(2024) 10 Supreme Court Cases 336

3J

(BEFORE DR D.Y. CHANDRACHUD, C.J. AND J.B. PARDIWALA AND MANOJ MISRA, JJ.)

DHANRAJ ASWANI . . Appellant;

Versus

AMAR S. MULCHANDANI AND ANOTHER . . Respondents.

Criminal Appeal No. 2501 of 2024†, decided on September 9, 2024

A. **Criminal Procedure Code, 1973 — S. 438 — Application for anticipatory bail — Held, maintainable, while accused in judicial custody in connection with different offence — Law clarified**

— Held, no restriction can be read into S. 438 precluding accused from applying for anticipatory bail, nor High Court or Court of Session from considering same, in relation to an offence, while in custody in different offence, as that would be against purport of provision and intent of legislature — Restrictions that could be imposed would only be in terms of statutory prescriptions

— Further held, accused entitled to seek anticipatory bail only so long as he is not arrested in connection with that offence — Once arrested, only remedy for him would be to seek regular bail

— Where person in custody in connection with particular offence apprehends arrest in different offence, subsequent offence is separate offence for all practical purposes which imply that rights of accused as well as investigating agency in relation to subsequent offence are independently protected

— Further, submission that person already in judicial custody, cannot have "reason to believe" that he may be arrested in different offence liable to be rejected since: (i) person may be arrested soon after his release from custody in connection with first case; and (ii) even before his release from custody in first case, investigating officer in subsequent case can formally arrest him, obtain Prisoner Transit Warrant under S. 267 CrPC and seek his remand

— Furthermore, submission that as object of S. 438 is to protect accused from humiliation of arrest, protective cover of S. 438 would not include within its ambit person already in custody also does not merit acceptance since each subsequent arrest underscores continued or escalating involvement in legal troubles that can erode dignity of person and their public standing — Subsequent arrest in relation to different offence further alienates individual from his community adversely affecting his personal integrity — Constitution of India — Art. 21 — Criminal Procedure Code, 1973, Ss. 267 and 438

† Arising out of SLP (Crl.) No. 6942 of 2024. Arising from the Judgment and Order in *Amar S. Mulchandani* v. *State of Maharashtra*, 2023 SCC OnLine Bom 2394 (Bombay High Court, Anticipatory Bail Application No. 2801 of 2023, dt. 31-10-2023) **[Affirmed]**

B. **Criminal Procedure Code, 1973 — Ss. 438 and 267 — Application for anticipatory bail while in custody in relation to different offence — Until when available and when stands extinguished — Law clarified**

— Held, would be available only till accused is arrested by investigating officer on strength of PT warrant obtained from jurisdictional Magistrate, whereafter his right to apply for anticipatory bail would stand extinguished — However, mere formal arrest (on-paper arrest) would not extinguish right of accused to apply for anticipatory bail since such formal arrest would not result in submission of accused, who is already in custody, to custody of police officer effecting formal arrest in subsequent case — Further held, where accused is granted anticipatory bail, while being in custody in different offence, it shall no longer be open to police officer to apply under S. 267 for production of accused before jurisdictional Magistrate — However, jurisdictional Magistrate can require production of accused under S. 267(1) for any "other purpose"

C. **Criminal Procedure Code, 1973 — Ss. 438 and 437 — Anticipatory bail — Grant of — Principles governing — Summarised**

D. **Criminal Procedure Code, 1973 — S. 438 — Anticipatory bail — Grant of — Restrictions/Limitations on — Principles summarised**

— Held, Court should not read any blanket restriction nor should it insist for some inflexible guidelines while considering application for grant of anticipatory bail, as that would amount to judicial legislation — Where Parliament intended to exclude or restrict powers of courts, it did so categorically while denying jurisdiction to court where accused charged under Ss. 373(3) or 376-AB, or S. 376-DA, or S. 376-DB, Penal Code, 1860 — Penal Code, 1860, Ss. 376(3), 376-AB, 376-DA & 376-DB

E. **Constitution of India — Arts. 21 and 14 r/w S. 438 CrPC, 1973 — Right to anticipatory bail as part of Art. 21 — Held, accused has right to protect his personal liberty within contours of Art. 21 with aid of provision of anticipatory bail as enshrined in S. 438 CrPC, which cannot be defeated or thwarted without valid procedure established by law — Further held, such procedure should also pass test of fairness, reasonableness and manifest non-arbitrariness on anvil of Art. 14 — Constitution of India — Art. 14 — Criminal Procedure Code, 1973, S. 438**

F. **Criminal Procedure Code, 1973 — Ss. 46(1), 267, 268 and 269 — Arrest — Mode of arrest — Procedure for arresting accused in relation to offence, while in custody in relation to different offence — Explained**

— Held, where accused is arrested with or without warrant while in custody for an offence, he can be removed from such custody under S. 267 and produced before Magistrate under whose territorial jurisdiction subsequent offence is registered for issuance of PT warrant — Where PT warrant is issued, then accused must be produced before such Magistrate on date and time stated in warrant subject to Ss. 268 and 269 whereafter accused can be remanded to police or judicial custody or enlarged on bail, if applied for and allowed

G. **Criminal Procedure Code, 1973 — S. 46(1) — Arrest, how made — Held, arrest involves actual touch or confinement of body of person sought to be arrested — However, arrest can also be effected without actual touch if person sought to be arrested submits to custody by words or action**

H. **Words and Phrases — "Arrest" — Meaning — To deprive person of his liberty by legal authority — Taking under real or assumed authority, custody of another for purpose of holding or detaining him to answer criminal charge or civil demand — Arrest involves authority to arrest, assertion of that authority with intent to effect arrest, and restraint of person to be arrested — Criminal Procedure Code, 1973, Ss. 46, 167 and 437 to 439**

I. **Words and Phrases — "Custody" — Meaning**

— When applied to persons it implies restraint, which may or may not imply physical force sufficient to restrain depending on circumstances — With reference to person charged with crime it means actual confinement or present means of enforcing it, detention of person contrary to his will — When applied to things it means having charge or safe-keeping and connotes control and includes as well, although not required, element of physical or manual possession, implying mere temporary physical control and connote dominion or supremacy of authority — Further, it is defined as keeping, guarding, care, watch, inspection, preservation or security of a thing which is within immediate personal care and control of person to whose custody it is subjected; charge; charge to keep subject to order or direction; immediate charge and control and not final absolute control of ownership — Criminal Procedure Code, 1973, Ss. 46, 167 and 437 to 439

J. **Constitution of India — Art. 14 — Right of every person to be dealt with in accordance with law and not in derogation of it — Procedural law confers valuable rights on person and their protection must be as much object of court's solicitude as those conferred under substantive law**

K. **Criminal Procedure Code, 1973 — S. 438 — Anticipatory bail — Evolution of concept — Traced**

— No specific analogous provision in CrPC, 1898 — Suggestions by 41st Law Commission of India in its Report dt. 24-9-1969 for introduction of new provision in CrPC empowering High Court and Sessions Court to grant anticipatory bail accepted by Central Government leading to incorporation of S. 438 in CrPC

L. **Criminal Procedure Code, 1973 — S. 438 — Anticipatory bail — Object of — To evolve device by which an alleged accused is not compelled to face ignominy and disgrace at instance of influential people who try to implicate their rivals in false cases — Importance of personal liberty and freedom in free and democratic country — Emphasised — Individual presumed to be innocent unless found guilty**

M. **Criminal Procedure Code, 1973 — S. 267 — Power to require attendance of prisoners — Expression "other proceeding" occurring in S. 267 — Law clarified**

— Held, though S. 267 cannot be invoked to enable production of accused before investigating agency, it can nevertheless be invoked for production of accused before jurisdictional Magistrate, who can thereafter remand him/her to custody of investigating agency — Such interpretation would accord true effect to words "other proceedings" which cannot be construed to exclude proceedings at investigation stage — Words and Phrases — "Other proceedings"

Respondent 1 was arrested in connection with ECIR No. 10 of 2021. While in custody, he apprehended arrest in connection with CR No. 806 of 2019 for offences punishable under Sections 406, 409, 420, 465, 467, 468, 471 read with Section 34 of the Penal Code, 1860, registered at the instance of the appellant. He therefore, applied for anticipatory bail before the High Court. The appellant intervened in the said proceedings and raised an objection that Respondent 1 being already in custody in connection with ECIR No. 10 of 2021, cannot pray for anticipatory bail application in CR No. 806 of 2019. The objection was overruled by the High Court. Hence, the instant appeal.

The issue for consideration in the instant appeal was: Whether an anticipatory bail application under Section 438 CrPC, 1973 is maintainable at instance of accused who is already in judicial custody in connection with his involvement in a different case?

Divergent views have been expressed by different High Courts. The Rajasthan, Delhi and Allahabad High Courts have taken view that an anticipatory bail application would not be maintainable where accused is already arrested and is in custody in connection with some offence. On the other hand, the Bombay and Orissa High Courts have taken a contrary view.

Held :

The Criminal Procedure Code, 1898 did not contain any specific provision analogous to Section 438 CrPC, 1973. The need for introduction of a new provision in CrPC empowering the High Court and the Court of Session to grant anticipatory bail was pointed out by the 41st Law Commission of India in its Report dated 24-9-1969. The suggestion made by the Law Commission was accepted by the Central Government and Section 438 was introduced in CrPC. The Statement of Objects and Reasons accompanying the Bill for introducing Section 438 in CrPC indicates that the legislature felt that it was imperative to evolve a device by which an alleged accused is not compelled to face ignominy and disgrace at the instance of influential people who try to implicate their rivals in false cases. The purpose behind incorporating Section 438 in CrPC was to recognise the importance of personal liberty and freedom in a free and democratic country. A careful reading of this section reveals that the legislature was keen to ensure respect for the personal liberty of individuals by pressing in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court. (Paras 23 to 28)

Siddharam Satlingappa Mhetre v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514, *affirmed*

Amir Chand v. *Crown*, 1949 SCC OnLine Punj 20, *considered*

M.C. Setalvad, *War and Civil Liberties*, *referred to*

The Constitution Bench of the Supreme Court in *Kartar Singh*, (1994) 3 SCC 569, held that there was no constitutional or fundamental right to seek anticipatory bail. In *Gurbaksh Singh Sibbia*, (1980) 2 SCC 565, the Constitution Bench of the Supreme Court undertook an extensive analysis of provision of anticipatory bail. It held that: (*i*) The applicant must genuinely show the "reason to believe" that he may be arrested for a non-bailable offence. Mere fear is not belief and the grounds on which the belief of the applicant is based must be capable of being examined by the court objectively. Specific events and facts must be disclosed to enable the court to judge the reasonableness of belief or likelihood of arrest, the existence of which is the sine qua non in the exercise of the power to grant anticipatory bail; (*ii*) The High Court or the Court of Session must apply its mind to the question of anticipatory bail and should not leave it to the discretion of the Magistrate under Section 437 CrPC; (*iii*) Filing of the FIR is not a condition precedent. However, imminence of a likely arrest founded on the reasonable belief must be shown; (*iv*) Anticipatory bail can be granted so long as the applicant is not arrested in connection with that case/offence; (*v*) Section 438 CrPC cannot be invoked by the accused in respect of the offence(s)/case in which he has been arrested. The remedy lies under Section 437 or 439 CrPC, as the case may be; and (*vi*) The normal rule is to not limit the operation of the order in relation to a period of time. (Paras 30, 32 to 35)

Kartar Singh v. *State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899, *relied on*

Bimal Kaur Khalsa v. *Union of India*, 1987 SCC OnLine P&H 918, *cited*

On account of various decisions of Benches of lesser strength than in *Gurbaksh Singh Sibbia case* taking a view curtailing the scope of the findings in the said case, the scope of Section 438 CrPC came to be considered yet again in *Siddharam Satlingappa Mhetre*, (2011) 1 SCC 694. A two-Judge Bench in *Siddharam Satlingappa Mhetre case* held that the intervening decisions between 1980 and 2011 curtailing the scope of *Gurbaksh Singh Sibbia case* were per incuriam. (Para 36)

Gurbaksh Singh Sibbia v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465, *followed*

Siddharam Satlingappa Mhetre v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514, *affirmed*

However, since *Siddharam Satlingappa Mhetre case* was delivered by a coram of two Judges, the matter again reached the Constitution Bench in the judgment rendered in *Sushila Aggarwal*, (2020) 5 SCC 1 laying down the following principles:

(*1*) An application for anticipatory bail should be based on concrete facts (and not vague or general allegations). It is not essential that an application should be moved only after an FIR is filed.

(*2*) It is advisable to issue a notice on the anticipatory bail application to the Public Prosecutor.

(*3*) Nothing in Section 438 CrPC compels or obliges courts to impose conditions limiting relief in terms of time. The courts would be justified — and ought to impose conditions spelt out in Section 437(3) CrPC [by virtue of Section 438(2)]. The need to impose other restrictive conditions would have to be judged on a case-to-case basis.

(*4*) Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail or not.

