

THE INDIAN LAW INSTITUTE, NEW DELHI
KARNATAK UNIVERSITY

Seminar on "Criminal Law" at Dharwar
(Dec. 17-22, 1978)

THE ANTICIPATORY BAIL - ITS OPERATION*

by

D.N. Jauhar

Under the criminal procedure code of 1898, there was no provision specifically providing for the grant of bail to a person apprehending arrest that is what is commonly called Anticipatory Bail. It continued to be a point of dispute as to whether Anticipatory Bail could be granted by the High Courts in exercise of their inherent powers. Lahore, 1 Madhya Bharat, 2 Rajasthan, 3 Hyderabad, 4 Calcutta, 5 and PEPSU 6 High Courts were of the view that Anticipatory Bail could be granted by the High Courts. On the other hand Sind, 7 Nagpur, 8 Madhya Bharat, 9 and Allahabad 10 High Courts were of the view that it was not within the competence of the High Courts to grant Anticipatory Bail as the same was not provided under the Code of Criminal Procedure.

The Law Commission considered the conflicting views about Anticipatory Bail. The Commission felt that a provision should be made for the grant of Anticipatory Bails. Explaining the reasons for incorporating a clause for Anticipatory Bail the Commission observed: 11

*. Lecturer, Department of Laws, Panjab University, Chandigarh.

1. Hidayat Ullah Khan vs. The Crown 50 Cr. L.J. 38.
2. State vs. Mangi Lal Shankerlal A.I.R. 1952 M. Bha. 161.
3. State vs. Nathumal A.I.R. 1952 Raj. 156.
4. Mazafaruddin vs. State 1953 Cr. L.J. 1320 (Hyd).
5. 10 Cal. W.N. 1093 (D.B.)
6. State vs. Sajjan Singh 1953 Cr. L.J. 1525.
7. Emperor vs. Mohammad Fanch A.I.R. 1934 Sind 131.
8. The State vs. Hussain Mohammad A.I.R. 1951 Nagpur 471.
9. State vs. Dattu Fania A.I.R. 1954 M. Bha. 143 (F.B.)
(per majority opinion).
10. State of U.P. vs. Kailash A.I.R. 1955 All. 98.
11. Para 39.9 Forty First Report of the Law Commission.

contd...p.2.

"Though there is a conflict of judicial opinion about the power of a Court for grant of Anticipatory Bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purposes of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."

As a result of this recommendation made by the Law Commission,¹² the legislative process to incorporate this as well as other recommendations in the criminal procedure code was started and section 483¹³ was incorporated in the New Cr. P.C. which come into force in 1974.

The term 'anticipatory bail' is a misnomer. The term is not used in Section 438. What is contemplated by Sec. 438 is merely an order releasing an accused on bail in the event of his arrest. It is manifest that there can be no question of bail, unless a person is under detention or custody. The moment a person is arrested, if he has already obtained an order from the Session Judge or High Court. He would be released immediately, without having to undergo the rigours of jail ever for a few days

12. The clause-wise objects and reasons with respect to Section 438 of the Code (which was clause 447 in the Bill) run thus:

"As recommended by the Commission, a new provision is being made enabling the superior courts to grant anticipatory bail i.e. a direction to release a person on bail issued even before the person is arrested. With a view to avoid the possibility of the person hampering the investigation, special provision is being made that the Court granting anticipatory bail may impose such conditions as it thinks fit. These conditions may be that a person shall make himself available to the investigating officer as and when required and shall not do anything to hamper investigation."

13. Section 438(1) when any person has reason to believe that he may 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; and that court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

which would necessarily be taken up if he has to apply for bail after arrest. 14

The sole purpose of an anticipatory bail order is to safeguard the personal prestige and liberty of an individual from motivated arrests under the garb of reasonable suspicion. Under Section 497 of the old Cr. P.C. the Court had the right to direct the release on bail of a person who was arrested or detained without warrant by an officer in charge of the police station. But this provision was not found to be adequate because the mischief could be done by mere arrest and detention which could be followed by bail. It is the conduct of the police in occasionally defying the provisions of law plus the reasons given in the report of the Law Commission, 14a, that a provision for anticipatory bail was included in the Code.

..... (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 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 dissuage 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 Sec.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).

14. Balchand Jain vs. State of M.P., A.I.R. 1977 S.C. 366 at p. 374.

14a. Ibid. F.N. No.11.

- ii) Court must keep in view that the investigation may lead to the tracing of more incriminating material if the anticipatory bail is not granted. The Court must not assume that there is going to be no further incriminating material.
- iii) The nature and seriousness of the charge must be kept in view. The court must not be hustled into exercising this power in those cases where the offence is one punishable with death or life imprisonment.
- iv) Nature of the accusation apart, likelihood of absconding, tampering with evidence, gravity of the offence, position of the offender are the factors which should be given due consideration.
- v) In the interest of the public, in cases, where the chances of reoffence of the offence cannot be foreclosed, like smuggling, hoarding, manipulation of foreign exchange, adulteration, profiteering etc., it may not be safe to exercise this power. 18
- vi) Instead of passing an order, granting anticipatory bail, for an unlimited period, it will be advisable to specify that the order will become inoperative if no arrest is made within a specified period, say two months.
- vii) Mere apprehension of false accusation or that such arrest will be a cause of dishonour should not entitle the petitioner for the grant of anticipatory bail. It is the petitioner who must substantiate his case. The investigating agency should not be expected to prove the guilt of the accused at the very threshold of proceedings.
- viii) A blanket anticipatory bail cannot be granted under Sec. 438 or any other provision of the code.

12. Somabhai Chaturbhai Patel vs. State of Gujarat,
83 Cr. L.J. 1523 Gujarat.

contd...p.7.

- ix) Where a case for remand is made under Section 167(2) Cr.F.C. or it is to secure incriminating material under section 27 of the Evidence Act, it may not be advisable to use the power under Sec.438 Cr.F.C. 19
- x) After hearing the petitioner and the prosecution, while passing a final order regarding the grant of anticipatory bail, the court must record the reasons for the conclusions it has drawn. 20

19. Gurbaksh Singh Sibia vs. State of Punjab,
A.I.R. 1978 Pb. and Harv. 1.

20. Forty Eighth Report of Law Commission Para 31 reads:
"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."

