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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 10.10.2018

% **Judgment delivered on: 13.11.2018**

\+ **CRL.REF.1/2018**

COURT ON ITS OWN MOTION

..... Petitioner

Through: Mr. Sumeet Verma, Amicus Curiae with Ms. Preeti Jakhar, Advocate.

versus

STATE

..... Respondent

Through: Mr. Rahul Mehra, Standing Counsel with Mr. Chaitanya Gosain, Adv for the State . Mr Rajat Katyal, APP

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE I.S. MEHTA

J U D G M E N T

VIPIN SANGHI, J.

1. The present is a reference received from the learned CMM (North West), Rohini Courts, Delhi under section 395(2) Cr PC.

2. Before setting out the questions of law raised by the learned CMM, we may set out the background in which the said questions of law have been referred for decision of this Court. Nitin Kumar Aggarwal is one of the accused in case FIR 136/2013, PS EOW. His anticipatory bail application under section 438 Cr PC was dismissed by this court on 30.05.2017.

Despite the said dismissal, he was not arrested and he had been charge sheeted under section 406/420/120B IPC without arrest, vide charge sheet/ final report filed on 23.08.2017. Cognizance of the offence was taken by the learned Magistrate on 30.08.2017 qua all the accused, including Nitin Kumar Aggarwal. Once summoned, the accused moved the application to seek bail under Section 437 Cr P.C. The learned CMM was dealing with that application moved by the said accused for release on regular bail under Section 437 Cr.P.C.

3. That aforesaid application for bail was opposed by the complainant. The complainant moved an application for issuance of non bailable warrants, and for a direction to the Investigating Officer (IO) to arrest the accused Nitin Kumar Aggarwal. The court called for a report from the IO, who filed the report dated 21.12.2017. The said report disclosed that two other accused in the case were arrested, but were later released on bail by the court. So far as Nitin Kumar Aggarwal is concerned, he moved an application to seek anticipatory bail under section 438 Cr PC. Vide order dated 04.12.2014, he was granted interim protection against coercive action. By the subsequent order dated 03.07.2015, the said interim order was made absolute and the application for grant of anticipatory bail was favourably disposed of. However, subsequently, the said order was recalled and vacated on 25.05.2017 and the petition for anticipatory bail of Nitin Kumar Aggarwal was dismissed on 30.05.2017.

4. In his report, the IO stated that the investigation in the case had been completed and Nitin Kumar Aggarwal was not arrested as his arrest was not required at that stage. There was no direction by this Court - in its order

dated 30.05.2017, to arrest Nitin Kumar Aggarwal. He was formally arrested after the anticipatory bail application was disposed of, and was released on bail as per law. Nitin Kumar Aggarwal had joined the investigation as and when required, and it was of no use to arrest Nitin Kumar Aggarwal twice.

5. In the order of reference, the learned CMM has taken note of the decision of this Court in a decision of a Ld. Single Judge of this Court in ***Court on its Own Motion v. C.B.I***, 2004 (72) DRJ 629 (referred to as ***Court on its own motion*** (1)) and "***Court on its Own Motion v. State*** (Manu/DE/3926/2017 also reported as 243 (2017) DLT 373 (DB) (referred to as ***Court on its own motion*** (2)) decided by a Division Bench of this Court. We shall refer to these decisions a little latter in our opinion.

6. The learned CMM before framing the questions of law on which the decision of this court is sought, observed as follows:

> "*The question that arises for consideration is for what purpose, the accused is to be sent in JC at this stage of proceedings, and if he is sent in JC, then for how long?*
>
> *If the ratio of the judgments in the matter of Courts by its Own Motion (Supra) to be applied, there is no discretion left with this court, but to release the accused on bail, but, at the same time, the fact of dismissal of anticipatory bail by Hon'ble Delhi High Court cannot be ignored. Thus, this court thinks it fit to make a reference u/s 395 (2) Cr.P.C on the following points*"

7. In the aforesaid background, the following questions of law have been referred to this court for our consideration:

"A) Whether, in the given facts, this court needs to refer to the order of Hon'ble Delhi High Court rejecting the anticipatory bail application, while considering regular bail application of the accused?

B) Whether this court needs to delve upon the reasons of non- arrest given by investigating agency after rejection of anticipatory bail of the accused by the Hon'ble High Court?

C) Whether the effect of anticipatory bail application, be it allowed or rejected, stands ceased with the filing of charge-sheet so as to consider the regular bail application without looking into the anticipatory bail application filed during investigation?

