

Before the Acting C.J. and I. S. Tiwana, J.

PURAN SINGH,—*Petitioner.*

versus

AJIT SINGH AND ANOTHER,—*Respondents.*

Cr. Misc. No. 2763 M of 1983..

March 1, 1984.

Code of Criminal Procedure (II of 1974)—Sections 204 and 438—Magistrate taking cognizance of a non-bailable offence on complaint—Accused not obtaining anticipatory bail as envisaged by section 438—Magistrate—Whether must issue bailable warrants in the first instance—Anticipatory bail—Whether can be granted where bailable warrants have been issued by the criminal Court.

Held, that it is not a matter of dispute that section 204, Code of Criminal Procedure, 1973, is the only section which authorises a Magistrate to issue process to an accused whether he takes cognizance on a private complaint or on a police report or on any other information. As per this section, though a summons is to be issued in a summons case and a warrant in a warrant case yet there are two exceptions to this section. Firstly, in cases in which a summon should be issued, the Magistrate can, under section 87, Code of Criminal Procedure, issue a warrant in lieu of or in addition to a summon in the circumstances specified in that section and, secondly, in cases in which a warrant should issue in the first instance, this section enables the Magistrate to issue a summon instead if he thinks fit to do so. The question that calls for consideration in this case is as to whether the later-mentioned discretion vested in a Magistrate is in any way hedged by the later part of sub-section (3) of section 438 even in cases where the person sought to be summoned as an accused has not already obtained anticipatory bail. The opening words of this sub-section (if such person) make it manifestly clear that it is only in the case of a person who has been allowed anticipatory bail that a police officer arresting him shall release him on bail—and similarly, a Magistrate taking cognizance of an offence on the commission of which a police officer in charge of a police station can arrest the accused without warrant, issue bailable warrant in conformity with the directions of the Court under sub-section (1). In the light of the clear language of this sub-section it is difficult to hold that even in cases where the person sought to be summoned as an accused has not been allowed anticipatory bail by the High Court or the Court of Session, the Magistrate has no jurisdiction to issue non-bailable warrant or, in other words, he is mandatorily obliged to issue bailable warrant in the first instance.

(Para 5).

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Held, that the main governing factor for the exercise of jurisdiction under section 438, Code of Criminal Procedure, is the apprehension of arrest by a person accused of the commission of a non-bailable offence. The section makes no distinction whether the arrest is apprehended at the hands of the police or at the instance of the Magistrate. The issuance of a warrant by the Magistrate against a person, justifiably gives rise to such an apprehension and well entitles a person to make a prayer for his anticipatory bail. The High Court or the Court of Sessions may, however, decline to exercise its powers under section 438(1), Code of Criminal Procedure, keeping in view the fact that the Magistrate has summoned the accused through bailable warrant i.e., a relief almost similar to what can be granted by the Court under section 438(1), Code of Criminal Procedure—yet that does not mean that the Court has no jurisdiction to grant anticipatory bail to such an accused person. The grant of bail under section 438(1) by the High Court or the Court of Session is, dependant on the merits of a particular case and not the order of the Magistrate choosing to summon an accused through bailable or non-bailable warrant. As such anticipatory bail can be granted to an accused although the said accused had been summoned only through a bailable warrant.

(Para 7).

Ram Lal vs. State of Punjab and others, 1976 C.L.R. 388.

Balwant Singh and others vs. State of Punjab and another 1983(1)
C.L.R. 473.

OVERRULED.

Application under Section 438 Cr. P.C. praying that the application be accepted and the petitioner may kindly be allowed anticipatory bail during the pendency of case under section 302/34, I.P.C.—vide F.I.R. No. 212, dated 24th October, 1982 in P.S. Fatehgarh Churian. And a direction may be issued to the Magistrate concerned to summon the petitioner through a bailable warrant only.

(Case referred by a learned Single Judge Hon'ble Mr. Justice J. M. Tandon to a larger Bench on 3rd June, 1983 for decision of an important question of law involved in this case. The larger Bench consisting of Hon'ble the Acting Chief Justice M. P. C. Jain and Hon'ble Mr. Justice I. S. Tiwana finally decided the case on 1st March, 1984).

R. S. Ahluwalia, Advocate, for the Petitioner.

Bhagwant Singh, A.G. (P) with H. S. Riar, D.A.G. (P),—for the Respondent.

