

STATE OF MAHARASHTRA AND ANR.
v.
MOHD. SAJID HUSAIN MOHD. S. HUSAIN ETC.

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OCTOBER 10, 2007

[S.B. SINHA AND H.S. BEDI, JJ.]

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Code of Criminal Procedure, 1973:

s. 439—Grant of anticipatory bail—Determining factors—Discussed.

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s. 439—Anticipatory bail—Accused persons police officers and politicians—Charged with offence of raping minor girl—Remaining underground—Sessions judge rejected their regular bail and anticipatory bail—High Court allowed anticipatory bail—Correctness of—Held: Not correct as victim needed protection—Moreover accused persons unscrupulously not complied with the conditions imposed on them and also not present before the court number of times—Penal Code, 1860—s. 376—Prevention of Immoral Trafficking Act—s. 5.

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Penal Code, 1860:

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ss. 376, 342 r.w. s. 34—Age of prosecutrix—According to medical examination, determined to be 14 to 16 years—Held: Prosecutrix being minor, her consent for sex is not relevant—Case rightly made out under s. 376.

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The prosecution case was that the prosecutrix was staying with her maternal aunt 'M' after her mother remarried on death of her father. She was assaulted and abused by 'M' and as a result she left the home and started working in the house of accused 'T' as a maid servant. In the house of 'T' some girls used to come. After few days when one girl did not come, 'T' took prosecutrix to a place where she was offered a soft drink and then against her will, was subjected to rape. Thereafter she was regularly been sent out with various

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A persons. Respondents who are politicians, police officers and businessmen allegedly had been taking her to hotel, government guest house and even to their own apartment. On 22.04.2007, the accused persons, named in the First Information Report took her to a hotel to take liquor. However, the accused persons started behaving indecently with her. The police came and took all of them to the police station.

B She was medically examined on 22.04.2007. Her Radiological (Bone) Assessment suggested her age to be between 14-16 years. Respondents were not named in the First Information Report. C However, prosecutrix made several statements thereafter implicating the respondents.

D When respondents came to know that they have been named by the said girl, they absconded. They filed an application for anticipatory bail before the Sessions Judge which was dismissed. Thereafter, they filed application for anticipatory bail before the High Court which was allowed on the ground that the prosecutrix being major and having willingly consented for sex for consideration, *prima facie*, a case under s.376 IPC is not made out and that since E prosecutrix was stationed in the Remand Home she was fully protected.

F In appeal to this Court, State contended that the High Court committed a serious error in passing the impugned judgment inasmuch as from various public documents, it is evident that the date of birth of the prosecutrix is 28.06.1991 and, thus, at all material times, namely, from January 2007 to 22.04.2007, she was minor and in that view of the matter, the purported consent given by her would not be of much significance; that in the First Information Report, the names of the respondents had not been taken, but in a case of G this nature, the court should have considered the fact that she had been arrested by the police and as such it is just possible that she was not in a position to recollect all the details.

Allowing the appeal, the Court

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HELD: 1. The four factors, which are relevant for considering the application for grant of anticipatory bail, are : “(i) the nature and gravity or seriousness of accusation as apprehended by the applicant; (ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court, previously undergone imprisonment for a term in respect of any cognizable offence; (iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested; and (iv) the possibility of the appellant, if granted anticipatory bail, fleeing from justice.” [Para 13] [1005-B, C, D]

2.1. If the prosecutrix was a minor, consent on her part will pale into insignificance. She had been medically examined and her approximate age on the basis of radiological test was determined to be between 14 to 16 years. Her date of birth was recorded on 04.07.1996 by the Parbhani Municipal Council as ‘28.06.1991’. The said certificate was issued on 29.05.2007, but evidently the date of registration of the said certificate was 04.07.1996 i.e. much before any controversy arose. Three school leaving certificates had been placed wherein her date of birth was shown as 28.06.1991. She had been, as per the said certificates, studying in 9th standard. She dropped out from the school. [Para 14] [1005-E, F, G]

2.2. The date of issuance of the certificates had not been stated, but evidently such certificates had been obtained by the prosecution. It may be true that in the First Information Report as also in her first supplementary examination, her age was recorded as 18 years, but she had been examined medically. The possibility of her trying to shield her from prosecution at the time of her arrest and for that purpose disclosing her age to be 18 years cannot be ruled out. [Para 15] [1005-H; 1006-A, B]

2.3. A mistake in regard to her age as recorded in the First Information Report or the first medical document or even in her supplementary affidavit should yield to the public documents which have been produced by the prosecution at this stage. Even before the Chief Judicial Magistrate, she disclosed her date of birth to be 22.06.1991. Therefore, even according to that she was below 16

A years of age. [Para 25] [1008-B, C]

3. Out of the eight respondents, five are police officers, two are politicians and one is owner of a hotel. It is not in dispute that after having come to learn that their names had been taken by the prosecutrix in her supplementary statement, they had been absconding for a long time. The respondents had not scrupulously complied with the conditions imposed upon them. Admittedly, at least on four occasions, some of them were not present.