D) Whether while deciding the bail application of the accused charge-sheeted without arrest, the court can delve into the reasons of non-arrest of the accused, considering the gravity of offence?"

8. An additional question of law has been referred to this Court on the ground that the same arises in two other cases pending before the same court, wherein the accused were charge sheeted under section 376 IPC without being arrested. The learned CMM, after making reference of the said two other cases, observed as follows:

"*In the aforesaid two matters pending before this court, the accused persons have been charge sheeted without arrest. After taking cognizance, summons has been issued to the accused persons. On appearance, this court is bound to follow the ratio of judgments in the matter of Court by its Own Motion vs. C.B.I (supra) and Court by its Own Motion vs. State (supra) to release the accused on bail. However, Section 437 (i) Cr PC provides that a magistrate can not release a person on bail if there appears reasonable ground that he has been guilty for offence punishable with death or imprisonment for life.*

So, Section 437 (i) bars the magistrate from releasing the accused on bail, thereby leaving only one option to the Magistrate to send the accused in JC who has been charge sheeted without arrest, and sending him in JC will be in violation of the judgments of Hon'ble Delhi High Court in the matter of Court on its Own Motion Vs State (supra) and Court on its Own Motion v. CBI (supra).

Further, in few cases, charge sheet is filed without arrest during pendency of anticipatory bail application of the accused person which is later on dismissed, but before its dismissal, the accused is admitted on bail by the court in the compliance of judgments of the Hon'ble Delhi High Court in the matter of Court on its Own Motion Vs State (supra) and Court on its Own Motion v. CBI (supra)".

9. In the aforesaid background, the following additional question of law has been referred by the learned CMM:

"*E) Whether this court can release the accused on bail charge sheeted without arrest under section 376 IPC or any other offence punishable with imprisonment of life or death in view of bar under section 437(1)[sic 437(i)] Cr. P.C"*

10. To assist this court in answering the questions, we appointed Mr. Sumeet Verma, Advocate as amicus curiae. We have heard his submissions as well as of the Standing Counsel Mr. Rahul Mehra, and we proceed to answer the reference.

11. At the outset, we may state that we are dealing with a specific fact situation, namely, where the accused in respect of a cognizable non- bailable offence is not arrested during investigation by the police, and the charge sheet is filed before the Magistrate without such arrest/ detention. Our discussion is relevant to this situation.

12. It is a well settled position in law that merely because the anticipatory bail application of the accused may have been rejected, the same does not lead to the automatic consequence of his arrest. The dismissal of the said application leaves the accused unprotected against his arrest, but it does not visit the accused with the inevitable consequence of his being taken into custody by the police. The Supreme Court in ***M.C. Abraham and Ors. v. State of Maharshtra and Ors***, (2003)2SCC649 was dealing with a challenge to orders passed by the Nagpur Bench of the High Court of Bombay whereby the High Court, inter alia, directed the State to cause the arrest of the accused and to produce them before the Court. This direction came in a petition raising a grievance that investigation had not made progress on the complaint filed by the Provident Fund Commissioner against the accused, on account of their influence and clout. The Supreme Court set aside the direction issued by the High Court. The Supreme Court observed:

> "*14…….In the first place, arrest of an accused is a part of the investigation and is within the discretion of the investigating officer. Section 41 of the Code of Criminal Procedure provides for arrest by a police officer without an order from a Magistrate and without a warrant. The section gives discretion to the police officer who may, without an order from a Magistrate and even without a warrant, arrest any person in the situations enumerated in that section. It is open to him, in the course of investigation, to arrest any person who has been concerned with any cognizable offence or against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. Obviously, he is not expected to act in a mechanical manner and in all cases to arrest the accused as soon as the report is lodged.* ***In appropriate cases, after some investigation, the investigating officer may make up his mind as to whether it is necessary to arrest the accused***

person. At that stage the court has no role to play. Since the power is discretionary, a police officer is not always bound to arrest an accused even if the allegation against him is of having committed a cognizable offence*. Since an arrest is in the nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends inter alia upon the nature of the offence alleged and the type of persons who are accused of having committed the cognizable offence. Obviously, the power has to be exercised with caution and circumspection.*