(*5*) Once granted, anticipatory bail can, depending on the conduct and behaviour of the accused, continue after filing of the charge-sheet till the end of trial.

(*6*) An order of anticipatory bail should not be a "blanket" order and should be confined to a specific incident.

(*7*) An order of anticipatory bail does not limit the rights of the police to conduct investigation.

(*8*) The observations in *Gurbaksh Singh Sibbia case* regarding "limited custody" or "deemed custody" would be sufficient for the purpose of fulfilling the provisions of Section 27 of the Evidence Act, 1872.

(*9*) The police can seek cancellation of anticipatory bail under Section 439(2) CrPC.

(*10*) The correctness of an order granting bail can be considered by the appellate or superior court. (Para 37)

Sushila Aggarwal v. *State (NCT of Delhi)*, (2020) 5 SCC 1 : (2020) 2 SCC (Cri) 721, *followed*

It was submitted on behalf of the appellant that a person already in judicial custody in relation to an offence, cannot have a "reason to believe" that he may be arrested on the accusation of having committed a different offence. The submission is liable to be rejected. There are two ways by which a person, who is already in custody, may be arrested—

(*a*) First, no sooner than he is released from custody in connection with the first case, the police officer can arrest and take him into custody in relation to a different case; and

(*b*) Secondly, even before he is set free from the custody in the first case, the police officer investigating the other offence can formally arrest him and thereafter obtain a Prisoner Transit Warrant ("PT warrant") under Section 267 CrPC from the jurisdictional Magistrate for the other offence, and thereafter, on production before the Magistrate, pray for remand;

OR

Instead of effecting formal arrest, the investigating officer can make an application before the jurisdictional Magistrate seeking a PT warrant for the production of the accused from prison. If the conditions required under Section 267 CrPC are satisfied, the jurisdictional Magistrate shall issue a PT warrant for the production of the accused in court. When the accused is so produced before the court in pursuance of the PT warrant, the investigating officer will be at liberty to make a request for remanding the accused, either to police custody or judicial custody, as provided in Section 167(1) CrPC.

At that time, the jurisdictional Magistrate shall consider the request of the investigating officer, peruse the case diary and the representation of the accused and then, pass an appropriate order, either remanding the accused or declining to remand the accused. (Para 45)

CBI v. *Anupam J. Kulkarni*, (1992) 3 SCC 141 : 1992 SCC (Cri) 554, *affirmed*

State v. *K.N. Nehru*, 2011 SCC OnLine Mad 1984, *approved*

S. Harsimran Singh v. *State of Punjab*, 1983 SCC OnLine P&H 685, *held, approved*

State v. *Mehar Chand*, 1967 SCC OnLine Del 105, *cited*

As arrest in both the aforesaid circumstances is permissible in law, it would be incorrect to hold that a person, while in custody, cannot have a "reason to believe" that he may be arrested in relation to a different offence. As a logical extension of this, it can also be said that when procedural law does not preclude the investigating agency from arresting a person in relation to a different offence while he is already under custody in some previous offence, the accused too cannot be precluded of his statutory right to apply for anticipatory bail only on the ground that he is in custody in relation to a different offence. (Para 46)

The procedure for arrest of the accused in relation to an offence after he is released from custody in the first offence would be similar to the procedure of arrest which is required to be followed in any other cognizable offence. However, where accused is arrested with or without a warrant while he is already in custody in one offence, then it is only under Section 267 CrPC that he can be removed from such custody and produced before the Magistrate under whose territorial jurisdiction the other offence is registered. (Paras 47 and 48)

Under Section 46(1) CrPC arrest involves actual touch or confinement of the body of the person sought to be arrested. However, arrest can also be effected without actual touch if the person sought to be arrested submits to the custody by words or action. (Para 50)

The term "arrest" is not defined either in the procedural Acts or in the various substantive Acts, though Section 46 CrPC, lays down the mode of arrest to be effected. *Black's Law Dictionary* (5th Edn., 1979) defines "arrest" as follows:

> "To deprive a person of his liberty by legal authority. Taking, under real or assumed authority, custody of another for the purpose of holding or detaining him to answer a criminal charge or civil demand. Arrest involves the authority to arrest, the assertion of that authority with the intent to effect an arrest, and the restraint of the person to be arrested. All that is required for an "arrest" is some act by officer indicating his intention to detain or take person into custody and thereby subject that person to the actual control and will of the officer, no formal declaration of arrest is required." (Para 51)

Black's Law Dictionary (5th Edn., 1979), *referred to*

Similarly, the term "custody" too is not defined either in CrPC or IPC. *Corpus Juris Secundum* (Vol. 25 at p. 69) defines "custody" as follows:

> "When it is applied to persons, it implies restraint and may or may not imply physical force sufficient to restrain depending on the circumstances and with reference to persons charged with crime, it has been defined as meaning

on actual confinement or the present means of enforcing it, the detention of the person contrary to his will. Applied to things, it means to have a charge or safe-keeping, and connotes control and includes as well, although it does not require, the element of physical or manual possession, implying a temporary physical control merely and responsibility for the protection and preservation of the thing in custody. So used, the word does not connote dominion or supremacy of authority. The said term has been defined as meaning the keeping, guarding, care, watch, inspection, preservation or security of a thing, and carries with it the idea of the thing being within the immediate personal care and control of the prisoner to whose custody it is subjected; charge; charge to keep, subject to order or direction; immediate charge and control and not the final absolute control of ownership." (Para 52)

State of U.P. v. *Deoman Upadhyaya*, 1960 SCC OnLine SC 8; *Alderson* v. *Booth*, (1969) 2 QB 216 : (1969) 2 WLR 1252, *followed*

Roshan Beevi v. *State of T.N.*, 1983 SCC OnLine Mad 163, *approved*

Corpus Juris Secundum (Vol. 25, p. 69), *referred to*

A police officer can formally arrest a person in relation to an offence while he is already in custody in a different offence. However, such formal arrest does not bring the accused in the custody of the police officer as the accused continues to remain in the custody of the Magistrate who remanded him to judicial custody in the first offence. Once such formal arrest has been made, the police officer has to make an application under Section 267 CrPC before the jurisdictional Magistrate for the issuance of a PT warrant without delay. If, based on the requirements prescribed under Section 267 CrPC, a PT warrant is issued by the jurisdictional Magistrate, then the accused has to be produced before such Magistrate on the date and time mentioned in the warrant, subject to Sections 268 and 269 respectively of CrPC. Upon production before the jurisdictional Magistrate, the accused can be remanded to police or judicial custody or be enlarged on bail, if applied for and allowed. (Para 56)

A number of decisions have held that although Section 267 CrPC cannot be invoked to enable production of the accused before the investigating agency, yet it can undoubtedly be invoked to require production of the accused before the jurisdictional Magistrate, who can thereafter remand him to the custody of the investigating agency. Such an interpretation of the provision would give true effect to the words "other proceedings" as they appear in the text of Section 267 CrPC, which cannot be construed to exclude proceedings at the stage of investigation. (Para 57)

C. Natesan v. *State of T.N.*, 1998 SCC OnLine Mad 931; *Ranjeet Singh* v. *State of U.P.*, 1994 SCC OnLine All 797; *State of Maharashtra* v. *Yadav Natthuji Kohachade*, 1999 SCC OnLine Bom 422; *Alnesh Akil Somji* v. *State of Maharashtra*, 2021 SCC OnLine Bom 5276; *Sanjay Kumar Sarangi* v. *State of Odisha*, 2024 SCC OnLine Ori 1334, *approved*

Sunil Kallani v. *State of Rajasthan*, 2021 SCC OnLine Raj 1654; *Rajesh Kumar Sharma* v. *CBI*, 2022 SCC OnLine All 832; *Bashir Hasan Siddiqui* v. *State (NCT of Delhi)*, 2023 SCC OnLine Del 7544, *overruled*

There is no restriction in the text of Section 438 or the scheme of CrPC precluding a person from seeking anticipatory bail in relation to an offence while being in custody in relation to another offence. Hence, such a prohibition cannot be read in the text of Section 438. (Para 58)

The option of applying for anticipatory bail in relation to an offence, while being in custody in relation to a different offence, will only be available to the accused till he is arrested by the police officer on the strength of the PT warrant obtained by him from the court concerned. Further, mere formal arrest (on-paper arrest) would not extinguish the right of the accused to apply for anticipatory bail because a formal arrest would not result in the submission of the accused, who is already in custody, to the custody of the police officer effecting a formal arrest in the subsequent case. However, if after effecting a formal arrest, the police officer on the strength of the same procures a PT warrant from the jurisdictional Magistrate, the accused would have no other choice but to submit to that compulsion and the right of the accused to apply for anticipatory bail would thereafter get extinguished. (Para 59)

If an accused is granted anticipatory bail in relation to an offence, while being in custody in a different offence, then it shall no longer be open to the police officer in the first case to apply under Section 267 CrPC for the production of the accused before the jurisdictional Magistrate for the purpose of remanding him to police or judicial custody. However, it shall be open to the jurisdictional Magistrate to require the production of accused under Section 267(1) for any other purpose mentioned under the said section except for the purpose of remanding him to police or judicial custody. (Para 60)

Tusharbhai Rajnikantbhai Shah v. *State of Gujarat*, (2025) 1 SCC 753 : 2024 SCC OnLine SC 1897, *affirmed*

Furthermore, contrary to the submission of the appellant that grant of anticipatory bail to the accused would prevent the investigating authorities from conducting investigation and discoveries, etc. it is always open to the investigating officer concerned to apply before the Magistrate in whose custody the accused is in relation to a different offence, seeking permission of such Magistrate to interrogate the accused in relation to the particular offence which he is investigating. (Para 61)

It was also submitted by the appellant that as the object of Section 438 CrPC was to prevent an accused from the humiliation of arrest, the protective cover of the provision would not include within its ambit a person who is already in custody. The submission is liable to be rejected since each subsequent arrest underscores a continued or escalating involvement in legal troubles that can erode dignity of person and their public standing. Subsequent arrest in relation to different offences, while the individual is in custody in particular offence, further alienates individual from their community adversely affecting their personal dignity. (Paras 62 and 63)

The right of an accused to protect his personal liberty within contours of Article 21 of the Constitution with the aid of provision of anticipatory bail as enshrined in Section 438 CrPC cannot be thwarted or defeated without valid procedure established by law. Such procedure should also pass test of fairness, reasonableness and manifest non-arbitrariness on anvil of Article 14 of the Constitution. (Para 65)

The importance of rights conferred under procedural laws cannot be underscored. No man can be denied of his rights under the Constitution and the laws. He has right to be dealt with in accordance with law and not in derogation of it. The procedural laws confer very valuable rights on a person, and their protection must be as much the object of court's solicitude as those conferred under substantive law. (Paras 66 and 68)

A.R. Antulay v. *R.S. Nayak*, (1988) 2 SCC 602 : 1988 SCC (Cri) 372; *State of W.B.* v. *Anwar Ali Sarkar*, (1952) 1 SCC 1, *followed*

Narinderjit Singh Sahni v. *Union of India*, (2002) 2 SCC 210, *distinguished*

Amar S. Mulchandani v. *State of Maharashtra*, 2023 SCC OnLine Bom 2394, *affirmed*

Anita Kushwaha v. *Pushap Sudan*, (2016) 8 SCC 509 : (2016) 4 SCC (Civ) 80 : (2016) 3 SCC (Cri) 530 : (2016) 2 SCC (L&S) 463; *Prathvi Raj Chauhan* v. *Union of India*, (2020) 4 SCC 727 : (2020) 2 SCC (Cri) 657; *Sushila Aggarwal* v. *State (NCT of Delhi)*, (2018) 7 SCC 731 : (2018) 3 SCC (Cri) 331; *Tejesh Suman* v. *State of Rajasthan*, 2023 SCC OnLine SC 76, *cited*

P-D/71826/CR

Advocates who appeared in this case :

Sidharth Luthra, Senior Advocate [Prashant S. Kenjale, Ms Minal Chandnani, Naresh Shamnani, Anmol Kheta, Ms Anshala Verma and M/s Juristrust Law Offices, Advocates], for the Appellant;

Siddhartha Dave, Senior Advocate [Shantanu Phanse and Siddhant Sharma (Advocate-on-Record), Advocates], for the Respondents.

