

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Writ Petition No. 1512 of 2018

Saurabh Suman Arora

.....Petitioner

Vs.

State of Uttarakhand and others

.....Respondents

Mr. Sanjeev Singh, Advocate for the petitioners.

Mr. Sandeep Tandon, Dy. Advocate General with Ms. Manisha Rana Singh,
A.G.A. for the State.

Hon'ble Lok Pal Singh, J.

Heard Mr. Sanjeev Singh, Advocate for the petitioners and Mr. Sandeep Tandon, Deputy Advocate General with Ms. Manisha Rana Singh, Assistant Government Advocate for the State.

2. This writ petition, under Article 226 of Constitution of India, has been filed seeking the following reliefs:

“i) Issue a writ, order or direction in the nature of certiorari to quash the F.I.R. dated 22.7.2018 registered as case crime no.563 of 2018 under Sections 420, 406, 323, 504 and 506 of IPC, Police Station Jwalapur, District Haridwar.

ii) Issue a writ, order or direction in the nature of mandamus commanding the respondent nos.1 and 2 not to arrest the petitioner in pursuance to FIR dated 22.7.2018 registered as case crime no.563/2018 under Sections 420, 406, 323, 504 and 506 of IPC, Police Station Jwalapur, District Haridwar.

3. Admit the petition.

4. Issue notice to respondent no. 3 fixing 5th October, 2018.

5. Counter affidavit be filed within five weeks.

6. Having heard learned counsel for the parties, and after perusal of the contents of the FIR, as an interim measure, it is directed that till the next date of listing no coercive steps shall be taken against the petitioner pursuant to the impugned FIR dated 22.07.2018, provided the petitioner co-operates in the investigation. (Stay application no.12252 of 2018 is disposed of).

7. This Court, while sitting in writ jurisdiction under Article 226 of Constitution of India, has noticed that filing of writ petition, for quashing of the F.I.R. and seeking interim protection in respect of cognizable offences, having imprisonment of less than 7 years, is increasing day-by-day.

8. Section 438 Cr.P.C. provides for grant of bail to person apprehending arrest. For kind reference, Section 438 Cr.P.C. is extracted hereunder:-

“438. Direction for grant of bail to person apprehending arrest.- (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Sessions for a direction under this Section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:

- (i) The nature and gravity of the accusation;
- (ii) The antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice; and

(iv) Where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

Either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer-in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Sessions makes a direction under sub-section (1), it may include such conditions in such direction in the light of the facts of the particular case, as it may think fit, including:

(i) A condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) A condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) A condition that the person shall not leave India without the previous permission of the Court;

(iv) Such other condition as may be imposed under Section 437(3), 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).

9. State of Uttar Pradesh by way of enactment of Act No.16 of 1976 has omitted Section 438 of Cr.P.C. In view of the provisions of The Uttar Pradesh Reorganisation Act, 2000 the law applicable on the appointed day in the State of U.P. would be applicable to the State of Uttarakhand. Thus, the provisions of Section 9 of Act No.16 of 1976, omitting the provisions of Section 438 of Cr.P.C., are also applicable in the State of Uttarakhand, meaning thereby that there is no provision for grant of bail to person apprehending arrest in the State of Uttarakhand.

10. Article 21 of Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

11. The Hon'ble Apex Court in the case of **Maneka Gandhi vs. Union of India (1978) 1SCC 248** has held as follows:-

5. It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is : what is the meaning and content of the words 'personal liberty' as used in this article ? This question incidently came up for discussion in some of the judgments in *A. K. Gopalan v. State of Madras*(1) and the observations made by Patanjali Sastri, J., Mukherjee, J., and S. R. Das, J., seemed to place a narrow interpretation on the words 'personal liberty' so as to confine the protection

