Sunita Devi vs State Of Bihar And Ors on 6 December, 2004

Equivalent citations: AIR 2005 SUPREME COURT 498, 2004 AIR SCW 7116, 2005 AIR - JHAR. H. C. R. 457, (2005) 1 CGLJ 257, (2005) 1 JCR 7 (SC), 2005 (3) SRJ 303, 2005 (1) CALCRILR 239, 2005 ALL MR(CRI) 511, 2005 SCC(CRI) 435, 2005 CRILR(SC MAH GUJ) 213, (2004) 10 JT 491 (SC), 2005 (1) SCC 608, 2004 (7) SLT 469, 2004 (10) SCALE 227, (2005) 25 ALLINDCAS 7 (SC), 2005 (1) BLJR 40, (2005) 3 PAT LJR 495, (2005) 1 CRIMES 227, (2004) 115 DLT 517, (2005) 1 ALLCRIR 20, (2005) 1 CHANDCRIC 9, (2005) 1 ORISSA LR 153, (2005) 2 GUJ LR 1096, (2005) 1 KER LT 748, (2005) 2 MAH LJ 534, (2005) 2 MPLJ 406, (2005) 30 OCR 215, (2005) 1 PAT LJR 270, (2005) 1 RECCRIR 410, (2005) 3 SCJ 134, (2004) 4 CURCRIR 378, (2004) 8 SUPREME 760, (2004) 10 SCALE 227, (2005) 1 JLJR 178, (2005) 1 EASTCRIC 1, (2005) 1 KCCR 615, (2005) 51 ALLCRIC 220, (2005) 2 BLJ 106, (2005) 1 ALLCRILR 543, 2005 CRILR(SC&MP) 213, (2005) 1 CRIMES 86, (2006) SC CR R 802, 2005 (2) ANDHLT(CRI) 35 SC, 2005 (1) ALD(CRL) 314

Author: Arijit Pasayat

Bench: Arijit Pasayat, S.H. Kapadia

```
           CASE NO.:
Appeal (crl.)  1424 of 2004

PETITIONER:
SUNITA DEVI

RESPONDENT:
STATE OF BIHAR AND ORS.

DATE OF JUDGMENT: 06/12/2004

BENCH:
ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
```

JUDGMENT 2004 Supp(6) SCR 707 The Judgment of the Court was delivered by ARIJIT PASAYAT, J. : Leave granted.

Protection to the respondent no. 2-Anuj Kumar under Section 438 of the Code of Criminal Procedure 1973 (in short the 'Code') is assailed by the appellant.

A brief reference to the factual aspects would suffice. On 13.2.2002 the appellant (hereinafter referred to as the 'informant') lodged a written complaint before the officer-in-charge, Sirdala P.S. Nawadah that on 13.2,2002 at about 10.00 p.m. respondent No. 2 Anju Kumar, headman of Londh Panchayat armed with revolver, Anil Kumar armed with lathi. Sunil Kumar with lathi and others armed with weapons entered into her house and the said Anuj Kumar demanded Rs. 1000 from her elder brother Suresh Vishwakarma. When Suresh Vishwakarma refused to give the same showing his inability to arrange such a huge amount, Anuj Kumar Assaulted him by the butt of revolver on his head and below his eye. When the informant came for his rescue, she too was assaulted by fists and legs and the said Anuj Kumar demonstrating the revolver said that since her brother has not given the money, therefore outraged the modesty of his sister in the presence of all. Saying this, the headman Anuj Kumar pulled the informant-Sunita Devi, put her on the ground and lifting her petticoat and saree lied down on her and attempted to commit rape on her. Further, when seeing the entire incident the informant's sister Usha Devi came to rescue her, Anil Kumar hit her on her left thumb and legs with lathi. Thereafter, Anil and Sunil assaulted the sons of the brother Suresh Vishwakarma, namely Amarjit and Sujit and her mother with lathi on their faces. Then the informant's family started crying and hearing this the villagers namely Chhotey Lal Pandit, Puran Singh and others came and have seen the incident. However, because of the fear of revolver they could not apprehend accused persons. The accused Anuj Kumar thereafter fired thrice in the air from his revolver and exhorted his men to loot the shop of Suresh Vishwakarma and then all of them looted the articles worth Rs. 10,000 from his shop which included watches, radio loudspeakers etc. On the basis of the said complaint of the informant, FIR was lodged on 15.2.2002 which was registered as Sirdala P.S. Case No. 15/2002 under Sections 384/376/511 read with Section 34 of the Indian Penal Code 1860 (in short the IPC). It appears that on the same day, an FIR was lodged by Anuj Kumar alleging commission of offences punishable under Sections 341/323 read with Section 34 IPC against the informant's brother Suresh Viswakarma and Chhotey Lal Pandit. The respondent No. 2 filed an application for protection in terms of Section 438 of the Code before the Patna High Court and the same was numbered as Criminal Misc. 14464 of 2003. By the impugned Order dated 4.7.2003 the protection was granted, inter-alia, on the following terms:

