

I.Y. Chanda Earappa vs State Of Karnataka on 18 September, 1989

Equivalent citations: ILR1989KAR2882, 1989(2)KARLJ585

JUDGMENT

M. Rama Jois, Actg. C.J.

1. In this Criminal Petition presented under S. 438 of the Code of Criminal Procedure (1973) the following questions are raised:
 - (1) Whether in a petition presented under S. 438 of the Code to the High Court or the Court of Sessions, an order made under S. 438 of the Code for the release of a person, if arrested, is maintainable?
 - (2) Whether an order made under S. 438 of the Code for the release of a person, if arrested, is maintainable?
 - (3) Whether a petition under S. 438 of the Code is not maintainable before the High Court or the Court of Sessions?
2. The facts of the case, in brief, are these : The petitioner made an application under S. 438 of the Code for the release of a person, if arrested, to the learned Sessions Judge.
3. The learned Sessions Judge rejected the application by order dated 28-12-1988. Thereafter, the petitioner filed a petition under S. 438 of the Code for the release of a person, if arrested, to the High Court.
4. As there has been a divergence of opinion in the two judgments delivered by two learned Judges of this Court on the question as to whether an anticipatory bail could be granted when the person seeking anticipatory bail is alleged to have committed an offence of murder, Shivashankar Bhat, J. has referred the matter to a Division Bench under S. 9 of the Karnataka High Court Act, 1961.
5. The first judgment is in the case of R. L. Jalappa v. Delhi Police Establishment, , decided by Doddakalegowda, J. In the said case relying on the judgment of the Supreme Court in Kiran Devi v. State, 1988 SCC (Cri) 106 it was contended for the State that no anticipatory bail could be granted in a case in which the petitioner seeking anticipatory bail is alleged to have committed an offence of murder. The learned Judge rejected the contention holding that the said judgment decided by a two Judge Bench of the Supreme Court was contrary to the ratio of the decision in the case of Gurbaksh Singh v. State, decided by a Constitution Bench. This case was decided on 12-5-1988. Thereafter, in the case of V. S. Norty v. State of Karnataka, on behalf of the State once again the same objection was raised in a petition under S. 438 of the Code. Navadgi, J. who decided this case, took the view that in the case of Kiran Devi, the Supreme Court had laid down the law to the effect that no anticipatory bail could be granted in a petition presented under S. 438 of the Code if the offence alleged to have

been committed by the petitioner was murder and that being a direct authority for the proposition that no anticipatory bail under S. 438 of the Code could be granted in a murder case, it was binding on this court and consequently no anticipatory bail could be granted in a case in which the petitioner seeking anticipatory bail is likely to be arrested on a charge of murder.

6. In order to appreciate the contention, it is necessary to set out the relevant portions of Sections 437 and 438 of the Code. They read :

"437 : When bail may be taken in case of non-bailable offence - (1) When any person accused of or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but -

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence.

438. Direction for grant of bail to person apprehending arrest - (1) When any person has reason to believe that he may be arrested of 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 directions in the light of the facts of the particular case, as it may think fit, including -

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

(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;

(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 S. 437, as if the bail were granted under that section."

Section 437 confers power on the Courts other than High Court or Court of Sessions to wit the Courts of Magistrates to grant bail to persons after arrest by the police. It provides that such court has the power to grant bail to a person accused of or suspected of the commission of a non-bailable offence and is arrested or detained by an officer in charge of a police station and is brought before the court. Clause (i) however limits the power of the Magistrates to the effect that person so arrested shall not be released if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life.

Section 438 confers power on the High Court as also the Court of Session to grant bail to any person apprehending arrest on an accusation of having committed a non-bailable offence in anticipation of his arrest, which is called anticipatory bail. The limitation imposed in S. 437(i) is not found in S. 438 of the Code.