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14. 2011 SCC OnLine Mad 1984, *State* v. *K.N. Nehru* 374*a*
15. (2002) 2 SCC 210, *Narinderjit Singh Sahni* v. *Union of India* 348*f-g*, 350*f-g*, 351*f*, 353*a*, 354*f*, 382*d*, 382*g-h*
16. 1999 SCC OnLine Bom 422, *State of Maharashtra* v. *Yadav Natthuji Kohachade* 377*d-e*
17. 1998 SCC OnLine Mad 931, *C. Natesan* v. *State of T.N.* 377*d*
18. (1994) 3 SCC 569 : 1994 SCC (Cri) 899, *Kartar Singh* v. *State of Punjab* 348*e-f*, 364*c*
19. 1994 SCC OnLine All 797, *Ranjeet Singh* v. *State of U.P.* 377*d*
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25. (1980) 2 SCC 565 : 1980 SCC (Cri) 465, *Gurbaksh Singh Sibbia* v. *State of Punjab* 348*e-f*, 353*d-e*, 354*b*, 365*d-e*, 365*f*, 367*a*, 367*c-d*, 367*e*, 368*b*, 368*b-c*, 368*g*, 380*a-b*
26. (1969) 2 QB 216 : (1969) 2 WLR 1252, *Alderson* v. *Booth* 376*a-b*, 376*d-e*
27. 1967 SCC OnLine Del 105, *State* v. *Mehar Chand* 371*g*
28. 1960 SCC OnLine SC 8, *State of U.P.* v. *Deoman Upadhyaya* 376*a*
29. (1952) 1 SCC 1, *State of W.B.* v. *Anwar Ali Sarkar* 381*d-e*, 382*a*
30. 1949 SCC OnLine Punj 20, *Amir Chand* v. *Crown* 359*b*

The Judgment of the Court was delivered by

J.B. PARDIWALA, J.— For the convenience of exposition, this judgment is divided into the following parts:

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2. A short question of general public importance on which there is great divergence of judicial opinion that falls for the consideration of this Court is as under:

> "Whether an application for anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 (for short "CrPC") is maintainable at the instance of an accused while he is already in judicial custody in connection with his involvement in a different case?"

3. This appeal arises from the judgment and order dated 31-10-2023[1] passed by the High Court of Judicature at Bombay in Anticipatory Bail Application No. 2801 of 2023 by which the High Court overruled the objection raised by the appellant herein (original complainant) as regards the maintainability of the anticipatory bail application filed by Respondent 1 (original accused) in connection with CR No. 806 of 2019 registered with Pimpri Police Station for the offences punishable under Sections 406, 409, 420, 465, 467, 468, 471 respectively read with Section 34 of the Penal Code, 1860 (for short "IPC") and thereby took the view that although Respondent 1 herein may already be in custody in connection with ECIR No. 10 of 2021, yet he would be entitled to pray for anticipatory bail in connection with a different case.

4. It appears from the materials on record that Respondent 1 herein came to be arrested in connection with ECIR No. 10 of 2021. While in custody, he apprehended arrest in connection with CR No. 806 of 2019 registered against him at the instance of the appellant herein. In such circumstances, he prayed for anticipatory bail before the High Court. The appellant herein intervened in the proceedings of the said anticipatory bail application and raised an objection that as Respondent 1 herein is already in custody in connection with ECIR No. 10 of 2021, he cannot pray for anticipatory bail in connection with CR No. 806 of 2019. The objection raised by the appellant herein in his capacity as the complainant came to be overruled and the High Court proceeded to hold that although Respondent 1 herein may be in custody in one case, yet the same would not preclude him from seeking pre-arrest bail in connection with a different case. Since the objection was overruled, the appellant is now before this Court.

A. ***Submissions on behalf of the appellant***

5. Mr Sidharth Luthra, learned Senior Counsel appearing for the appellant canvassed the following submissions:

5.1. The High Court committed a serious error in taking the view that although a person might be in custody after his arrest in one case, yet such a person can apply for the grant of pre-arrest bail under Section 438 CrPC in connection with a different case.

5.2. The essential part of arrest is placing the corpus (body of the person) in custody of the police authorities. The natural corollary, therefore, is that a person who is already in custody cannot have reasons to believe that he

1 *Amar S. Mulchandani* v. *State of Maharashtra*, 2023 SCC OnLine Bom 2394

would be arrested as he already stands arrested. The precondition to invoke Section 438 CrPC is that the accused should have a reason to believe that he "may be arrested". If the accused is already in custody, then he can have no reason to believe that he "may be arrested".

5.3. The salutary provision of Section 438 CrPC was enshrined with a view to see that the liberty of any individual concerned is not put in jeopardy on frivolous grounds at the instance of unscrupulous or irresponsible person or officers who may be in charge of the prosecution. If such is the objective behind the enactment of Section 438 CrPC, then for a person who is already arrested there is no question of any humiliation being caused.

5.4. If an accused while being in custody in connection with one case, is granted anticipatory bail under Section 438 CrPC in connection with a different case, then it would not be possible for him to fulfil the requirement of the condition that may be imposed under Section 438(2)(*i*) CrPC i.e. to make himself/herself available for interrogation as and when required. In other words, a person in custody would not be able to meet or comply with the condition that may be imposed under Section 438(2)(*i*) CrPC. This being a material consideration for grant of anticipatory bail, it would be illogical to permit a person to seek anticipatory bail if he is unable to satisfy conditions that may be imposed under Section 438(2)(*i*) CrPC.

5.5. If a person who is already in custody in connection with one case apprehends arrest in connection with a different case, then he is not remediless. In such circumstances, he can seek to surrender and pray for regular bail on the principle of "deemed custody" both in Magistrate as well as Sessions triable cases.

6. Mr Luthra, with a view to fortify his aforesaid submissions, placed strong reliance on the following decisions:

(*i*) *Kartar Singh* v. *State of Punjab*[2]
(*ii*) *Gurbaksh Singh Sibbia* v. *State of Punjab*[3]
(*iii*) *Sushila Aggarwal* v. *State (NCT of Delhi)*[4]
(*iv*) *Sunil Kallani* v. *State of Rajasthan*[5]
(*v*) *Rajesh Kumar Sharma* v. *CBI*[6]
(*vi*) *Tejesh Suman* v. *State of Rajasthan*[7]
(*vii*) *Bashir Hasan Siddiqui* v. *State (NCT of Delhi)*[8]
(*viii*) *Narinderjit Singh Sahni* v. *Union of India*[9]

2 (1994) 3 SCC 569 : 1994 SCC (Cri) 899 : (1994) 2 SCR 375
3 (1980) 2 SCC 565 : 1980 SCC (Cri) 465 : (1980) 3 SCR 383
4 (2020) 5 SCC 1 : (2020) 2 SCC (Cri) 721 : (2020) 2 SCR 1
5 2021 SCC OnLine Raj 1654
6 2022 SCC OnLine All 832
7 2023 SCC OnLine SC 76
8 2023 SCC OnLine Del 7544
9 (2002) 2 SCC 210 : 2001 Supp (4) SCR 114

7. In such circumstances referred to above, the learned Senior Counsel prayed that there being merit in his appeal, the same may be allowed and the impugned order[1] passed by the High Court be set aside.

B. ***Submissions on behalf of Respondent 1 (original accused)***

8. Mr Siddharth Dave, the learned Senior Counsel appearing for the original accused, vehemently opposed the present appeal and canvassed the following submissions:

8.1. The legal maxim *ubi jus, ibi remedium* i.e. where there is a right, there is a remedy, is recognised as a basic principle of jurisprudence. A Constitution Bench of this Court in *Anita Kushwaha* v. *Pushap Sudan*[10] held that the right to access justice is so inalienable, that no system of governance can possibly ignore its significance, leave alone afford to deny the same to its citizens. It was also held that the ancient Roman jurisprudential maxim *ubi jus, ibi remedium* has contributed to the acceptance of access to justice as a basic and inalienable human right, which all civilised societies recognise and enforce.

8.2. The right of an accused to apply for pre-arrest bail under Section 438 CrPC is intrinsically linked to his right to access the competent courts to avail his remedies under the law. A person would thus be entitled to apply for pre-arrest bail under Section 438 CrPC in one case, even though he may be in custody in connection with some other case.

8.3. The right of an accused to protect his personal liberty within the contours of Article 21 of the Constitution of India, by applying for pre-arrest bail under Section 438 CrPC cannot be eliminated without a procedure established by law. Further, such procedure should also pass the test of fairness, reasonableness and manifest non-arbitrariness on the touchstone of Article 14 of the Constitution of India.

8.4. Under Section 438 CrPC, the precondition for a person to apply for pre-arrest bail is a "*reason to believe that he may be arrested on accusation of having committed a non-bailable offence*". Therefore, the only precondition for exercising the said right is the apprehension of the accused that he may be arrested.

8.5. The arrest of an accused in one case cannot foreclose his right to apply for pre-arrest bail in a different case, since there is no such stipulation in the language of Section 438 CrPC. The restrictions on the exercise of power to grant pre-arrest bail under Section 438 CrPC are prescribed under Section 438(4) CrPC which provides that the provisions of Section 438 shall not apply to cases involving arrest under Sections 376(3), 376-AB, 376-DA or 376-DB respectively of IPC.

8.6. A Constitution Bench of this Court, in *Sushila Aggarwal*[4] while considering the statutory restrictions on Section 438 CrPC held that where Parliament intended to exclude or restrict the powers of the court under

1. *Amar S. Mulchandani* v. *State of Maharashtra*, 2023 SCC OnLine Bom 2394
10. (2016) 8 SCC 509 : (2016) 4 SCC (Civ) 80 : (2016) 3 SCC (Cri) 530 : (2016) 2 SCC (L&S) 463
4. *Sushila Aggarwal* v. *State (NCT of Delhi)*, (2020) 5 SCC 1 : (2020) 2 SCC (Cri) 721 : (2020) 2 SCR 1

Section 438 CrPC, it did so in categorical terms [such as Section 438(4)]. The omission on the part of the legislature to restrict the right of any person accused of having committed a non-bailable offence to seek anticipatory bail can lead one to assume that neither a blanket restriction can be read into the text of Section 438 CrPC by this Court, nor can inflexible guidelines in the exercise of discretion be insisted as that would amount to judicial legislation.

8.7. A statutory restriction on the right to apply for pre-arrest bail is also found under Sections 18 and 18-A(2) respectively of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short "the 1989 Act"). The said provisions provide that Section 438 CrPC shall not apply to cases under the 1989 Act. That despite the statutory bar under Sections 18 and 18-A(2) respectively of the 1989 Act a three-Judge Bench of this Court in *Prathvi Raj Chauhan* v. *Union of India*[11] held that if a complaint does not make out a prima facie case for applicability of the 1989 Act the bar under Sections 18 and 18-A(2) respectively of the said Act shall not apply. The aforesaid judgment indicates the judicial approach of adopting an interpretation in favour of personal liberty.

9. In such circumstances referred to above, Mr Dave prayed that there being no merit in the appeal, the same may be dismissed.

C. *Views of different High Courts on the issue in question*

10. In *Sunil Kallani*[5], a learned Single Judge of the High Court of Rajasthan took the view that an application for anticipatory bail would not be maintainable at the instance of a person who is already arrested and is in police custody or judicial custody in relation to a different case. The line of reasoning adopted by the High Court in taking such a view was that a person who is already in custody cannot have a reason to believe that he would be arrested as he already stood arrested, albeit in a different case. The High Court observed that arrest means to actually touch or confine the body of the person to the custody of a police officer and an essential part of arrest is placing the corpus, that is, the body of the person, in custody of the police authorities. In light of this essential requirement to constitute an arrest, a person who is already in custody cannot have a reason to believe that he may be arrested as he stood already arrested. The High Court tried to fortify its view by relying on some of the observations made by this Court in *Narinderjit Singh Sahni*[9].

11. A few relevant observations made by the High Court are extracted hereinbelow: (*Sunil Kallani case*[5], SCC OnLine Raj paras 17-19 & 23-26)

> "*17.* The Scheme of Code of Criminal Procedure does not define the word "arrest". In Chapter V of the Code of Criminal Procedure, Section 41 lays down when police may arrest without warrant. Section 41-B lays down procedure of arrest and duties of officer. Section 46 mentions how arrest is to be made.

11 (2020) 4 SCC 727 : (2020) 2 SCC (Cri) 657

5 *Sunil Kallani* v. *State of Rajasthan*, 2021 SCC OnLine Raj 1654

9 *Narinderjit Singh Sahni* v. *Union of India*, (2002) 2 SCC 210 : 2001 Supp (4) SCR 114

18. Upon reading Section 46 CrPC (supra), it is apparent that arrest would mean to actually touch or confine the body of the person to custody of the police officer. Section 167 CrPC lays down that the custody may be given to the police for the purpose of investigation (called as remand) or be sent to jail (called as judicial custody). Thus the essential part of arrest is placing the corpus, body of the person in custody of the police authorities whether of a police station or before him or in a jail concerned.

19. The natural corollary is therefore that a person who is already in custody cannot have reasons to believe that he shall be arrested as he stands already arrested. In view thereof, the precondition of bail application to be moved under Section 438 CrPC i.e. reasons to believe that he may be arrested do not survive since a person is already arrested in another case and is in custody whether before the police or in jail.

