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Criminal Original Petition No. 22361 of 2015

K. Vignesh v. State

2017 SCC OnLine Mad 28442

In the High Court of Madras

(BEFORE S. NAGAMUTHU AND ANITA SUMANTH, JJ.)

K. Vignesh ..... Petitioner

v.

State rep by The Inspector of Police, C-3, Seven Wells Police Station, Chennai - 600 079 ..... Respondent

Criminal Original Petition No. 22361 of 2015

Decided on April 27, 2017, [Reserved On: 18.04.2017]

For petitioner: No appearance

For Respondent: Mr. P. Govindarajan Additional Public Prosecutor

Prayer:- Petition filed under Section 438 of the Code of Criminal Procedure seeking to enlarge the petitioner on anticipatory bail in the event of arrest in connection with the Crime No. not known 2015 pending on the file of the respondent police.

ORDER

S. NAGAMUTHU, J.:— The Hon'ble The Chief Justice has referred to this Division Bench to answer the following question of law:

> *"Whether an application seeking anticipatory bail under Section 438 of the Code of Criminal Procedure at the instance of a juvenile in conflict with law in terms of the Juvenile Justice (Care and Protection of Children) Act, 2000 is maintainable before the High Court or before the Court of Sessions?"*

2. The above reference was made in view of the conflicting orders on this important legal issue. In Crl.O.P. No. 6590 of 2015 a learned Single Judge has taken the view that an application under Section 438 Cr.P.C. at the instance of a juvenile in conflict with law seeking anticipatory bail is maintainable. Another learned Single Judge in *Karkuvel, Minor* v. *State*, decided on 08.05.2014, has also taken the same view. But quite contrary to the same, subsequently, another learned Single Judge of this Court in Crl.O.P. No. 22361 of 2015 took the view that such an application under Section 438 Cr.P.C. for anticipatory bail at the instance of a juvenile in conflict with law is not at all maintainable. The learned Judge has relied on two judgments of the Madhya Pradesh High Court in *Satendra Sharma* v. *State of Madhya Pradesh* in Mc.Rc. No. 4183 of 2014 dated 08.07.2014 and *Kapil Durgawani* v. *State of Madhya Pradesh* reported in 2010 (IV) MPJR 155 and another judgment of Chattisgarh High Court in *Preetam Pathak* v. *State of Chattisgarh* in M.Cr.C.(A) No. 1104 of 2014. These two Hon'ble High Courts have also taken the view that such a petition is not at all maintainable. Subsequently, another Hon'ble Judge of this Court (Hon'ble Mr. Justice P.N. Prakash) has changed his earlier view and has taken the view that such a petition is not maintainable. The Hon'ble Judge has interpreted the relevant provisions of law and also referred to various judgments to come to the above conclusion. We will discuss about the same a little later.

3. Apart from these orders, there are several orders passed by a number of Hon'ble Judges sitting Single taking contrary views. Thus, the issue remains volatile and the law remains uncertain. It is needless to point out that the hallmark and strength of

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law is its certainty. Uncertainty in understanding a law and interpreting the same will only result in chaos and confusion in the implementation of the law. Hence, this reference by the Hon'ble The Chief justice.

4. The suggestion for making a provision in the Code of Criminal Procedure empowering the High Court and the Court of Sessions for directing the release of a person on bail prior to his arrest (commonly known as anticipatory bail) was conceived by the Law Commission of India and in its 41st Report it made the following suggestion:

> *"Though there is conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential 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."*

5. Accepting the above recommendation of the Law Commission, the Parliament incorporated Section 438 to the Code of Criminal Procedure empowering the High Court and the Court of Sessions to issue a direction that in the event of the arrest, the arrestee shall be released on bail. Such a direction could be issued by a Court *inter alia* in the following circumstances. For that, let us have a quick look into Section 438 Cr.P.C.:

> *"Section 438. Direction for grant of bail to person apprehending arrest:*
>
> *(1) Where any person has reason to believe that he may be arrested on accusation of having committed a nonbailable 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.*
>
> *(1-A) 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.*

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(1-B) 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.

(2) When the High Court or the Court of Session makes a direction under subsection (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer 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 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 cognizance 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 under Sub-Section (1)."

6. A plain reading of the suggestion of the Law Commission and the language of Section 438 Cr.P.C. would make it *ipso facto* clear that if only there has been an apprehension of arrest, on the accusation of having committed a non-bailable offence, such person may apply to the High Court or to the Court of Sessions seeking a direction as dealt with in the said provision. In all cases involving adults, if there is an accusation of having committed a non-bailable offence, the threat of arrest is imminent and therefore he could apply to the High Court or Court of Sessions seeking a direction as stated above. Where there is no apprehension of arrest or there is no power of arrest, then, it is quite obvious that an application under Section 438 Cr.P.C. is not maintainable.

7. Now, let us have a look as to whether a juvenile in conflict with law in terms of the Juvenile Justice (Care and Protection of Children) Act, 2000, or a child in conflict with law in terms of Juvenile Justice (Care and Protection of Children) Act, 2015, can have any apprehension of arrest so that he could make an application to the High Court or to the Court of Sessions under Section 438 Cr.P.C. seeking a direction for his release as soon as the arrest is made.

8. Since the Juvenile Justice (Care and Protection of Children) Act, 2000 has been repealed by the Juvenile Justice (Care and Protection of Children) Act, 2015, it would be suffice to have a survey of the provisions of the Act of the year 2015. In the entire scheme of the said Act, there is only one provision which empowers the police to apprehend a child alleged to be in conflict with law (vide Section 10). A child in conflict with law is defined in Sub-Section 13 of Section 2 of the Act as follows:

"Section 2(13). 'Child in conflict with law' means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence."

