V.S. Norti And Ors. vs State Of Karnataka on 9 February, 1989

Equivalent citations: ILR1989KAR943

ORDER

1. This is a petition under S. 458 of the Code of Criminal Procedure ('the Code' for short). Petitioner 1 is a Head Constable bearing Buckle No. 178, while petitioners 2, 3, 4, 5 and 6 are Constables (Members of State Police Force).

2. It is the case of the prosecution, as is seen from the record, that the petitioners were attached to Ranebennur Police Station at the material time and that they committed murder of one Guddappa who had been taken to the Police Station at Ranebenner on 20-10-1988 as a suspect in a case registered in Crime No. 168 of 1988 in the said Police Station.

3. The petitioners along with one other arraigned as co-accused with them approached the Principal Sessions Judge, Dharwad, in Criminal Miscellaneous petition No. 308 of 1988 for a direction under S. 438 of the Code to release them on bail in the event of their arrest. The learned Principal Sessions Judge by the order dated November 29, 1988 rejected their petition. The petitioners have renewed their request in this petition.

4. Learned counsel for the petitioners submitted that there are no reasonable grounds be believe that the petitioners have committed the offence punishable under S. 302, I.P.C. Supplementing the submissions he stated, even if all the facts alleged against the petitioners are taken in their entirety, the offence alleged to have been committed by them would at the most be one under S. 330, I.P.C. He also submitted that the lungi stated to have been used by deceased Guddappa to hang himself belonged to one Krishna and that neither the Sub-Divisional Magistrate who held inquest proceedings over the dead body and preliminary investigation into the death of deceased Guddappa, nor the investigating agency recorded the statement of the said Krishna and that this circumstance along with other circumstances is sufficient to grant the relief asked for.

5. The learned counsel for the petitioners submitted that the substantial part of the investigation is over, whereas the learned High Court Government Pleader for the State stated that the investigation is under progress and that the Inspector of Police on the establishment of the Corps of Detectives, Bangalore, is investigating into the matter. It was also submitted by the learned counsel for the petitioners that the petitioners have been kept under suspension after the incident.

6. It was submitted by the learned counsel for the petitioners when his attention was drawn to the decision of the Supreme Court in Kirandevi v. State of Rajasthan, 1988 SCC (Cri) 106, that if the principle laid down by the Supreme Court in the said decision is followed, it would practically render S. 438 of the Code nugatory and that the decision needs reconsideration. He also submitted that the principle laid down by the Supreme Court in the said decision must be restricted to the facts appearing in the said case and should not be taken as a principle or rule of law binding on all Courts as the declared by it.

7. I will take up first the question as to whether the decision of the Supreme Court in Kirandevi's case lays down the principle or rule of law as binding precedent.

8. It may be necessary to look at the historical background of S. 438 of the Code.

9. At one time, there was conflict of views amongst different High Courts in our Country about the power of a Court to grant anticipatory bail i.e. bail in anticipation of arrest. The majority view was that there was no such power vested in the Court under the Code of Criminal Procedure 1898 repealed by the Code.

10. The Law Commission in its Forty First Report observed :

> "The necessity for granting anticipatory bail arises mainly because sometimes influentical persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases. Where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."

The Law Commission after observing thus, recommended introduction of a provision for grant of anticipatory bail.

11. The recommendation was accepted by the Central Government and Clause (447) was introduced in the draft Bill of the Code conferring express power on a Court of Session or a High Court to grant anticipatory bail.

12. Commenting on this provision in the draft Bill, the law Commission observed paragraph 31 of its Forty-Eighth Report as under :-

> "The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendations made by the previous Commission (41st Report). We agree that this would be a useful addition, thought we must add that it is in very exceptional cases that such a power should be exercised.
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> We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the public prosecutor. The initial order should only be an interim one. Further the relevant Section should make it clear that the direction can be issued only for reasons to be recorded, and if the Court is satisfied that such a direction is necessary in the interests of justice."

Clause 447 become S. 438 when the Bill was enacted into the new Code (vide the observations made by the Supreme Court in Balchand Jain v. State of Madhya Pradesh, AIR 1977 SC 366 : (1977 Cri LJ 225).

