

Andhra High Court

C.H. Siva Prasad And Others vs State Of A.P. on 13 August, 1998

Equivalent citations: 1998 (5) ALD 729, 1998 (2) ALD Cri 498, 1999 (1) ALT Cri 644, 1999 CriLJ 1263

Bench: B S Reddy

ORDER

1. This is an application filed under Section 438 of the Code of Criminal Procedure to direct the SHO, II Town Police Station, Mahaboobnagar to release the petitioners on bail in the event of their arrest in connection with Cr. No.99 of 1998.

2. The petitioners herein are the accused Nos. 1 to 4 in the above crime. One Smt. Sarada Devi wife of the 1st petitioner herein filed a complaint on 15-6-1998 against the petitioners alleging harassment and a case in Cr. No.99 of 1998 on the file of the II Town Police Station Mahaboobnagar was registered for the offence punishable under Section 498-AIPC. The petitioners apprehend arrest in connection with the above crime. Petitioner No.2 is the father and 3rd petitioner is the mother and 4th petitioner is the younger brother of the 1st petitioner. The de facto complainant was married to the 1st petitioner on 22-8-1997. It is alleged that at the time of marriage, the parents of the de facto complainant gave certain amount of cash as dowry and also presented jewellery to the petitioners apart from incurring other marriage expenses. The 1 st petitioner and the complainant was residing at Nagarkurnool. After two months of marriage, the 1st petitioner is alleged to have started demanding more amounts towards dowry and asked the complainant to bring the amount. Similarly, on two or three occasions her in-laws are alleged to have abused her and sent her away from the house asking her to get money. It is also alleged that once he was beaten by her husband. The 2nd petitioner is alleged to have pushed her by catching hold of her hand and the 3rd petitioner is alleged to have abused her by catching hold of her hair and the 4th petitioner is supposed to have stated that she has become a nuisance and she should be killed. These are in nut-shell the allegations against the petitioner in the complaint.

3. It is evident from the record that the de facto complainant sent a representation to the Hon'ble Chief Minister and other higher authorities and on directions from the authorities, the Sub-Divisional Police Officer, Mahaboobnagar made an enquiry into the allegations and submitted a report on 30-7-1998 stating that the allegations in the complaint are not true.

4. Be that as it may, we are not concerned at this stage as to whether the allegations made in the complaint are true or not, But the fact remains that a senior Police Officer made an enquiry into the allegations and came to the conclusion that the allegations levelled against the petitioners by the de facto complainant are false.

5. Having regard to the facts and circumstances of the case, I have expressed the view that the petitioners are entitled to be released on bail in the event of their arrest. The learned Additional Public Prosecutor Sri O. Kallashnath Reddy, however, contends that the operation of the order, if any to be granted by this Court is required to be in operation only for a limited period. The learned Addl. Public Prosecutor would contend that this Court in exercise of its jurisdiction under Section

438 of Code of Criminal Procedure cannot direct release of any accused person on bail in the event of his or her arrest by the police without specifying the period in which the order will be in force. According to the learned Additional Public Prosecutor, the accused persons, in all such cases where the Court direct their release on bail in exercise of the power under Section 438 Cr.PC, should be made to surrender before the Court of competent jurisdiction and they should file application for grant of bail.

6. Sri Padmanabha Reddy, the learned senior Counsel appearing for the petitioners would contend that the jurisdiction and power of this Court as also the Court of Session is not circumscribed by any such limitation. It is well within the discretion of this Court either to direct release of the accused persons in the event of their arrest by the police for a specified period or without specifying any period, which would virtually mean that the order would enure to the benefit of the accused till the trial is over.

7. Short but interesting question that would, arise for consideration in this case is to whether this Court or the Court of Session in exercise of the power and jurisdiction under Section 438 of Code of Criminal Procedure is bound to limit the operation of the order only for a specified period and as to whether this Court is not competent to direct the release of the accused in the event of their arrest until the trial is over?