I. S. Tiwana, J. (Oral)

(1) Whether it is mandatory for a Magistrate deciding to proceed against an accused on taking cognizance of a non-bailable offence on a complaint to issue bailable warrant in the first instance irrespective of the fact that the accused has not obtained anticipatory bail under section 438 of the Code of Criminal Procedure is the precise question posed before us for answer on a reference. Though it is not necessary to advert to the detailed factual matrix of the case in order to answer the purely legal question noted above yet a brief reference to the following facts is called for to unravel the controversy raised.

(2) On 24th October, 1982, Ajit Singh lodged First Information Report No. 212 with Police Station Fatehgarh Churian, District Gurdaspur, about the murder of his son Baljinder Singh *alias* Balwinder Singh and amongst others accused the present petitioner Puran Singh on that account. As a result of the investigation that followed, the police found Puran Singh innocent and mentioned his name in column No. 2 of the challan papers which were submitted to the Court under section 193 of the Code. On 2nd February, 1983, Ajit Singh respondent filed a complaint under section 302/34, Indian Penal Code, and arrayed Puran Singh petitioner as one of the accused. The Judicial Magistrate 1st Class, Batala, after recording preliminary evidence in support of the averments made in the complaint decided to summon the petitioner through non-bailable warrant. The petitioner approached the Additional Sessions Judge, Gurdaspur, for anticipatory bail but the latter declined it in view of the observation made by this Court in *Ram Lal v. State of Punjab and others* (1) wherein it is ruled that even in cases where a Magistrate chooses to summon the accused on a complaint through bailable warrant "the question of the Session Court or the High Court granting anticipatory bail does not arise as the Magistrate concerned has already applied his mind and issued bailable warrant". This order of the learned Additional Sessions Judge necessitated for the petitioner to approach this Court for anticipatory bail.

(3) At the time of hearing the primary contention raised before the learned Single Bench was that the trial magistrate could

(1) 1976 C.L.R. 388.

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only summon the petitioner by issuing bailable warrant and not non-bailable warrant and reliance for this stand was placed on the observations made in *Balwant Singh and others v. State of Punjab and another* (2) wherein on facts similar to the case in hand it is said in the context of later part of sub-section (3) of section 438 of the Code of Criminal Procedure, as follows:—

“Reliance has been placed by Mr. Sharma on sub-section (3) of section 438 of the Code. It is constituted of two parts. The first part which concerns about the taking of the accused in custody is not attracted for application. The second part which is relevant is ‘and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1)’. This enjoins upon the Magistrate when he, exercising jurisdiction after taking cognizance of the case, decides to summon the accused he has to issue a bailable warrant in the first instance. The bailable warrant has to be issued irrespective of the fact whether the offence is bailable or non-bailable. The making of this provision regarding the issue of a bailable warrant in Chapter XXXIII of the Code, which concerns provisions as to bail and bonds, has a special meaning in the form of a mandate to the Magistrate that unmindful of the nature of the offence he shall issue a bailable warrant, in the first instance. This provision is mandatory and it cannot be by passed or misconstrued.”

And again, “The Magistrate in the case in hand in the first instance acted in complete disregard of this provision in issuing non-bailable warrant.”

We might have dismissed this petition as infructuous as Mr. R. S. Ahluwalia, the learned counsel for the petitioner, discloses that by now the trial proceedings against the petitioner stand concluded but since the reference has been made by the learned Single Judge after doubting the correctness of the view expressed in *Balwant Singh's case supra*, we thought it proper to examine the above-noted

point of law in depth as the same, to our mind, is likely to arise in a number of cases.

(4) Mr. Sidhu, the learned Advocate-General, appearing for the State-authorities, does not support the ratio of both the above-noted judgments, i.e., in *Ram Lal* and *Balwant Singh* cases supra and maintains that it is open to this Court as well as the Sessions Court to grant anticipatory bail on merits even in cases where bailable or non-bailable warrants have been issued by the Magistrate under section 204 of the Code of Criminal Procedure and provisions of sub-section (3) of section 438, Cr. P. C. are only attracted when the accused sought to be summoned by the Magistrate under section 204, Cr. P. C., has already been granted anticipatory bail by the High Court or the Court of Session. Having given our thoughtful consideration to the entire matter in the light of the submissions of both the learned counsel, we find merit in the submissions of the learned Advocate-General.

