

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

B.A. 80/2009

Dt.16.11.09

Rakesh Kumar and ors v. State and ors

Coram:

Hon'ble Mr Justice Sunil Hali, Judge

Appearing counsel:

<i>For the petitioner(s)</i>	: M/s MA Goni, Sr.Adv, A.Parihar,MA Bhat, Astsham Bhat and Ajay Singh Kotwal, Advs
<i>For the respondent(s)</i>	: M/s Sunil Sethi, Sr.Adv. & Sudershan Sharma,Adv.

<i>Whether approved for reporting in Digest/Journal/Media.</i>	Yes/No
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One Amandeep Singh was fired upon by Jatinder Singh on 29th of Aug'09, in his home at Shastri Nagar, Jammu. Jatinder Singh at that point of time was accompanied by one Royal Singh. As a result of the said firing, Amandeep Singh, who was firstly admitted in Government Medical College, Hospital, Jammu, and later shifted to Sir Ganga Ram Hospital, Delhi, died on 30th of Aug'09. An FIR No. 247/09, came to be registered in police station Gandhi Nagar, Jammu, under Sections 307, 323, 34 RPC and 3/25 of the Arms Act. However, after the death of deceased Amandeep Singh, the offence was changed from 307 to 302. The alleged weapon which was used in the commission of crime was said to be a Dessi

pistol (Katta). Accused Jatinder Singh was arrested on 30th of Aug'09, whereas the co-accused namely Royal Singh was arrested from Ahmedabad on 3rd of Sept'09. On the disclosure statement made by accused Jatinder Singh, the weapon of offence was recovered from the floor mill owned by his father. The same was seized along with two live cartridge and one spent cartridge 3.15. After the post-mortem was conducted and the bullet was recovered from the body of the deceased, the same was sealed and sent to the FSL for report.

During the course of investigation, it was revealed that the weapon of offence used was exchanged by another Dessi pistol (Katta), which was in rusted condition. On this revelation, S/Sh Manohar Senior Superintendent of Police, Mumtaz Ahmed, SP City South, Jammu, Jaswant Singh Katoch, SDPO South, Sultan Mirza, SHO, Satnam Singh, SI and Talib Hussain, Head Constable, were placed under suspension. It was stated that they were instrumental in fudging the evidence by replacing the weapon of offence used in the crime. As the members of the Special Investigation Team earlier constituted for the purpose of investigating into

the matter were suspended, a new SIT was constituted on 19th of Sept'09, with Sh Mubasir Latifi, Superintendent of Police as its Incharge and Dy.S.P. Mohd Rouf Lone as one of its member. During the course of investigation by the new SIT, it was revealed that money was used by the petitioners to effect fudging of the evidence by the police officials. It is this link in the case which involves the present petitioners. Petitioner No.2 is the father of accused Jatinder Singh and petitioner Nos. 1 and 3 are his uncles. The resultant effect of the revelation is that the police officers involved in the alleged fudging of evidence have been arrested and as per the statement made at the bar, they continue to remain in judicial custody.

Threatened by the said allegation, the present petitioners moved an application for grant of bail in anticipation of arrest before the learned 2nd Additional Sessions Judge, Jammu. It was contended before the court below by the petitioners that the whole issue was being manipulated by their business rivals who are having contacts with the top police officers and the bureaucrats in the State administration and it is only with a malafide

intention and at the behest of the top officials of the State administration that action is being taken against the petitioners for arresting them just to ruin their social status.

The trial court, however, did not find favour with the above contention raised by the petitioners and vide order impugned dated 9th of Oct'09, has rejected their application for grant of bail in anticipation of arrest. It is how the present application has been filed by the petitioners under Section 497-A of the Code of Criminal Procedure, for grant of pre-arrest bail.

I have heard learned counsel for the parties and perused the case diaries as also the record.

The allegations against the petitioners are that they have conspired with the then Senior Superintendent of Police and other officers/officials who were the members of the earlier Special Investigating Team constituted for investigating into the matter regarding murder of aforementioned Amandeep Singh, for which FIR 247/09,

was registered with the Police Station, Gandhi Nagar, Jammu, and have fudged the evidence in the case with the help of said officers. It is contended that the fudging of evidence was planned at two stages i.e.,:

a/ the weapon of offence which was recovered and seized by the police was exchanged with a non functional weapon of the same caliber .315 bore ; and

b/ the bullet recovered from the body of the deceased and sent to the FSL was sought to be changed. The object of this change of bullet was to obliterate the evidence that the said bullet was fired from the weapon of offence used.