8. The law on the subject is not res Integra. A Constitution Bench of the Apex Court in Gurbaksh Singh v. State of Punjab, , had an occasion to consider the very same question while construing the true nature and scope of Section 438 Cr.PC. The Apex Court observed as follows:

"38. There was some discussion before us on certain minor modalities regarding the passing of bail orders under Section 438(1). Can any order of bail be passed under that Section without notice to the Public Prosecutor? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the Section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily. The Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time".

9. It is thus evident that it is well within the discretion of this Court or Court of Session to limit the operation of the order under Section 438 Cr.PC for a particular period whenever there are reasons for doing so. But there is no restriction as such upon the powers of the Court to invariably restrict the operation of the order only for a limited period. It is true as held in Gurubakshi Singh 's case (supra) that the Jurisdiction conferred on the Court under Section 438 of the Code is required to be exercised after careful consideration of the material available on record. The power under Section

438 of the Code to direct enlargement of the accused persons in the event of their arrest by the police is required to be exercised for good reasons and in rare cases. Precisely, for the reason the discretion is to be exercised in proper and rare cases, the Parliament had thought it fit to confer the power and jurisdiction only on Court of Session and the High Court.

10. However, the learned Additional Public Prosecutor places reliance upon the decision of the Apex Court in Salauddin Abdulsamad Shaikh v. State of Maharashtra, 1996 SCC (Crl.) 198, in support of his submission. The Apex Court while construing the scope of power and jurisdiction of this Court under Section 438 Cr.PC observed thus:

"...Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular Court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular Court for bail. That is the correct procedure to follow because it must be realised that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of the limited duration only and ordinarily on the expiry of that duration or extended duration the Court granting anticipatory bail should leave it to the regular Court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted."

11. The above decision again fell for consideration before the Apex Court in K.L. Varma v. State and another, 1996 (7) Scale (SP) 20, where it was held as follows:

"..... While dealing with that order, this Court observed that under Section 438 of the Code, when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the High Court or the Court of Session may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail and in passing that order, it may include such conditions as it may deem appropriate. This Court further observed that anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular Court, which is to try the offender, is sought to be bypassed. It was, therefore, is sought to be pointed out that it was necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the Court granting anticipatory bail should leave it to the regular Court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted. By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular Court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular Court for bail and to give the regular Court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the Court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher Court, if they so desire.

This decision was not intended to convey that as soon as the accused persons are produced before the regular Court the anticipatory bail ends even if the Court is yet to decide the question of bail on merits. The decision in Saluddin's case, has to be so understood."

12. The Apex Court clarified that anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher Court, if they so desire. The Apex Court further held that the operation of the anticipatory bail does not end immediately on the accused appearing before the regular Court and even before the Court decides the question of bail on merits in one way or the other. The Apex Court thus observed that Salauddin's case is required to be understood in the light of the observations made in K.L. Varma's case (*supra*).

13. A Division Bench of the Calcutta High Court, speaking through the Hon'ble the Chief Justice, in *Manish Bhowmik v. the State of West Bengal*, 1998 (2) All India Crl. Law Report 406, after referring to Salauddin's case and K.L. Varma's case, held as follows:

"The above leaves no manner of doubt that if as a condition of bail in the event of arrest, in exercise of its power under Section 438 of the Code of Criminal Procedure, the High Court or the Court of Session fixes its duration, the accused, if so advised or if so directed by the Court, can seek bail under Section 437 of the Code and or 439 of the Code and if regular bail is refused but outer limit of the anticipatory bail is not yet over the accused shall not be taken into custody until the expiry of the said period of anticipatory bail and he may, if so advised, move the higher Court for regular bail. If, however, as a condition bail in the event of arrest it is ordered by the Court while exercising its power under Section 438 of the Code that the anticipatory bail shall enure until regular bail application is heard and ordered once regular bail application is heard and ordered there would be no surviving order of anticipatory bail which in accordance with prescribed procedure of law must follow the surrender of the accused for regular bail. If the regular bail application is moved within the limited duration of anticipatory bail it is obvious on the expiry of the duration the accused can be arrested and taken into custody. There may be a situation, however, when application for regular bail is moved within the duration of anticipatory bail so granted but the order is delayed and it is likely to come after the expiry of the duration, the Court hearing the regular bail application can always grant interim regular bail. As a condition, however, for grant of interim regular bail if it has to operate on and from a date after the expiry of the duration of the anticipatory bail the accused must surrender and be in the custody of the Court on the date of the order. If, however, no interim order of regular bail is made or the regular bail application is refused and there is no remaining period of anticipatory bail available to the accused he must surrender and if he has not done so he can always be arrested in accordance with the prescribed procedure of law."

