

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/CRIMINAL MISC.APPLICATION NO. 6978 of 2021**

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KURESHI IRFAN HASAMBHAI THRO KURESHI KALUBHAI HASAMBHAI  
Versus  
STATE OF GUJARAT

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Appearance:

MR. R.C.JANI, ADVOCATE with KASHYAP R JANI(8287) for the Applicant(s)  
No. 1 and MR. VISHRUT R JANI(6696) for the Applicant(s) No. 1  
MR. D.M.DEVNANI, APP, (2) for the Respondent(s) No. 1

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**CORAM: HONOURABLE MR. JUSTICE A.Y. KOGJE**

**Date : 09/06/2021**

**ORAL ORDER**

[1] **RULE.** Learned APP waives service of Rule on behalf of the respondent-State.

[2] This is an application by the applicant under Section 438 of the Code of Criminal Procedure, 1973 for anticipatory bail in the event of his arrest in connection with FIR registered at **C.R. No.11192050210093 of 2021 before Sanand Police Station, Ahmedabad (Rural)** for the offence under Sections 143, 147, 148, 149, 152, 153, 224, 225, 186, 332, 353, 395, 397, 427 and 504 of the Indian Penal Code, under Section 135 of the GP Act and under Section 12 of the Gambling Act.

[3] The application is filed through the brother of the proposed accused who is aged 17 years and apprehends that he may be falsely involved in the aforesaid offence on account of the previous enmity with the accused No.1 though applicant is not named as an accused in the FIR.

[4] The application essentially is for anticipatory bail of child in conflict with law. The State through Additional Public Prosecutor has

raised question of maintainability of this application and therefore, the issue comes for consideration as to whether an application for anticipatory bail under Section 438 of the Code of Criminal Procedure (for short "the Code") can be maintained by child in conflict with law more particularly considering the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "the Act, 2015").

[5] The personal liberty of an individual is at the highest pedestal and the personal liberty of a juvenile cannot be considered to be anything lower. Right of an individual to a legal recourse is also fundamental for an individual and has to be so if not with more vigor for a juvenile.

[5.1] With the aforesaid, it would be necessary to refer to few facts of the case. The applicant who is not named as an accused in the FIR has raised an apprehension that the applicant will be falsely implicated in the offence by naming him as an accused during the course of investigation by or at the behest of the accused No.1 as the applicant is having a previous quarrel with accused No.1 named in the FIR over a pet dog and therefore, the said accused No.1 would try to get the name of the applicant involved. Therefore, an application was filed before the 8<sup>th</sup> Additional District and Sessions judge, Ahmedabad (Rural) at Mirzapur, however, on account of maintainability the application was not entertained.

[6] Learned advocate for the applicant submitted that the applicant is not involved in the offence and therefore also, the complainant has not named him in the offence however apprehension of arrest has arisen due to previous incident which occurred between accused No.1 regarding pet dog for which in the present offence accused No.1 and/or other co-accused named in the FIR are likely to name the present applicant as an accused in the offence during the course of investigation; thereby falsely

implicating the applicant in the offence. It is submitted that the applicant had furnished a Video Footage to the Investigating Officer as well as to the Sessions Court wherein the entire incident was seen and no role of the applicant was coming out in that. It is also submitted that the co-accused who are named in the FIR have been enlarged on regular bail.

[6.1] Reliance is placed upon the decision of Punjab and Haryana High Court in the case of **Krishan Kumar Minor through his mother v/s. State of Haryana** in **CRM-M No.19907 of 2020 (O&M)** to indicate that the High Court had exercised the discretion granting pre-arrest bail. Reliance is also placed upon the decision in the case of **Kumari Shivani and another v/s. State of M.P.**, reported in **2009 SC OnLine MP 4803**, wherein the anticipatory bail to the minor was granted. Reliance is also placed upon the decision of Jharkhand High Court in the case of **Birbal Munda and others v/s. State of Jharkhand**, reported in **2019 SCC OnLine 1794**. It is submitted that the Jharkhand High Court had taken into consideration all the aspects including relevant definitions and provisions of Juvenile Justice Act and concluded that the application for anticipatory bail is maintainable.