15. In the instant case the appellants had not been arrested. It appears that the result of the investigation showed that no amount had been defalcated. We are here not concerned with the correctness of the conclusion that the investigating officer may have reached. What is, however, significant is that the investigation officer did not consider it necessary, having regard to all the facts and circumstances of the case, to arrest the accused. In such a case there was no justification for the High Court to direct the State to arrest the appellants against whom the first information report was lodged, as it amounted to unjustified interference in the investigation of the case. ***The mere fact that the bail applications of some of the appellants had been rejected is no ground for directing their immediate arrest. In the very nature of things, a person may move the Court on mere apprehension that he may be arrested. The Court may nor may not grant anticipatory bail depending upon the facts and circumstances of the case and the material placed before the Court. There may, however, be cases where the application for grant of anticipatory bail may be rejected and ultimately, after investigation, the said person may not be put up for trial as no material is disclosed against him in the course of investigation. The High Court proceeded on the assumption that since petitions for anticipatory bail had been rejected, there was no option open for the State but to arrest those persons. This assumption, to our mind, is erroneous. A person whose petition for grant of anticipatory bail has been rejected may or may not be arrested by the investigating officer depending upon the facts and circumstances of the***

case, nature of the offence, the background of the accused, the facts disclosed in the course of investigation and other relevant considerations."(emphasis supplied)

13. Thus, as noticed above, the mere rejection of the Anticipatory Bail Application of the accused is no ground to arrest the accused. Considerations for arrest during investigation of the cognizable non- bailable offence by the police are set out in Section 41 of the Cr.P.C. Mere rejection of the Anticipatory Bail Application is not one of them.

14. What follows from the above discussion is that it is not essential that in every case involving a cognizable and non-bailable offence, when the final report/ chargesheet is filed, the accused must be produced before the Magistrate in custody. In this regard, we may also refer to the decision in ***Court on its own motion (1)*** (supra). The learned Single Judge examined Section 170 Cr.P.C. which provides that where it appears to the officer in charge of a police station that there is sufficient evidence or reasonable ground for believing that the accusation or information is well founded, such officer shall forward the accused under custody to a Magistrate (empowered to take cognizance of the offence upon a police report and to try the accused or to commit him for trial), in case the offence is not bailable. The learned Single Judge observed in the aforesaid decision that the word "custody"- appearing in Section 170, does not contemplate either police or judicial custody. It merely connotates presentation of accused by the investigating officer before the Court, at the time of filing of the charge sheet, whereafter the role of the Court starts. The learned Single Judge went on to observe:

"16. In case the police/Investigating Officer thinks it unnecessary to present the accused in custody for the reason

that accused would neither abscond nor would disobey the summons as he has been co-operating in investigation and investigation can be completed without arresting him, the I.O. is not obliged to produce such an accused in custody.

17. Thus, the only meaning of sub-clause (g) of sub-section (2) (i) of Section 173 Cr.P.C "whether the accused has been forwarded in custody under Section 170" is with regard to the information that whether the accused is being forwarded under custody or not. Nothing more nothing less. Section 1-73 Cr.P.C. confines to providing the said information."

15. The learned Single Judge further observed:

"20……..In normal and ordinary course the police should always avoid arresting a person and sending him to jail, if it is possible for the police to complete the investigation without his arrest and if every kind of co-operation is provided by the accused to the Investigating Officer in completing the investigation. It is only in cases of utmost necessity, where the investigation cannot be completed without arresting the person, for instance, a person may be required for recovery of incriminating articles or weapon of offence or for eliciting some information"

16. The learned Single Judge proceeded to issue certain directions to criminal courts. Direction number (v) reads as follows:

"(v) The Court shall on appearance of an accused in non-bailable offence who has neither been arrested by the police/Investigating agency during investigation nor produced in custody as envisaged in Section 170 Cr.P.C. call upon the accused to move a bail application if the accused does not move it on his own and release him on bail as the circumstance of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. Reason is simple. If a person has been at large and free for several years and has not been even arrested during investigation, to send him to jail by refusing bail

suddenly, merely because chargesheet has been filed is against the basic principles governing grant or refusal of bail."

17. This decision of the learned Single Judge was relied upon by the Division Bench while answering the reference in ***Court on its Own Motion (2)*** (supra).

18. To answer the reference we need to examine Section 437 Cr.P.C. The same reads as follows:

"437. When bail may be taken in case of non- bailable offence-

(1) When any person accused of, or suspected of, the commission of any non- bailable offence is arrested or detained without warrant by an officer in charge of a police station ***or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-***

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail it such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that It is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation

shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.]

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non- bailable offence, but that there are sufficient grounds for further inquiry into his[1] guilt the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail] or at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub- section (1), the Court may impose any condition which the Court considers necessary-

(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interests of justice.