7. It is contended on behalf of the petitioner that the scope of S. 438 of the Code has been fully expounded by the Supreme Court in the case of Gurbaksh Singh, (1980 Cri LJ 1125), decided by a Constitution Bench. The learned counsel submitted that the ratio of the said decision was that the limitation imposed on the Magistrates regarding granting of bail could not be read into S. 438 of the Code and that even if a non-bailable offence alleged to have been committed by a person happens to be an offence of murder, the High Court or the Sessions Court exercising its power under S. 438 of the Code has the power to grant anticipatory bail and it is for the court to decide as to whether in a given case the anticipatory bail should be granted or not. The learned counsel also submitted that the decision in Kiran Devi's case, (1988 SCC (Cri) 106) was only to the effect that in that particular case in which the petitioner therein was proposed to be arrested on a charge of murder, the High Court should not have granted anticipatory bail and that no law was laid down to the effect that under S. 438 of the Code the Court had no power to grant anticipatory bail where the petitioner seeking anticipatory bail was likely to be arrested on a charge of murder and that in any event even if the said decision can be regarded as having laid down the law to that effect, it cannot prevail over the ratio of the decision of the Constitution Bench in the case of Gurubaksh Singh.

8. In our opinion, the contention urged by the learned counsel for the petitioner is unexceptionable. In fact, the precise question, namely, as to whether the limitation imposed in S. 437(1)(i) of the Code to the effect that a Magistrate should not grant bail where there are reasonable grounds to believe that the accused is alleged to have committed any of the non-bailable offences specified therein would also control the exercise of power under S. 438 of the Code, was the subject matter for consideration by the Supreme Court in the case of Gurbaksh Singh, (1980 Cri LJ 1125). In the said case, the Supreme Court was considering the correctness of the view taken by a Full Bench of the Punjab High Court, to the effect that (at pp. 1131-32 of Cri LJ) :

(1) the power under S. 438 of the Code is not unguided or uncanalised but all the limitation imposed in the preceding S. 437 are implicit therein and must be read into S. 438 of the Code;

(2) the discretion under S. 438 cannot be exercised with regard to offences punishable with death or imprisonment for life unless the court at that very stage is

satisfied that such a charge appears to be false or groundless.

The Supreme Court emphatically ruled that on both the points the view taken by the Full Bench of the Punjab High Court was erroneous. The relevant portion of the judgment reads (at pp. 1134, 1135-36 of Cri LJ) :

"13. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code.

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18. According to the sixth proposition framed by the High Court, the discretion under S. 438 cannot be exercised in regard to offences punishable with death or imprisonment for life unless, the court at the state of granting anticipatory bail, is satisfied that such a charge appears to be false or groundless. Now S. 438 confers on the High Court and the Court of Session the power to grant anticipatory bail if the applicant has reason to believe that he may be arrested on an accusation of having committed "a non-bailable offence." We see no warrant for reading into this provision the conditions subject to which bail can be granted under S. 437(1) of the Code. That section, while conferring the power to grant bail in cases of non-bailable offences, provides by way of an exception that a person accused or suspected of the commission of a non-bailable offence "shall not be so released" if there appears to be reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. If it was intended that the exception contained in S. 437(1) should govern the grant of relief under S. 438(1), nothing would have been easier for the legislature than to introduce into the latter section a similar provision. We have already pointed out the basic distinction between these two sections. S. 437 applies only after a person, who is alleged to have committed a non-bailable offence, is arrested or detained without warrant or appears or is brought before a court. Section 438 applies before the arrest is made and in fact, one of the pre-conditions of its application is that the person, who applies for relief under it must be able to show that he has reason to believe that "he may be arrested", which plainly means that he is not yet arrested. The nexus which this distinction bears with the grant or refusal of

bail is that in cases falling under S. 437, there is some concrete data on the basis of which it is possible to show that there appear to be reasonable grounds for believing that the applicant has been guilty of an offence punishable with death or imprisonment for life. In cases falling under S. 438 that stage is still to arrive and, in the generality of cases thereunder, it would be premature and indeed difficult to predicate that there are or are not reasonable grounds for so believing. The foundation of the belief spoken of in S. 437(1), by reason of which the court cannot release the applicant on bail is, normally, the credibility of the allegations contained in the First Information Report. In the majority of cases falling under S. 438, that data will be lacking for forming the requisite belief. If at all the conditions mentioned in S. 437 are to be read into the provisions of S. 438 the transplantation shall have to be done without amputation. That is to say, on the reasoning of the High Court, S. 438(1) shall have to be read as containing the clause that the applicant "shall not" be released on bail "if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life." In this process one shall have overlooked that whereas, the power under S. 438(1) can be exercised if the High Court or the Court of Session "thinks fit" to do so, S. 437(1) does not confer the power to grant bail in the same wide terms. The expression 'if it thinks fit' which occurs in S. 438(1) in relation to the power of the High Court or the Court of Session, is conspicuously absent in Section 437(1). We see no valid reason for re-writing S. 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court and the Court of Session, but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the Court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal."