[7] As against this, learned Additional Public Prosecutor has opposed the grant of application by submitting that the provisions of Act, 2015 does not provide for effecting of arrest and therefore, condition precedent of arrest for invoking Section 438 of the Code does not arise and therefore, the order of the Sessions Court, Ahmedabad (Rural) holding application under Section 438 of the Code is not maintainable, is justified.

[7.1] Learned APP has also relied upon the decision in the case of **Suriya v/s. State of The Tamil Nadu** by Madurai Bench of Madrash High Court in **Cri.O.P. (MD) No.433 of 2016**. Learned APP has also relied upon the decision in the case of **Vinayak Pandey**

**v/s. State of Madhya Pradesh, in M.Cr.C.No.22489 of 2007.**

[8] The Court has considered rival submissions of parties and perused the documents placed on record. The FIR came to be registered for offence under Sections 143, 147, 148, 149, 152, 153, 224, 225, 186, 332, 353, 395, 397, 427 and 504 of the Indian Penal Code, under Section 135 of the GP Act and under Section 12 of the Gambling Act, naming five persons as an accused, whereas the applicant is admittedly not named as an accused. The applicant who is aged 17 years has submitted that he has no connection with the offence, but the apprehension of being implicated falsely in the offence is on account of his previous quarrel with the accused No.1 in connection with the pet dog and therefore, during the course of investigation there is likelihood of accused No.1 and/or other co-accused persons naming the applicant as an accused in the offence subjecting the applicant to the offence. The applicant has no criminal history and has no previous antecedents. The accused persons who are named in the FIR have been enlarged on regular bail by an order dated 23.03.2021 passed in Criminal Misc. Application No.935 of 2021.

[8.1] The applicant had filed an application for anticipatory bail in Criminal Misc. Application No.1050 of 2021 before the 8<sup>th</sup> Additional District and Sessions Judge, Ahmedabad (Rural) which came to be dismissed by holding that the application for anticipatory bail under Section 438 of the Code is not maintainable. While doing so, finding is given in para-5 by relying upon the decision in the case of **Satyendra Sharma v/s. State of Madhya Pradesh**, reported in **2014(2) MPLJ (Cri) 374**, where according to the Sessions Court the issue was dealt with regarding maintainability of bail of a juvenile and such application cannot be entertained by the High Court or Court of Sessions by applying the provisions contained under Section 6(2) of the Act, 2015. Section 6(2) of the Act provides placement of persons, who committed an offence, when person

below the age of 18 years. Sub-Section provides for when such person is not released on bail by the Board shall be placed in a place of safety during the process of inquiry. However, in the order nothing is discussed as to in what manner Section 6(2) of the Act, 2015 is attracted. It appears that the judgment in the case of **Satyendra Sharma (Supra)** was pronounced when the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short "the Act, 2000) was prevailing and at that time Section 6(2) of the Act, 2000 provides for the powers conferred on the Board by or under this Act was also exercised by High Court and Court of Sessions when the proceedings come before them in appeal, revision or otherwise. However, the Act, 2000 is now substituted by the Act, 2015 and under Section 111 of the Act, 2015, the Act, 2000 stands repealed. This aspect appears to have escaped the attention of the Sessions Court while dealing with the present case.

[9] The question requires to be addressed is whether application for anticipatory bail under Section 438 of the Code can be maintained by a juvenile or not. The foundation for the contention raised at the behest of the State is the language of Section 438 of the Code which is required to be read with Sections 10 and 12 of the Act, 2015. It has been argued that for maintaining application under Section 438 of the Code there has to be an apprehension of arrest of a person, whereas provisions of Section 10 of the Act, 2015 provides for in no case, a child alleged to be in conflict with law shall be placed in a police lockup or lodged in jail and as in case of a child in conflict with law there is a complete bar for placing the child in police lockup or to be lodged in jail. There is no apprehension of arrest and therefore, Section 438 of the Code cannot be invoked.