13. Section 438 of the Code reads thus :-

> "438 : Direction for grant of bail to person apprehending arrest :-
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> (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.
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> (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 the particular case, as it may think fit, including -
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> (i) a condition that the person shall make himself available for interrogation by a police officer as and when required;
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> (ii) 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;
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> (iii) a condition that the person shall not leave India without the previous permission of the Court;
>
> (iv) such other condition as may be imposed under sub-section (3) of Section 437, 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 a Magistrate taking cognisance 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 sub-section (1)."

14. In Balchand Jain v. State of Madhya Pradesh, AIR 1977 SC 366 : (1977 Cri LJ 225) the Supreme Court after referring to the recommendation made by the Law Commission in its Forty First Report and the observations made by the Law Commission in its Forty-Eighth Report in respect of Clause 447 as introduced in the draft Bill on its earlier recommendation observed thus :-

> "We do not find in this Section the words 'anticipatory bail,' but that is clearly the subject with which the Section deals. In fact 'anticipatory bail' is a misnomer. It is not

> as if bail is presently granted by the Court in anticipation of arrest. When the Court grants 'anticipatory bail,' what it does is to make an order that in the event of arrest, a person shall be released on bail. Manifestly there is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting 'anticipatory bail' becomes operative. Now, this power of granting 'anticipatory bail' is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or 'there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail' that such power is to be exercised. And this power being rather of an unusual nature, it is entrusted only to the higher echelons of judicial service, namely a Court of Session and the High Court. It is a power exercisable in case of an anticipated accusation of non-bailable offence and there is no limitation as to the category of non-bailable offence in respect of which the power can be exercised by the appropriate Court."

15. In Gurbaksh Singh Sibbia v. State of Punjab, the Constitution Bench of the Supreme Court dealt with the distinction between an ordinary order of bail and an order of anticipatory bail and examined the question for grant of anticipatory bail and held that the provision of S. 438 of the Code cannot be invoked after the arrest of the accused and that a blanket order for anticipatory bail should not generally be passed. On the question as to whether an order of bail if can be passed without notice to Public Prosecutor, the Constitution Bench held thus :-

> "An order of bail can be passed under S. 438 without notice to the Public Prosecutor. 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."

16. In Pokar Ram v. State of Rajasthan, , the Supreme Court was concerned with the question as to whether the order granting anticipatory bail exercised sub silentio as to reasons can be interfered with by it and held that it must interfere to avoid miscarriage of justice. Referring to the law laid down by it in Gurbaksh Singh Sibbia's case, the Supreme Court in Pokar Ram's case observed thus :-

> "6. The decision of the Constitution Bench of Gurbaksh Singh Sibbia v. State of Punjab, clearly lays down that 'the distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. A direction under S. 438 is intended to confer a conditional immunity from the touch as envisaged by S. 46(1)

> or confinement. In Para 31, Chandrachud, C.J. clearly demarcated the distinction between the relevant considerations while examining an application for anticipatory bail and an application for bail after arrest in the course of investigation. Says the learned Chief Justice that in regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. It was observed that' it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond.' Some of the relevant considerations which govern the discretion, noticed therein are the nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tempered with and 'the larger interests of public or the State', are some of the considerations which the Court has to keep in mind while deciding an application for anticipatory bail. A caution was voiced that in the evaluation of the consideration whether the applicant is likely to abscond, there can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it."

17. The Supreme Court in Pokar Ram's case (1985 Cri LJ 1175) after noticing the relevant considerations which should weigh with the court in the matter of granting or refusing to grant anticipatory bail, looked at the order made by the Sessions Judge and observed in Para 13 of the judgment thus :-

> "Before we conclude this judgment, it must be made distinctly clear that some very compelling circumstances must be made out for granting bail to a person accused of committing murder and that too when the investigation in progress ..... If such an order is allowed to stand, faith of public in administration of justice is likely to be considerably shaken. Therefore, we have no option but to cancel the order granting anticipatory bail."

18. Dealing with the powers of High Court or Sessions Court to impose conditions, the Constitution Bench of the Supreme Court in Gurbaksh Singh Sibbia's case (1980 Cri LJ 1125) observed thus :-

> "14. Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, Courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting

anticipatory bail because, firstly, these are higher Courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by Courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. While dealing with the necessity for preserving judicial discretion unhampered by rules of general application, Earl Loreburn L.C. said in Hyman v. Rose, 1912 AC 623.

