

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**NAGPUR BENCH : NAGPUR****CRIMINAL APPLICATION (ABA) NO. 137/2023**

Lalit s/o Ramsanjivan Agnihotri .vs. State of Maharashtra

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. R. R. Vyas, Advocate for applicant.

Mr. M. J. Khan, A.P.P. for non applicant-State.

Mr. S. B. Gandhe, Advocate Assisting the prosecution.

CORAM : ANIL L. PANSARE, J.

DATE : APRIL 18, 2023.

Heard.

2. The applicant is apprehending arrest in Crime No. 1089/2022, registered with Police Station Ramnagar, Wardha for the offences punishable under Sections 385, 341, 504, 506 of the Indian Penal Code, 1860 and Sections 3, 5 and 25 of the Arms Act, 1959. Learned counsel for the applicant submits that the maximum punishment for the alleged offences is seven years.

3. If that be so, the Investigating Officer is bound to follow the directions issued by the Hon'ble Supreme Court in *Satender Kumar Antil V/s Central Bureau of Investigation and another*; reported in *(2022) 10 SCC 51* and *Arnesh Kumar V/s State of Bihar*, reported in *(2014) 8 SCC 273* and also to abide by the Standing Order No. 3 of 2022 dated 20/7/2022 issued by the Director General of Police, Mumbai.

4. The Hon'ble Apex Court has, in the above two cases, issued a slew of directions, and in a way laid down a complete mechanism for investigating a crime, where the offence alleged is not punishable for more than seven years.

5. In ***Arnesh Kumar's*** case (*cited supra*), the Supreme Court, while considering the offences punishable up to 7 years, has held that the compliance of Section 41 of the Code of Criminal Procedure is mandatory and opined that if provisions of Section 41 of the Code is complied, then number of cases which come to the Court for grant of anticipatory bail will substantially reduce. The Apex Court has held that the Police Officer, before arresting, must put a question to himself; why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions of Section 41 of the Code is satisfied, power of arrest should be exercised. The Court then directed the State Government to provide to all the Police Officers a check list containing specified sub-clauses under Section 41(1)(b)(ii). The Police Officers are required to forward the check list duly filled and furnish the reasons and material which necessitated the arrest while forwarding/producing the accused before the Magistrate for further detention. The Apex Court then directs the Magistrate to peruse the report furnished by the Police Officer and only after recording its satisfaction, the Magistrate will authorise detention. It is then directed that the decision not to arrest an accused should be forwarded to the Magistrate within two weeks from the date of the institution of the case. Such decision could only be extended by the Superintendent of Police of the district for the reasons to be recorded in writing. The Apex Court has then held that the failure to comply with the directions aforesaid shall apart from rendering the Police Officer concerned liable for departmental action, he shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction. The Apex Court has also

held that non-compliance with Section 41 of the Code would entitle the accused to grant of bail.

6. In ***Satender Kumar's*** case (*cited supra*), the Apex Court observed that despite directions in ***Arnesh Kumar's*** case, no concrete steps have been taken to comply with the mandate of Section 41A of the Code, and therefore, the Hon'ble Apex Court has issued guidelines to deal with the bail applications.

7. The Apex Court has held that sub-clause (1)(b)(i) of Section 41 has to be read along with sub-clause (ii), and therefore, both the elements of '*reasons to believe*' and '*satisfaction qua an arrest*' are mandated and accordingly are to be recorded by the Police Officer. The Apex Court has discouraged the practise followed by the Investigating Officers of mechanically reproducing in the case diary of or most of the reasons contained in Section 41 of the Code for effecting arrest.

8. Thus, firstly, the Police Officer has to take a decision whether or not the accused should be arrested. He has to record the reasons in writing in support of the decision. If the Police Officer takes decision '*not to arrest*' the accused, the said decision shall be communicated to the concerned Magistrate within two weeks from the date of institution of the case/FIR. This decision, however, should be taken as expeditiously as possible, for the reason that the best evidence could be collected immediately after commission of the offence and further to rule out the possibility of tampering with the evidence. If the Police Officer takes a decision '*to arrest*' the accused, then upon his arrest the Police Officer is duty-bound to produce the accused before the Magistrate within 24 hours and while producing the

accused, the Police Officer is duty-bound to furnish the reasons and material which necessitated the arrest and thereupon the Magistrate is duty-bound to peruse the report furnished by the Police Officer and only after recording its satisfaction the Magistrate will authorise further detention. Needless to mention that the satisfaction by the Magistrate will be reflected in its order.

9. The Apex Court has then warned that failure to comply with directions shall render the Police Officer concerned liable for departmental action. The Apex Court further expects the trial Courts to come down heavily on the Police Officers effecting arrest without due compliance of Sections 41 and 41A of the Code.

10. This is not to suggest that in the cases where maximum punishment is seven years, the accused persons cannot be arrested at all. What is suggested, is that in normal and ordinary course, the police should always avoid arresting a person and sending him to jail, if it is possible for the police to complete the investigation without his arrest and if every kind of cooperation is provided by accused to the Investigating Officer in completing the investigation. It is only in cases of utmost necessity where investigation cannot be completed without arresting the person, for instance, a person may be required for recovery of incriminating articles or weapons of offence or for elucidating some information or clue as to his accomplices or any substantial evidence, that his arrest may be necessary. Such an arrest may also be necessary if the Investigating Officer concerned and/or incharge of police station thinks that presence of the accused will be difficult to procure because of grave and

serious nature of the crime as the possibility of his absconding or disobeying the process or fleeing from justice cannot be ruled out.