(5) It is not a matter of dispute that section 204, Cr. P. C., is the only section which authorises a Magistrate to issue process to an accused whether he takes cognizance on a private complaint or on a police report or on any other information. As per this section, though a summons is to be issued in a summons case and a warrant in a warrant case yet there are two exceptions to this section. Firstly, in cases in which a summon should be issued, the Magistrate can, under section 87, Cr. P. C., issue a warrant in lieu of or in addition to a summon in the circumstances specified in that section and, secondly, in cases in which a warrant should issue in the first instance, this section enables the Magistrate to issue a summons instead if he thinks fit to do so. The question that calls for consideration in this case is as to whether the later-mentioned discretion vested in a Magistrate is in any way hedged by the later part of sub-section (3) of section 438 even in cases where the person sought to be summoned as an accused has not already obtained anticipatory bail. Our considered answer to this question is in the negative. The opening words of this sub-section (If such person) make it manifestly clear that it is only in the case of a person who has been allowed anticipatory bail that a police officer arresting him shall release him on bail and similarly, a Magistrate taking cognizance of an offence on the commission of which a police officer in charge of a police station can arrest the accused without

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warrant, issue bailable warrant in conformity with the directions of the Court under sub-section (1). In the light of the clear language of this sub-section it is difficult to hold that even in cases where the person sought to be summoned as an accused has not been allowed anticipatory bail by this Court or the Court of Session, the Magistrate has no jurisdiction to issue non-bailable warrant or, in other words, he is mandatorily obliged to issue bailable warrant in the first instance.

Thus, while respectfully disagreeing with the above-noted observations made in *Balwant Singh's case* supra, we over-rule the same.

6) So far as *Ram Lal's case* supra is concerned though I find that there is a material difference between the facts of that case and the instant case yet I am of the view that the conclusion recorded therein that the Court specified in sub-section (1) of section 438, Cr. P. C. have the jurisdiction to grant anticipatory bail only till the time an order is passed by a Magistrate under section 204, Cr. P. C., issuing bailable or non-bailable warrant against the person sought to be summoned is difficult to be sustained. That was a case where the persons sought to be summoned through bailable warrants on a complaint made against them under section 302/34 Indian Penal Code had secured anticipatory bail under section 438 (1), Cr. P. C. One of the considerations which prevailed with the Sessions Judge for the grant of anticipatory bail was that in case the applicants before him were not granted bail by him they were bound to be committed in custody to the Court of Session under section 209, Cr. P. C. He, thus, thought it proper to exercise jurisdiction under section 438, Cr. P. C. It was this order of the Sessions Judge which was the subject-matter of challenge in this Court. The primary argument raised before the learned Single Judge against that order was that "an order under section 438, Cr. P. C. can be passed till the time any order of bail is not issued by the Magistrate".

While accepting this argument, the learned Judge after a reference to the provisions of section 438(1) and (3) observed as follows:—

"A perusal of these provisions shows that the High Court or the Court of Session has been empowered to grant bail

to the accused in the event of his arrest under sub-section (1) if he apprehends that he may be arrested for having committed a non-bailable offence. If this sub-section is read by itself, the power to grant anticipatory bail can be exercised at any time, but it has to be read along with sub-section (3), to determine the proper scope of this power. According to sub-section (3) order regarding bail passed under sub-section (1) will have to be complied with by an officer-in-charge of a police station while arresting the accused inasmuch as it has been specifically provided that the officer concerned will have to accept bail if offered and the accused will be released on bail. In the later part of this sub-section, it is laid down that if the Magistrate takes cognizance of such offence and decides that warrants should issue in the first instance, then bailable warrants will have to be issued by the Magistrate so as to comply with the direction of the Court ordering anticipatory bail under sub-section (1). From this, it is clear that the intention of the legislature in enacting section 438 was that the power conferred on the Sessions Court or the High Court to grant anticipatory bail under sub-section (1) should be and could be exercised till the order regarding bailable warrants had been issued by the Magistrate. If before this power is exercised, the Magistrate has already issued bailable warrants, the question of the Sessions Court or the High Court granting anticipatory bail does not arise as the Magistrate concerned has already applied his mind and issued bailable warrants."