"I desire in the first instance to point out that the discretion given by the Section is very wide ..... Now it seems to me that when the Act is so express to provide a wide discretion ..... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which Judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by status to the Court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that Court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the Court wish it had kept a free hand".

19. In Kiran Devi v. State of Rajasthan, 1988 SCC (Cri) 106 : 1987 Supp SCC 549, there was an application for special leave to appeal and the Supreme Court after granting special leave heard the counsel for the parties and disposed of the matter. The observations made by the Supreme Court are these :-

"We are of the opinion that anticipatory bail should not have been granted in the murder case when the investigation was still incomplete. The proper course to adipt was to leave it to the trial Court to do the needful if and when the person concerned was arrested in the light of the record available at that point of time. The order passed by the High Court is, therefore, set aside. It will be open to respondent 2 if and when he is arrested to apply for bail to the appropriate Court which will decide the matter on the basis of the available records in accordance with law. We have set aside the order under appeal on principle and we are not making any observation one way or the other on the merits of the case."

20. Article 141 of the Constitution embodies as a rule of law the doctrine of precedent on which our judicial system is based. Principles that enunciate rules of law form the foundation of administration

of justice under our system and Art. 141 gives a Constitutional status to the theory of precedents in respect of the law declared by the Supreme Court.

21. The question for consideration is whether the principle declared by the Supreme Court in Kiran Devi's case enunciates a rule of law of universal application so as to constitute the principle laid down therein as a binding precedent under Art. 141 of the Constitution.

22. Explaining the expression precedent, the Supreme Court in Sreenivasa General Traders v. State of A.P. has observed thus :-

> "A case is an authority only for what it actually decides and not for what may logically follow from it. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed or qualified by the particular facts of the case in which such expressions are to be found. Observations in the judgment which were really not necessary for the purposes of the decision and go beyond the occasion have no binding authority and merely have persuasive value."

The law declared by the Supreme Court is to be found inter alia in the ratio of the case. That is why it is stated that a decision is binding not because of its conclusion but in regard to its ratio and the principles laid down therein.

23. The ratio decidendi has been described roughly as a rule of law applied by and acted on by the Court or the rule which the Court regarded as governing the case.

24. It is in the light of these well settled principles, the question is as to whether Kiran Devi's case, (1988 SCC (Cri) 106) lays down a ratio is to be decided.

25. The judgment discloses that the case before the Supreme Court was a murder case where the investigation was still incomplete. The facts of the case are not mentioned in the judgment. In that view of the matter, it cannot be said that the principle laid down by the Supreme Court that in a murder case when the investigation is still incomplete anticipatory bail should not be granted to be a principle laid down as applicable to the facts in the case. It cannot also be said that the principle laid down is governed or qualified by the particular facts in the said case. The Supreme Court stated the principle as a rule of law, applied it to the case before it and acted on it. It clearly held that the principle governs a case in which the applicant seeking anticipatory bail is accused of the offence of murder and in which the investigation is incomplete. The principle laid down by the Supreme Court cannot be said to be an observation of general character relating to the issue in the case before it. Nor can it be said that the observation was not necessary for the purpose of deciding the case and was beyond the occasion. The case before the Supreme Court was a murder case in which the investigation was incomplete. The Supreme Court in clear terms stated that it was setting aside the order made by the High Court on principle and was not making any observation one way or the other on the merits of the case. I am unable to agree with the learned counsel for the petitioners that

the principle laid down by the Supreme Court in Kiran Devi's case must be restricted to the facts appearing in the said case and should not be taken as a principle or a rule of law binding on all Courts as the law declared by it. It is difficult to countenance the view that the principle laid down by the Supreme Court is either obiter dicta or a casual observation made in the judgment on a point not calling for decision as contended.

26. The Supreme Court as is clear from the observation extracted earlier decided a question of law. Judicial discipline requires that this principle should be followed.

