IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

FRIDAY, THE 24TH DAYOF JULY 2015/2ND SRAVANA, 1937

Crl.MC.No. 3054 of 2015

CR.M.P.NO.907/2015 OF ADDITIONAL SESSIONS COURT - II, KALPETTA

CRIME NO. 233/2015 OF PANAMARAM POLICE STATION , WAYANAD

PETITIONER(S)/ACCUSED :

1. ANTHRU, AGED 65 YEARS,
   S/O.IBRAYI HAJI, KOMBI HOUSE, ARATTUTHARA POST,
   MANANTHAVADY TALUK, WAYANAD DISTRICT.

2. KAMARUNNEESA, AGED 22 YEARS,
   W/O.SALIM, KOMBI HOUSE, ARATTUTHARA POST,
   MANANTHAVADY TALUK, WAYANAD DISTRICT.

   BY ADV. SRI.SUNNY MATHEW

RESPONDENT(S) AND STATE :

1. THE SUB INSPECTOR OF POLICE,
   PANAMARAM POLICE STATION, WAYANAD DISTRICT- 673 001.

2. STATE OF KERALA,
   REPRESENTED BY PUBLIC PROSECUTOR,
   HIGH COURT OF KERALA, ERNAKULAM- 682 031.

   BY PUBLIC PROSECUTOR SRI.V.S.SREEJITH

   THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD
   ON 24-07-2015, THE COURT ON THE SAME DAY PASSED THE
   FOLLOWING:

Msd.

Crl.MC.No. 3054 of 2015

APPENDIX

PETITIONER(S)' ANNEXURES :

ANNEXURE A1: TRUE COPY OF THE ORDER DATED 16.05.2015 PASSED BY THE COURT OF SESSIONS, KALPETTA.

RESPONDENT(S)' ANNEXURES :

NIL

//TRUE COPY//

P.A.TO JUDGE.

Msd.

K.ABRAHAM MATHEW J.

Crl.M.C. NO.3054 OF 2015

Dated this the 24th day of July, 2015

ORDER

Petitioners challenge the legality of the order passed by a Sessions Court in an application filed under Section 438 Cr.P.C though it was disposed of in their favour, which appears to be very strange. Is the remedy worse than the disease ? Even a cursory look at the order will not leave one astonished at the petitioners' assailing the order.

2. They are accused of having committed the offences under Sections 323 and 354B IPC. The facts of the case are not relevant for the present purpose as I have already passed an interim order.

3. By the impugned order the learned Sessions Judge directed the petitioners to surrender before the investigating officer within 10 days. Some of the other directions which contain certain declarations of law also are as follows:

> "On their surrender, as a non-bailable offence is alleged, in case, the Investigating Officer effects their arrest, they shall be released on bail by the Investigating Officer himself on executing bond for Rs.1,00,000/- (Rupees One lakh only) each with two solvent sureties each for the like sum for the purpose of securing their presence for interrogation, if it is required."

"On completion of the interrogation (which may or may

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not be completed within 24 hours), they shall be produced before the Judicial Magistrate concerned, who shall dispose of the regular bail application, if any, filed on their behalf without any delay".

"..... The Investigating Officer has no authority to grant bail in a non-bailable offence and it is the prerogative of the Judicial Magistrate alone."

4. The observation of the learned Sessions Judge that as a non bailable offence is alleged the petitioners shall be released on bail if the investigating officer effects their arrest on their surrender before him is meaningless for the simple reason that an application under Section 438 Cr.P.C is maintainable only if the petitioner is alleged to have committed a non bailable offence.

5. In Balchand Jain vs. State of Madhya Pradesh (AIR 1977 SC 366) the Supreme Court has said that the expression anticipatory bail is really a misnomer because what Section 438 Cr.P.C contemplates is not an anticipatory bail but merely an order directing release of an accused in the event of his arrest. The order becomes effective only when the investigating officer effects the arrest of the petitioner. "Manifestly, there is no question of release on bail unless a person is arrested, and therefore, it is only on arrest that the order granting 'anticipatory bail' becomes operative," the Supreme Court has observed.

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Where there is no arrest, the order shall remain without life. An order which can become effective before the petitioner is arrested or even if he

is not arrested does not conform to the idea contained in Section 438 of the Code.

6. In his order the learned Sessions Judge has directed the petitioners to surrender before the investigating officer within 10 days from the date of the order. I do not find any provision in the Code empowering the court to direct the petitioner in an application under Section 438 of the Code to surrender before the investigating officer. The object of the section is not to help the accused avoid arrest. The direction to surrender militates against the concept of 'anticipatory bail'. It makes the order operative without the petitioner being arrested. If the court allows an application under Section 438, the only direction that may be passed is the direction to the investigating officer to release the petitioner on bail if he is arrested. It is illegal for the court to direct the petitioner to surrender before the investigating officer. A fortiori, under no circumstance the court can direct the accused to surrender before the Magistrate in the course of an investigation. If the applicant is entitled to 'anticipatory bail', the court shall grant it, and if he is not, the court shall reject it. For still stronger reasons, when the court dismisses the application, there is no justification at all to direct the petitioner to surrender before the magistrate

or the investigating officer as some courts do. That which cannot be done directly shall not be done indirectly also.