of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words 'personal liberty' as the inter-relation between Article 19 and 21. It was in *Kharak Singh v. State of U.P. & Ors.*(1) that the question as to the, proper scope and meaning of the expression 'personal liberty' came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that 'personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue". The Minority judges, however, disagreed with this view taken by the majority and explained their position in the following words : "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned". There can be no doubt that in view of the decision of this Court in *R. C. Cooper v. Union of India*(2) the minority view must be regarded as correct and the majority view must be held to have been overruled. We shall have occasion to analyse and discuss the decision in *R. C. Cooper's* case a little later when we deal with the arguments based on infringement of Articles 19(1) (a) and 19 (1) (g), but it is sufficient to state for the present that according to this decision, which was a decision given by the full Court, the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom. The decision in *A. K. Gopalan's* (supra) case gave rise to the theory that the freedoms under Articles 19, 21, 22 and 31 are exclusive-each article enacting a code relating to the protection of distinct rights, but this theory was overturned in *R. C. Cooper's* case (supra) where Shah, J.,

speaking on behalf of the majority pointed out that "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human: rights. The guarantees delimit the protection of those rights in their allotted fields : they do not attempt to enunciate distinct rights." The conclusion was summarised in these terms : "In our judgment, the assumption in A. K. Gopalan's case that certain articles in the Constitution exclusively deal with specific matters cannot be accepted as correct". It was hold in R. C. Cooper's case and that is clear from the judgment of Shah, J., because Shah, J., in so many terms disapproved of the contrary statement of law contained in the opinions of Kania, C. J., Patanjali Sastri, J., Mahajan, J., Mukherjee, J., and S. R. Das, J., in A. K. Gopalan's case that even where a person is detained in accordance with the procedure prescribed by law, as mandated by Article 21, the protection conferred by the various clauses of Article 19(1) does not cease to be available to him and the law authorising such detention has to satisfy the test of the applicable freedom under Article 19, clause (1). This would clearly show that Articles 19(1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21 having to meet the challenge of a fundamental right under Article 19(1). Indeed, in that event, a law of preventive detention which deprives a person of 'personal liberty' in the narrowest sense, namely, freedom from detention and thus falls indisputably within Art. 21 would not require to be tested on the touchstone of clause (d) of Article 19 (1) and yet it was held by a Bench of seven Judges of this Court in Shambhu Nath Sarkar v. The State of West Bengal& Ors. (1) that such a law would have to satisfy the requirement inter alia of Article 19 (1), clause (d) and in Haradhan Saha v. The State, of West Bengal & Ors., (2) which was a decision given by a Bench of five judges, this Court considered the challenge of clause (d) of Article 19(1) to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that that Act did not violate the constitutional guarantee embodied in that article. It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression ' personal liberty' as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wave length for comprehending the scope and ambit of the fundamental rights has been set by this Court in R. C.

Cooper's case and our approach in the interpretation of the fundamental rights must now be in tune with this wave, length. We may point out even at the cost of repetition that this Court has said in so; many terms in R. C. Cooper's case that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression 'personal liberty' in Article 21 must be so interpreted as to avoid overlapping between that article and Article 19(1). The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. Now, it has been held by this Court in Satwant Singh's case that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure prescribed by law. Prior to the enactment of the Passports Act, 1967, there was no law regulating the right of a person to go abroad and that was the reason why the order of the Passport Officer refusing to issue passport to the petitioner in Satwant Singh's case was struck down as invalid. It will be seen at once from the language of Article 21 that the protection it secures is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law; and law here means 'enacted law' or 'State Law'. Vide A. K. Gopalan's case. Thus, no person can be deprived of his right to, go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the deprivation is effected strictly in accordance with such procedure. It was for this reason, in order to comply with the requirement of Article 21, that Parliament enacted the Passports Act, 1967 for regulating the right to go abroad. It is clear from the provisions of the Passports Act, 1967 that it lays down the circumstances under which a passport may be issued or refused or cancelled or impounded and also prescribes a procedure for doing so, but the question is whether that is sufficient compliance with Article 21. Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements ? Obviously, procedure cannot be arbitrary, unfair or unreasonable. This indeed was conceded by the learned Attorney General who with his usual candour frankly stated that it was not possible for him to contend that any procedure howsoever arbitrary, oppressive or unjust may be prescribed by the law. There was some discussion in A. K. Gopalan's case in regard to the nature of the procedure required to be prescribed under Article 21 and at least three of the learned Judges out of five expressed themselves strongly in favour of the view

that the procedure cannot be any arbitrary, fantastic or oppressive procedure. Fazal Ali, J., who was in a minority, went to the farthest limit in saying that the procedure must include the four essentials, set out in Prof. Willi's book on Constitutional Law, namely, notice, opportunity to be heard, impartial tribunal and ordinary course of procedure. Patanjali Sastri, J. did not go as far as that but he did say that "certain basic principles emerged as the constant factors known to all those procedures and they formed the core of the procedure established by law." Mahajan, J., also observed that Article 21 requires that "there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty" and "it negatives the idea of fantastic, arbitrary and oppressive forms of proceedings". But apart altogether from these observations in A. K. Gopalan's case, which have great weight, we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21,, having regard to the impact of Article 14 on Article 21."