27. The learned counsel for the petitioners invited my attention to the order made by this Court in Criminal Petition No. 1505 of 1988 disposed of on 7th November, 1988 and submitted that the dictum laid down in Kiran Devi's case (1988 SCC (Cri) 106) was considered by this Court and this Court held that the application for anticipatory bail should be decided on merits. A reading of the order would show that the Sessions Judge, whom the petitioner had approached had refused to grant anticipatory bail relying on the decision of the Supreme Court in Kiran Devi's case. This court observed thus :-

> "From what has been stated in the case of Kiran Devi, it appears to me on facts of that case, no law has been laid down by the Supreme Court that in the case of murder, anticipatory bail cannot be granted. Anticipatory bail should or should not be granted for the heinous nature of offence was for consideration before the Supreme Court. The Supreme Court, after consideration of various aspects, held that mere heinous nature of the offence is no ground for refusing the anticipatory bail. The fact that the case is also under investigation cannot be a ground for refusing anticipatory bail, because, the anticipatory bail is granted only during the course of investigation and before the accused is arrested. As provided under S. 438, Cr.P.C. itself it is clear that if such anticipatory bail is granted, the accused has to appear and make himself available to the Investigating Officer for investigation of the case. Therefore, neither the fact that the offence is one of murder nor the fact that the case is still under investigation is a ground for refusing anticipatory bail. Such application for anticipatory bail. Such application for anticipatory bail has to be considered on its own merits ....."

It is clear from the reading of the order that this Court in Criminal Petition No. 1505 of 1988 did not consider whether the principle laid down by the Supreme Court in Kiran Devi's case constituted a binding precedent under Art. 141 of the Constitution."

28. The next decision relied upon by the learned counsel for the petitioners is R. L. Jalappa v. Delhi Police Establishment, . In R. L. Jalappa's case, the petition was under S. 438 of the Code. The learned counsel for the prosecution relying on the decision of the Supreme Court in Kiran Devi's case (1988 SCC (Cri) 106) had contended that anticipatory bail should not be granted in a murder case when investigation was still incomplete. This Court dealing with the said contention observed thus :-

> "The Supreme Court itself has declared that the decision of a Constitution Bench and/or larger Bench will be binding on High Courts under Art. 141 of the Constitution of India in preference to latter decision by a smaller Bench if they are irreconcilable."

It is clear from the order that this Court did not go into the question as to whether the principle laid down in Kiran Devi's case is irreconcilable with the principles laid down by the Constitution Bench in Gurbaksh Singh Sibbia's case (1980 Cri LJ 1125). Having carefully read the decision, the principles laid down in Gurbaksh Singh Sibbia's case and the principle laid down in Kiran Devi's case, I do not feel persuaded to accept the contention of the learned counsel for the petitioners that the principle laid down in Kiran Devi's case conflicts with the principles laid down in Gurbaksh Singh Sibbia's case. The principle in Kiran Devi's case does not limit the amplitude of judicial discretion which is given to a High Court and a Court of Session. Nor does it curtail the scope and ambit of the discretion. It lays down a salutary guideline as a principle to be applied to and acted on in cases in which the investigation is incomplete.

29. For all the aforesaid reasons, I hold that the principle laid down in Kiran Devi's case is a ratio laid down by the Supreme Court intended as laying down a rule of universal application applicable to cases in which the offence alleged is murder and in which the investigation is incomplete.

30. In the instant case, the petitioners who are the members of the State Police Force are accused of the offence of murder. Thoughts the learned counsel for the petitioners contended that the substantial part of the investigation is over, it was represented on behalf of the respondent State that the investigation is still incomplete and that further investigation has been taken over by the Inspector of Police on the establishment of the Corps of Detectives.

31. The facts and circumstances in the instant case attract the principle laid down by the Supreme Court in Kiran Devi's case (1988 SCC (Cri) 106).

32. In view of my conclusion that the principle in Kiran Devi's case has to be applied to the case of the petitioners, I do not propose to go into the contentions raised, argued and canvassed by the learned counsel for the petitioners on the merits of the matter. It will be open to the petitioners if and when they are arrested to apply for bail to the appropriate Court. The appropriate Court will decide the matter on the basis of the available record in accordance with law.

33. With these observations, the petition is dismissed.

34. Return the case diaries produced in a sealed cover by the prosecution under a Memo to the learned High Court Government Pleader under acknowledgment.

34. Petition dismissed.