* * *

23. As pointed out by the learned counsel for the petitioner that there may be cases where a person who has already been arrested in a particular case may be faced with registering of several FIRs by the persons who do not want him to be released from jail and in the said circumstances only option available is to take anticipatory bail in other FIRs as the police would seek his arrest in all the cases. It may be subsequently registered against him for non-bailable offences and in such an event, there would be infraction of his personal liberty. However this Court does not agree to the submissions noticed as above. Once the FIR has been registered in relation to an offence committed against any person by an accused he cannot claim to be protected from offences which he may have committed with other persons who have their individual right of registering an FIR against such an accused. The accused will have to face investigation and subsequent trial in relation to each and every case individually. The question whether he may be punished separately or jointly for other cases is a completely different question altogether and need not be gone into in the present case.

24. However, keeping in view the observations in Narinderjit Singh Sahni[9]*, and considering that the purpose of preventive arrest by a direction of the court on an application under Section 438 CrPC would be an order in vacuum. As a person is already in custody with the police this Court is of the view that such an anticipatory bail application under Section 438 CrPC would not lie and would be nothing but travesty of justice in allowing anticipatory bail to such an accused who is already in custody.*

25. Examining the issue from another angle if such an application is held to be maintainable the result would be that if an accused is arrested say for an offence committed of abduction and another case is registered against him for having committed murder and third case is — registered against him for having stolen the car which was used for abduction in a different police station and the said accused is granted anticipatory bail in respect to the offence of stealing of the car or in respect to the offence

9 *Narinderjit Singh Sahni* v. *Union of India*, (2002) 2 SCC 210 : 2001 Supp (4) SCR 114

of having committed murder the Police Investigating Agency concerned where FIRs have been registered would be prevented from conducting individual investigation and making recoveries as anticipatory bail once granted would continue to operate without limitation as laid down by the Supreme Court in *Sushila Aggarwal*[4]. The concept of anticipatory bail, as envisaged under Section 438 CrPC would stand frustrated. The provisions of grant of anticipatory bail are essentially to prevent the person concerned from litigation initiated with the object of injuring and humiliating the applicant by having him so arrested and for a person who stands already arrested, such a factor does not remain available.

26. In view of above discussion, this Court holds that the anticipatory bail would not lie and would not be maintainable if a person is already arrested and is in custody of police or judicial custody in relation to another criminal case which may be for similar offence or for different offences." (emphasis supplied)

12. In *Rajesh Kumar Sharma*[6], a learned Single Judge of the High Court of Allahabad followed the view taken by the High Court of Rajasthan referred to above.

13. In *Bashir Hasan Siddiqui*[8], a learned Single Judge of the High Court of Delhi, relying on *Sunil Kallani*[5] and *Rajesh Kumar Sharma*[6], took a similar view that an application seeking anticipatory bail would not be maintainable at the instance of a person who apprehends arrest if such a person is already arrested and is in custody in connection with a different offence. The relevant observations made by the High Court in para 6 of the said decision are extracted as under: (*Bashir Hasan Siddiqui case*[8], SCC OnLine Del)

"*6.* Therefore, keeping in view the entire facts and circumstances and also *taking into account the judgment passed by the Rajasthan High Court in Sunil Kallani*[5] *and subsequently judgment passed by the Allahabad High Court in Rajesh Kumar Sharma*[6]*, this Court is in consonance with the opinions of both the High Court that since the accused is in custody in another FIR, the anticipatory bail in other FIR is not maintainable. As a result, the present petition stands dismissed.*" (emphasis supplied)

14. In *Alnesh Akil Somji* v. *State of Maharashtra*[12], a learned Single Judge of the High Court of Judicature at Bombay formulated the following question of law for its consideration: (SCC OnLine Bom para 4)

"*4.* … Whether an anticipatory bail application would be maintainable by an accused who is already arrested and is in magisterial custody in relation to another crime?"

4 *Sushila Aggarwal* v. *State (NCT of Delhi)*, (2020) 5 SCC 1 : (2020) 2 SCC (Cri) 721 : (2020) 2 SCR 1
6 *Rajesh Kumar Sharma* v. *CBI*, 2022 SCC OnLine All 832
8 *Bashir Hasan Siddiqui* v. *State (NCT of Delhi)*, 2023 SCC OnLine Del 7544
5 *Sunil Kallani* v. *State of Rajasthan*, 2021 SCC OnLine Raj 1654
12 2021 SCC OnLine Bom 5276

15. The Bombay High Court also took notice of the decision of the High Court of Rajasthan in *Sunil Kallani*[5]. The decision of this Court in *Narinderjit Singh Sahni*[9] was also looked into and ultimately it was held that an accused has every right, even if he is arrested in a number of cases, to move the courts for anticipatory bail in each of the offence registered against him, irrespective of the fact that he is already in custody in relation to a different offence. The High Court was of the view that the application(s) under Section 438 CrPC would have to be heard and decided on merits independent of the other cases in which he is already in custody.

16. We may refer to some of the observations made by the High Court as under: (*Alnesh Akil Somji case*[12], SCC OnLine Bom paras 8-12 & 14-16)

> "*8*. A plain reading of the provision would show that the only restriction provided is under Section 438(4) CrPC, which says that the provision will not apply to accusations of offences which are stated in Section 438(4) CrPC. Similarly, certain special statutes have excluded the operation of Section 438 CrPC for accusation of offences punishable under those special statutes, for example, Section 18-A of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 bars exercise of powers under Section 438 CrPC.
>
> *9*. The Hon'ble Supreme Court in *Sushila Aggarwal*[4], while dealing with the scope of Section 438 CrPC has followed the decision in *Gurbaksh Singh Sibbia* v. *State of Punjab*[3] and regarding the bar or restriction on the exercise of power to grant anticipatory bail, the Hon'ble Supreme Court has held as follows: (*Sushila Aggarwal case*[4], SCC pp. 92-93, paras 62-63)
>
> > '*62*. … In this background, it is important to notice that the only bar, or restriction, imposed by Parliament upon the exercise of the power (to grant *anticipatory bail) is by way of a positive restriction i.e. in the case where accused are alleged to have committed offences punishable under Section 376(3) or Section 376-AB or Section 376-DA or Section 376-DB of the Penal Code*. In other words, Parliament has now denied jurisdiction of the court (i.e. Court of Session and High Courts) from granting anticipatory bail to those accused of such offences. The amendment [Code of Criminal Procedure Amendment Act, 2018 introduced Section 438(4)] reads as follows:
> >
> > > "**438. (4)** Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code."

5 *Sunil Kallani* v. *State of Rajasthan*, 2021 SCC OnLine Raj 1654
9 *Narinderjit Singh Sahni* v. *Union of India*, (2002) 2 SCC 210 : 2001 Supp (4) SCR 114
12 *Alnesh Akil Somji* v. *State of Maharashtra*, 2021 SCC OnLine Bom 5276
4 *Sushila Aggarwal* v. *State (NCT of Delhi)*, (2020) 5 SCC 1 : (2020) 2 SCC (Cri) 721 : (2020) 2 SCR 1
3 (1980) 2 SCC 565 : 1980 SCC (Cri) 465 : (1980) 3 SCR 383

63. Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this Court, nor can inflexible guidelines in the exercise of discretion, be insisted upon — that would amount to judicial legislation.'

10. Similarly, the Hon'ble Supreme Court has made the following observations in *Gurbaksh Singh Sibbia*[3]: (SCC p. 590, para 39)

'*39*. Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is under arrest involves a contradiction in terms, insofar as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.'

11. It is thus very clear, according to Hon'ble Supreme Court, that anticipatory bail will not be maintainable in case a person is in custody in the same offence for which pre-arrest bail is sought, the restriction, if any, upon maintainability of pre-arrest bail will be there only if a person is in custody in that particular offence itself.

12. From the above pronouncements, two things are clear. First, there is no such bar in CrPC or any statute which prohibits Session or the High Court from entertaining and deciding an anticipatory bail, when such person is already in judicial or police custody in some other offence. Second, the restriction cannot be stretched to include arrest made in any other offence as that would be against the purport of the provision.

* * *

14. I may point out here that *Narinderjit Singh Sahni*[9] was in respect of maintainability of Article 32 wherein relief in the nature of Section 438 was sought. Even, the said judgment does not hold in very clear terms that a person arrested in one offence cannot seek the relief provided under Section 438 CrPC in another offence merely on the ground that he stands arrested in another distinct offence.

15. In my considered opinion, there was no proper interpretation of Section 438 CrPC at the hands of the learned Additional Sessions Judge. Accused has every right, even if he is arrested in a number of cases, to move in each of offence registered against him irrespective of the fact that he is already in custody but for different offence, for the reason that the

3 *Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465 : (1980) 3 SCR 383

9 *Narinderjit Singh Sahni* v. *Union of India*, (2002) 2 SCC 210 : 2001 Supp (4) SCR 114

application(s) will have to be heard and decided on merits independent of another crime in which he is already in custody.

16. One cannot and must not venture, under the garb of interpretation, to substantiate its own meaning than the plain and simple particular though provided by statute. What has not been said cannot be inferred unless the provision itself gives room for speculation. If the purpose behind the intendment is discernible sans obscurity and ambiguity, there is no place for supposition." (emphasis in original and supplied)

17. In *Sanjay Kumar Sarangi* v. *State of Odisha*[13], a learned Single Judge of the High Court of Orissa took the view that there is no statutory bar for an accused in custody in connection with a case to pray for grant of anticipatory bail in a different case registered against him. The Court, upon perusal of the relevant provisions, took the view that arrest means physical confinement of a person with or without the order of the court. The Court noted that Section 167(2) CrPC, which governs "remand", is applicable to a case where the accused is already arrested, and charge-sheet has not been filed. The Court observed that there is no specific provision in CrPC which governs a situation where a person is required to be arrested/remanded in connection with a new case when he is already in custody in connection with some other case and in such a situation, the accused can only be remanded in connection with the new case on the order of the competent court. Answering the question whether such order of remand by the court can be equated with an act of arrest, the Court held that the purpose of remand as in the case of arrest is to collect evidence during investigation, and thus both amount to one and the same thing.

18. The High Court in *Sanjay Kumar Sarangi*[13] proceeded to explain that if a new case is registered against a person already in custody in connection with one case, the police in such circumstances can either seek an order of remand from the court or arrest the accused, as and when he is released from custody in connection with the other case. The Court explained that it is only in the latter scenario that an order of anticipatory bail under Section 438 CrPC would become effective because it is only after the accused is released from custody that he can be arrested in relation to the subsequent case. The Court said that the anticipatory bail operates at a future time. After being released from custody in the former case, if he is sought to be arrested in relation to the subsequent case, there is no reason why he should be precluded from approaching the court beforehand with the necessary protection in the form of anticipatory bail.

19. The Court clarified in *Sanjay Kumar Sarangi*[13] that a person cannot be arrested if he is already in custody in connection with some case, however, his right to obtain an anticipatory bail in connection with a different case cannot be curtailed having regard to the scheme of CrPC. The anticipatory bail, if granted, shall however be effective only if he is arrested in connection with the subsequent case consequent upon his release from custody in the previous case.

13 2024 SCC OnLine Ori 1334

20. Lastly, the Court observed in *Sanjay Kumar Sarangi*[13] that there is nothing in CrPC which takes away the right of the accused to seek his liberty or of the investigating agency to investigate the case only because the accused is in custody in a different case. The Court observed that an accused can exercise his right of moving the court for anticipatory bail just as the investigating agency can exercise its right to investigate the subsequent case by seeking remand of the accused from the court having jurisdiction over the case. Both the rights can co-exist and operate at their respective and appropriate times. The Court held that if the application of the investigating agency, seeking remand of the accused whilst he is in custody in connection with the former case, is allowed, the accused can no longer pray for anticipatory bail in the subsequent case, as then he could be said to be technically in custody in connection with the subsequent case also. In such a scenario, the accused can only seek regular bail. The Court further elaborated that the grant of anticipatory bail does not clothe the accused with a licence to avoid investigation or claim any immunity therefrom.

21. We may refer to some of the relevant observations made by the learned Single Judge as under: (*Sanjay Kumar Sarangi case*[13], SCC OnLine Ori paras 13-17)

> "*13. To illustrate, a person is in custody in connection with a case and a new case is registered against him for commission of some other offence. Two recourses are available to the police in such a situation — firstly to seek an order of remand from the Court if the presence of the accused is required for investigation or secondly, to arrest him, as and when he is released from custody in connection with the previous case. It is only in the second scenario that an order of anticipatory bail can become effective because only then can he be "arrested"*. It is trite law that the distinction between an order in case of custody bail and anticipatory bail is that the former is passed when the accused is already arrested and in custody and operates as soon as it is passed (subject to submission of bail bonds, etc.), while the latter operates at a future time—when the person not being in custody, is arrested. This, according to the considered view of this Court, is the crux of the issue. *To amplify, since an order granting anticipatory bail becomes effective only when the person is arrested and as it is not possible to arrest a person already in custody, it follows that when, on being released from custody in the former case, he is sought to be arrested in the new case, there is no reason why he shall be restrained from moving the Court beforehand to arm himself with necessary protection in the form of anticipatory bail to protect himself from such a situation. If such an order is passed by the Court in his favour, it shall become effective if and when he is arrested as normally happens*. The only catch is, he cannot be arrested as long as he is in custody in the first-mentioned case. So, his right to obtain an order in the new case beforehand that can be effective only upon his

13 *Sanjay Kumar Sarangi* v. *State of Odisha*, 2024 SCC OnLine Ori 1334

release from the first-mentioned case cannot be denied under the scheme of the Code.