12. The Hon'ble Apex Court in the case of **Bandhua Mukti Morcha vs. Union of India (1997) 10 SCC 549** has held that Articles 21, 39(e), (f), 41 and 42 has been meant to ensure life and liberty with human dignity. Right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity. Neither the Central Government nor any State Government has the right to take an action which will

deprive a person of the enjoyment of these basic essentials.

13. The Hon'ble Apex Court in the case of **D.K. Basu vs. State of West Bengal** reported in (1997) 1SCC 416 has held as follows:-

22. Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Articles 21 and 22(1) of the Constitution required to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal court of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicted undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

23. In Neelabati Bahera Vs. State of Orissa [1993 (2) SCC, 746], (to which Anand, J. was a party) this Court pointed out that prisoners and detenues are not denuded of their fundamental rights under Article 21 and it is only such restrictions as are permitted by law, which can be imposed on the enjoyment of the fundamental rights of the arrestees and detenues. It was observed :

"It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen of life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the constitution of India cannot be denied to convicts, under trials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and

therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.

14. The Hon'ble Apex Court in the case of **Umesh Kumar vs. State of Andhra Pradesh reported in (2013) 10SCC 591** has held as follows:-

18. Allegations against any person if found to be false or made forging some one else signature may affect his reputation. Reputation is a sort of right to enjoy the good opinion of others and it is a personal right and an enquiry to reputation is a personal injury. Thus, scandal and defamation are injurious to reputation. Reputation has been defined in dictionary as "to have a good name; the credit, honor, or character which is derived from a favourable public opinion or esteem and character by report". Personal rights of a human being include the right of reputation. A good reputation is an element of personal security and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property. Therefore, it has been held to be a necessary element in regard to right to life of a citizen under Article 21 of the Constitution. International Covenant on Civil and Political Rights 1966 recognises the right to have opinions and the right of freedom of expression under Article 19 is subject to the right of reputation of others. Reputation is "not only a salt of life but the purest treasure and the most precious perfume of life." (Vide: Smt. Kiran Bedi & Jinder Singh v. The Committee of Inquiry & Anr., Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni & Ors; Nilgiris Bar Association v. TK Mahalingam & Anr., Dr. Mehmood Nayyar Azam v. State of Chattisgarh & Ors. Vishwanath Sitaram Agrawal v. Sau Sarla Vishwanath Agrawal, and Kishore Samrite v. State of U.P. & Ors.

15. The Hon'ble Apex Court in **Arnesh Kumar vs State of Bihar and another, (2014) 8 SCC 273** has issued certain directions before making arrest of a person. The same reads as under:

"7.1. From a plain reading of the aforesaid provision, it is evident that a person accused of an offence punishable with imprisonment for a terms which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the

police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts.

7.2. The law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. The law further requires the police officers to record the reasons in writing for not making the arrest.

7.3. In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or more purposes envisaged by Sub-Clauses (a) to (e) of Clause (1) of Section 41 of Cr.P.C."

16. The arrest of a person without following the principle of law violates the personal liberty. Unless credible evidence is collected and unless the Investigating Officer comes to the conclusion that the accused shall flee away from the clutches of the law, a person should not be arrested even in a cognizable offence.

17. Allahabad High Court in the case of **Amarawati vs. State of U.P. (2005) Cri.L.J. 75** has observed as under:

"27. Section 173(5) provides that when the police report is in respect of a case to which Section 170

applies the police officer must forward to the Magistrate the documents mentioned therein.