11. The Investigating Officer, therefore, is expected to avoid arresting a person and sending him to jail, if it is possible for him to complete investigation without arresting the accused. Therefore, the Investigating Officer may explore possibility of completing investigation without arresting accused even where the recovery of incriminating articles or weapons of offence is to be made. For this, the Investigating Officer will have to consider the attending circumstances. Broadly there could be two categories of the cases. The first is the one where the offence is not pre-meditated or is not strategic, where the offence has been committed at the spur of the moment and the offender is not history-sheeter, the offence is based on agreements or contract and in essence is a civil dispute, the accused is the first time offender and so on. The Investigating Officer while investigating the crime in this category may explore possibility of not arresting the accused and to issue him notice under Section 41A of the Code of Criminal Procedure for the purpose of elucidating necessary information. The attendance of the accused in response to the notice under Section 41A of the Code could be treated as custody for the purpose of discovery under Section 27 of the Indian Evidence Act. The other category of the offences could be where the offence has been committed with pre-determined mind, the nature of weapons used, the manner in which the offence has been committed, the criminal antecedents of the accused, the economic offences indicating strategic operation and so on. The Investigating Officer while

investigating the crime in the said category may decide to arrest the accused by recording reasons in terms of the Judgments of Hon'ble Supreme Court. The above two categories are illustrative, and therefore, the decision to arrest or not to arrest will have to be taken by the Investigating Officer depending on the nature of the offence and all other attending circumstances.

12. Thus, in appropriate cases, arrest of accused will be justified, of course, subject to strict compliance of law laid down by the Hon'ble Apex Court in the aforementioned two judgments.

13. The accusation against the applicant will have to be considered in the above backdrop. The accusation against the applicant, as reflected from the FIR, is that the applicant demanded commission for selling of flat and thereafter threatened the informant for selling the flat at a higher rate and demanded more money and that while doing so he has given life threat to the informant. It so happened that in the year 2019, when the informant was involved in building material supply business, one Nitin Gawande owed money to him. It appears that Nitin Gawande has constructed a flat scheme and promised the informant to pay the amount once his flats are sold. The informant then passed on this information to the applicant. The applicant's friend Sumit Mahalle purchased the flat for Rs.12,00,000/-. In turn, Nitin Gawande paid the amount to the informant. The applicant has allegedly obtained commission of Rs.5,00,000/- from Sumit. The applicant then approached the informant and demanded commission to the tune of Rs.50,000/-, which the informant paid. On 31.12.2019, when the informant was present in his shop with his employees, the applicant with

one unknown person entered the shop. The applicant said to the informant that the flat was sold at a higher rate. According to him, the flat was worth Rs.10,00,000/- but was sold for Rs.12,50,000/-. Accordingly, the applicant instructed the informant to repurchase the flat and to pay him (applicant) Rs.15,00,000/-. The applicant has then threatened the applicant that if the amount is not paid, he and his family will suffer the consequences. While doing so, the applicant has handed over the revolver/pistol to the unknown person who accompanied him. The said incident is captured by the informant in the CCTV camera installed in his shop. The informant then states that on 24.11.2022 i.e. after about three years of the first incident, the applicant intercepted him on the road and demanded money by saying that he has knowledge as to where does his (informant's) children study and then gave him life threats. Since the applicant continued his threats, the informant has finally lodged the report on 20.12.2022.

14. Learned counsel for the applicant submits that the first incident is of the year 2019. The delay in lodging FIR has not been justified. He further submits that the allegation is that the applicant has handed over the alleged revolver/pistol to his associate. There are no allegation that the applicant has threatened the informant by means of revolver/pistol. He further submits that while on interim anticipatory bail, the applicant has attended Police Station and cooperated in the investigation and handed over the gun to the investigating officer which, in fact, is a lighter (fake gun). Learned counsel for applicant, therefore, has prayed for relief on the ground that

belated FIR has not been justified and further on the ground that the applicant has cooperated in the investigation.

15. The investigating officer is seeking custodial interrogation on the ground that the applicant has not cooperated in the investigation and has not produced the revolver/pistol used in the crime.

16. The learned A.P.P. for the State and learned counsel assisting the prosecution submit that there is no delay. The same has been justified, in the sense that the applicant's continuous threats made the informant lodge the report. He avoided to do so for considerable period but finally lodged the report. It is then submitted that, the applicant has criminal antecedents. There are six cases pending against him which were filed during the period from the year 2017 to 2020. Accordingly, they prayed for rejection of the bail on the ground that the custodial interrogation will only reveal the true status of the weapon.

17. To my mind, the investigating officer ought to be mindful of the fact that there is substantial delay in lodging the report. Further, it appears that the applicant has not shown revolver/pistol to the informant but has given the same to his associate, whose statement would be helpful in the investigation, to understand whether the revolver/pistol was real or was toy gun (the lighter).

18. The investigating officer will have to also consider couple of facts here. Firstly, the informant does not disclose the details of the revolver/pistol. In fact what informant has said is that the applicant was holding a small gun (revolver/pistol). Thus, the informant is unaware of nature of weapon, whether

real pistol or fake. Thus, the details of weapon for the purpose of identification are absent. CCTV footage could be of some help if viewed meticulously to find out whether specification/details of revolver/pistol could be noted down for the purpose of identification. The statement of the unknown person who accompanied the applicant may also be helpful in this regard.

19. Nonetheless, considering the nature of allegations, coupled with the fact that the applicant has criminal antecedents, though I intend to reject the application, that by itself would not entitle the investigating officer to arrest the applicant without complying guidelines laid down by the Hon'ble Apex Court in the aforesaid cases. In other words, the investigating officer will make sincere efforts to complete the investigation without arresting the applicant. However, if the circumstances so warrant that the applicant's arrest is necessary, the investigating officer shall record reasons in writing which shall be tested by the learned Magistrate when the applicant is produced before him.

20. The application is dismissed with the above observations.

(Anil L. Pansare, J.)

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