REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 406 OF 2008

Vaman Narain Ghiya ...Appellant

Versus

State of Rajasthan ...Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the order passed by a learned Single Judge of the Rajasthan High Court at Jodhpur, rejecting the application for bail filed by the appellant. An earlier application for bail filed by the appellant was also rejected by the High Court by order dated 15.12.2003. Allegation against the appellant was that he is involved in several nefarious activities of smuggling of antiques particularly the idols to foreign countries for heavy sums of money.

2. Stand of appellant before the High Court was that he was discharged of offence punishable under Section 413 of the Indian Penal Code, 1860 (in short the 'IPC') by the trial Court and therefore he was facing trial only for the offence triable by the Court of Magistrate, i.e. under Sections 457, 380 and 411 IPC. It was the stand of the appellant that the evidence of the prosecution witnesses was not sufficient to secure his conviction in respect of any of the charges. It was pointed out that evidence of seven witnesses have been recorded and none of them has implicated him in the crime. There is no recovery from him and other co-accused persons similarly situated namely, Madam Mohan Agarwal and Manoj Sharma had been enlarged on bail. Out of 10 cases registered against him, he has been granted bail in six cases. He is in jail for more than 2 ½ years and in any case he is entitled to bail in view of the provisions contained in Section 437 (6) of the Code of Criminal Procedure, 1973 (in short the 'Code'). The State opposed the bail application on the ground that in an identical case the application of the applicant was rejected by the Jaipur Bench and the matter was carried to this Court and no interference was made. Further the order of discharge in respect of offence punishable under Section 413 IPC was challenged by

filing a revision before the High Court. Considering the aforesaid aspects the prayer for bail was rejected.

3. Learned counsel for the respondent submitted that though the proceedings have been stayed and several cases have been clubbed together, the charge sheet was filed on 27.9.2003 and on 21.4.2005 the order of discharge was passed. Subsequently, the order of discharge has been set aside by the High Court in S.B. Criminal Revision No.817 of 2005. The same order of discharge was challenged before this Court in Criminal Appeal No.1585 of 2007 which was dismissed as withdrawn. The only distinguishing feature pointed out by the appellant to seek reconsideration of the prayer for bail was the order of discharge. As noted above, the same was set aside by the High Court. Appeal against the same has been dismissed as withdrawn.

4. Section 439 of the Code reads as follows:

> "439. (1) A High Court or Court of Session may direct -
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> (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)

5. 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".

6. 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)

7. In K.L. Verma v. State and Anr. (1996 (7) SCALE 20) 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 enure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even

a few days thereafter to enable the accused persons to move the higher court, if they so desire."

(Emphasis supplied)

8. In Nirmal Jeet Kaur v. State of M.P. and Another (2004 (7) SCC 558) and Sunita Devi v. State of Bihar and Anr. Criminal Appeal arising out of SLP (Crl.) No. 4601 of 2003 disposed of on 6.12.2004 certain grey areas in the case of K.L. Verma's case (supra) were noticed. The same related to the observation "or even a few days thereafter to enable the accused persons to move the Higher Court, if they so desire". It was held that 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.

9. 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.

10. After analyzing the crucial question that when a person is in custody, within the meaning of Section 439 of the Code, it was held in Nirmal Jeet Kaur's case (supra) and Sunita Devi's case (supra) that 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 in 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.

11. 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.

12. Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead, innocence, since he is not on the date of application for exercise of power under Section 438 of the Code convicted for the offence in respect of which he seeks bail. The applicant must show that he has 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' shows that the applicant may be arrested must be founded on reasonable grounds. Mere "fear" is not 'belief' for which reason it is not enough for the applicant to show that he has some sort of vague apprehension that some one is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief on the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the Court concerned to decide whether a case

has been made out of for granting the relief sought. The provisions cannot be invoked after arrest of the accused. A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such 'blanket order' should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under Section 438 is a device is secure the individual's liberty' it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. On the facts of the case, considered in the background of legal position set out above, this does not prima facie appear to be a case where any order in terms of Section 438 of the Code can be passed.

13. "Bail" remains an undefined term in the Cr.P.C. Nowhere else the term has been statutorily defined. Conceptually, it continues to be

understood as a right for assertion of freedom against the State imposing restraints since the U.N. Declaration of Human Rights of 1948, to which Indian is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression 'bail' denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb 'bailer' which means to 'give' or 'to deliver', although another view is that its derivation is from the Latin term baiulare, meaning 'to bear a burden'. Bail is a conditional liberty. Strouds' Judicial Dictionary (Fourth Edition 1971) spells out certain other details. It states:

> "When a man is taken or arrested for felony, suspicion of felony, indicated of felony, or any such case, so that he is restrained of his liberty – And being by law bailable, offence surety to those which have authority to bail him, which sureties are bound for him to the Kings use in a certain sums of money, or body for body, that he shall appear before the Justices of Goale delivery at the next sessions etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed, that is to say, set at liberty until the day appointed for his appearance."

14. Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.

15. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on one hand, the requirements of the society for being shielded from the hazards of being exposed to the mis-adventures of a person alleged to have committed a crime; and on the other, the fundamental cannon of criminal jurisprudence, viz, the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restrain, the more restraint on others to keep off from us, the more liberty we have (See A.K. Gopalan v. State of Madras AIR 1950 SC 1000).

16. The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt.

17. Chapter XXXIII consists of Sections 436 to 450. Sections 436 and 437 provide for the granting of bail to accused persons before trial and conviction. For the purposes of bail, offences are classified into two categories, that is, (i) bailable, (ii) non-bailable. Section 436 provides for granting bail in bailable cases and Section 437 in non bailable cases. A person accused of a bailable offence is entitled to be released on bail pending his trial. In case of such offences, a police officer has no discretion to refuse bail if the accused is prepared to furnish surety. The Magistrate gets jurisdiction to grant bail during the course of investigation when the accused is produced before him. In bailable offence there is no question of discretion for granting bail. The only choice for the Court is as between taking a simple recognizance of the principal offender or demanding security with surety. Persons contemplated by this Section cannot be taken in custody unless they are unable or unwilling to offer bail or to execute personal bonds. The Court has no discretion, when granting bail under this section, even to impose any condition except the demanding of security with sureties.

18. "Bailable offence" is defined in Clause (b) of Section 2 of the Cr.P.C. to mean an offence which is shown as bailable in the First Schedule of the

Cr.P.C., or which is made bailable by any other law for the time being in force; and "non-bailable offence" means an other offence.

19. While considering an application for bail, detailed discussion of the evidence and elaborate documentation of the merits is to be avoided. This requirement stems from the desirability that no party should have the impression that his case has been pre-judged. Existence of a prima facie case is only to be considered. Elaborate analysis or exhaustive exploration of the merits is not required. (See Niranjan Singh and Anr. v. Prabhakar Rajram Kharote and Ors. AIR 1980 SC 785). Where the offence is of serious nature the question of grant of bail has to be decided keeping in view the nature and seriousness of the offence, character of the evidence and amongst others the larger interest of the public. (See State of Maharashtra v. Anand Chaintaman Dighe AIR 1990 SC 625 and State v. Surendranath Mohanty 1990 (3) OCR 462).

20. We find no merit in this appeal which is dismissed accordingly.

…….J.
(Dr. ARIJIT PASAYAT)

……J.
(Dr. MUKUNDAKAM SHARMA)

New Delhi,
December 12, 2008