the learned Magistrate. He also went on to say that it is highly improbable to contend that the accused committed rape upon the prosecutrix by making false promise of marriage. Magistrate could not have gone to infer the things without evidence/trial. The scope of proviso to Section 437(1) of the Code of Criminal Procedure cannot be so inferred and cannot give such wide powers to the Magistrate to literally carry out postmortem of the First Information Report. While doing so the learned Judicial Magistrate First Class, Kalamnuri assumed himself to be the Sessions Judge and also relied on certain authorities which lay that how a married woman cannot be said to be subjected to “rape” under the false promise of marriage, when she is already married. This Herculean task ought not to have been taken by the learned Magistrate upon himself. As observed in **Pralhad Singh Bhati** (supra) “assumption of jurisdiction to entertain the application is distinguishable from the exercise of jurisdiction” gives caution to the Magistrates that under the assumption of jurisdiction to grant bail to such persons with the help of proviso to Section 437(1) of the Code of Criminal Procedure the limitations circumscribing the jurisdiction should not

be crossed.

7 In this case, there was only the First Information Report by that time. The bail application was considered by the learned Magistrate. The investigation was still pending. Before dissecting the First Information Report the learned Magistrate ought to have considered that First Information Report is not encyclopedia. There would be a certain circumstances which would have been explained by the prosecutrix, may be in her supplementary statement. Whether there were supporting statements of witnesses to the prosecution story or not could have been considered by the concerned Court and not by the Magistrate. The stage, at which the application was entertained, is also required to be considered here. When literally except the First Information Report there was nothing it could not have been turned into a dead letter giving clean chit to the accused. Proper Court which could have assessed the contents of the First Information Report for the purpose of bail in such cases would be the Court of Sessions and learned Judicial Magistrate First Class, Kalamnuri ought not to have taken “adventure” to decide the said application. The learned Additional Sessions Judge, Hingoli was therefore justified in exercising his powers under Section 439(2) of the Code of Criminal Procedure to cancel the said bail which was granted by the learned Judicial Magistrate First Class by assumption of

jurisdiction. No case is made out for the exercise of constitutional powers of this Court under Article 227 of the Constitution of India or inherent powers under Section 482 of the Code of Criminal Procedure to set aside the order passed by the learned Additional Sessions Judge, Hingoli under Section 439(2) of the Code of Criminal Procedure. Hence, the writ petition stands dismissed.

8 After the rejection of the writ petition, the learned Advocate for the petitioner prays for continuation of the interim protection granted by this Court (**Coram : R.G. Avachat, J.**) on 20.04.2022. In view of the fact that the intention is expressed by the petitioner to approach the higher Court, the interim protection granted by this Court on 20.04.2022 to continue till 29.07.2022.

(**Smt. Vibha Kankanwadi, J.)**

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