14. Another aspect must also be taken into consideration — when a person is in custody in connection with a case and a new case gets registered against him, it is, for all practical purposes a separate case altogether. This implies all rights conferred by the statute on the accused consequent upon registration of a case against him as well as the investigating agency are independently protected. There is no provision in the Code that takes away the right of the accused to seek his liberty or of the investigating agency to investigate into the case only because he is in custody in another case. As already stated, the accused can exercise his right of moving the court for anticipatory bail which would of course be effective only upon his release from the earlier case and in the event of his arrest in the subsequent case. Similarly, the right of the investigating agency to investigate/interrogate in the subsequent case can be exercised by seeking remand of the accused from the court in the subsequent case. *Both these scenarios are not mutually exclusive and can operate at their respective and appropriate times. The investigating agency, if it feels necessary for the purpose of interrogation/investigation can seek remand of the accused whilst he is in custody in connection with the previous case and if such prayer is allowed, the accused can no longer pray for grant of anticipatory bail as then he would be technically in custody in connection with the subsequent case also. Then, he can only seek regular or custody bail. It is also to be considered that if the prosecution has the power to register a case against a person who is in custody in connection with another case how can the accused be deprived of his right to seek protection of his liberty in such case? This would militate against the very principle underlying Article 21 of the Constitution as also Section 438 of the Code.*

15. This takes the court to the reasoning adopted by the learned Single Judge of the Rajasthan High Court in *Sunil Kallani*[5] that: (SCC OnLine Raj para 25)

> '*25.* … the Police Investigating Agency concerned where FIRs have been registered would be prevented from conducting individual investigation and making recoveries as anticipatory bail once granted would continue to operate without limitation as laid down by the Supreme Court in *Sushila Aggarwal*[14].'

With great respect, this Court is unable to persuade itself to agree with the above-quoted reasoning in view of the fact that grant of anticipatory bail does not and cannot grant the accused a licence to avoid investigation or clothe him with any immunity therefrom. In fact, sub-section (2) of Section 438 holds the answer to this question as follows:

5 *Sunil Kallani* v. *State of Rajasthan*, 2021 SCC OnLine Raj 1654
14 *Sushila Aggarwal* v. *State (NCT of Delhi)*, (2018) 7 SCC 731 : (2018) 3 SCC (Cri) 331

'**438. (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 officer as and when required;'

* * *

It is needless to mention that an order under sub-section (1) can be passed only upon hearing the Public Prosecutor. Hence, the prosecution can always insist upon inclusion of such a condition by the court in the order granting anticipatory bail. And insofar as "recoveries" are concerned, as already stated, it is always open to the investigating agency to pray for remand of the accused, as long as he is in custody, for such purpose and an order granting anticipatory bail has not been passed. …

* * *

16. From a conspectus of the analysis made hereinbefore thus, this Court holds as follows:

(*i*) There is no statutory bar for an accused in custody in connection with a case to pray for grant of anticipatory bail in another case registered against him;

(*ii*) Anticipatory bail, if granted, shall however be effective only if he is arrested in connection with the subsequent case consequent upon his release from custody in the previous case;

(*iii*) The investigating agency, if it feels necessary for the purpose of interrogation/investigation can seek remand of the accused whilst he is in custody in connection with the previous case and in which no order granting anticipatory bail has yet been passed. If such order granting remand is passed, it would no longer be open to the accused to seek anticipatory bail but he can seek regular bail.

17. In the cases at hand, the prosecution has not sought for nor obtained any order from the Court for remand of the petitioners in the subsequent cases registered against them. Thus, this Court holds that the anticipatory bail applications are maintainable." (emphasis supplied)

22. Thus, it appears from the aforesaid discussion that there are divergent opinions expressed by different High Courts of the country. The Rajasthan[5], Delhi[8] and Allahabad[6] High Courts have taken the view that an anticipatory bail application would not be maintainable if the accused is already arrested and is in custody in connection with some offence. On the other hand, the Bombay and Orissa High Courts have taken the view that even if the accused

5 *Sunil Kallani* v. *State of Rajasthan*, 2021 SCC OnLine Raj 1654
8 *Bashir Hasan Siddiqui* v. *State (NCT of Delhi)*, 2023 SCC OnLine Del 7544
6 *Rajesh Kumar Sharma* v. *CBI*, 2022 SCC OnLine All 832

is in custody in connection with one case, anticipatory bail application at his instance in connection with a different case is maintainable.

D. ***Analysis***

(*i*) *Evolution of the concept of anticipatory bail*

23. The Code of Criminal Procedure, 1898 (for short "the 1898 Code") did not contain any specific provision analogous to Section 438 CrPC. In *Amir Chand* v. *Crown*[15], the question before the Full Bench was whether Section 498 of the 1898 Code empowered the High Court or the Court of Session to grant bail to a person who had not been placed under restraint by arrest or otherwise. The Full Bench answered the reference as under: (SCC OnLine Punj)

> "... *The very notion of bail presupposes some form of previous restraint. Therefore, bail cannot be granted to a person who has not been arrested and for whose arrest no warrants have been issued.* Section 498, Criminal Procedure Code, does not permit the High Court or the Court of Session to grant bail to anyone whose case is not covered by Sections 496 and 497, Criminal Procedure Code. It follows, therefore, that bail can only be allowed to a person who has been arrested or detained without warrant or appears or is brought before a court. Such person must be liable to arrest and must surrender himself before the question of bail can be considered. In the case of a person who is not under arrest, but for whose arrest warrants have been issued, bail can be allowed if he appears in Court and surrenders himself. *No bail can be allowed to a person at liberty for whose arrest no warrants have been issued.* The petitioners in the present case are, therefore, not entitled to bail. The question referred to the Full Bench is, therefore, answered in the negative." (emphasis supplied)

24. Under the 1898 Code, the concept of anticipatory or pre-arrest bail was absent and the need for introduction of a new provision in CrPC empowering the High Court and Court of Session to grant anticipatory bail was pointed out by the 41st Law Commission of India in its Report dated 24-9-1969. It observed thus in Para 39.9 of the said Report (Vol. I):

> "Anticipatory bail
>
> *39.9. The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a 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 causes for the purpose of disgracing them or for other purposes by getting detained in jail for some days.* In recent times, the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, *where there are*

15 1949 SCC OnLine Punj 20

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."

We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter.

In order to settle the details of this suggestion, the following draft of a new section is placed for consideration:

'497-A. (1) When any person has a reasonable apprehension that he would be arrested on 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. That Court may, in its discretion, direct that in the event of his arrest, he shall be released on bail.

(2) A Magistrate taking cognizance of an offence against that person shall, while taking steps under Section 204(1), either issue summons or a bailable warrant as indicated in the direction of the court under sub-section (1).

(3) If any person in respect of whom such a direction is made is arrested without warrant by an officer in charge of a police station on an accusation of having committed that offence, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, such person shall be released on bail.'

We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed as prejudging (partially at any rate) the whole case. Hence we would leave it to the discretion of the court and prefer not to fetter such discretion in the statutory provision itself. Superior courts will, undoubtedly, exercise their discretion properly, and not make any observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the accused." (emphasis supplied)

25. The suggestion made by the Law Commission was, in principle, accepted by the Central Government which introduced Clause 447 in the Draft Bill of the Code of Criminal Procedure, 1970 with a view to confer express power on the High Court and the Court of Session to grant anticipatory bail. The said clause of the Draft Bill was enacted with certain modifications and became Section 438 CrPC.

26. The Law Commission, in Para 31 of its 48th Report (1972), made the following comments on the aforesaid clause:

"31. Point (*vi*)— *Provision for grant of anticipatory bail.—The Bill*[15a] *introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission*[15b]. *We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.*

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith." (emphasis supplied)

27. Section 438 CrPC reads thus:

"**438.** ***Discretion 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 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.

(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,

15a CrPC Bill, Cl. 447.
15b 41st Report, Vol. 1, pp. 320-321, Para 39.9.

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,

(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 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 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 be issued 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).

(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860).”

28. The Statement of Objects and Reasons accompanying the Bill for introducing Section 438 in CrPC indicates that the legislature felt that it was imperative to evolve a device by which an alleged accused is not compelled to face ignominy and disgrace at the instance of influential people who try to implicate their rivals in false cases. The purpose behind incorporating Section 438 in CrPC was to recognise the importance of personal liberty and freedom in a free and democratic country. A careful reading of this section reveals that the legislature was keen to ensure respect for the personal liberty of individuals by pressing in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court. [See: *Siddharam Satlingappa Mhetre* v. *State of Maharashtra*[16].]

16 (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514

29. In the context of anticipatory bail, this Court, in *Siddharam Satlingappa Mhetre*[16], discussed the relevance and importance of personal liberty as under: (SCC pp. 718-19 & 721, paras 36-37, 43 & 49-50)

"*36*. All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why "liberty" is called the very quintessence of a civilised existence.

37. Origin of "liberty" can be traced in the ancient Greek civilisation. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 BC, an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realise itself as fully as possible through the self-realisation of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. According to Aristotle, as the State was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens so it was natural and necessary to man. Plato found his "republic" as the best source for the achievement of the self-realisation of the people.

* * *

43. A distinguished former Attorney General for India, M.C. Setalvad in his treatise *War and Civil Liberties* observed that the French Convention stipulates common happiness as the end of the society, whereas Bentham postulates the greatest happiness of the greatest number as the end of law. Article 19 of the Indian Constitution averts to freedom and it enumerates certain rights regarding individual freedom. These rights are vital and most important freedoms which lie at the very root of liberty. He further observed that the concept of civil liberty is essentially rooted in the philosophy of individualism. According to this doctrine, the highest development of the individual and the enrichment of his personality are the true function and end of the State. It is only when the individual has reached the highest state of perfection and evolved what is best in him that society and the State can reach their goal of perfection. In brief, according to this doctrine, the State exists mainly, if not solely, for the purpose of affording the individual freedom and assistance for the attainment of his growth and perfection. The State exists for the benefit of the individual.

* * *

16 *Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514

49. An eminent English Judge, Lord Alfred Denning observed:

> 'By personal freedom I mean freedom of every law abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person.... It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live.'

50. An eminent former Judge of this Court, Justice H.R. Khanna in a speech as published in 2 IJIL, Vol. 18 (1978), p. 133 observed that

> 'liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body.' "

30. In *Kartar Singh*[2], a Constitution Bench of this Court held that there is no constitutional or fundamental right to seek anticipatory bail. In the said case, this Court was called upon to consider the constitutional validity of sub-section (7) of Section 20 of the Terrorists and Disruptive Activities (Prevention) Act, 1987. The Constitution Bench also looked into the validity of Section 9 of the Code of Criminal Procedure (U.P. Amendment) Act, 1976 which deleted the operation of Section 438 CrPC in the State of Uttar Pradesh with effect from 28-11-1975. In the aforesaid context, Ratnavel Pandian, J. speaking for himself and on behalf of four other Judges observed as under: (SCC pp. 698-700, paras 326-27 & 329)

> "*326*. The High Court of Punjab and Haryana in *Bimal Kaur*[17] has examined a similar challenge as to the vires of Section 20(7) of TADA Act, and held thus: (SCC OnLine P&H para 108)
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> '*108*. In my opinion Section 20(7) is intra vires the provision of Article 14 of the Constitution in that the persons charged with the commission of terrorist act fall in a category which is distinct from the class of persons charged with commission of offences under the Penal Code and the offences created by other statutes. The persons indulging in terrorist act form a member of well organised secret movement. The enforcing agencies find it difficult to lay their hands on them. Unless the police is able to secure clue as to who are the persons behind this movement, how it is organised, who are its active members and how they operate, it cannot hope to put an end to this movement and restore public order. The police can secure this knowledge only from the arrested terrorists after effective interrogation. If the real offenders apprehending arrest are able to secure anticipatory bail then the police shall virtually be denied the said opportunity.'

2 *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899 : (1994) 2 SCR 375
17 *Bimal Kaur Khalsa* v. *Union of India*, 1987 SCC OnLine P&H 918 : AIR 1988 P&H 95 : PLR (1988) 93 P&H 189 : 1988 Cri LJ 869

327. It is needless to emphasise that both Parliament as well as the State Legislatures have got legislative competence to enact any law relating to the Code of Criminal Procedure. No provision relating to anticipatory bail was in the old Code and it was introduced for the first time in the present Code of 1973 on the suggestion made of the Forty-first Report of the Law Commission and the Joint Committee Report. It may be noted that this section is completely omitted in the State of Uttar Pradesh by Section 9 of the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act 16 of 1976) w.e.f. 28-11-1975. In the State of West Bengal, proviso is inserted to Section 438(1) of the Code w.e.f. 24-12-1988 to the effect that no final order shall be made on an application filed by the accused praying for anticipatory bail in relation to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, without giving the State not less than seven days' notice to present its case. In the State of Orissa, by Section 2 of Orissa Act 11 of 1988 w.e.f. 28-6-1988, a proviso is added to Section 438 stating that no final order shall be made on an application for anticipatory bail without giving the State notice to present its case for offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years.