In our opinion, the above judgment of the Supreme Court is a complete answer in the negative to the first question arising for consideration in this case.

9. The next point for consideration is, whether the Supreme Court in the case of Kiran Devi (1988 SCC (Cri) 106), has laid down the law to the contrary, and if so whether the said decision prevails over the decision in the case of Gurbaksh Singh (1980 Cri LJ 1125) (SC). The decision in the case of Kiran Devi, is an order made on the Special Leave petition filed against anticipatory bail granted by the Rajasthan High Court, in which the petitioner therein was alleged to have committed an offence of murder. The Supreme Court set aside the order of the High Court. The order reads :

"1. Special Leave granted, Heard counsel for the parties.

2. 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 adopt 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.

3. The appeal is disposed of accordingly."

As can be seen from the above decision, decided by a two Judge Bench, the Supreme Court was of the view that in the said murder case the bail should not have been granted. It is a decision rendered on the facts of the said case. Therefore, we are of the view that the learned counsel for the petitioner is right in contending that in Kiran Devi's case (1988 SCC (Cri) 106) no law has been laid down, which conflicts with the ratio in Gurbaksh Singh's case (1980 Cri LJ 1125) (SC). Even if the said decision is regarded as having laid down the law to the effect that under Section 438 of the Code no anticipatory bail should be granted in a case in which the person seeking anticipatory bail is alleged to have committed an offence of murder, in view of the last sentence of the second paragraph in which the Supreme Court said that the order under appeal was being set aside on principle, in our view, the ratio in Gurbaksh Singh's case decided by a Constitution Bench prevails and is binding on us, for, a Five Judge Full Bench of this Court in Govinda Naik v. West Patent Press, has held that if there is divergence of opinion between two decisions of the Supreme Court the opinion of the larger bench is binding on this Court.

10. Sri C. Shivappa, the learned Advocate General, fairly conceded that the scope of Section 438 of the Code has been fully expounded by the Supreme Court in the case of Gurbaksh Singh (1980 Cri LJ 1125), decided by a Constitution Bench and the decision in Kiran Devi's case (1988 SCC (Cri) 106) rendered by a two Judge Bench of the Supreme Court decided the case on the facts of the said case and has not laid down the law to the contrary. He submitted that the only indication available from the judgment in Kiran Devi's case was that the Court should be circumspect in granting anticipatory bail in a murder case.

11. We are of the view that Section 438 of the Code confers power on the High Court or the Court of Session, as the case may be, to grant anticipatory bail, in absolute terms and the powers conferred under that provision is not controlled by the limitations imposed in Section 437(i) of the Code and these limitations cannot be read into the provisions of Section 438. We are also of the view that the scope of Section 438 of the Code has been fully expounded by the Supreme Court in the case of Gurbaksh Singh and no law to the contrary has been laid down in Kiran Devi's case (1988 SCC (Cri) 106). We, therefore, respectfully agree with the view taken by Doddakalegowda, J. and respectfully disagree with the view taken by Navadgi, J. and answer the first question referred for our opinion as under :

"In a petition presented under section 438 of the Code to the High Court or the Court of Session, the Court has the power to direct to grant of bail, even if the petitioner apprehends arrest by the Police on the allegation that he had committed an offence of

murder."