After a reference to the circumstance that had weighed with the Sessions Judge for the grant of anticipatory bail that the applicants before him were bound to be committed in custody at the time of sending them up to the Court of Session for trial was not a relevant consideration for the grant of bail under section 438, Cr. P. C., the learned Single Judge concluded the matter thus:—

"For the aforesaid reasons, the impugned order passed by learned Sessions Judge granting anticipatory bail to respondents No. 2 to 5 is set aside as being without jurisdiction.

(7) How the jurisdiction of this Court or that of the Court of Session under section 438, Cr. P. C., to grant anticipatory bail is dependant on the fact that the Magistrate has issued aailable or a non-ailable warrant is not clear from this judgment. The main governing factor for the exercise of jurisdiction under section 438, Cr. P. C., is the apprehension of arrest by a person accused of the commission of a non-ailable offence. The section makes no distinction whether the arrest is apprehended at the hands of the police or at the instance of the Magistrate. The issuance of a warrant by the Magistrate against a person, to my mind, justifiably gives rise to such an apprehension and well entitles a person to make a prayer for his anticipatory bail. The High Court or the Court of Session may, however, decline to exercise its powers under section 438 (1), Cr. P. C., keeping in view the fact that the Magistrate has summoned the accused throughailable warrant i.e., a relief almost similar to what can be granted by the Court under section 438 (1), Cr. P. C.—yet that does not mean that the Court has no jurisdiction to grant anticipatory bail to such an accused person. The grant of ail under section 438 (1) by the High Court or the Court of Session is, to my mind, dependent on the merits of particular case and not the order of the Magistrate choosing to summon an accused throughailable or non-ailable warrant.

The order of the Sessions Judge in *Ran Lal's case supra* well might have been set aside on the ground that while granting anticipatory bail he had been swayed by irrelevant consideraton, yet it could not possibly be set aside on the ground that the Sessions Judge had no jurisdiction to grant anticipatory bail. The differentiation between lack of jurisdiction and non-exercise of jurisdiction has essentially not to be lost sight of. Though Mr. Sidhu, the learned Advocate-General, also sought to contend in the light of the observations of this Lordships of the Supreme Court in *Free Legal Aid Committee Jamshedpur vs. State of Bihar* (3) that what had weighed with the Sessions Judge in *Ran Lal's case supra* was not irrelevant for the question of grant of bail yet we do not feel the necessity of going into that aspect of the matter at all. However, this is what their Lordships have laid down for the future guidance of the Magistrate in the country in cases triable by the Court of Session:—

“There is also another difficulty pointed out by Mr. Sibal and it is that in cases triable by the Court of Session, the

practice followed is that when an accused is released on bail by the Magistrate, the bail is granted to him only during the pendency of the enquiry before the Magistrate with the result that when the case is committed to the Court of Session, he is re-arrested and brought before the Court of Session where he has to apply once again for fresh bail. This causes considerable inconvenience to the accused without any corresponding advantage so far as the administration of criminal justice is concerned. This situation can, however, easily be avoided because there is a provision in S. 441 sub-section (3) of the Cr. P. C. under which bail can be granted to an accused so as to bind him to appear before the Court of Session, in which event, on committal he would not have to be re-arrested and brought before the Court of Session. It is also clear from S. 209 cl. (b) of the Cr. P. C. that the Magistrate has discretion to release the accused on bail "during and until completion of trial" even in cases where the offence is triable by the Court of Session. We, therefore, feel that it would avoid hardship to an accused if the Magistrate, while releasing the accused on bail, requires execution of a bond with or without surety, as the case may be, binding the accused not only to appear as and when required before him out also to appear when called upon in the Court of Session. Mr. K. G. Bhagat on behalf of the State of Bihar also agrees that this is a procedure which can be legitimately followed by the Magistrates. We hope and trust that hereafter this procedure will be followed by the Magistrates unless there are any particular reasons for not doing so."

(8) It is, thus, patent in the light of the discussion above that the decision in *Ram Lal's case* supra that the jurisdiction under section 438 (1), Cr. P. C. can be exercised only till an order is passed by a Magistrate choosing to summon an accused through bailable or non-bailable Warrant and not thereafter too deserves to be over-ruled and we order accordingly.

(9) Thus, with the observations made above we dismiss this petition as infructuous.

Prem Chand Jain, Acting Chief Justice.—I agree.

H. S. B.