9. Sub Section (1) of Section 10 of the Act reads as follows:

"Section 10 Apprehension of child alleged to be in conflict with law.- (1) As soon

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as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:

Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lockup or lodged in a jail."

10. A deep reading of these two provisions would make it crystal clear that no police officer has been empowered to arrest a child in conflict with law and instead he has been empowered only to apprehend a child in conflict with law. To know what arrest is, let us refer to Chapter V of the Code of Criminal Procedure which contains various provisions relating to arrest of persons. Section 46 of the Code of Criminal Procedure regulates as to how a person could be arrested which reads as follows:

"Section 46. Arrest how made:

(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

(4) Save in exceptional circumstances, no women shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made."

11. While enacting the Juvenile Justice (Care and Protection of Children) Act, 2015, the Legislature was well aware of Chapter V of the Code of Criminal Procedure more particularly Section 46 of the Code of Criminal Procedure as to how a person could be arrested. Had it been the intention of the Legislature, that a police officer should be empowered to arrest a child in conflict with law, the Legislature would have very well used the expression 'arrest' instead of using the expression 'apprehend' in Section 10 of the Juvenile Justice (Care and Protection of Children) Act, 2015. In our considered view, the Legislature has, thus, consciously omitted to use the expression 'arrest' in Section 10 of the Act, which means that the Legislature did not want to empower the police to arrest a child in conflict with law. The Legislature, being aware of the consequences that ensue the arrest, has avoided to empower the police to arrest a child in conflict with law. At the same time, the child in conflict with law cannot be let free as it would not be in the interest of the child in conflict with law as well as the society. Therefore, the Legislature had obviously thought it fit to give only a limited power to the police. In other words, the Legislature has empowered the police simply to apprehend a child in conflict with law and immediately, without any delay, cause his production before the Juvenile Justice Board. The Juvenile Justice Board has also not been empowered to pass any order of remand of the child in conflict with law either with the police or in jail. The proviso to Section 10 of the Act makes it very clear that

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in no case a child alleged to be in conflict with law shall be placed in a police lock-up or lodged in a jail. The Board has been obligated to send the child either to an observation home or a place of safety. There are lot of other safeguards in the Act as well as in the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 to ensure that the child so apprehended by a police or any other authority shall not in any manner be disturbed emotionally, psychological or physically. Thus, a reading of the entire scheme of the Act would inform that no authority, including the police, has been empowered to arrest a child in conflict with law but instead the child in conflict with law could only be apprehended and produced before the Juvenile Justice Board.

12. After the child in conflict with law is so apprehended or detained by the police or appears or brought before the Board such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person. Thus, a child in conflict with law apprehended or detained is, as of right, entitled for bail irrespective of whether the offence said to have been committed by him is bailable or non-bailable. But, as per the proviso to sub-section (1) of Section 12, the Board may refuse to grant bail only in the circumstances enumerated in the said provision which reads as follows:

> *"Provided 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 the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision."*

13. As per Sub-Section (2) of Section 4 of the Act, the Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman.

14. Sub-Section (3) of Section 4 prescribes certain qualifications such as active involvement in health, education, or welfare activities pertaining to children for at least seven years or a practicing professional with a degree in child psychology, psychiatry, sociology or law. As per the Rules, the Principal Magistrate and the Members of the Board undergo induction training and sensitisation. The Juvenile Justice Board which consists of child friendly eminent persons who know the child psychology have been exclusively empowered to deal with the child in conflict with law as soon as the child is produced before the Board.

15. From the above narration of various provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, one can understand, without any doubt whatsoever, that a child in conflict with law cannot be arrested and thus there can not be apprehension of arrest and so an application at the instance of a child in conflict with law either before the High Court or before the Court of Sessions under Section 438 Cr.P.C. is not maintainable. The the Juvenile Justice (Care and Protection of Children) Act, 2015 is a self-contained Code which is both substantive as well as procedural. The Act takes care of the interest of the child in conflict with law on the child being apprehended. When a question arises before the Board as to whether to grant bail to the child or not, the Board shall not grant bail if it finds that it is likely to bring the child into association with any known criminal or expose the said person to moral, physical or psychological danger or when the Board finds that the person's release would defeat the ends of justice. Even after bail is refused to the child, the child cannot be remanded to either judicial custody or police custody. The Board shall

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ensure the welfare of the child by keeping the Child in an Observation Home or a place of safety.

16. Thus, there are lot of safeguards provided to the child in conflict with law in the event the child is apprehended by the police. In the light of these safeguards, and in the light of the legal position that the child in conflict with law cannot be arrested, the child in conflict with law need not apply for anticipatory bail. The legislature has consciously did not empower the police to arrest a child in conflict with law. Thus, it is manifestly clear that an application seeking anticipatory bail under Section 438 Cr.P.C. at the instance of a child in conflict with law is not at all maintainable. Similarly, a direction to the Juvenile Justice Board to release the child in conflict with law cannot be issued by the High Court in exercise of its inherent power saved under Section 482 Cr.P.C. Thus, we approve the view of the Hon'ble Mr. Justice P.N. Prakash in *Ajith Kumar* v. *State*, reported in 2016 (2) CTC 63 and we are impelled to overrule all the other orders wherein conflicting views have been expressed. Accordingly, we answer the reference.

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