

IN THE HIGH COURT OF ORISSA AT CUTTACK

ABLAPL No. 12669 of 2023

(Application under Section 438 of Cr.P.C.)

Jharu Naik and another **Petitioners**

- Versus -

State of Odisha **Opp. Party**

Advocate(s) appeared in this case:-

For Petitioners : M/s. B.B. Behera, S. Bahadur &
S.C. Sahoo, Advocates.

For Opp. Party : Mr. S.K. Mishra
Addl. Standing Counsel

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

12th January, 2024

SASHIKANTA MISHRA, J.

The present application involves the following question of law - whether a person added as an accused by the trial Court exercising power under Section 319 of Cr.P.C. is entitled to seek anticipatory bail under Section 438 of Cr.P.C.

2. Brief reference to the facts would be necessary at the outset.

3. On 12.01.2022, one Bhimasen Naik of Bentapur village under Angul Sadar Police Station lodged an FIR alleging therein that on previous day his brother, Tikan Naik had a quarrel with Biju Naik, Badal Naik (petitioner No.2) and Sipun. A scuffle ensued, but because of intervention by the complainant and others, the same subsided. On the same evening when Tikan and his uncle were returning home after visiting his sister, Biju Naik, Gopi Naik, Biranchi Naik, Badal Naik and Dasa Naik, all of whom had concealed themselves, suddenly came to the spot and jointly assaulted him by means of bhujali, axe and thenga. Hearing shouts, the complainant rushed to the spot and saw the assailants assaulting his brother and upon seeing him they fled away. Tikan was taken to DHH, Angul but was referred to Cuttack. He died on the way. On the FIR thus lodged, Angul Sadar P.S. Case No. 32/2022 was registered under Sections 302/34 of IPC followed by investigation. In course of investigation, the I.O. found that accused, Biju had stabbed the deceased by means of an arrow causing his death. Accordingly, charge sheet was submitted only against him under Section 302 of IPC. The case being committed to the

Court of Sessions, trial commenced, in course of which, some witnesses were examined including the informant as P.W.-1 and his other brothers as P.Ws. 2 and 3. In course of trial, the prosecution filed an application under Section 319 of Cr.P.C. on 06.03.2023 to add the other FIR named accused persons including the petitioners as accused persons in the case basing on the testimony of P.Ws.1, 2 and 3. The Court below by order dated 01.05.2023 found that there was sufficient evidence available against the non-charge sheeted persons and accordingly, added them as accused and directed issuance of summons to them. The petitioners are among the persons so summoned and apprehending that they may be taken into custody on their appearance, have approached this Court in the present application seeking anticipatory bail.

4. This Court, in the present application is not concerned with the correctness or otherwise of the order passed by the trial Court adding the petitioners as additional accused persons in the case.

5. A preliminary objection as regards maintainability of the application was raised by learned State Counsel, Mr. S.K. Mishra. He argues that the trial Court having issued only a summons, apprehension of the petitioners of being taken to custody is entirely unjustified. Even otherwise, Section 438 of Cr.P.C. would apply to cases of arrest by police and not to cases where summons has been issued by Court.

6. On the other hand, Mr. S. Bahadur, learned counsel appearing for the petitioners would argue that the expression 'reason to believe' used in Section 438 of Cr.P.C. is wide enough to include any reasonable apprehension of a person of being taken to custody. He further argues that Sub-Section (3) of Section 319 confers power on the trial Court to detain a person appearing upon summons and therefore, the apprehension of the petitioners must be held to be reasonable.

7. For better appreciation of the rival contentions it is necessary to refer to the provision of Section 438 of

Cr.P.C. at the outset, sub-Section(1) of which being relevant in the present context, is quoted hereinbelow:

“Section 438 -Direction for grant of bail to person apprehending arrest.

1(1) Where any person has reason to believe that he may be arrested on 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 that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:---

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and.

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable

opportunity of being heard when the application shall be finally heard by the Court,

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.”