> "Considering all the fact and circumstances of the case the prayer for anticipatory bail is allowed. In the event of arrest/surrender Petitioner Anuj Kumar shall be enlarged on bail on furnishing bail bond of Rs. 10,000 with two sureties of the like amount each to the satisfaction of the Chief Judicial Magistrate Nawadah in connection with Sirdala P.S. Case No. 15/2002; subject to the condition laid down under Section 438(2) Cr.P.C."

In support of the present appeal, it has been contended that the blanket protection given is contrary to the scheme of the Code and the legislative intent. The protection if any can be given for a limited period in order to enable the accused to apply for bail in terms of Section 439 of the Code before the appropriate Court. The applicant has to be in custody for moving such application.

Per contra, learned counsel for respondent No. 2 submitted that in view of what has been stated in K.L. Verma v. State and Another, (1996) 7 SCALE 20, protection given by the High Court is clearly in order. It was submitted that for the purpose of making an application in terms of Section 439 of

the Code, when the same is pursuant to an order passed on application under Section 438 of the Code, it is not necessary that the applicant should be in custody.

Sections 438 and 439 operate in different fields. Section 439 of the Code reads as follows :

> "439. (I) A High Court or Court of session may direct -
>
> (a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;
>
> (b) that any condition imposed by the Magistrate when releasing any person on bail be set aside or modified."

(underlined for emphasis) It is clear from a bare reading of the provisions that for making an application in terms of Section 439 of the Code a person has to be in custody. Section 438 of the Code deals with "Direction for grant of bail to person apprehending arrest". In Bal Chand Jain v. State of M.P., [1976] 4 SCC 572, it was observed that the expression "anticipatory bail" is really a misnomer because what Section 438 contemplates is not an anticipatory bail, but merely an order directing the release of an accused on bail on the event of his arrest. It is, therefore, manifest that there is no question of bail unless a person is arrested in connection with a non- bailable offence by the police. The distinction between an order in terms of Section 438 and that in terms of Section 439 is that the latter is passed after arrest whereas former is passed in anticipation of arrest and becomes effective at the very moment of arrest. (See Gur Baksh Singh v. State of Punjab, [1980] 2 SCC 565).

In Salauddin Abdulsamad Shaikh v. State of Maharashtra, AIR (1996) SC 1042 it was observed as follows :

> "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".

(Emphasis supplied) In K.L. Verma's case (supra) this Court observed as follows :

> "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, 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 ensure 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 cases 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. "

(Emphasis supplied) The reference to this Court's observation as quoted above was to Salauddin's case (supra).

The grey area according to us is the following part of the judgment in K.L. Verma's case (supra) '"or even a few days thereafter to enable the accused persons to move the Higher Court, if they so desire".