(4) An officer or a Court releasing any person on bail under sub- section (1) or sub- section (2), shall record in writing his or its[1] reasons or special seasons] for so doing.

(5) Any Court which has released a person on bail under sub-section (1) or sub- section (2), may, if it considers it necessary

so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non- bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non- bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered."

19. Sub-section (1) of Section 437 states that when the accused or suspect in respect of a non bailable offence is arrested/ detained without a warrant, or appears or is brought before the Court **"** *he may be released on bail, but* - ……..**".** What follow are the exceptions to this general rule, which are contained in sub clauses (i) and (ii). There are 4 provisos contained in sub section (1) of Section 437 - the first 3 of which seek to limit the scope of the exceptions contained in sub clauses (i) and (ii). The exceptions carved out in sub clauses (i) and (ii) of Section 437 (1) relate to, firstly, cases where the punishment for the offence - which the Court reasonably believes to have been committed, is either the capital punishment, or imprisonment for life, and, secondly, cases of repeat offenders of the kind described in clause (ii), respectively. The language used in clause (i) shows that even in cases where the case/ FIR is registered and charge sheet is filed for offence(s)

which prescribe either death, or imprisonment for life as punishment, and there are not enough grounds for the Court to believe that the accused is guilty of the offence, he may be released on bail. The phraseology in which clause (1) of Section 437 is couched reflects the well settled and accepted principle that bail is the rule, and jail is the exception.

20. However, in a case where the accused is named in a case/FIR for commission of an offence which prescribes either death, or imprisonment for life, as punishments and there appear reasonable grounds for believing that the accused is guilty of such an offence, the Court shall not consider releasing him on bail under Section 437(1), unless one or more of the circumstances set out in the first two proviso of section 437(1) Cr PC are made out. He would be taken into judicial custody, even though, he may not have been arrested or detained by the officer in charge of the police station and he may appear on his own, or may be brought before the Court in response to summons issued to him upon taking of cognizance of the case by the Magistrate. The remedy of such an accused would be to move an application to seek bail under Section 439 Cr P.C. to the Court of Sessions, or to the High Court (which is not the Court under Section 437(1)). Once moved, that application would be considered by the Court of Sessions, or the High Court – as the case may be, by application of the principles for grant/ refusal of bail taken note of hereinafter.

21. Similarly, clause (ii) of Section 437 (1) relates to situations where the accused is a previous convict for an offence punishable with imprisonment for life, or imprisonment for seven years or more. It also relates to cases

where the accused has been repeatedly convicted on two or more occasions for commission of cognizable offences punishable with imprisonment for three years or more, but less than seven years.

22. Thus, in the cases falling under clause (i) and (ii) of Section 437 (1), even though the accused may not have been produced in custody/ detention before the Magistrate while filing the charge sheet, when the accused appears before the Court of the Magistrate, the Magistrate would take such an accused into custody and shall not release him on bail, unless the case is covered by one or more of the first two provisos which follow Clause (ii) of Section 437 (1) Cr.P.C. As aforesaid, the remedy of such an accused would lie under Section 439 Cr P.C. either before the Court of Sessions or the High Court.

23. While dealing with the application of the accused for grant of bail (in cases which do not fall within clauses (i) and (ii) of Sub-Section (1) of Section 437, or which are covered by one or more of the first two provisos to Sub-Section (1) of Section 437), the Court would bestow consideration upon the well settled principles upon which the Court of Sessions or the High Court – as the case may be, may grant or refuse bail under Section 439Cr.P.C.

24. Thus, at this stage, we may notice a few decisions on the law relating to grant or denial of bail by the Court.

25. In ***State of Rajasthan V. Balchand***, AIR 1977 SC 2447, the Supreme Court observed:

"2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail from the Court. We do not intend to be exhaustive but only illustrative."

26. The Supreme Court recognized the fact that the gravity and heinousness of the offence in which the accused is involved must weigh with the Court while considering the question of bail or jail, since these aspects are likely to induce the accused to avoid the course of justice. The Supreme Court took notice of the conduct of the accused before it - that he was on bail throughout the proceedings before the Trial Court and after his acquittal by the Trial Court, and there was nothing to suggest that he had abused the trust placed in him by the Court. He was not a desperate character or unsocial element, who was likely to betray the confidence that the Court may place in him to turn up to take justice at the hands of the Court. His age, circumstances and social milieu were also considered by the Court while granting him bail, subject to conditions.