7. The learned Sessions Judge passed the impugned order unmindful of its consequences. He granted 10 days time for the petitioners to surrender before the investigating officer. The investigating officer could not arrest and would not have arrested them for 10 days. In other words, the investigating officer was restrained for 10 days from arresting the petitioners, which is illegal for the court to do in an application under Section 438 Cr.P.C as held by the Supreme Court in Adri Dharan Das Vs. State of West Bengal (AIR 2005 SC 1057),

Parvindirjit Singh Vs. State (AIR 2009 SC 502) and Rashmi R Thatoi Vs. State of Orissa (2012) 5 SCC 690). The period - it is irrelevant whether it is one day or 10 days - granted for surrender may be sufficient for the petitioner to destroy the evidence or to intimidate or influence the witnesses. It is not in public interest for the court to create a situation wherein an accused who is sought to be arrested by the police can, armed with its order, freely move about scoffing at the investigating officer as well as the victim, for whom it is adding insult to injury. After the expiry of the period allowed by the court for him to surrender the accused can without complying with the direction file an application for extension of time, the disposal of which will again take time. Meanwhile, he can tell

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the investigating officer that he should not arrest him as his application for extension of time is pending consideration by the court. This will make the investigation an ineffective one. The court shall not pass an order or issue a direction which will cause serious interference with the powers and duties of the police officer in investigating the case. Giving liberty to an accused to surrender before the investigating officer at the pleasure of the accused will make the process of administration of justice a laughing stock before the whole world.

8. It is true that there is no prohibition for the accused to surrender before the investigating officer or the magistrate even after the disposal of his application under Section 438, whether it was in his favour or not. The law permits it, which is evident from sub section 1 of Section 437 which mentions appearance of an accused before a magistrate. But if the accused who has obtained an order in his favour chooses to surrender before the magistrate, the latter has the discretion to pass an appropriate order de hors the order passed by the sessions court or High Court since the order to release the accused is not directed to the

magistrate but the station house officer.

9. The learned Sessions Judge lost sight of the effect of the surrender of an accused before a police officer, which is why he directed that on their surrender the petitioners shall be released on bail in case the

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investigating officer effects their arrest. Once an accused surrenders before the investigating officer there is no question of the investigating officer's refusing to arrest him because submission to the custody of the investigating officer amounts to arrest as provided in Section 46 of the Code. Section 59 of the Code which stipulates that an accused who has been arrested by a police officer shall not be discharged except on bond or on bail or under the special order of a Magistrate also is irrelevant.

10. The learned Sessions Judge directed the investigating officer to produce the petitioner before the judicial magistrate concerned on completion of their interrogation "(which may or may not be completed within 24 hours)". Article 22(2) of the Constitution of India mandates that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate. This has been reiterated in Section 57 of the Code. The learned judge should not have observed that the interrogation may or may not be completed within 24 hours and the accused shall be produced before the Magistrate after completion of the interrogation.

11. The direction in the impugned order to produce the petitioners

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before the judicial magistrate on completion of their interrogation defies common sense because there is already a direction to release them on bail on their surrender. The two directions are inconsistent. Moreover, in

an order passed under Section 438 of the Code it is illegal to direct production of the accused in custody before the magistrate.

12. The statement of the learned Sessions Judge that the investigating officer has no authority to grant bail for a non bailable offence and that is " the prerogative of the judicial magistrate alone" is a startling one. Section 437 of the Code relates to granting of bail in cases of non bailable offences. Sub section (1) provides that 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 the court other than the High Court or court of session, he may be released on bail. Two situations are contemplated by this provision: (1) accused is arrested or detained without warrant by a police officer and (2) accused appears or is brought before the magistrate. No doubt, in both these situations the accused may be released on bail. The question is who has been empowered to grant bail in the first situation. In that situation the only authority concerned is the Station House Officer. It is crystal clear that it is to him the power to release the accused on bail is given in the first situation. So,

when a person accused of or suspected of having committed a non bailable offence is arrested or detained without a warrant, the station house officer has the power to release him on bail, but the power is subject to the two exceptions given in sub Section 1 of Section 437 of the Code. At the same it may be noted that so far the magistrate is concerned in the first and second provisos to the said Sub Section two exceptions have been carved out of the above two exceptions and those two exceptions given in the provisos are not applicable to a station house officer.

For the reasons stated above, the order under challenge is set

aside and the interim order passed by this court is made absolute.

K.ABRAHAM MATHEW
JUDGE