14. The Orissa High Court in *Drajeet Roy v. State of Orissa*, 1998 Crl. LJ 2415, after referring to the decision in Gurubaksh Singh's case (*supra*) and Varina's case (*supra*) held as follows:

"In view of the authoritative pronouncements of the Apex Court referred to above, I am not inclined to grant anticipatory bail to the petitioner till end of the trial. I, however, feel that it will be just and proper if his such prayer is allowed for a limited duration. Accordingly, it is ordered that in the event

of arrest of the petitioner in Case No.RC7/5 of 97-Cal, the investigating/arresting officer of the CBI shall release him till 25th September, 1997, on his furnishing a bond of Rs.20,000/-with one surety for the like amount, within which period he may apply for bail to the regular Court in Seisin of the Criminal Case. Since a time limit has been fixed, the petitioner may apply for bail as carry as possible so that the Court concerned will get sufficient time to hear the parties and pass orders in accordance with law within that period, uninfluenced by any observation made in this order. In case bail application is filed, the Investigating Officer of the CBI shall submit case diary to the Court on the date of hearing of the application. If the petitioner's prayer for bail is rejected, then in order to enable him to move the higher Court, the period of anticipatory bail shall stand extended till 7th October, 1997."

15. It is required to notice that the decision of the Apex Court in Gurubaksh Singh's case (*supra*) is by a Constitution Bench while the decisions in Saluddin (*supra*) and Varma 's case (*supra*) are by the Division Benches of the same Court. It is also required to notice that the decision of the Apex Court in Gurubaksh Singh's case was not placed and brought to the notice of the Apex Court in Salauddin and Varma's Cases. It is, therefore, not possible for this Court to predict as to what could have been the decision of the Apex Court in Saluddin and Varma's cases had the decision of the Constitution Bench of the Apex Court in Gurubaksh Singh's case been brought to its notice. But the fact remains that a clear and unambiguous verdict of the Constitution Bench of the Apex Court was not brought to the notice of the two Division Benches of the Apex Court which had dealt with Salauddin and Varma's Cases. It is settled law that this Court is bound by the law declared by the Supreme Court and even an obiter of the Apex Court is binding on this Court. However, in case of any divergent views and conflict between a larger Bench and a smaller Bench, this Court is required to follow up the decision of the larger Bench. It would be entirely a different thing if the subsequent smaller Bench refers to the decision of the larger Bench and interprets the decision of the larger Bench in a particular manner, and in such an event, it would not be open for this Court to take any other view except to follow the decision of the smaller Bench which is subsequent in point of time to that of the larger Bench. It is also clear that in the absence of reference of larger Bench decision by the subsequent smaller Bench, this Court is required and bound to follow the decision of the larger Bench until the conflict is resolved by the Apex Court itself in an appropriate case.

16. In *State of Uttar Pradesh v. Ramchandra Trivedi*, , the Apex Court while considering the question that in case of any conflict between the views expressed by larger and smaller Benches of the Supreme Court what should be done by the High Court held that-

"...It is also to be borne in mind that even in cases where a High Court finds any conflict between the views expressed by larger and smaller Benches of this Court, it cannot disregard or skirt the views expressed by the larger Benches. The proper course for a High Court in such a case as observed by this Court in *Union of India v. S. Subramaniati*, , to which one of us was a party, is to try to find out and follow the opinion expressed by larger Benches of this Court in preference to those expressed by smaller Benches of the Court which practice, hardened as it has into a rule of law is followed by this Court itself"

17. The Apex Court in N. Meera Rani " v. Govt. of Tamil Nadu, , observed that the subsequent decisions by Benches comprised of lesser number of Judges have to be read in the light of the Constitution Bench decision covering the very same point. The Apex Court observed thus:

"...All subsequent decisions which are cited have to be read in the light of this Constitution Bench decision since they are decisions by Benches comprised of lesser number of Judges. It is obvious that none of these subsequent decisions could have intended taking a view contrary to that of the Constitution Bench In Rameshwar Shaw case."