27. We may also notice the exhaustive judgment of the Supreme Court in ***Sanjay Chandra v. Central Bureau of Investigation*** (2012) 1SCC 40. In this decision the Supreme Court was dealing with a situation where the accused had been denied bail by the High Court under Section 439 Cr.P.C. The Supreme Court observed:

"25. The provisions of CrPC confer discretionary jurisdiction on criminal courts to grant bail to the accused pending trial or in appeal against convictions; since the jurisdiction is discretionary, it has to be exercised with great care and

caution by balancing the valuable right of liberty of an individual and the interest of the society in general. *In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, is a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognised, then it may lead to chaotic situation and would jeopardise the personal liberty of an individual*." (emphasis supplied)

28. The Supreme Court observed that it had "*time and again stated that bail is the rule and committal to jail an exception. ... ... refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution."* The Supreme Court referred to its earlier decision in ***Gudikanti Narasimhulu v. Public Prosecutor*** [(1978) 1 SCC 240 : 1978 SCC (Cri) 115], wherin after setting out the discipline that the Court is bound to adhere to in the matter of exercise of judicial discretion in the matter of grant/ refusal of bail, it observed:

"6. Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and ***the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the court punishing him with imprisonment. In this perspective, relevance of considerations is regulated by their nexus with the likely absence of the applicant for fear of a severe sentence, if such be plausible in the case. As Erle, J. indicated, when the crime charged (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the Court may reasonably presume, some***

evidence warranting, that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged. Lord Campbell, C.J. concurred in this approach in that case and Coleridge, J. set down the order of priorities as follows:

> ***I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his appearance at trial…. It is a very important element in considering whether the party, if admitted to bail, would appear to take his trial; and I think that in coming to a determination on that point three elements will generally be found the most important: the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted.***

In the present case, the charge is that of wilful murder; the evidence contains an admission by the prisoners of the truth of the charge, and the punishment of the offence is, by law, death.

7. It is thus obvious that the nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

8. Another relevant factor is as to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the court to be freed for the time being.

9. Thus the legal principles and practice validate the court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record—particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals,

it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant, is therefore not an exercise in irrelevance". (emphasis supplied)

29. The Supreme Court then referred to ***Gurcharan Singh v. State (Delhi Admn.)***, [(1978) 1 SCC 118 : 1978 SCC (Cri) 41 : AIR 1978 SC 179], wherein it took the view:

"22. In other non-bailable cases the court will exercise its judicial discretion in favour of granting bail subject to sub-section (3) of Section 437 CrPC if it deems necessary to act under it. ***Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life****. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1) CrPC and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.*

23. ....

24. ... . The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1) CrPC of the new Code ***are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the***

accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out." (emphasis supplied)

30. The Supreme Court also considered ***Babu Singh v. State of U.P.*** [(1978) 1 SCC 579 : 1978 SCC (Cri) 133]. In ***Babu Singh*** (supra), the Supreme Court, inter alia, opined:

"17. The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19. Indeed, the considerations I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulates intelligent care and predicates that ***deprivation of freedom by refusal of bail is not for punitive purpose but for the bifocal interests of justice—to the individual involved and society affected.***

18. We must weigh the contrary factors to answer the test of reasonableness, subject to the need for securing the presence of the bail applicant. It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. ***And if public justice is to be promoted, mechanical detention should be demoted.*** *In the United States, which has a constitutional perspective close to ours, the function of bail is limited, 'community roots' of the applicant are stressed and, after the Vera Foundation's Manhattan Bail Project, monetary suretyship is losing ground. The considerable public expense in keeping in custody where no danger of disappearance or disturbance can arise, is not a*

negligible consideration. Equally important is the deplorable condition, verging on the inhuman, of our sub-jails, that the unrewarding cruelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly sensible". (emphasis supplied)

31. The Supreme Court also considered ***Moti Ram v. State of M.P.***, [(1978) 4 SCC 47 : 1978 SCC (Cri) 485], wherein it observed in respect of pretrial detention:

"14. The consequences of pretrial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family."