12. The learned Advocate General, however, submitted that though the court has the power under section 438 of the Code to grant anticipatory bail in all cases in which the petitioner seeking anticipatory bail is likely to be arrested for a non-bailable offence including offences for which punishment of death or imprisonment for life is the punishment prescribed under the Penal Code, having regard to the facts and circumstances of the a given case, the court has the power to limit the anticipatory bail in point of time and to require the accused to seek bail either under section 437 of the Code or under section 439 of the Code after the F.I.R. or charge-sheet is filed before the jurisdictional criminal court, as that court would be in a better position to decide as to whether bail should be granted or not having due regard to the material collected during investigation and placed before the court. He submitted that if the facts and circumstances of the case justify imposition of such condition, such condition should be imposed in order to safeguard the rights of the investigating agency to fully and properly investigate into the offence alleged against the accused as it is in public interest that there should be effective investigation of complaints about the commission of such offences. He submitted that in the present case as the charge levelled against the petitioner was that he had committed murder and it is further alleged that he had caused the disappearance of evidence of the commission of offence by causing the burning of the body of the deceased and thereby also committed an offence punishable under Section 201 of the Penal Code, this court should refuse to grant anticipatory bail as sought for. He submitted that even if this court were to decide to grant anticipatory bail, it should be limited in point of time and the petitioner should be asked to seek bail under section 437 or under section 439 of the Code and impose a condition to the effect that the anticipatory bail granted by this court would come to an end with the passing of the order on the application to be presented by the petitioner under Section 437 or Section 439 of the Code.

13. The learned counsel for the petitioner, however, contended that once an anticipatory bail is granted under section 438 of the Code, it has to continue till the completion of the trial and there is no power vested in this court to limit it in point of time. He also submitted that as a petition under section 439 of the Code could be made only by a person in custody, it would not be permissible for this court to impose a condition to the effect that the petitioner, if he were to be arrested, should be released on bail and that thereafter he should make an application under section 439 of the Code as his petition under Section 439 would not be maintainable as he would not be in custody as he would have been released pursuant to the order of this Court.

14. The learned Advocate General submitted that even after the release of a person after arrest subject to the condition imposed by the order of this court in an order made under section 438 of the Code, such person would be deemed to be in custody and his application under section 439 of the Code would be maintainable. He also submitted that a person presenting himself before the court under section 439 of the Code and seeking bail, should be deemed to have submitted to the custody of the court and therefore his application would be maintainable and could be considered. In support of this submission, he relied on the judgment of the Supreme Court in the case of *Niranjan Singh v. Prabhakar*, .

15. In order to appreciate the contention, it is necessary to look into the wordings of Section 438 of the Code. As can be seen from Section 438(2), extracted earlier, the discretion conferred on the court regarding imposition of conditions and restrictions while granting anticipatory bail is very wide. It provides that when the court makes a direction under section 438(1) for the release of a person on bail after he is arrested, the court may include such condition in such directions, as it thinks fit, in the light of the facts of the case including the conditions specified in Clauses (i), (ii), (iii) and (iv). Therefore, there is nothing in Section 438 of the Code which prevents the court from imposing a condition limiting the Direction for grant of anticipatory bail in point of time. This position in law is made clear by the Supreme Court in Gurbaksh Singh's case (1980 Cri LJ 1125). The relevant paragraphs are 38 and 39. They read :

"38. There was some discussion before us on certain minor modalities regarding the passing of bail orders under S. 438(1). Can an 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 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 F.I.R. 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.

39. During the last couple of years this court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in S. 438(2)(i), (ii) and (iii). The court has, in addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made under S. 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the Court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the F.I.R. in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The appellants who were refused anticipatory bail by various courts have long since been released by this Court under Section 438(1) of the Code."

From the above paragraphs of the judgment, it is clear that while it is not obligatory for the High Court to limit an order of anticipatory bail in point of time, there is no prohibition in Section 438 of the Code for imposing such condition also. Therefore, the question as to whether anticipatory bail should be limited in point of time, is a matter to be considered by the Court in each case having due regard to the importance of the personal freedom of the individual and the public duty and power of the Police to investigate into an offence fully which is in public interest, which is equally important. If the court considers that anticipatory bail should be granted having due regard to the material before the court and further if on the facts and circumstances of the case the court considers that the question as to whether the case is a fit one in which the accused should be on bail throughout trial or not, should be examined in the light of the material placed before the court after the filing of the F.I.R. or the charge-sheet, it would be a wise exercise of jurisdiction to limit the anticipatory bail in point of time, in that, the accused should be asked that after his arrest and release he should apply for bail under section 437 of the Code or under section 439 of the Code and that the anticipatory bail granted under section 438 of the Code would come to an end on the passing of the order on such application.