[10] The word "apprehend" with reference to an offence is defined as under:-

*"Apprehend: To seize under process of law: to take into custody; make prisoner; arrest by legal warrant or*

*authority. “*

The word “apprehension” in Concise Law Dictionary, 1997 Edition reads as under:-

*“Apprehension (of a person) The seizing or taking hold of a man; the act of arresting or seizing under process of law; arrest; (as) the apprehension of criminals. “Apprehension”, may include detention.”*

However, for the purpose of this case, the word “Apprehend” is to mean “seize” or “Arrest”.

[11] The word “arrest” though not defined in Criminal Procedure Code, purport could be gathered from Chapter-5 of CRPC. The word ‘arrest’ in common parlance and as defined in various dictionaries would mean to deprive a person of his personal liberty to go anywhere he pleases. The word “arrest” in legal sense refers to a procedure connected with an offence to take into custody of another person under an authority of law for the purpose of holding or detaining him to answer a criminal charge or preventing commission of offence. The manner and method of arrest is also provided for under Chapter-5 of CRPC. Section 438 of the Code opens with the phrase *“when any person has reason to believe that he may be arrested on accusation of having committed non-bailable offence....”*

[11.1] Section 10 of Act, 2015 opens as under:-

*“as soon as a child alleged to be in conflict with law is apprehended by the police.....”.*

Therefore, use of word “arrest” is avoided in Section 10 of Act, 2015. The word “apprehend” is also not defined in the CRPC nor in Juvenile Justice Act. The word “arrest” therefore, in common parlance would mean from the Concise Law Dictionary, 1997 Edition. As per Webster Law Dictionary, meaning of “Arrest” is to

seize or take into custody by authority of law. As per Stroud's Dictionary, meaning of "Arrest" is when one is taken and refrained from his liberty.

[12] It would be necessary after considering the provisions of Section 10 of Act, 2015 to also take into consideration the provisions of Section 12 of Act, 2015 which provides for bail to a person who is apparently a child alleged to be in conflict with law. Section 12 of the Act, 2015 provides for release on bail with or without surety or placed under the supervision of a probation officer or under care of any fit person. The proviso to Section 1 states that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or release of such person would defeat the end of justice. Such reasons, which Board will have to be recorded in denying the bail to such person who is apparently child in conflict with law. Sub-Section 2 of Section 12 provides for when such person who is apprehended and is not released on bail then such person has to be kept only in observation home in such manner as may be prescribed until the person is brought before the Board. Sub-Section 3 of Section 12 provides that when such person is not released on bail an order will have to be made by the Board to send him in a observation home or a place of safety during the pendency of the inquiry that may be specified in the order and Section 4 of Section 12 provides that when a child in conflict with law is unable to fulfill the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of conditions of bail.

[13] The conjoint reading of Sections 10 and 12, in the opinion of the Court, places the word "apprehension" used in Section 10 of the Act, 2015 at par with and synonyms to "arrest" used in Section 438 of the Code. Therefore, though methods different Acts are provided

for to deal with juvenile/child in conflict with law, still the methodology provided for apprehending the child in conflict with law curtails the liberty of such child and is subjected to various stages as provided particularly in Sections 10 and 12 of the Act, 2015. The Court of is the opinion that the languages of the relevant Sections of the Act, 2015 do not carve out a complete bar or the right of an individual under Section 438 of the Code and by implication takes out child in conflict with law from the purview of Section 438 of the Code.

[14] At this stage, it would be appropriate to reproduce Section 1(4) of the Act, 2015, which reads as under:-

“Section 1(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all members concerning children in need of care and protection and children in conflict with law, including

- (i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;
- (ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration and restoration of children in need of care and protection.”

[15] Chapter-II of the Act, 2015 provides for general principles of Care and Protection of children where relevant Sections are 3(i), 3(ii) and 3(viii) , which read as under:-

“3(i) Principle of presumption of innocence: Any child shall be presumed to be an innocent of any mala fide or criminal intent upto the age of eighteen years.