* * *

329. Further, at the risk of repetition, we may add that Section 438 is a new provision incorporated in the present Code creating a new right. If that new right is taken away, can it be said that the removal of Section 438 is violative of Article 21. In Gurbaksh Singh[3]*, there is no specific statement that the removal of Section 438 at any time will amount to violation of Article 21 of the Constitution."* (emphasis supplied)

31. The aforesaid decision was discussed in the course of the hearing of this case for the limited proposition that there is no constitutional or fundamental right to seek anticipatory bail. Section 438 CrPC is just a statutory right.

32. In *Gurbaksh Singh Sibbia*[3], a Constitution Bench of this Court (speaking through Justice Y.V. Chandrachud, C.J., as his Lordship then was) undertook an extensive analysis of the provision of anticipatory bail. This Constitution Bench decision can be termed as a profound and passionate essay on how personal liberty under the Constitution can be consistent with needs of investigations and why this Court should avoid any generalisation that would take away the discretion of the courts dealing with a new set of facts in each case. Y.V. Chandrachud, C.J. observed thus: (SCC pp. 575 & 579-81, paras 8, 12 & 14-15)

"*8.* … Attendant upon such investigations, when the police are not free agents within their sphere of duty, is a great amount of inconvenience, harassment and humiliation. That can even take the form of the parading of

3 *Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465 : (1980) 3 SCR 383

a respectable person in handcuffs, apparently on way to a court of justice. The foul deed is done when an adversary is exposed to social ridicule and obloquy, no matter when and whether a conviction is secured or is at all possible. It is in order to meet such situations, though not limited to these contingencies, that the power to grant anticipatory bail was introduced into the 1973 Code.

* * *

12. … The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Sub-section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provides that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in clauses (*i*) to (*iv*) of sub-section (2). …

* * *

14. Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. …

15. … While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises."

33. As regards making out a "special case" to seek anticipatory bail, this Court in *Gurbaksh Singh Sibbia*[3] said: (SCC pp. 584 & 587, paras 21 & 27)

> "*21.* … A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.
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> * * *
>
> *27.* … An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence."

34. In *Gurbaksh Singh Sibbia*[3], this Court emphasised that the applicant must have a tangible reason to believe. Vague apprehension will not do. Secondly, it held that the High Court or the Court of Session should not ask an applicant to go before the Magistrate to try his luck under Section 437 CrPC. It was also observed that once the accused is arrested, Section 438 CrPC ceases to play any role with reference to the offence or offences for which he is arrested. This Court also cautioned against passing a blanket order for anticipatory bail.

35. The following principles of law as regards the grant of anticipatory bail can be discerned from *Gurbaksh Singh Sibbia*[3]:

35.1. The applicant must genuinely show the "reason to believe" that he may be arrested for a non-bailable offence. Mere fear is not belief and the grounds on which the belief of the applicant is based must be capable of being examined by the court objectively. Specific events and facts must be disclosed to enable the court to judge the reasonableness of belief or likelihood of arrest, the existence of which is the sine qua non in the exercise of the power to grant anticipatory bail.

35.2. The High Court or the Court of Session must apply its mind to the question of anticipatory bail and should not leave it to the discretion of the Magistrate under Section 437 CrPC.

35.3. Filing of the FIR is not a condition precedent. However, imminence of a likely arrest founded on the reasonable belief must be shown.

35.4. Anticipatory bail can be granted so long as the applicant is not arrested in connection with that case/offence.

3 *Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465 : (1980) 3 SCR 383

35.5. Section 438 CrPC cannot be invoked by the accused in respect of the offence(s)/case in which he has been arrested. The remedy lies under Section 437 or 439 CrPC, as the case may be, for the offence for which he is arrested.

35.6. The normal rule is to not limit the operation of the order in relation to a period of time.

36. On account of various decisions of Benches of lesser strength than in *Gurbaksh Singh Sibbia*[3] taking a view curtailing the scope of the findings in the said case, the scope of Section 438 CrPC came to be considered yet again in *Siddharam Satlingappa Mhetre*[16]. A two-Judge Bench in *Siddharam Satlingappa Mhetre*[16] held that the intervening decisions between 1980 and 2011 curtailing the scope of *Gurbaksh Singh Sibbia*[3] were per incuriam.

37. However, since *Siddharam Satlingappa Mhetre*[16] was delivered by a coram of two Judges, the matter again reached the Constitution Bench in the judgment rendered in *Sushila Aggarwal*[4] laying down the following principles:

37.1. An application for anticipatory bail should be based on concrete facts (and not vague or general allegations). It is not essential that an application should be moved only after an FIR is filed.

37.2. It is advisable to issue a notice on the anticipatory bail application to the Public Prosecutor.

37.3. Nothing in Section 438 CrPC compels or obliges courts to impose conditions limiting relief in terms of time. The courts would be justified — and ought to impose conditions spelt out in Section 437(3) CrPC [by virtue of Section 438(2)]. The need to impose other restrictive conditions would have to be judged on a case-to-case basis.

37.4. Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail or not.

37.5. Once granted, anticipatory bail can, depending on the conduct and behaviour of the accused, continue after filing of the charge-sheet till the end of trial.

37.6. An order of anticipatory bail should not be a "blanket" order and should be confined to a specific incident.

37.7. An order of anticipatory bail does not limit the rights of the police to conduct investigation.

37.8. The observations in *Gurbaksh Singh Sibbia*[3] regarding "limited custody" or "deemed custody" would be sufficient for the purpose of fulfilling the provisions of Section 27 of the Evidence Act, 1872.

3 *Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465 : (1980) 3 SCR 383

16 *Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514

4 *Sushila Aggarwal* v. *State (NCT of Delhi)*, (2020) 5 SCC 1 : (2020) 2 SCC (Cri) 721 : (2020) 2 SCR 1

37.9. The police can seek cancellation of anticipatory bail under Section 439(2) CrPC.

37.10. The correctness of an order granting bail can be considered by the appellate or superior court.

38. The aforesaid principles as regards the grant of anticipatory bail discernible from the decision of this Court in *Sushila Aggarwal*[4] are general and may not have a direct bearing on the question we are called upon to consider and answer. What is important to be taken note of in the decision in *Sushila Aggarwal*[4] is the following: (SCC pp. 92-93, paras 62-63)

> *"62. … In this background, it is important to notice that the only bar, or restriction, imposed by Parliament upon the exercise of the power (to grant anticipatory bail) is by way of a positive restriction i.e. in the case where accused are alleged to have committed offences punishable under Section 376(3) or Section 376-AB or Section 376-DA or Section 376-DB of the Penal Code. In other words, Parliament has now denied jurisdiction of the courts (i.e. Court of Session and High Courts) from granting anticipatory bail to those accused of such offences. …*
>
> *63. Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this Court, nor can inflexible guidelines in the exercise of discretion, be insisted upon — that would amount to judicial legislation."* (emphasis in original and supplied)

39. What has been conveyed in the aforesaid decision is that the court, on its own, should not try to read any other restriction as regards the exercise of its power to consider the plea for grant of anticipatory bail. Wherever Parliament intends or desires to exclude or restrict the power of courts, it does so in categorical terms. This is very much evident from the plain reading of sub-section (4) of Section 438 CrPC itself. The dictum as laid is that the court should not read any blanket restriction nor should it insist for some inflexible guidelines as that would amount to judicial legislation.

(ii) Whether a person, while in custody for a particular offence, can have a "reason to believe" that he may be arrested in relation to some other non-bailable offence?

40. The line of reasoning adopted by the High Court of Rajasthan in *Sunil Kallani*[5] was that once a person is taken in custody in relation to an offence, it is not possible thereafter to arrest him in relation to a different offence as one of the essential conditions for arrest is placing the body of the accused in custody of the police authorities by means of actual touch or confinement. As

4 *Sushila Aggarwal* v. *State (NCT of Delhi)*, (2020) 5 SCC 1 : (2020) 2 SCC (Cri) 721 : (2020) 2 SCR 1

5 *Sunil Kallani* v. *State of Rajasthan*, 2021 SCC OnLine Raj 1654

there cannot be any actual touch or confinement while a person is in custody, he cannot have a "reason to believe" that he may be arrested in relation to a different offence.

41. However, there are two fundamental fallacies in the reasoning adopted by the Rajasthan High Court. First, the High Court failed to consider the possibility of arrest of the person in custody in relation to a different offence immediately after he is set free from the custody in the first offence. In such a scenario, if it is held that the application seeking anticipatory bail in relation to an offence, filed during the period when the applicant is in custody in relation to a different offence, would not be maintainable, then it would amount to precluding the applicant from availing a statutory remedy which he is otherwise entitled to and which he can avail as soon as he is released from custody in the first offence. Thus, in cases where the accused has a "reason to believe" that he may be arrested in relation to an offence different from the one in which he is in custody immediately upon his release, the view taken by the Rajasthan High Court, if allowed to stand, would deprive him of his statutory right of seeking anticipatory bail because it is quite possible that before such a person is able to exercise the aforesaid right, he may be arrested.

42. In our opinion, no useful purpose would be served by depriving the accused of exercising his statutory right to seek anticipatory bail till his release from custody in the first offence. We find force in the submission of the respondent that if the accused is not allowed to obtain a pre-arrest bail in relation to a different offence, while being in custody in one offence, then he may get arrested by the police immediately upon his release in the first case, even before he gets the opportunity to approach the competent court and file an application for the grant of anticipatory bail in relation to the said particular offence. This practical shortcoming in the approach taken by the Rajasthan High Court is prone to exploitation by the investigating agencies for the purpose of putting the personal liberty of the accused in peril.

43. The second fallacy in the reasoning of the High Court is that there can be no arrest of an accused in relation to a different offence while he is already in custody in relation to some offence. Although there is no specific provision in CrPC which provides for the arrest of an accused in relation to an offence while he is already in judicial custody in a different offence, yet this Court explained in *CBI* v. *Anupam J. Kulkarni*[18] that even if an accused is in judicial custody in connection with the investigation of an earlier case, the investigating agency can formally arrest him in connection with his involvement in a different case and associate him with the investigation of that other case. In other words, this Court clarified that even when a person is in judicial custody, he can be shown as arrested in respect of any number of other crimes registered elsewhere in the country. Reliance was placed by this Court on the decision of the Punjab and Haryana High Court in *S. Harsimran Singh* v. *State of Punjab*[19] wherein it was held that there is no inflexible bar under the law against the re-arrest of a

18 (1992) 3 SCC 141 : 1992 SCC (Cri) 554
19 1983 SCC OnLine P&H 685 : ILR (1984) 2 P&H 139 : 1984 Cri LJ 253

person who is already in judicial custody in relation to a different offence. The High Court held that judicial custody could be converted into police custody by an order of the Magistrate under Section 167(2) CrPC for the purpose of investigating the other offence.