16. As stated earlier, the learned counsel for the petitioner contended that once a person was released pursuant to an order of anticipatory bail, he would be no longer in custody and therefore though he could make an application under section 437 of the Code, he could not move an application under section 439 of the Code as the condition precedent for making an application under that provision was that the person should be in custody and therefore no condition could be imposed to the effect that an anticipatory bail would continue till the disposal of an application under Section 439 of the Code by the person who had been released pursuant to the anticipatory bail order.

17. In our opinion, the contentions raised by the learned counsel for the petitioner is on the assumption that an application by a person who has been arrested and released pursuant to an order made under section 438 of the Code, cannot make an application under Section 439 of the Code. The Supreme Court in the case of Niranjana Singh (1980 Cri LJ 426) has held that though it is true that unless a person is in custody he cannot make an application under Section 439 of the Code, the very fact that a person presents himself before a Sessions Judge and makes an application under Section 439 of the Code, means that he has submitted to the custody or jurisdiction of the court and for the purpose of the application under section 439 of the Code he should be deemed to be in custody. Therefore, there is no substance in the contention that a person arrested and released pursuant to an order of anticipatory bail cannot make an application under section 439 of the Code. The moment such person appears before the court and makes an application under section 439 of the Code, he would be deemed to be in custody as held by the Supreme Court in the case of Niranjana Singh and his application has to be considered by the Session Court on its merits. It is more so in the case of a person who has been arrested and released pursuant to an order made under section 438 of the Code. If a person is arrested and taken to the custody of Police and released pursuant to an order made under section 438 of the Code, subject to the conditions imposed in the said order such as his making available to the police for investigation and his not moving out of a specified locality without the express permission of the officer specified, he is, and in any event, should be deemed to be, in custody for the purpose of an application under section 439 of the Code. This position is also made

clear in paragraph 39 of the judgment in Gurbaksh Singh's case (1980 Cri LJ 1125) (SC), in the context of Section 27 of the Evidence Act.

18. For these reasons, we answer the second question as follows :

"An order under section 438 of the Code for the release of a person on bail, after his arrest, could be limited in point of time."

19. The learned Advocate General next contended that Section 438 of the Code confers concurrent jurisdiction on the High Court and the Sessions Court and from this it follows the party has the choice of either approaching the High Court or the Sessions Court but not both one after another. He submitted that as in the present case the petitioner had made an application under section 438 of the Code before the Sessions Court and the same has been dismissed, his application under section 438 of the Code before this Court is not maintainable. This contention has given rise to the third question.

20. The learned counsel for the petitioner, per contra, submitted that there was nothing in Section 438 of the Code which suggests that an application before the High Court under section 438 of the Code was not maintainable after a similar application had been rejected by the Court of Sessions.

21. It is true that Section 438 confers concurrent jurisdiction in the matter of grant of anticipatory bail on the High Court and the Court of Session. The Section says that a person may apply either to the High Court or to the Court of Session. It is no doubt true that in the absence of any contra indication, the construction suggested by the learned Advocate General that both the forums were not available and the party concerned has to choose one of the forums and once having chosen and taken a decision before one forum, he cannot, for the same relief, approach the other forum, would have to be upheld. But in our opinion, there is an indication to the contrary in the provisions of the Code. For instance, Section 397 of the Code confers concurrent revisional power both on the High Court and the Court of Session. Sub-section (3) of that provision expressly provides that a party could approach either of the courts, but could not approach one after the another. The Parliament which imposed such a condition while conferring concurrent jurisdiction under Section 397 of the Code, has omitted to impose such a condition in Section 438 of the Code. This, in our opinion, is an indication to the contrary.

