

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (ABA) NO.150 OF 2023

Jayeshkumar alias Jakki Ganvir Vs. State of Maharashtra

WITH

CRIMINAL APPLICATION (ABA) NO.138 OF 2023

Pankaj Chunnilal Bijewar Vs. State of Maharashtra

WITH

CRIMINAL APPLICATION (ABA) NO.147 OF 2023

Yogesh Ranglal Pache Vs. State of Maharashtra

WITH

CRIMINAL APPLICATION (ABA) NO.148 OF 2023

Akash S/o Hemraj Pache 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.

Shri V.S. Mishra, Advocate for applicants.

Shri M.J. Khan, APP for non-applicant/State.

CORAM : ANIL L. PANSARE, J.

DATE : APRIL 11, 2023.

Heard.

2. The applicants are apprehending arrest in Crime No.32/2023 registered with Police Station, Ravanwadi, District Gondia for the offences punishable under Sections 353, 379 and 506 of the Indian Penal Code. Learned counsel for the applicants submits that the maximum punishment for the alleged offences is five 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 reduced. 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 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. Briefly stated the case of the prosecution is that the informant the Circle Officer lodged report stating therein that on 01.02.2022 at about 6 pm, the informant along with Talathi and other members went to the spot where mining of the sand was being carried out. They found that the sand was being loaded in the tractors. There were four tractors. The drivers of the tractors were not possessing the document to excavate the sand. When enquired, the driver disclosed his name as Akash Pache. He has also disclosed the name of Yogesh Pache, the owner of the tractors. The applicants abused the informant and others and extended threats. Further, learned APP submits that one tractor is recovered and other tractors are to be recovered. According to him, except for recovery of tractors custodial interrogation of the applicants is not necessary.

14. Learned counsel for the applicants submits that applicant-Yogesh Pache has deposited the tractor. However, according to learned APP, he owns two tractors and only one has been deposited.

15. Thus, it appears that the only reason for opposing application is that the tractors have not been deposited by the applicants.

16. Learned counsel for the applicants submits that two tractors have been recovered. One from applicant-Yogesh and another from Pankaj. The altercation was between the informant and Yogesh and none else. He further submits that so far as the applicants are concerned, their tractors were not present on the spot and that they have not hurled any abuse. The informant has unnecessarily implicated the applicants.

17. The aforesaid submission will naturally be considered by the investigating officer while taking decision whether or not to arrest the applicants. As such the decision ought to have been taken immediately after the registration of FIR. Nonetheless this decision will be tested in the light of the judgments of the Hon'ble Supreme Court referred above.

18. Learned counsel for the applicants submits that the investigating officer may arrest the applicants without any valid reason. This apprehension is uncalled for because the

investigating officer is bound to be careful in arresting the accused as he will suffer stringent action of departmental enquiry, if it is found by the learned Magistrate that the arrest was not necessary for completing investigation.

19. Copy of the order be served upon the Police Officer, who is incharge of the Police Station, Rawanwadi, District Gondia. He shall ensure compliance of the aforesaid Rulings.

20. Copy of the order shall also be served upon the learned Magistrate and the learned APP of the trial Court, who shall also ensure compliance of the aforesaid Rulings.

The applications are disposed of in above terms.

(Anil L. Pansare, J.)

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