8. It is no longer res integra that the apprehension of arrest must be based on tangible facts and be reasonable in nature. Any imagination, fear or speculation, per se, cannot be treated as reasonable apprehension. So, whether in the facts of the present case the petitioners have a reasonable apprehension of being taken into custody is to be seen. As already stated, the petitioners have been summoned to appear before the trial Court being added as accused persons in the ongoing trial on the strength of the power under Section 319 of Cr.P.C. The provision reads as follows;

“Section 319- Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the

circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.”

9. Sub-Section (3) of Section 319 Cr.P.C. is clear to the extent that the Court has power to detain a person also appearing upon summons. To such extent therefore, the apprehension of the petitioners can be treated as genuine and reasonable. Viewed differently, if the trial Court decides to detain the petitioners exercising power under Sub-Section(3) of Section 319 of Cr.P.C. upon their appearance it would tantamount to curtailment of their liberty. This, in turn, is akin to arrest. In such circumstances, the right to liberty guaranteed under Article 21 of the Constitution comes into play.

10. In the case of **Vikas v. State of Rajasthan**, reported in **(2014) 3 SCC 321**, the Supreme Court while reiterating the need of exercising restraint and judicial discretion by the trial Court while exercising power under Section 319 of Cr.P.C., referred to the right to liberty guaranteed under Article 21 of the Constitution.

11. A single Judge Bench of Punjab and Haryana High Court in the case of **Bajinder Singh v. State of Punjab**, reported in **2015 SCC OnLine P&H 3229** held that since the petitioners therein had been summoned to face trial for offence under Section 302 of IPC, on their appearance before the Court they have a reasonable apprehension that they would be taken into custody and thus, their plea for anticipatory bail was held to be not misconceived.

A Division Bench of Rajasthan High Court, in the case of **Manohar Lal Saini v. State of Rajasthan**, reported in **2015 SCC OnLine Raj 10662** held that a person added as an accused in exercise of power under Section 319 of

Cr.P.C. has remedy to apply for anticipatory bail under Section 438 of the Code.

Thus, this Court essentially finds that the petitioners, though summoned after being added as accused persons in the ongoing trial can verily lose their liberty upon their appearance. There is no gainsaying that protection of liberty is one of the most cherished objects of the Constitution as reflected in Article 21 of the Constitution. Such a remedy therefore, cannot be denied. Of course, whether anticipatory bail would actually be granted or not is a matter to be determined basing on the facts and circumstances of each case as it cannot be laid down as a straight-jacket formula that in every such case where a person is summoned as an added accused, he is to be granted anticipatory bail.

12. Coming to the merits of the claim of anticipatory bail, this Court finds that the trial Court has relied on the testimonies of the informant (P.W.-1) and his other two brothers (P.Ws. 2 & 3). Copies of depositions of the said witnesses are available in the case record. Though the

informant claims to have seen the occurrence, yet it is admitted that he was not present at the spot and had gone to attend the call of nature and came to the spot only upon hearing the shouts of his brother. He admits in cross-examination that he could not see who assaulted to which part of his brother's body and by what weapon. P.W.-2 clearly admits in cross-examination that he had not seen the incident. P.W.-3 also denies knowledge as to who assaulted the deceased by which instrument. Thus, prima facie, there is some doubt as regards the veracity of the version of the above named witnesses as to the involvement of the petitioners. It must be kept in mind that police had not found any evidence against any other FIR named accused persons save and except Biju Naik. Thus, taking into consideration all the above facts, this Court is inclined to take a view that there is reasonable doubt as regards involvement of the petitioners in the alleged occurrence.

13. Since the trial Court has already summoned the petitioners, the anticipatory bail application is disposed of directing them to appear in pursuance thereof and to move for bail. In such event, they shall be released on such terms

and conditions as the trial Court may deem fit and proper to impose including the condition that they shall personally appear before the trial Court on each date of posting of the case. It is needless to mention that any observations made in this order shall have no bearing on the final decision in the trial.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack.
The 12th January, 2024/ A.K. Rana, P.A.