Of course, there can be no doubt that as in the hierarchy, Court of Session is subordinate to the High Court; a party who makes an application under section 438 of the Code before the Sessions Court could approach the High Court, if his application had been rejected by the Court of Session, but not vice versa. In other words, if the party chooses to file an application under section 438 of the Code before the High Court and it is rejected he cannot thereafter approach the Court of Session under the same provision and on the same grounds. This position is conceded, in our opinion, rightly, by the learned counsel on both sides. For the aforesaid reasons, we find no substance in the construction of Section 438 of the Code, as suggested by the learned Advocate General. We receive support for this view from the following decisions : Mohan Lal v. Prem Chand, (FB); Diptendu Nayak v. State of West Bengal, (1989) 1 Cri LJ 424 (Cal) (SB). For these reasons, we answer the third

question as follows :

"A petition under section 438 of the Code is maintainable before the High Court even if a similar application has been made and rejected by the Court of Session."

22. Now coming to the merits of the case, the brief facts of the case, as set out in the petition, are as follows : An anonymous letter was received by the Sub-Inspector of Police, Virajapet Police Station on 28-11-1988. In the letter it was stated that three Malayalis, one of whom was bearing the name Thangappan, were caught on the allegation that they had committed theft of money of one Krishna and they were brought to Devanagiri village. There the three Malayalis were assaulted with sticks by the petitioner and other accused. The petitioner kicked Thangappan with his leg wearing the boot, at his testicles and as a result he died instantaneously and that immediately thereafter the petitioner and others took the body to a nearby Devarakadu and burnt it and that all the villagers were threatened by the petitioner of dire consequences if they were to give information to the Police and, therefore, no one had lodged a complaint to the Police and that it was in those circumstances the anonymous letter was being written to the Sub-Inspector of Police giving all the information about the offence so that the Police might make investigation and take action against the culprits. It is, thereafter, the Sub-Inspector of Police went to the spot, made investigation and has registered a case of murder against number of persons and the petitioner is the first accused and the Police have not been able to arrest him as his whereabouts are not known.

23. The learned counsel for the petitioner submitted that a false case was being foisted against the petitioner and that even on the material stated in the objection statement, there was no intention on the part of the petitioner to kill the deceased and therefore no charge of murder under section 302 of the Penal Code could be levelled against the petitioner and the case might even if true, fall only under section 304 of the Penal Code.

24. On the facts and circumstances of the case, it appears to us that an anticipatory bail should be granted to the petitioner subject to certain conditions. Further on the facts and circumstances and in particular in view of the allegation contained in the anonymous letter that the dead body was burnt and the eye witnesses were threatened of dire consequences if they were to lodge a complaint before the Police about the offence, the anticipatory bail should also be limited in point of time, that is, till an application to be made by the petitioner under Section 437 or Section 439 of the Code is decided on merits having due regard to the material placed before the court along with the F.I.R. and the charge-sheet which are stated to have already been filed.

24A. In the result, we make the following order :

(i) The petition is allowed;

(ii) A direction shall issue to the respondents to release the petitioner on bail immediately after his arrest, subject to the following conditions :

- 1). The petitioner shall furnish a bond for Rs. 25,000-00 with a surety for the like sum.
 - 2). The petitioner shall make himself available to the Police for interrogation and shall cooperate with the Police in the investigation process;
 - 3). The petitioner shall not go out of the district without the express permission of the jurisdictional Magistrate.
 - 4). The petitioner is at liberty to make an application either under Section 437 or Section 439 of the Code before the competent court for grant of bail, within two weeks from the date of his arrest and release on bail pursuant to this order. If the petitioner fails to make application within the aforesaid time, the order for anticipatory bail shall cease to be effective on the expiry of the two weeks.
- (iii) If the petitioner makes an application either under section 437 or Section 439 of the Code within the period to two weeks from the date of his arrest, the anticipatory bail granted pursuant to this order shall remain in force till the date on which such an application is disposed of.
- (iv) The court, before whom such an application, either under Section 437 or Section 439 of the Code, is made, shall dispose of the application on its merits most expeditiously uninfluenced by the grant of anticipatory bail by this order.

25. Order accordingly.