32. The Supreme Court also referred to ***Vaman Narain Ghiya v. State of Rajasthan***, [(2009) 2 SCC 281 : (2009) 1 SCC (Cri) 745], wherein the concept and philosophy of bail was discussed by the said Court as follows:

"6. 'Bail' remains an undefined term in CrPC. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression 'bail' denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb 'bailer' which means to 'give' or 'to deliver', although another view is that its derivation is from the Latin term 'baiulare', meaning 'to bear a burden'. Bail is a conditional liberty. Stroud's Judicial Dictionary(4th Edn., 1971) spells out certain other details. It states:

> *'... when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money, or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed—that is to say, set at liberty until the day appointed for his appearance.'*

Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.

7. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have*. (See A.K. Gopalan v. State of Madras [AIR 1950 SC 27 : 1950 Cri LJ 1383] .)*

8. The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the

administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt." (emphasis supplied)

33. Reference was also made to ***Prahlad Singh Bhati v. NCT, Delhi*** [(2001) 4 SCC 280 : 2001 SCC (Cri) 674], wherein the principles, which the Court must consider while granting or declining bail, have been culled out by the Supreme Court as follows:

"8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. ***While granting the bail, the court has to keep in mind the nature of accusations, the nature of [the] evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations****. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words 'reasonable grounds for believing' instead of 'the evidence' which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."* (emphasis supplied)

34. The Supreme Court also noticed its earlier judgment in ***State of U.P. v. Amarmani Tripathi***, [(2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)], wherein it held:

> *"**18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail** [see Prahlad Singh Bhativ. NCT, Delhi [(2001) 4 SCC 280 : 2001 SCC (Cri) 674] and Gurcharan Singh v. State (Delhi Admn.) [(1978) 1 SCC 118 : 1978 SCC (Cri) 41 : AIR 1978 SC 179]]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in Kalyan Chandra Sarkar v. Rajesh Ranjan[(2004) 7 SCC 528 : 2004 SCC (Cri) 1977] : (SCC pp. 535-36, para 11)*
>
> > *'11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order*

devoid of such reasons would suffer from non-application of mind. ***It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:***

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge*. (See Ram Govind Upadhyay v. Sudarshan Singh [(2002) 3 SCC 598: 2002 SCC (Cri) 688] and Puran v. Rambilas [(2001) 6 SCC 338 : 2001 SCC (Cri) 1124] .)'*

***

22. While a detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no prejudging and no prejudice, a brief examination to be satisfied about the existence or otherwise of a prima facie case is necessary." (emphasis supplied)

35. What emerges from the aforesaid observations of the Supreme Court, and on a reading of Section 437 Cr PC is the following:

(i) The power of the Court to grant or refuse bail is a discretionary power and the exercise of the said discretion is circumscribed by germane and relevant considerations. The discretion has to be exercised with care and caution by balancing the valuable right of the individual, and the interest of the society in general.

(ii) The basic rule in respect of an accused in a cognizable, non-bailable offence, and an under-trial is to grant him bail. The option to commit

him to jail is the exception. This is because refusal of bail is a restriction on the personal liberty of the individual, which is guaranteed under Article 21 of the Constitution and, therefore, the personal liberty of the accused/under trial should not be curbed lightly.

(iii) Pre-conviction incarceration of the accused/ under trial is a preventive measure, and not a punitive one. Denial of bail in an otherwise deserving case to the accused/ under trial cannot be actuated with the desire to punish the accused/ under trial.

(iv) The option of denying bail, and subjecting the accused/ under trial to incarceration would be resorted to by the Court where there are apprehensions that the accused/ under trial may: flee from justice; thwart the course of justice; appear to be likely to commit other offences while on bail, or; likely to intimidate witnesses or destroy evidence. These considerations are illustrative and not exhaustive;

(v) The gravity or heinousness of the offence involved, and the severity of the punishment that the accused may be subjected to is a relevant consideration, as it is likely to induce the accused to avoid the course of justice where the offence is grave and the punishment therefor is severe, and must weigh with the Court when considering the question of bail, or jail;

(vi) The conduct of the accused/ under trial - particularly, post the involvement in the case, is also a relevant consideration. Thus, if the accused/ under trial has not abused the trust placed by the Court in

him, that would be a factor in his favour while considering his application for grant of bail.

(vii) The other circumstance, namely his roots and family background; his age; his antecedents, and; his status in the society are other considerations which would be taken into account at the time of consideration of grant, or refusal, of bail to the accused/ under trial.

(viii) The court can curb (though not completely eliminate) the possibility of the accused fleeing from justice, by subjecting him to conditions such as requiring him to furnish his personal bond; surety bonds; surrendering his passport; reporting at the police station on regular intervals to mark his attendance etc.