In order to sustain these allegations, following circumstances have been brought on record by the Investigating agency regarding the role of the petitioners in the commission of fudging of evidence:

i/ the call details from 29th of Aug'09 onwards showing the various calls made by the petitioners to the different police officers/officials involved in the investigation of the case;

ii/ frequent visit of petitioner Nos.1 and 3 in the police station concerned during the period from 30th of Aug'09, onwards and their meetings with SHO Sultan Mirza;

iii/ that an amount of Rs. 6 crores was withdrawn from the banks by self drawn cheques by the petitioners indicating that the said amount was meant for the police officials who had effected change of weapon of offence;

iv/ statement of police officials in whose presence, alleged fudging has taken place, which was recorded under Section 164 of the Code of Cr.P.C., indicating the involvement of the petitioners in the said fudging;

v/ that the original weapon of offence used for commission of crime was yet to be recovered.

vi/ recovery of an amount of Rs. 3.10 lakhs from the house of Sarwar Bukhari, Ballistic expert and Rs. 40,000 from the house of Raj Singh, Constable, posted in FSL, Jammu, during investigation.

After these facts were revealed by the newly constituted SIT, notices were sent to the petitioners to appear before the said team for

investigation. However, the petitioners have not responded to the said notices. Due to the said non cooperation of the petitioners, an application under Section 87 Cr.P.C., was filed before the learned Chief Judicial Magistrate, Jammu, who has allowed the same and declared them as proclaimed offenders.

During the pendency of the present application, the police filed the report under Section 173 Cr.P.C., before the court of learned Chief Judicial Magistrate, Jammu, who has committed the file to the court of Principal Sessions Judge, Jammu.

Mr MA Goni, learned Senior counsel, appearing for the petitioners contended that the process issued against the petitioners is on account of the business rivalry by their opponents with the sole intention to finish their business. It is stated that various processes issued by the Investigating Officer against the petitioners which includes seizing of their bank accounts and harassing other members of the family is a pointer towards this fact. The call details which have been relied upon by the prosecution does not disclose the nature of

conversation which is stated to have been exchanged by the petitioners and the police officers/officials alleged to have been involved in the fudging of evidence. It is contended that no presumption can be drawn that the said call details relate to the case in question. No reliance can be placed on the statement of Mr Mumtaz Ahmad, SP South Jammu, ASI Brij Lal and HC Talib Hussain, as they are party to the crime. It is further stated that no evidence has been collected in respect of the money which is stated to have been paid by the petitioners to the police officers. The involvement of the petitioners is not proved by any evidence collected by the SIT.

On the other hand, Mr Sunil Sethi, learned Senior counsel, appearing for the respondent State, contended that the evidence collected against the petitioners, without any doubt, proves that the petitioners are involved in the commission of offence. It is stated that petitioner No.2 being the father of accused Jatinder Singh and petitioner Nos. 1 and 3 being their uncles had direct interest in the fudging of the evidence. The call detail statement which now forms the part of report under

Section 173 Cr.P.C., clearly reveals that petitioners were in touch with the police officers more particularly S.Manohar Singh, the then SSP, SHO of the Police station concerned namely Sultan Mirza, Constable Raj Singh, posted in FSL, Jammu, and Sarwar Bukhari, Ballistic expert, FSL, after the murder was committed by the son of petitioner No.2. He specifically laid emphasis on the call details of S.Manohar Singh, who is stated to have two mobile Phones-9419012360 and 9622113601. The call detail reveals that on 1st of Sept'09, petitioner No.1 was in constant touch with S.Manohar Singh, and six calls were made from 15.57 hrs to 22.39 hrs. It is stated that there was regular conversation between S.Manohar Singh and the SHO concerned and also petitioner No.2 after the commission of crime by the son of said petitioner. The weapon of offence was exchanged on 2nd of Sept'09, and as a prelude to that the petitioners were in constant touch with the police officers and the employees of the FSL, Jammu. The investigation clearly reveals that it was at the behest of petitioner NO.3 that the money was paid by petitioner No.1 to the police officers and the employees of FSL and the involvement of petitioner No.3 in the said act was detected only after the

statement was made by Mr Talib Hussain.

Due to non cooperation by the petitioners in the matter of investigation certain aspects of this conspiracy could not be unearthed. It is under these circumstances stated that the presence of petitioners is required for their custodial interrogation in order to:

- i/ unearth the conspiracy which has led to fudging of evidence;
- ii/ money paid to the police officers by the petitioners;
- iii/ the details of withdrawal of money from the accounts of petitioner No.2 and its utilization;
- iv/ disappearance of weapon of offence.

The petitioners as on today are not only involved in the commission of offence under Section 201 read with Sec.120-B RPC and 3/25 of the Arms Act but also for the offence under Section 409 RPC. It is stated that their involvement in the offence under Section 302 RPC cannot be ruled out at this stage as according to Mr Sethi, the motive for committing the crime was that the accused Royal

Singh had threatened the deceased Amandeep Singh to close the cable business which he was running in Shastri Nagar area.