Obviously, the requirement of section 439 of the Code is not wiped out by the above observations. Section 439 comes into operation only when a person is "in custody". In K.L. Verma's case (supra) reference was made to Salauddin's case (supra). In the said case there was no such indication as given in K.L Verma's case (supra), that a few days can be granted to the accused to move the higher Court if they so desire, the statutory requirement of Section 439 of the Code cannot be said to have been rendered totally inoperative by the said observation.

In view of the clear language of Section 439 and in view of the decision of this Court in Niranjan Singh and Anr, v. Prabhakar Rajaram Kharote and Ors., AIR (1980) SC 785, there cannot be any doubt that unless a person is in custody, an application for bail under Section 439 of the Code would not be maintainable. The question when a person can be said to be in custody within the meaning of Section 439 of the Code came up for consideration before this Court in the aforesaid decision.

The crucial question is when a person is in custody, within the meaning of Section 439 of the Code? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having

offered himself to the court's jurisdiction and submitted to its order by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold to an officer with coercive power is in custody for the purpose of Section 439. The word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have determined him for interrogation but not taken him into formal custody and other tike terminological dubieties are unfair evasions of the straightforwardness of the law. Since the expression "custody" though used in various provisions of the Code, including Section 439, has not been defined in the Code, it has to be understood in setting in which it is used and the provisions contained in Section 437 which relates to jurisdiction of the Magistrate to release an accused on bail under certain circumstances which can be characterized as "in custody" in a generic sense. The expression "custody" as used in Section 439, must be taken to be a compendious expression referring to the events on the happening of which Magistrate can entertain a bail petition of an accused. Section 437 envisages, inter alia, that the Magistrate may release an accused on bail, if such accused appears before the Magistrate. There cannot be any doubt that such appearance before the Magistrate must be physical appearance and the consequential surrender to the jurisdiction of the Court of the Magistrate.

In Black's Law Dictionary by Henry Campbell Black, M.A. (Sixth Edn.), the expression "custody" has been explained in the following manner :

> ".....The term is very elastic and may mean actual imprisonment or physical detention ... within statute requiring that petitioner be 'in custody' to be entitled to federal habeas corpus relief does not necessarily man actual physical detention in jail or prison but rather is synonymous with restraint of liberty.....
>
> Accordingly, persons on probation or parole or released on bail or on own recognizance have been held to be 'in custody' for purposes of habeas corpus proceeding."

It is to be noted that in K.L. Verma's case (supra) the Court only indicated that time may be extended to "move" the higher court. In Black's Law Dictionary the said expression has been explained as follows :

> "Move: to make an application to a Court for a rule or order, or to take action in any matter. The term comprehends all things necessary to be done by a litigant to obtain an order of the Court directing the relief sought."
>
> In Salauddin's case (supra) also this Court observed that the regular Court has to be moved for bail Obviously, an application under Section 439 of the Code must be in a manner in accordance with la and accused seeking remedy under Section 439 must ensure that it would be lawful for the Court to deal with the application. Unless the applicant is in custody his making application only under Section 439 of the Code will

not confer jurisdiction on the Court to which the application is made. The view regarding extension of time to "move" the higher Court as culled out from the decision in K.L Verma's case (supra) shall have to be treated as having been rendered per incuriam, as no reference was made to the prescription in Section 439 requiring the accused to be in custody. In State through S.P. New Delhi v. Ratan Lal Arora, [2004] 4 SCC 590 it was held that where in a case the decision has been rendered without reference to statutory bars, the same cannot have any precedent value and shall have to be treated as having been rendered per incuriam. The present case stands at par, any precedent value and shall have to be treated as having been rendered per incuriam. The present case stands at par, if not, on a better footing. The provisions of Section 439 do not appear to have been taken note of.

"Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. the "quotable in law", as held in Young v. Bristol Aeroplane Co. Ltd., [1944] 2 All E.R. 293, is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority," Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution of India, 1950 (in short the 'Constitution') which embodies the doctrine of precedents as a matter of law. The above position was highlighted in State of U.P. and Another v. Synthetics and Chemicals Ltd. and Another, [1991] 4 SCC 139. To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience.