(ix) In a case where the accused is alleged to have committed an offence punishable with death or imprisonment for life, or in a case where the accused appears to be a repeat offender whose case is covered by clause (ii) of sub section (1) of section 437, ordinarily his bail may be refused. However, in cases falling under one or more of the first two provisos to Section 437 (1) Cr.P.C., the bail may be granted upon consideration of the relevant circumstances taken note of herein.

(x) The considerations in granting bail are common - both to cases falling under Section 437 (1) Cr P.C, and cases falling under Section 439 (1) Cr.P.C, namely: the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood of the accused fleeing from justice; the likelihood of the accused repeating the offence; the likelihood of the accused jeopardizing his own life -

being faced with a grim prospect of possible conviction in the case; the likelihood of the accused tampering with evidence or influencing witnesses; the history of the case as well as of its investigation, and other relevant grounds which cannot be exhaustively set out.

36. In the light of the aforesaid discussion, we proceed to answer the first question of law referred for our consideration, i.e.:

A) *Whether, in the given facts, this court needs to refer to the order of Hon'ble Delhi High Court rejecting the anticipatory bail application, while considering regular bail application of the accused?*

While considering the regular bail application of the accused under Section 437(1) Cr PC, the factum of the rejection or acceptance of the anticipatory bail application, by itself, is not germane. However, the factors which weighed with the court while either rejecting or granting anticipatory bail to the accused, or such of them - as are relevant post the filing of the charge sheet, may be looked at by the Court while dealing with the bail application of the accused under Section 437(1) Cr PC. Since the court is seized of the final report/ charge sheet while dealing with the bail application under Section 437 (1) Cr PC, it would be in a position to make a better assessment and it should not get influenced by the conclusions drawn by the court while - either accepting, or rejecting the anticipatory bail of the accused. We have already discussed the limitations on the power of the court (which is not the Court of Sessions or the High Court) to grant bail placed by clause (i) and (ii) of section 437(1) and the aspects that the court would take into consideration while considering the regular bail application

of the accused under Section 437(1) Cr PC. Question (A) is answered accordingly.

37. Now, we may proceed to answer question (B), i.e.:

B) *Whether this court needs to delve upon the reasons of non- arrest given by investigating agency after rejection of anticipatory bail of the accused by the Hon'ble High Court?*

The aforesaid question of law has already been answered by this court in ***Court on its Own Motion*** (2) (supra). When the charge sheet is filed before the Court/ Magistrate without arresting the accused, despite the rejection of his anticipatory bail application by the High Court, it is not open to the court to examine whether the exercise of discretion by the Investigating Officer (IO) - not to arrest the accused despite rejection of his anticipatory bail application by this Court, has been properly exercised. The Magistrate/ Court is only concerned with the final report/ charge sheet, as filed. This Court in ***Court on its Own Motion*** (2) (supra) has observed as follows:

> *"8. The view taken by the learned Magistrate that in offences, whereof the sentence is beyond seven years,* ***the investigating agency should necessarily arrest the accused and produce the accused in custody at the time of filing the charge-sheet under Section 173, Cr.P.C. before the Magistrate, has no basis and is contrary to the statutory scheme****. In this regard, reference may be made to Sections 2(c), 41, 41(1)(b), 41(1)(b)(a), 157(1), 173(2)(e), 173(2)(f) & 173(2)(g) of the Code, which put the matter beyond any doubt that the investigating agency is not obliged to arrest the accused whenever a cognizable offence is registered****. The discretion to arrest the accused has to be exercised by the***

investigating agency by applying the principles laid down in the Code itself.

9. The aforesaid position has been reiterated by this Court in Udit Raj Poonia v. State (Govt. of NCT of Delhi), MANU/DE/0371/2017 : 238 (2017) DLT 212; as also in Rajesh Dua v. State, Bail Application No. 778/2017 decided on 9.8.2017. ***Thus, the Metropolitan Magistrate cannot examine whether the discretion of the IO to arrest, or not to arrest the accused, has been properly exercised. He is only concerned with the chargesheet, as filed. He may return the charge-sheet if he finds that the investigation is not complete, or the charge is not borne out from the evidence collected and filed with the charge-sheet. But he cannot return the same merely because the accused has not been arrested and produced in custody at the time of filing the charge-sheet. The reference stands answered, accordingly.****"*

Question (B) stands answered accordingly.