Mr Sethi, further contended that the present bail application is not maintainable as the report under Section 173 Cr.P.C., has already been filed and the petitioners are required to surrender before the trial court.

The power of granting anticipatory bail is extraordinary in character and only in exceptional cases where it appears that the person is falsely implicated or a frivolous case has been lodged against him or where there are reasonable grounds to hold that the person accused of an offence is not likely to abscond or otherwise misuse the liberty while on bail. It is only under these circumstances, such a power can be exercised. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and means release from the custody of the police, the later is granted in anticipation of arrest and is effective at the very

moment of arrest. The principles generally governing the grant of anticipatory bail are relatable to the following things:

- a/ seriousness of the allegations, severity of punishment, the character of evidence on which charge is supposed to be sustained, tampering and intimidating the witnesses and chances of running away from the trial. These principles are in perimateria with the power of the court under Section 498 Cr.P.C. However, additional factors are also to be taken note of in the matter of grant of anticipatory bail;
- b/ false implication of the accused, allegations levelled not believable and the wrecking vengeance for political or business reasons.

These additional factors mentioned supra can go a long way in deciding as to whether the petitioners are entitled to anticipatory bail.

Whether the operation of an order of bail in anticipation is to last till the conclusion of the trial or till the investigation of the case is completed has been the subject matter of debate in

number of cases before the Apex Court. The earlier view expressed was that the operation of such an order passed under Section 497-A would not necessarily be limited in point of time. This view was expressed in *Gurbaksh Singh v. State of Punjab*, AIR 1980 SC 1632. The relevant observations made by the Apex Court in this regard may be noticed as under:-

".....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 F.I.R., in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under S.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."

The subsequent pronouncements of the Apex Court considered the view expressed by the Constitution Bench in the above case and there has

been a unanimity of opinion that while granting an order of bail, the power of the regular court which is to grant the bail cannot be taken away. Laying emphasis on the observations made by the Constitution Bench in the case *supra*, it has been interpreted that the accused is required to obtain the order under Section 497-A for a shorter period of time. The purpose and object of granting anticipatory bail is at a stage when the investigation is incomplete and the court is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that the order of anticipatory bail is passed for a limited duration only and on the expiry of that duration, the matter should be left to be dealt with by the regular court after appreciation of evidence placed before it after the investigation has made progress or the charge sheet is submitted. This view is fortified by the judgment of the Apex Court passed in the case of *Salauddin Abdulsamad Sheikh v. State of Maharashtra*, AIR 1996 SC 1042. What has been observed by the Apex Court in this regard is being reproduced below:-

"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 Sessions 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 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."

The import of the aforementioned judgment clearly reveals that order of grant of anticipatory bail is for a limited point of time.

There is other aspect of this matter which affirms the directions of the Apex Court that the operation of the anticipatory bail order in such a case is for a limited duration.

In the cases where the accused under custody, he can be ordered to be released on bail provided the circumstances so exist in the case under which such an order can be passed. The operation of bail order in such a case is till the conclusion of the trial. Regarding operation of order passed under Section 497-A, the order, as indicated above is required to be limited in point of time. It is in this context, the contention of the learned counsel for the parties is to be examined as to whether the petitioners can seek bail in anticipation of arrest when the court below has already taken cognizance of the matter after filing of the report under Section 173.

Before dealing with the main contentions raised, it would be appropriate to notice Section 497-A, which is reproduced below:-

"497-A. Direction for grant of bail to person apprehending arrest

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section, and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such direction in the light of the facts of particular case, as it may think fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

1. a condition that the person shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not

leave the State without the previous permission of the Court;

(iv) such other condition as may be imposed under sub section (2-a) of section 497 as if the bail were granted under that section.

(3) *If such person is thereafter arrested without warrant by an officer-in-charge of a police station on such accusation and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person he shall issue a bailable warrant in conformity with the direction of the Court under sub section (1)."*

The import of the aforementioned Section is that the order of anticipatory bail can be granted where a person has reason to believe that he may be arrested on an accusation having committed a non bailable offence and this order is subject to the conditions enumerated in the aforementioned provision and in the event of arrest, the person is

entitled to bail under sub Sec.3 of Section 497-A.

Sub Section 3 of Section 497-A has two parts. In the first part, it refers to willingness of the person arrested to give bail before the police and the second limb of the said Section authorises the issuance of warrant of arrest (bailable) against the accused for surrendering before the Magistrate. It transpires that the provision for issuance of warrant of arrest by the Magistrate after he takes cognizance of the case, indicates the fact that the accused is required to appear or surrender before the Magistrate concerned.

The power to issue process after the court takes cognizance of the offence is to be done under Section 204 Cr.P.C. The said Section in-so-far-as relevant is being reproduced below:-

“204. Issue of process

1. If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding and the case appears to

be one in which, according to the fourth column of the Second Schedule, a summon should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issued in the first instance, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has not jurisdiction himself)some other Magistrate having jurisdiction.....