[Para 18] [1006-F, G, H]

C 4. The High Court has in regard to the first factor envisaged under the Maharashtra Amendment of s.438 of the Code of Criminal Procedure proceeded on the basis that the prosecutrix was a girl of easy virtue. This may be so but the same by itself may not be a relevant consideration. A case of this nature should be allowed to be fully investigated. Once a criminal case is set in motion by lodging an information in regard to the commission of the offence in terms of s.154 Cr. PC, it may not always be held to be imperative that all the accused persons must be named in the First Information Report. It has not been denied nor disputed that the prosecutrix does not bear any animosity against the respondents. There is no reason for her to falsely implicate them. It is also not a case that she did so at the behest of some other person, who may be inimically disposed of towards the respondents. The prosecution has disclosed the manner in which she was being taken from place to place which finds some corroboration from the testimonies of the other witnesses and, thus, at least at this stage her evidence should not be rejected outrightly. Parameters for grant of anticipatory bail in such a serious offence, being under ss. 376, 376(2)(g) IPC are required to be satisfied.

[Para 22, 23 and 24] [1007-E, F, G, H; 1008-A, B]

G *State of U.P. v. Pappu alias Yunus and Anr.*, [2005] 3 SCC 594 and *D.K. Ganesh Babu v. P.T. Manokaran and Ors.*, [2007] 4 SCC 434, relied on.

H 5.1. Immoral trafficking is now widespread. Victims, who are lured, coerced or threatened for the purpose of bringing them to the

trade should be given all protection. At this stage, this court need not enter into the details in regard to the merit of the matter so as to prejudice the case of one party or the other at the trial, but it is now well-settled principle of law that while granting anticipatory bail, the court must record the reasons therefor. [Para 21] [1007-C, D] A

5.2. Immoral conduct on the part of police officers should not be encouraged. It is not understandable as to how the police officers could go underground. They had been changing their residence very frequently. Although most of them were police officers, their whereabouts were not known. During the aforementioned period attempts had been made even by 'M' to obtain the custody of the girl at whose instance, is not known. On the one hand, 'M' had been praying for the custody of the girl and the mother of the girl had affirmed an affidavit in relation to her date of birth. These may not be acts of voluntariness on their part. It, therefore is a case where no anticipatory bail should have been granted. B C D

[Para 26] [1008-D, E]

6. The High Court itself has refused to grant regular bail to the accused against whom charge-sheet has been submitted. The Session Judge also did not grant bail to some of the accused persons. If on the same materials, prayer for regular bail has been rejected, there is no reason to enlarge respondents on anticipatory bail. In the peculiar fact and circumstances of the case, the High Court ought not to have granted anticipatory bail to the respondents. E

[Paras 28 and 29] [1009-B, C, D] F

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1402-1409 of 2007.

From the Common Judgment and final Order dated 27.6.2006 of the High Court of Judicature at Bombay, Bench at Aurangabad in Crl. A. Nos. 1751, 1786, 1789, 1833, 1853, 1911, 1949 and 2007 of 2007. G

Ravindra Keshavrao Adsure, Subhash Tambe and Gautam Godara for the Appellants.

Paramjit Singh Patwalia, Sushil Karanjkar, Vishal Joganand, K.N. H

A Rai, Varuna Bhandari Gugnani, Rameshwar Prasad Goyal and Sohrab Samsay for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

B 2. This appeal is directed against a judgment and order dated 27.06.2007 passed by the High Court of Bombay, Aurangabad Bench at Aurangabad granting anticipatory bail to the respondents herein for commission of an offence punishable under Sections 376, 342 read with Section 34 of the Indian Penal Code (IPC) and under Section 5 of the
C Prevention of Immoral Trafficking Act.

3. Respondents herein comprise of police officers, politicians and a businessman.

D 4. A First Information Report was lodged by a girl, who is said to be minor, showing how she was driven to the flash trade by accused Shamim Tabassum.

E 5. One Maruti Chandre had seven sisters, two of them are Mahananda and Sunita. Mahananda was unmarried. Sunita's first husband was Dilip Deshmukh, who died. She married to Sahebrao Mhaske, who also died leaving behind prosecutrix and one Santosh. After the death of Sahebrao Mhaske, she again married to Vasantrao Hudgir. There are two issues from the said marriage. Mahananda allegedly was taking care of the prosecutrix as well as Santosh. Before us some documents have been
F placed to show that the date of birth of Puja is 28.06.1991.