3(ii) principle of dignity and worth: All human beings shall be treated with equal dignity and rights.

3(viii) Principle of non-stigmatising semantics” Adversarial or accusatory words are not be used in the processes pertaining to a child.”

[16] Section 1(4) of the Act, 2015 though begin with non-obstante clause provides for application of Juvenile Justice Act to all matters concerning children in conflict with law. However, thereby, the object of the Act is to provide something more that is already



provided for in the ordinary law in the present case provided under Section 438 of the Code. The Act which is separately provided for the children is to Act in the benefit of the children and cannot be understood to curtail the rights which are otherwise ordinarily available to the individuals.

[17] One more reason in support of holding application under Section 438 of the Code to be maintained is the language used by the Legislature. There is no expressed bar to exercise powers under Section 438 of the Code in the entire Act, 2015. The Court may refer to the other statutes where the intention of the Legislature to exclude certain offence from the provisions of Section 438 of the Code. The Legislature in unequivocal terms has expressly provided it. Reference be made to Section 18 of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 which read as under:-

**“18. Section 438 of the Code not to apply to persons committing an offence under the Act.—Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act”**

[18] Section 17(2) of the Gujarat Protection of Interest of Depositors (in Financial Establishments) Act, 2003 reads as under:-

**“17(2) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) except section 438 thereof shall, so far as may be, apply to the proceedings before a Designated Court and for the purposes of the said provisions a Designated Court shall be deemed to be a Magistrate.”**

[19] Section 20(3) of the Gujarat Control of Terrorism and Organized Crime Act, 2015 reads as under:-

**“20(3) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.”**

[20] Considering the aforesaid sets of provisions where there is expressed bar of application of Section 438 of the Code to

aforementioned Special Acts, this Court is of the opinion that there is no expressed bar of application of Section 438 of the Code to the children in conflict with law covered by the Act, 2015 and in absence of expressed bar of application of Section 438 of the Code, there is no reason to imply such bar more particularly in the facts of the present case where the applicant who is juvenile is not even named as an accused and has raised a apprehension for being impleaded on extraneous consideration.

[21] The issue may arise when the anticipatory bail is granted, the child in conflict with law will still be subjected to provisions of Section 12 of the Act, 2015. Reliance placed by the learned APP upon the decision of the Madurai Bench of Madras High Court in the case of **Suriya v/s. State of Tamilnadu (Supra)** referred to Sections 6 and 12 of the Act, 2000. Relevant paras-8 and 9 read as under:-

“8. A conjoint reading of Sections 6 and 12 of the Act would reveal that to deal with all the proceedings including bail, etc, in respect of juvenile, a Juvenile Board is the appropriate authority and it has been constituted exclusively for this purpose and no Court, either Sessions Court or High Court has jurisdiction to deal with the proceedings pertaining to a juvenile. Therefore, it is clear that the bail application of a juvenile can be entertained by the Board only when he is arrested or detained or appears or is brought before the Board, otherwise the application cannot be entertained. If the juvenile is arrested or detained or appears or is brought before the Board, then certainly bail application will be filed under Section 12 and the same has to be decided by the Board only, but not by the High Court or Court of Sessions. However, Section 52 of the Act gives right to a juvenile, who is accused of a bailable or non-bailable offence, if he has been refused bail, to file an appeal under Section 52 of the Act within 30 days from the date of such order or after the expiry of the said period if prevented by sufficient cause to prefer an appeal within time, to the Court of Sessions, and in case the appeal fails, he can file a revision against the appellate order before the High Court in accordance with Section 53 of the Act. Therefore, the Act specifically envisages that the powers conferred on the Board by or under this Act can be exercised by the High Court and the Court of Sessions, only when the proceedings comes before them in appeal, revision or

otherwise.

9. Such being the legal position, if any bail application filed by a juvenile is entertained by the High Court and rejected, certainly, the juvenile would be left with no option, since he would have been deprived of the right of appeal before the Court of Sessions and revision before the High Court. In fact, no provisions of the Act or in the Code of Criminal Procedure enables the juvenile to move an application for anticipatory bail either before the Court of Sessions or High Court or even before the Board, which has been exclusively constituted for the purpose of dealing with the proceedings pertaining to a juvenile.”