38. Question (C) referred by the learned CMM is as under:

C) *Whether the effect of anticipatory bail application, be it allowed or rejected, stands ceased with the filing of charge-sheet so as to consider the regular bail application without looking into the anticipatory bail application filed during investigation?*

This question of law was considered by the Constitution Bench of the Supreme Court in ***Gurbaksh Singh Sibbia v. State of Punjab***, (1980) 2 SCC 565. In ***Siddharam Satlingappa Mhetre v. State of Maharshtra***, (2011) 1 SCC 694, a two judge bench of the Supreme Court took the view that the Constitution Bench in its judgment rendered in ***Gurbaksh Singh Sibbia*** (supra) has held that anticipatory bail granted by the Court should ordinarily continue till the trial of the case. The decision in ***Siddharam Satlingappa***

Mhetre (supra) was followed in ***Bhadresh Bipinbhai Sheth v. State of Gujarat***, (2016) 1 SCC 152. However, there is another line of judgments, which advance the view that the orders of anticipatory bail should be of a limited duration. It has been so held in ***Salauddin Abdulsamad Shaikh v. State of Maharashtra***, (1996) 1 SCC 667. The view taken in ***Salauddin Abdulsamad Shaikh*** (supra) has been followed in several subsequent judgments such as ***K.L. Verma v. State***, (1998) 9 SCC 348; ***Sunita Devi v. State of Bihar***, (2005) 1 SCC 608, and; ***Adri Dharan Das v. State of West Bengal***, (2005) 4 SCC 303. The correctness of ***K.L. Verma*** (supra) was, however, doubted in ***Nirmal Jeet Kaur v. State***, (2004) 7 SCC 558. ***HDFC Bank Ltd. v. J.J. Mannan***, (2010) 1 SCC 679 is yet another decision, wherein the view taken by the Supreme Court is that the protection under Section 438 Cr PC is only till the investigation is complete and charge sheet is filed. The same view has been adopted in ***Satpal v. State of Punjab***, (2018) 3 SCC 813.

The aforesaid conflicting positions were noticed by the Supreme Court, recently, in ***Sushila Aggarwal v. State (NCT of Delhi) & Anr.***, (2018) 7 SCC 731. The Supreme Court observed that on a reading of ***Gurbaksh Singh Sibbia*** (supra), it appears that there are indications that anticipatory bail may be for a limited period. In the light of the conflicting views of different bench of the Supreme Court of equal strength, the Supreme Court in ***Sushila Aggarwal*** (supra) has referred the following questions for consideration by a larger bench of the Supreme Court, so that they are authoritatively settled in clear and unambiguous terms:

"*(1) Whether the protection granted to a person Under Section 438 Code of Criminal Procedure should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.*

(2) Whether the life of an anticipatory bail should end at the time and stage when the Accused is summoned by the Court".

In the light of the aforesaid position, since the issue is still pending consideration before the larger bench of the Supreme Court, we do not consider it appropriate to delve into this question of law referred for our consideration.

39. Question (D) referred for our consideration is the following:

D) *Whether while deciding the bail application of the accused charge-sheeted without arrest, the court can delve into the reasons of non-arrest of the accused, considering the gravity of offence?*

The aforesaid question is a mere paraphrasing of Question (B) and, therefore, does not require us to give a separate answer to it. The answer to this question is covered by our decision in ***Court on its Own Motion (2)*** (supra).

40. The last question of law referred for our consideration is the following:

E) *Whether this court can release the accused on bail charge sheeted without arrest under section 376 IPC or any other offence punishable with imprisonment of life or death in view of bar under section 437(1)(i)[sic 437(i)] Cr. P.C.*

In the light of our discussion, as aforesaid, the accused, who is charge sheeted without arrest under Section 376 IPC or any other offence punishable with imprisonment for life or death, may be released on bail under Section 437(1) Cr PC, provided:

i) There are no reasonable grounds for the Court to believe that the accused has been guilty of the offence punishable with death or imprisonment for life, or;

ii) the accused is under the age of 16 years or a woman or a sick or infirm.

The existence of the aforesaid circumstances merely enables the Court to consider the application for grant of bail under Section 437(1) Cr PC. However, the considerations which go into the making of the decision whether to grant bail or not, are those that we have exhaustively considered and set out herein above. Thus, it would depend on the circumstances of the individual case, whether or not the accused should be released on bail by the Court under Section 437(1) Cr PC. The reference stands answered in the aforesaid terms.

(VIPIN SANGHI)
JUDGE

(I.S. MEHTA)
JUDGE

NOVEMBER 13, 2018