For making an application under Section 439 the fundamental requirement is that the accused should be in custody. As observed in Salauddin's case (supra) the protection is terms of Section 438 is for a limited duration during which the regular Court has to be moved for bail. Obviously such bail is bail in terms of Section 439 of the Code, mandating the applicant to be in custody. Otherwise, the distinction between orders under Sections 438 and 439 shall be rendered meaningless and redundant.

If the protective umbrella of Section 438 is extended beyond what was laid down in Salauddin's case (supra) the result would be clear bypassing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies upto higher Courts, the requirements of Section 439 become dead letter. No part of a statute can be rendered redundant in that manner.

These aspects were recently highlighted in Nirmal Jeet Kaur v. The State of Madhya Pradesh and Anr., JT (2004) 7 SC 161. Therefore the order of the High Court granting unconditional protection is clearly untenable and is set aside. However the petitioner is granted a month's time from today to apply for regular bail after surrendering to custody before the concerned Court which shall deal with the application in accordance with law. We express no opinion about the merits of the case.

Respondent no. 2 would surrender to custody as required in law so that his application under Section 439 of the Code can be taken for disposal.

Before saying omega, a few factors need to be noted.

From the petition filed in this Court and the counter affidavit filed by Respondent no. 2 some baffling features are noticed. Both the appellant and respondent no. 2 have referred to the supervision notes of the supervisory police officers. When asked as to how they could know about contends of supervision notes, evasive replies were given. Many instances have come in light when reference to the supervision notes have been made by the accused persons while seeking bail and also during trial.

Sections 207 and 208 of the Code deal with documents which are commonly known as police papers, which are to be supplied to the accused. The said sections read as follows :

> "Section 207 - Supply to the accused of copy of police report and other documents : In any case where the proceedings has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following :-
>
> (i) the police report;
>
> (ii) the first information report recorded under Section 154;
>
> (iii) the statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;
>
> (iv) the confessions and statements, if any, recorded under Section 164;
>
> (v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173 :
>
> Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused :
>
> Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed toinspect it either personally or though pleader in Court, Section 208 - Supply of copies of statements and documents to accused in other cases triable by Court of Session - Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under Section 204 that the offence is triable exclusively by the Court of Section, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of

the following : -

(i) the statements recorded under Section 200 or Section 202, or all persons examined by the Magistrate;

(ii) the statements and confessions, if any, recorded under Section 161 Section 164;

(iii) any documents produced before the Magistrate on which the prosecution proposes to rely :

Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

The supervision notes can in no count be called. They are not a part of the papers which are supplied to the accused. Moreover, the informant is not entitled to the copy of the supervision notes. The supervision notes are recorded by the supervising officer. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilized against him. The object is to enable the accused to defend hiself properly. The idea behind the supply of copies is to put him on notice of what he had to meet at the trial. The effect of non-supply of copies has been considered by this Court in Noor Khan v. State of Rajasthan, AIR (1964) SC 286 and Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble and Anr.. [2003] 7 SCC 749. It was held that non-supply is not necessarily prejudicial to the accused. The Court has to give a definite finding about the prejudice or otherwise. The supervision notes cannot be utilized by the prosecution as a piece of material or evidence against the accused. At the same time the accused cannot make any reference to them for any purpose. If any reference is made before any court to the supervision notes, as has noted above they are not to be taken note of by the concerned court. As many instances have come to light when the parties, as in the present case, make reference to the supervision notes, the inevitable conclusion is that they have unauthorized access to the official records. We, therefore, direct the Chief Secretary of each State and Union Territory and the concerned Director General of Police to ensure that the supervision notes are not made available to any person and to ensure that confidentiality of the supervision notes is protected. If it comes to light that any official is involved in enabling any person to get the same appropriate action should be taken against such official. Due care and caution should be taken to see that while supplying police papers supervision notes are not given.

The appeal is allowed to the aforesaid extent.