18. In Govoindanaik v. West Patent Press Co., , a Full Bench of the Karnataka High Court observed that:

"If two decisions of the Supreme Court, on a question of law cannot be reconciled and one of them is by a larger Bench while the other is by a smaller Bench, the decision of the larger Bench, whether it is earlier or later in point of time should be followed by High Courts and other Courts. However, if both such Benches of the Supreme Court consist of equal number of Judges, the later of the two decisions should be followed by High Courts and other Courts."

19. It is true that it is not permissible for this Court to take any different view as to the true ratio rendered by larger Bench of the Supreme Court if such decision is rendered by a later smaller Bench of the Supreme Court and understood the ratio in a particular manner. The State of Punjab v. Teja Singh, 1976 Crl LJ 1648, a Full Bench of Punjab and Haryana High Court observed thus:

"Now it is trite learning to say that when an earlier judgment of the Supreme Court is analysed and considered by a later Bench of that Court then the view taken by the latter as to the true ratio of the earlier case is authoritative. In any case that view is binding on the High Courts."

20. The law relating to the question as to whether this Court or Court of Session exercising the power and jurisdiction under Section 438 of the Code has to invariably issue directions to release the accused persons in the event of their arrest only for a limited period is clearly and authoritatively laid down in Gurubaksh Singh 's case (supra.) It was held therein that normally the operation of the order should not be limited. The later decisions of the Apex Court in Salauddin and Varma 's cases (supra) could not have intended to lay down any law contrary to the pronouncement by the Constitution Bench in Gurubaksh Singh's case. Therefore, the subsequent decisions by Smaller Benches have to be understood in the background of set of facts in those cases.

21. It is also required to notice that an application under Section 437 or 439 Cr.PC as the case may be can be filed only after the arrest of the accused person or detained without a warrant. It would not be possible for any accused to file any application under Section 437 or 439 Cr.PC while the operation of the order under Section 438 Cr.PC is in force. Under those circumstances, the question of directing the accused person to apply for and obtain a regular bail even while the directions issued in exercise of the power under Section 438 Cr.PC are in operation may become difficult and such application may not be maintainable.

22. On an analysis and a close reading of the decisions referred to above, the following propositions would emerge:

(1) This Court or Court of Session in exercise of its power and jurisdiction under Section 438 Cr.PC may direct the release of the accused person in a given case only for a specific period and direct the accused person to apply for and obtain regular bail. This would necessarily mean that the operation of the order would come to an end immediately after the specified time and the accused person has to necessarily surrender or get arrested so as to enable the accused person to file an application under Section 437 or 439 Cr.PC as the case maybe.

(2) This Court or Court of Session in exercise of its power and discretion under Section 438 of the Code can restrict the operation of directions issued under the said provision at the initial stage and extend the same until further orders;

(3) The Court exercising the power and jurisdiction under Section 438 of the Code is entitled to issue necessary directions directing release of the accused person in the event of his or her arrest without specifying any period; and (4) The power and jurisdiction of this" Court or Court of Session under Section 438 of the Code is not limited or circumscribed in any manner whatsoever requiring to limit the operation of the directions to release the accused person in the event of his or her arrest.

23. For the aforesaid reasons, I consider it appropriate to direct the release of the petitioners in the event of their arrest in connection with the Crime No.99 of 98 of II Town Police Station, Mahaboobnagar subject to the condition of each one of them executing a personal bond for a sum of Rs.5,000/- and two sureties each for the likes sum to the satisfaction of the Station House Officer, II Town Police Station, Mahaboobnagar. The petitioners shall appear before the Investigating Officer as and when their presence is required in connection with the investigation of the Crime.

Criminal Petition is disposed of accordingly.