[22] The aforesaid view of the Madurai Bench of Madras High Court considers a point that in case of rejection of any bail application by the juvenile by the High Court would render the juvenile remedy-less. In this regard, it is pertinent to observe that for any child in conflict with law, necessary procedure to be adopted as prescribed under Section 12 of the Act, 2015 and therefore, even where the application under Section 438 of the Code is decided in any which way, the protection of Section 12 of the Act, 2015 will always be available.

[22.1] The question with regards to fruitfulness to invoke Section 438 of the Code for the child in conflict with law may arise, in other words, even of invoking Section 438 of the Code no useful purpose will be served as the child in conflict with law have to undergo the process of Section 12 of the Act, 2015. The parameters of practical usage and/or application of parameters cannot lead to inferring of bar of application of a provision, Section 438 of the Code in the present case.

[22.2] Moreover, considering the Section 1(4) of the Act, 2015, it is clear to the extent that it does not exclude the application of other Acts, CRPC in the present case and therefore, this Court in respectful disagreement with the view expressed by the Madurai Bench of Madras High Court in case of **Suriya v/s. State of Tamilnadu (Supra)**.

[23] After considering the judgments of various High Courts, the Court held in para-12 as under:-

“12. In view of the above discussion, I am of the considered view that this petition filed under Section 482 Cr.P.C. for consideration of the bail application of the petitioner, who is admittedly a juvenile, is not maintainable and it is liable to be dismissed.”

[24] It would be appropriate to mention here that the Madurai Bench of the Madras High Court has taken into consideration the conjoint reading of Sections 6 and 12 of the Act, 2000 and arrived at such conclusion.

[25] In the case of **Vinayak Pande (Supra)** while reproducing the finding given by the Division Bench of the Madras High Court in the case of K. Vignesh v/s. State, reported in Criminal Original Petition No.22361 of 2015 holding application filed under Section 438 of the Code is not maintainable in law. The Madras High Court in the subsequent decision in the case of **Kumari Shivani (Supra)** has referred to the decision of the Madhya Pradesh High Court in M.Cr.C. No.47297 of 2018 holding an application for anticipatory bail by the juvenile is maintainable and has granted anticipatory bail. Moreover, the reason for holding the anticipatory bail not maintainable was that in any case the Juvenile Justice Act provided for all the safeguards that the child in conflict with law cannot be arrested for the reasons stated here in preceding paras.

[26] The Court also finds that the contention raised by the applicant for his apprehension on affidavit that the accused who has axe to grind against the applicant is likely to name him as an accused to falsely impleade him in the offence has not been denied in any manner either before the Sessions Court or before this Court by the Investigating Agency. The Court has also considered the fact that the other accused persons who have been named in the FIR have already been released on regular bail. The applicant not being

named in the FIR nor having any antecedents and no role being attributed by the Investigating Agency thus far, deserves to be enlarged on anticipatory bail.

[27] In the result, the present application is allowed by directing that in the event of arrest of the applicant herein in connection with FIR registered at **C.R. No.11192050210093 of 2021 before Sanand Police Station, Ahmedabad (Rural)**, the applicant shall be released on bail in conformity with Section 12 of the Act,2015.

- (a) shall remain present at the concerned Board on 14.06.2021 between 11.00 AM and 02.00 PM;
- (b) shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the fact of the case so as to dissuade from disclosing such facts to the court or to any police officer;
- (c) shall not obstruct or hamper the police investigation and shall not to play mischief with the evidence collected or yet to be collected by the police;
- (d) shall be subjected to the conditions prescribed by the Board as per the provisions of law;

[28] At the trial, the Trial Court shall not be influenced by the prima-facie observations made by this Court while enlarging the applicant on bail. Rule is made is made absolute. **Direct service** is permitted.

SIDDHARTH

(A.Y. KOGJE, J)