44. The relevant paragraphs of *Anupam J. Kulkarni*[18] are extracted hereinbelow: (SCC pp. 156-59, paras 11 & 13)

> "*11*. A question may then arise whether a person arrested in respect of an offence alleged to have been committed by him during an occurrence can be detained again in police custody in respect of another offence committed by him in the same case and which fact comes to light after the expiry of the period of first fifteen days of his arrest. The learned Additional Solicitor General submitted that as a result of the investigation carried on and the evidence collected by the police the arrested accused may be found to be involved in more serious offences than the one for which he was originally arrested and that in such a case there is no reason as to why the accused who is in magisterial custody should not be turned over to police custody at a subsequent stage of investigation when the information discloses his complicity in more serious offences. We are unable to agree. In one occurrence it may so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences on the basis of the available information and obtain police custody. If during the investigation his complicity in more serious offences during the same occurrence is disclosed that does not authorise the police to ask for police custody for a further period after the expiry of the first fifteen days. If that is permitted then the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly, this would defeat the very object underlying Section 167. However, we must clarify that this limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed. *That would be a different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation he must be formally arrested in connection with other case and then obtain the order of the Magistrate for detention in police custody.* The learned Additional Solicitor General however strongly relied on some of the observations made by Hardy, J. in *Mehar Chand case*[20] extracted above in support of his contention, namely, that an arrested accused who is in judicial custody can be turned over to police custody even after the expiry of first fifteen days at a subsequent stage of the investigation in the same case if the information discloses his complicity in more serious offences. We are unable to agree that the mere fact that some more offences alleged to have been committed by the

18 *CBI* v. *Anupam J. Kulkarni*, (1992) 3 SCC 141 : 1992 SCC (Cri) 554
20 *State* v. *Mehar Chand*, 1967 SCC OnLine Del 105 : (1969) 5 DLT 179

arrested accused in the same case are discovered in the same case would by itself render it to be a different case. All these offences including the so-called serious offences discovered at a later stage arise out of the same transaction in connection with which the accused was arrested. Therefore there is a marked difference between the two situations. The occurrences constituting two different transactions give rise to two different cases and the exercise of power under Sections 167(1) and (2) should be in consonance with the object underlying the said provision in respect of each of those occurrences which constitute two different cases. Investigation in one specific case cannot be the same as in the other. Arrest and detention in custody in the context of Sections 167(1) and (2) of the Code has to be truly viewed with regard to the investigation of that specific case in which the accused person has been taken into custody. In *S. Harsimran Singh* v. *State of Punjab*[19] a Division Bench of the Punjab and Haryana High Court considered the question whether the limit of police custody exceeding fifteen days as prescribed by Section 167(2) is applicable only to a single case or is attracted to a series of different cases requiring investigation against the same accused and held thus: (SCC OnLine P&H para 11)

> '*11. … We see no inflexible bar against a person in custody with regard to the investigation of a particular offence being either re-arrested for the purpose of the investigation of an altogether different offence. To put it in other words, there is no insurmountable hurdle in the conversion of judicial custody into police custody by an order of the Magistrate under Section 167(2) of the Code for investigating another offence. Therefore, a rearrest or second arrest in a different case is not necessarily beyond the ken of law.*'

This view of the Division Bench of the Punjab and Haryana High Court appears to be practicable and also conforms to Section 167. We may, however, like to make it explicit that such re-arrest or second arrest and seeking police custody after the expiry of the period of first fifteen days should be with regard to the investigation of a different case other than the specific one in respect of which the accused is already in custody. A literal construction of Section 167(2) to the effect that a fresh remand for police custody of a person already in judicial custody during investigation of a specific case cannot under any circumstances be issued, would seriously hamper the very investigation of the other case the importance of which needs no special emphasis. The procedural law is meant to further the ends of justice and not to frustrate the same. It is an accepted rule that an interpretation which furthers the ends of justice should be preferred. It is true that the police custody is not the be-all and end-all of the whole investigation but yet it is one of its primary requisites particularly in the investigation of serious and heinous crimes. The legislature also noticed this and permitted limited police custody. The period of first fifteen days should naturally apply in respect of the investigation of that specific case

19 1983 SCC OnLine P&H 685 : ILR (1984) 2 P&H 139 : 1984 Cri LJ 253

for which the accused is held in custody. But such custody cannot further be held to be a bar for invoking a fresh remand to such custody like police custody in respect of an altogether different case involving the same accused.

* * *

13. … There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167(2) and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the proviso as discussed above." (emphasis supplied)

45. It was submitted on behalf of the appellant that a person already in judicial custody in relation to an offence, cannot have a "reason to believe" that he may be arrested on the accusation of having committed a different offence. However, we do not find any merit in the aforesaid submission. There are two ways by which a person, who is already in custody, may be arrested—

(*a*) First, no sooner than he is released from custody in connection with the first case, the police officer can arrest and take him into custody in relation to a different case; and

(*b*) Secondly, even before he is set free from the custody in the first case, the police officer investigating the other offence can formally arrest him and thereafter obtain a Prisoner Transit Warrant ("PT warrant") under Section 267 CrPC from the jurisdictional Magistrate for the other offence, and thereafter, on production before the Magistrate, pray for remand;

OR

Instead of effecting formal arrest, the investigating officer can make an application before the jurisdictional Magistrate seeking a PT warrant for the production of the accused from prison. If the conditions required under Section 267 CrPC are satisfied, the jurisdictional Magistrate shall issue a PT warrant for the production of the accused in court. When the accused is so produced before the court in pursuance of the PT warrant, the investigating officer will be at liberty to make a request for remanding the accused, either to police custody or judicial custody, as provided in Section 167(1) CrPC. At that time, the jurisdictional Magistrate shall consider the request of the investigating officer, peruse the case diary and the representation of the accused and then, pass an appropriate order, either

remanding the accused or declining to remand the accused. [See: *State* v. *K.N. Nehru*[21].]

46. As arrest in both the aforesaid circumstances is permissible in law, it would be incorrect to hold that a person, while in custody, cannot have a "reason to believe" that he may be arrested in relation to a different offence. As a logical extension of this, it can also be said that when procedural law does not preclude the investigating agency from arresting a person in relation to a different offence while he is already under custody in some previous offence, the accused too cannot be precluded of his statutory right to apply for anticipatory bail only on the ground that he is in custody in relation to a different offence.

47. The procedure for arrest of the accused in relation to an offence after he is released from custody in the first offence would be similar to the procedure of arrest which is required to be followed in any other cognizable offence. However, we think it is necessary to shed some light on the procedure to effect arrest in the second category of cases, that is, where the investigating agency arrests the accused in relation to an offence while he is in custody in relation to a different offence.

48. As discussed in the preceding paragraphs, an accused could be arrested either when he is free or when he is in custody in some offence. Similarly, an arrest can be made by a police officer either without a warrant or with a warrant issued by a court. Thus, the following possibilities emerge:

(*a*) If an accused is arrested without a warrant while he is free and not in custody, then he has to be produced before the nearest Magistrate, who may remand him to police or judicial custody or may grant bail if applied for by the accused.

(*b*) If an accused is arrested with a warrant while he is free and not in custody, then Section 81 CrPC permits the production of such a person before the court issuing the warrant.

(*c*) If an accused is arrested with or without a warrant while he is already in custody in one offence, then it is only under Section 267 CrPC that he can be removed from such custody and produced before the Magistrate under whose territorial jurisdiction the other offence is registered.

49. Section 46(1) CrPC reads as under:

"**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."

21 2011 SCC OnLine Mad 1984

50. Thus, the plain reading of the aforesaid makes it clear that arrest involves actual touch or confinement of the body of the person sought to be arrested. However, arrest can also be effected without actual touch if the person sought to be arrested submits to the custody by words or action.

51. The term "arrest" is not defined either in the procedural Acts or in the various substantive Acts, though Section 46 CrPC, lays down the mode of arrest to be effected. *Black's Law Dictionary* (5th Edn., 1979) defines "arrest" as follows:

> "To deprive a person of his liberty by legal authority. Taking, under real or assumed authority, custody of another for the purpose of holding or detaining him to answer a criminal charge or civil demand. Arrest involves the authority to arrest, the assertion of that authority with the intent to effect an arrest, and the restraint of the person to be arrested. All that is required for an "arrest" is some act by officer indicating his intention to detain or take person into custody and thereby subject that person to the actual control and will of the officer, no formal declaration of arrest is required."

52. Similarly, the term "custody" too is not defined either in CrPC or IPC. *Corpus Juris Secundum* (Vol. 25 at p. 69) defines "custody" as follows:

> "When it is applied to persons, it implies restraint and may or may not imply physical force sufficient to restrain depending on the circumstances and with reference to persons charged with crime, it has been defined as meaning on actual confinement or the present means of enforcing it, the detention of the person contrary to his will. Applied to things, it means to have a charge or safe-keeping, and connotes control and includes as well, although it does not require, the element of physical or manual possession, implying a temporary physical control merely and responsibility for the protection and preservation of the thing in custody. So used, the word does not connote dominion or supremacy of authority. The said term has been defined as meaning the keeping, guarding, care, watch, inspection, preservation or security of a thing, and carries with it the idea of the thing being within the immediate personal care and control of the prisoner to whose custody it is subjected; charge; charge to keep, subject to order or direction; immediate charge and control and not the final absolute control of ownership."

[See *Roshan Beevi* v. *State of T.N.*[22]]

53. The Rajasthan High Court proceeded on the assumption that there can be no arrest while a person is in judicial custody because it is not possible for the police officer to arrest him without actual touch or confinement while such person is under custody. However, we are unable to agree with the view taken by the High Court for the reason that a lawful arrest can be made even without actually seizing or touching the body. Actions or words which successfully bring to the notice of the accused that he is under a compulsion and thereafter cause him to submit to such compulsion will also be sufficient to constitute

22 1983 SCC OnLine Mad 163

arrest. This Court in *State of U.P.* v. *Deoman Upadhyaya*[23] held that submission to the custody by word or action by a person is sufficient so as to constitute arrest under Section 46 CrPC.

54. In the aforesaid context, we may also refer to and rely upon the decision of the Queen's Bench in *Alderson* v. *Booth*[24]. The relevant observations are as under: (QB pp. 220-21)

> "*There are a number of cases, both ancient and modern, as to what constitutes an arrest, and whereas there was a time when it was held that there could be no lawful arrest unless there was an actual seizing or touching, it is quite clear that that is no longer the law. There may be an arrest by mere words, by saying "I arrest you" without any touching, provided, of course, that the accused submits and goes with the police officer. Equally it is clear, as it seems to me, that an arrest is constituted when any form of words in used which in the circumstances of the case were calculated to bring to the accused's notice, and did bring to the accused's notice, that he was under compulsion and thereafter he submitted to that compulsion.*" (emphasis supplied)

55. The aforesaid decision fortifies the view that the actual seizing or touching of the body of the person to be arrested is not necessary in a case where the arrester by word brings to the notice of the accused that he is under compulsion and thereafter the accused submits to that compulsion. This is in conformity with the modality of the arrest contemplated under Section 46 CrPC wherein also it is provided that the submission of a person to be arrested to the custody of the arrester by word or action can amount to an arrest. The essence of the decision in *Alderson*[24] is that there must be an actual seizing or touching, and in the absence of that, it must be brought to the notice of the person to be arrested that he is under compulsion, and as a result of such notice, the said person should submit to that compulsion, and then only the arrest is consummated.

56. As pointed out in the preceding paragraphs, a police officer can formally arrest a person in relation to an offence while he is already in custody in a different offence. However, such formal arrest does not bring the accused in the custody of the police officer as the accused continues to remain in the custody of the Magistrate who remanded him to judicial custody in the first offence. Once such formal arrest has been made, the police officer has to make an application under Section 267 CrPC before the jurisdictional Magistrate for the issuance of a PT warrant without delay. If, based on the requirements prescribed under Section 267 CrPC, a PT warrant is issued by the jurisdictional Magistrate, then the accused has to be produced before such Magistrate on the date and time mentioned in the warrant, subject to Sections 268 and 269 respectively of CrPC. Upon production before the jurisdictional Magistrate, the accused can be remanded to police or judicial custody or be enlarged on bail, if applied for and allowed.

23 1960 SCC OnLine SC 8 : AIR 1960 SC 1125
24 (1969) 2 QB 216 : (1969) 2 WLR 1252

57. The only reason why we have delineated the procedure followed in cases where a person already in custody is required to be arrested in relation to a different offence is to negate the reasoning of the Rajasthan, Delhi and Allahabad High Courts that once in custody, it is not possible to re-arrest a person in relation to a different offence. When a person in custody is confronted with a PT warrant obtained in relation to a different offence, such a person has no choice but to submit to the custody of the police officer who has obtained the PT warrant. Thus, in such a scenario, although there is no confinement to custody by touch, yet there is submission to the custody by the accused based on the action of the police officer in showing the PT warrant to the accused. Thereafter, on production of the accused before the jurisdictional Magistrate, like in the case of arrest of a free person who is not in custody, the accused can either be remanded to police or judicial custody, or he may be enlarged on bail and sent back to the custody in the first offence. A number of decisions have held that although Section 267 CrPC cannot be invoked to enable production of the accused before the investigating agency, yet it can undoubtedly be invoked to require production of the accused before the jurisdictional Magistrate, who can thereafter remand him to the custody of the investigating agency. Such an interpretation of the provision would give true effect to the words "other proceedings" as they appear in the text of Section 267 CrPC, which cannot be construed to exclude proceedings at the stage of investigation. [See: *C. Natesan* v. *State of T.N.*[25], *Ranjeet Singh* v. *State of U.P.*[26] and *State of Maharashtra* v. *Yadav Natthuji Kohachade*[27].]

58. Thus, contrary to the view taken by the Rajasthan, Allahabad and Delhi High Courts, a person, while in custody in relation to an offence, can be arrested in relation to a different offence, either after getting released from custody in the first offence, or even while remaining in custody in the first offence. In such circumstances, it follows that a person, while in custody in relation to an offence, can have "reason to believe" that he may be arrested in relation to a different cognizable offence. We find no restriction in the text of Section 438 or the scheme of CrPC precluding a person from seeking anticipatory bail in relation to an offence while being in custody in relation to another offence. In the absence of any such restriction, we find no valid reason to read any prohibition in the text of Section 438 CrPC, to preclude a person in custody from seeking anticipatory bail in relation to different offences.