....."

A perusal of the above Section shows that once a Magistrate takes cognizance of the offence in which there is sufficient ground for proceeding, he is required to procure the presence of accused by issuance of summons, which is a clear indicator to the fact that the accused is required to surrender before the court taking cognizance of the offence.

It be seen that the present case is exclusively triable by the Court of Sessions. In terms of

Section 205-D of the Cr.P.C., the power to refer the matter to the court of Sessions vests with the Magistrate. He is empowered to remand the accused to custody during and until the conclusion of the trial subject to the provisions of the Code relating to bail. The said Section is also relevant and is being reproduced below:-

"205-D- Commitment of case to Court of Sessions when offence is triable exclusively by it.

When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions, he shall-

- (a) commit the case to the Court of Sessions;*
- (b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of the trial;*
- (c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;*
- (d) notify the public prosecutor of the commitment of the case to the Court of Session."*

A perusal of the above shows that when a case

is instituted on a police report or otherwise, the accused appears or is brought before the Magistrate, if it appears to the Magistrate that the matter is triable by the Court of Sessions, the Magistrate has the power to refer the same to the Court of Sessions. The irresistible conclusion, as indicated above, is that the accused is required to surrender before the Magistrate and unless he obtains the regular bail, he is to be sent to the custody.

In case, the proceedings are instituted by the Magistrate on the basis of a report filed under Section 173, the accused is required to be furnished, free of cost, a copy of the police report along with the documents which are appended with the report under Section 173 Cr.P.C. The effect of not supplying the copies of the said documents would be violative of the provisions of Section 205-B, Cr.P.C. Thus, it clearly envisages that the order of anticipatory bail granted in pre-trial stage can be made operative till filing of the chargesheet. It clearly explains the objective of Section 497-A of Cr.P.C.

Thus, it is abundantly clear that order for grant of bail in anticipation of arrest has to be limited in point of time and cannot be extended after the charge-sheet is filed before the Magistrate in any case. To say it candidly, the order of grant of anticipatory bail will remain operative only during the course of investigation and not after the charge sheet is filed. It is not in dispute that the charge-sheet has been filed in the present case before the trial court where the petitioners are required to appear for seeking regular bail.

The second question that arises in this case is whether the petitioners are entitled to any protective umbrella till the matter is considered by the trial court. In order to appreciate this fact, it is to be seen whether the petitioners satisfy the conditions laid down for grant of such a bail.

The power of granting anticipatory bail, as indicated above, is extraordinary in character and has to be exercised in exceptional cases where it appears that the person is falsely implicated or a

frivolous case has been lodged against him or where the court is of the view that there are reasonable grounds to believe that the person accused of an offence is not likely to abscond or misuse the liberty while on bail. The purpose and objective of exercising such a power is to see that the liberty of a person is not put to jeopardy on frivolous grounds at the instance of irresponsible officers who have been made incharge of the investigation.

Applying this principle in the present case, it be seen that the allegations levelled against the petitioners relate to fudging of a weapon of offence which has been used by the accused who is son of petitioner No.2, and this fudging of evidence has been done in order to scuttle the case of the prosecution. The incriminating material produced by the prosecution in the report under Section 173 cannot be said to be false and vexatious at this stage. A crime has been committed in which a person has died. The fudging of weapon of offence used in the said crime *prima-facie* obliterates the possibility of the case being based on false-hood. The conduct of the petitioners after the occurrence and the statement of witnesses recorded supporting

their involvement in the case cannot be wished away by exercising the power under Section 497-A. The manner in which the petitioners are evading the arrest and not cooperating with the investigating agencies is also an indicator which creates an apprehension that they may run away from the trial.

The contention of the petitioners that the present process has been unleashed against to wreck vengeance with the intend to destroy their business and status in the society cannot be accepted because the process against the petitioners has been issued only after it was revealed that the weapon of offence used in the crime has been fudged by them in conspiracy with the then Senior Superintendent of Police and other members of the earlier constituted Special Investigating Team. It is nobody's case that the petitioners were harassed prior to the date when it came to the notice of the authorities concerned that there has been a fudging of weapon of offence. The process issued against the petitioners is only to secure their presence in the investigation for which necessary steps under law have been taken against them.

The issue is no longer res-integra as to what are the requirements before the court grants an order of anticipatory bail. Additional burden is cast on the court while passing such an order as it has to see the nature and seriousness of the offence, character of evidence and amongst others the larger public interest has also to be kept in view. Taking all the facts and circumstances into consideration as noticed above, I do not find any ground in the present case to grant bail in anticipation of arrest of the petitioners.

For the reasons mentioned above, this application is found to be without merit and is dismissed.

(Sunil Hali)
Judge

Jammu

Dt.16.11.09

SS/