28. Section 437 Cr.P.C. applies to relatively minor offences where the punishment provided is not life sentence or death. In our opinion any application for bail under Section 437 Cr.P.C. should ordinarily be decided by the Magistrate the same day, except in rare cases where reasons shall be recorded in writing for adjourning the hearing of the bail application. We think it necessary to lay down this guideline in respect of such applications under Section 437 in view of (1) there being no provision for giving notice to the Public Prosecutor, as is required for applications under Section 439(2) and Article 21 of the Constitution, which has been given a very wide interpretation in a series of decisions of the Supreme Court, referred to above.

29. There is no doubt that now-a-days often false and frivolous first information reports are lodged against even respectable persons of society, and if such respectable persons have to be arrested on the basis of such false and frivolous FIRs/complaints it will certainly result in incalculable harm to their reputation and self-respect.

31. In our country unfortunately whenever an FIR of a cognizable offence is lodged the police immediately goes to arrest the accused. This practice in our opinion is illegal as it is against the decision of the Supreme Court in Joginder Kumar's case (1994 Cri LJ 1981), and it is also in violation of Article 21 of the Constitution as well as Section 157(1) Cr.P.C. which gives a police officer discretion to arrest or not, but this discretion cannot be exercised arbitrarily, and it must be exercised in accordance with the principles laid down in Joginder Kumar's case (supra). The view of Hon'ble Palok Basu, J. in this connection is hence clearly incorrect.

33. It may be mentioned that a person's reputation and esteem in society is a valuable asset, just as in civil law it is an established principle that goodwill of a firm is an intangible asset. In practice, if a person applies for bail he has to surrender in Court, and normally the bail application is put up for hearing after a few days and in the meantime he has to go to jail. Even if he is subsequently granted bail or is acquitted, his reputation is irreparably tarnished in society. Often false and frivolous FIRs are filed yet the innocent person has to go to jail, and this greatly damages his reputation in society. For instance, as observed by the Supreme Court in *Kans Raj v. State of Punjab*, 2000 Cr LJ 2993 (vide Para 5), a tendency has developed of roping in all relations of the in-laws of the deceased wife in matters of dowry death. All these

factors must be kept in mind by the Court particularly after the promulgation of the Constitution, which has embodied the right to liberty as a valuable fundamental right in Article 21 of the Constitution of India.”

18. The provision for anticipatory bail was introduced in the Cr.P.C. because it was realized by Parliament in its wisdom that false and frivolous cases are often filed against some persons. Often false First Information Reports are filed e.g. under Section 498-A IPC, Section 3/4 of Dowry Prohibition Act, etc. and grand-mothers, uncles, aunts, unmarried sisters etc. and sometimes even the mediator of the marriage, are implicated in such cases, even though they may have nothing to do with the offence. Some times unmarried girls have to go to jail, which may affect their chances of marriage. Even if the First Information Report is false and frivolous, a person has to go to jail and has to obtain bail, and for that he/she has to first surrender before the learned Magistrate, and his/her bail application is heard only after several days (usually a week or two) after giving notice to the State. During this period, the applicant has to go to jail. Even if such person subsequently obtains bail, his/her reputation may be irreparably tarnished. The reputation of a person is valuable asset for him, just as in law the good will of a firm is an intangible asset In the Gita, Lord Krishna said to Arjun [Gita, Chapter 2, Sholk 34] :

अकीर्तिं चापि भूतानि
कथयिष्यन्ति तेऽव्ययाम् ।
सम्भावितस्य चाकीर्तिं
र्मणादतिरिच्यते ॥ 34॥

which means: For a self respecting man, infamy is worse than death. This difficulty can be overcome by restoring the provision for anticipatory bail.

19. In view of the reasons indicated above, I am of the view that there must be a provision for anticipatory bail in the State of Uttarakhand.

20. This Court, therefore, make a suggestion/recommendation to the Uttarakhand Government to issue an ordinance to restore the provision for anticipatory bail by repealing Section 9 of U.P. Act No. 16 of 1976 and empowering the High Court as well as the Sessions Courts to grant anticipatory bail.

21. The Registrar General of this Court shall send a copy of this order to the Principal Secretary (Home) and Principal Secretary (Law-cum-L.R.) Government of Uttarakhand forthwith, who in turn are requested to urgently place the matter before Hon'ble the Chief Minister, State of Uttarakhand, to do the needful for issuing the ordinance as suggested above.

(Lok Pal Singh, J.)

14.08.2018

Parul