59. The option of applying for anticipatory bail in relation to an offence, while being in custody in relation to a different offence, will only be available to the accused till he is arrested by the police officer on the strength of the PT warrant obtained by him from the court concerned. We must clarify that mere formal arrest (on-paper arrest) would not extinguish the right of the accused to apply for anticipatory bail. We say so because a formal arrest would not result in the submission of the accused, who is already in custody, to the custody of the

25 1998 SCC OnLine Mad 931
26 1994 SCC OnLine All 797 : 1995 Cri LJ 3505
27 1999 SCC OnLine Bom 422 : 2000 Cri LJ 959

police officer effecting a formal arrest in the subsequent case. However, if after effecting a formal arrest, the police officer on the strength of the same procures a PT warrant from the jurisdictional Magistrate, the accused would have no other choice but to submit to that compulsion and the right of the accused to apply for anticipatory bail would thereafter get extinguished.

60. If an accused is granted anticipatory bail in relation to an offence, while being in custody in a different offence, then it shall no longer be open to the police officer in the first case to apply under Section 267 CrPC for the production of the accused before the jurisdictional Magistrate for the purpose of remanding him to police or judicial custody. However, it shall be open to the jurisdictional Magistrate to require the production of accused under Section 267(1) for any other purpose mentioned under the said section except for the purpose of remanding him to police or judicial custody. [See: *Tusharbhai Rajnikantbhai Shah* v. *State of Gujarat*[28].]

61. We would also like to observe that contrary to the submission of the appellant that grant of anticipatory bail to the accused would prevent the investigating authorities from conducting investigation and discoveries, etc. it is always open to the investigating officer concerned to apply before the Magistrate in whose custody the accused is in relation to a different offence, seeking permission of such Magistrate to interrogate the accused in relation to the particular offence which he is investigating.

62. It was also submitted by the appellant that as the object of Section 438 CrPC was to prevent an accused from the humiliation of arrest, the protective cover of the provision would not include within its ambit a person who is already in custody. In other words, a person once arrested in relation to an offence, cannot be said to suffer further humiliation for any subsequent arrest which may take place, and thus, the relief of anticipatory bail should not be made available to a person who is already in custody.

63. We are unable to accept the aforesaid contention of the appellant. Each arrest a person faces compounds their humiliation and ignominy. We say so because each subsequent arrest underscores a continued or escalating involvement in legal troubles that can erode the dignity of the person and their public standing. The initial arrest itself often brings a wave of social stigma and personal distress, as the individual struggles with the implications of their legal predicament. When a subsequent arrest occurs, it intensifies this emotional and social burden, amplifying the perception of their criminality and reinforcing negative judgments from society. Subsequent arrest in relation to different offences, while the individual is in custody in a particular offence, further alienates the individual from their community and adversely affects their personal integrity. For this reason, it is incorrect to assume that subsequent arrests diminish the level of humiliation. On the contrary, each additional arrest exacerbates the person's shame making the cumulative impact of such legal entanglements increasingly devastating.

28 (2025) 1 SCC 753 : 2024 SCC OnLine SC 1897

(iii) Illustrative examples

64. The discrimination that would be caused if the submissions canvassed on behalf of the appellant were to be accepted can be understood with the aid of the following illustrations:

Illustration A

(1) *A* is in custody for a case under Section 420 IPC, and is enlarged on bail on a particular date. On the same day, *A's* wife registers a case under Section 498-A IPC against him. Here, if the appellant's argument is accepted, *A* would be able to apply for anticipatory bail.

(2) *B* is in custody under Section 420 IPC, and he has applied for bail. However, the order releasing him on bail is yet to be passed. While so, *B's* wife files a case under Section 498-A IPC against him. Here, if the appellant's argument is accepted, *B* would not be able to apply for anticipatory bail while in custody for a case under Section 420. He can apply for anticipatory bail in relation to the case under Section 498-A only if he is not arrested immediately after his release in the case under Section 420. If he is arrested immediately in the case under Section 498-A after being released in the case under Section 420, then the only remedy left for him would be to seek regular bail.

If the interpretation sought to be put forward by the appellant is accepted, two persons who are accused of similar offences are entitled to different sets of rights. While one is permitted to avail the right under Section 438 CrPC, the other is deprived of it, merely on the basis of the point in time when the FIR gets lodged.

Illustration B

(1) *X* is in custody for an offence under Section 302 IPC punishable by life imprisonment or death, and subsequently an FIR is registered against him for an offence under Section 376 IPC which is punishable with imprisonment which may extend for life. Here, if the appellant's argument is accepted, then *X* would not be able to apply for anticipatory bail in the subsequent case, since he is in custody for the earlier case under Section 302 IPC.

(2) *Y* is in custody for an offence under Section 384 IPC [extortion — punishable with imprisonment for 3 years], and while in custody for this offence, an FIR is registered against him for an offence under Section 406 IPC [criminal breach of trust — punishable with imprisonment for 3 years]. In this example as well, if the argument of the appellant is accepted, *Y* would not be able to apply for anticipatory bail, even though the offence is punishable with imprisonment for 3 years.

Y, therefore, would be placed on a par with a person who has committed a serious crime and would ordinarily not be granted anticipatory bail. However, by prohibiting *Y* from even applying for anticipatory bail for an offence punishable by imprisonment for a maximum of 3 years [i.e. Section 406 IPC], *Y* is placed in the same class as *X*.

E. *Conclusion*

65. Our examination of the matter has led us to the following conclusions:

65.1. An accused is entitled to seek anticipatory bail in connection with an offence so long as he is not arrested in relation to that offence. Once he is arrested, the only remedy available to him is to apply for regular bail either under Section 437 or Section 439 CrPC, as the case may be. This is evident from para 39 of *Gurbaksh Singh Sibbia*[3].

65.2. There is no express or implied restriction in CrPC or in any other statute that prohibits the Court of Session or the High Court from entertaining and deciding an anticipatory bail application in relation to an offence, while the applicant is in custody in relation to a different offence. No restriction can be read into Section 438 CrPC to preclude an accused from applying for anticipatory bail in relation to an offence while he is in custody in a different offence, as that would be against the purport of the provision and the intent of the legislature. The only restriction on the power of the court to grant anticipatory bail under Section 438 CrPC is the one prescribed under sub-section (4) of Section 438 CrPC, and in other statutes like the 1989 Act, etc.

65.3. While a person already in custody in connection with a particular offence apprehends arrest in a different offence, then, the subsequent offence is a separate offence for all practical purposes. This would necessarily imply that all rights conferred by the statute on the accused as well as the investigating agency in relation to the subsequent offence are independently protected.

65.4. The investigating agency, if it deems necessary for the purpose of interrogation/investigation in an offence, can seek remand of the accused whilst he is in custody in connection with a previous offence so long as no order granting anticipatory bail has been passed in relation to the subsequent offence. However, if an order granting anticipatory bail in relation to the subsequent offence is obtained by the accused, it shall no longer be open to the investigating agency to seek remand of the accused in relation to the subsequent offence. Similarly, if an order of police remand is passed before the accused is able to obtain anticipatory bail, it would thereafter not be open to the accused to seek anticipatory bail and the only option available to him would be to seek regular bail.

65.5. We are at one with Mr Dave that the right of an accused to protect his personal liberty within the contours of Article 21 of the Constitution of India with the aid of the provision of anticipatory bail as enshrined under Section 438 CrPC cannot be defeated or thwarted without a valid procedure established by law. He is right in his submission that such procedure should also pass the test of fairness, reasonableness and manifest non-arbitrariness on the anvil of Article 14 of the Constitution of India.

65.6. Under Section 438 CrPC, the precondition for a person to apply for pre-arrest bail is a "reason to believe that he may be arrested on an accusation of having committed a non-bailable offence". Therefore, the only precondition

3. *Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465 : (1980) 3 SCR 383

for exercising the said right is the apprehension of the accused that he is likely to be arrested. In view of the discussion in the preceding paragraphs, custody in one case does not have the effect of taking away the apprehension of arrest in a different case.

65.7. If the interpretation, as sought to be put forward by Mr Luthra is to be accepted, the same would not only defeat the right of a person to apply for pre-arrest bail under Section 438 CrPC but may also lead to absurd situations in its practical application.

66. Before we part with the matter, we would like to underscore the importance of the rights conferred under the procedural laws as noted by a Constitution Bench of this Court in *A.R. Antulay* v. *R.S. Nayak*[29]. It was observed therein that no man can be denied of his rights under the Constitution and the laws. He has a right to be dealt with in accordance with the law, and not in derogation of it. This Court held that a denial of equal protection of laws, by being singled out for a special procedure not provided under the law, caused denial of rights under Article 14 of the Constitution of India.

67. A few relevant observations are extracted hereinbelow: (SCC pp. 651 & 671, paras 41 & 81)

> *"41. In the aforesaid view of the matter and the principle reiterated, it is manifest that the appellant has not been ordered to be tried by a procedure mandated by law, but by a procedure which was violative of Article 21 of the Constitution. That is violative of Articles 14 and 19 of the Constitution also, as is evident from the observations of the seven-Judge Bench judgment in Anwar Ali Sarkar case*[30] *where this Court found that even for a criminal who was alleged to have committed an offence, a special trial would be per se illegal because it will deprive the accused of his substantial and valuable privileges of defence which, others similarly charged, were able to claim. ...*
>
> * * *
>
> *81. ... We proclaim and pronounce that no man is above the law, but at the same time reiterate and declare that no man can be denied his rights under the Constitution and the laws. He has a right to be dealt with in accordance with the law and not in derogation of it. This Court, in its anxiety to facilitate the parties to have a speedy trial gave directions on 16-2-1984 as mentioned hereinbefore without conscious awareness of the exclusive jurisdiction of the Special Courts under the 1952 Act and that being the only procedure established by law, there can be no deviation from the terms of Article 21 of the Constitution of India. That is the only procedure under which it should have been guided. By reason of giving the directions on 16-2-1984 this Court had also unintentionally caused the appellant the denial of rights under Article 14 of the Constitution by*

29 (1988) 2 SCC 602 : 1988 SCC (Cri) 372
30 *State of W.B.* v. *Anwar Ali Sarkar*, (1952) 1 SCC 1

denying him the equal protection of law by being singled out for a special procedure not provided for by law." (emphasis supplied)

68. Similarly, a Constitution Bench of this Court in *State of W.B.* v. *Anwar Ali Sarkar*[30], held that procedural law confers very valuable rights on a person, and their protection must be as much the object of a court's solicitude as those conferred under the substantive law. Few pertinent observations are extracted hereinbelow: (SCC p. 42, para 27)

"27. *The argument that changes in procedural law are not material and cannot be said to deny equality before the law or the equal protection of the laws so long as the substantive law remains unchanged or that only the fundamental rights referred to in Articles 20 to 22 should be safeguarded is, on the face of it, unsound. The right to equality postulated by Article 14 is as much a fundamental right as any other fundamental right dealt with in Part III of the Constitution. Procedural law may and does confer very valuable rights on a person, and their protection must be as much the object of a court's solicitude as those conferred under substantive law*." (emphasis supplied)

69. It was also sought to be argued by Mr Luthra that the issue at hand has already been dealt with and decided by a three-Judge Bench of this Court in *Narinderjit Singh Sahni*[9]. It was contended that the dictum laid therein is that an anticipatory bail application filed by an accused in a different case, while he is in custody in one case, would not be maintainable. However, we are unable to agree with such submission of the appellant. In the said case, the petitioners therein, who were arrayed as accused in multiple FIRs registered at various police stations across the country, had invoked the jurisdiction of this Court under Article 32 praying for an order for bail in the nature as prescribed under Section 438 CrPC. The crux of the grievance of the petitioners was that although they had secured an order of bail in one case yet they were being detained in prison on the strength of a production warrant in another matter. This, according to the petitioners, was violative of Article 21 as they were deprived of their liberty despite having been granted bail in one of the cases.

70. The aforesaid contention of the petitioners in the said case was ultimately rejected by this Court on the ground that even if the petitioners could be said to have been deprived of their liberty, such deprivation was in accordance with the due process of law. Having observed thus, this Court dismissed the writ petition filed by the petitioners as no infraction of Article 21 was established.

71. Evidently, this Court in the aforesaid case had no occasion to go into the question of maintainability of an application for grant of anticipatory bail by an accused who is already in judicial custody in relation to some offence. On the contrary, this Court in *Narinderjit Singh Sahni*[9] examined the issue whether a blanket order in the nature of anticipatory bail could be passed by this Court

30 (1952) 1 SCC 1

9 *Narinderjit Singh Sahni* v. *Union of India*, (2002) 2 SCC 210 : 2001 Supp (4) SCR 114

in exercise of its writ jurisdiction, wherein the petitioner was arrayed as an accused in multiple criminal proceedings.

72. On the other hand, in the present case, we have decided the issue of maintainability of an anticipatory bail application filed at the instance of an accused who is already in judicial custody in a different offence and have reached the conclusion that such an application is maintainable under the scheme of CrPC. However, it is clarified that each of such applications will have to be decided by the competent courts on their own merits.

73. In view of the aforesaid discussion, the present appeal must fail and the same is thereby dismissed.

74. The High Court of Judicature at Bombay shall now proceed to decide the anticipatory bail application filed by the respondent-accused on its own merits.

75. Pending application(s), if any, shall stand disposed of.

76. The Registry shall forward one copy each of this judgment to all the High Courts across the country.

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