Once she had left her house at Parbhani having been abused and assaulted by Mahananda; but returned after some time. However, after her return to Parbhani, she was again abused and assaulted by her cousin. She again came back to Aurangabad and started residing at Mukundwadi,
G where she met accused Tabassum @ Baji. She was asked to work at her place as a maid-servant. According to Puja, in Tabassum's house some girls used to come. After a few days, as one girl did not come, she was asked to go with her. They reached a Dhaba at Mhaismal in a white coloured vehicle, where they found a person sitting. She was offered a

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soft drink. Having consumed it, she felt reeling in her head. She was also not able to walk. Allegedly, against her will, she was subjected to rape. She was taken back to the house by accused Tabassum. She thereafter allegedly had regularly been sent out with various persons. Sometimes, the amount she received was to be divided in the ratio of 50 : 50. Sometimes Tabassum herself used to keep the amount with her. She purchased clothing, jewellery etc. from the amount she used to earn. Respondents herein, according to the girl, had taken her to a hotel, government guest house and even on one occasion to their own apartment. On 22.04.2007, the accused persons, named in the First Information Report, came to the house of Accused No. 1 for taking her to Mumbai. They were to travel in a bus. They, however, went to a hotel to take liquor, before boarding the bus. However, when the accused persons started behaving indecently with her, the police came and took all of them to the police station.

She was medically examined on 22.04.2007. Her Radiological (Bone) Assessment suggested her age to be between 14-16 years. Respondents herein were not named in the First Information Report. However, Puja made several statements thereafter implicating the respondents herein.

She also gave her statement under Section 164 of the Code of Criminal Procedure (Cr.PC).

Respondents, having come to know that they have been named by the said girl, absconded. They filed an application for anticipatory bail before the learned Sessions Judge, Aurangabad. The same was dismissed by an order dated 24.05.2007.

6. Respondents moved the High Court thereagainst and by reason of the impugned judgment dated 27.06.2007, the said application for anticipatory bail was allowed, *inter alia*, holding that the prosecutrix being major and having willingly consented for sex for consideration, prima facie, a case under Section 376 IPC has not been made out.

It was furthermore held that she being 'stationed in the Remand Home at Aurangabad', was fully protected and, thus, the question of the

A respondents being in a position to influence her, does not arise.

7. The State is, thus, before us.

B 8. Mr. Ravindra Keshavrao Adsure, learned counsel appearing on behalf of the State, would, *inter alia*, submit that the High Court committed a serious error in passing the impugned judgment inasmuch as from various public documents, it is evident that the date of birth of the prosecutrix is 28.06.1991 and, thus, at all material times, namely, from January 2007 to 22.04.2007, she was minor and in that view of the matter, the purported consent given by her would not be of much significance.

C The learned counsel would contend that it is true that in the First Information Report, the names of the respondents had not been taken, but in a case of this nature, the court should have considered the fact that she had been arrested by the police and as such it is just possible that she was not in a position to recollect all the details.

D In any event, the First Information Report being not encyclopedic, any evidence which has been collected by the prosecution during the course of investigation should have been taken into consideration having regard to the nature and gravity of the offence.

E The learned counsel would submit that the prosecutrix in her statement recorded by the police, had made categorical allegations against Accused Nos. 7, 9, 10, 11, 12, 13, 14 and 15. She made a similar statement before the learned Magistrate, which was recorded under Section 164 Cr. PC on 28.04.2007.

F It was pointed out that all the accused persons had been absconding from 24.05.2007 to 11.06.2007. The learned counsel would submit that as an investigation had been conducted by the CID under the supervision of a Superintendent of Police, it cannot be said that any attempt had been made to falsely implicate the respondents. It was pointed out that a chargesheet had been submitted against the six accused persons on 18.07.2007 and they have been refused bail by the same learned Judge. Keeping in view the fact that she was taken to a hotel, guest houses and apartment, custodial interrogation of the accused is imperative.

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9. Mr. Paramjit Singh Patwalia, learned Senior Counsel appearing on behalf of the respondents, on the other hand, pointed out that in the First Information Report, in her medical examination as also in her supplementary statement, the prosecutrix stated her age to be 18 years. Even her aunt stated her age to be 18 years. It was in the aforementioned situation, it was urged, no reliance can be placed on the purported birth certificate, which was issued on 29.05.2007 by the Parbhani Municipal Council and the School Leave Certificates by different schools as also the medical certificate, stating her age to be between 14 to 16 years.

The learned counsel would submit that *prima facie* the girl was above 16 years and she being a consenting party and having been getting consideration, no case under Section 376 IPC having been made out and, thus, this Court should not interfere with the impugned judgment.

It was contended that pursuant to the interim order passed by the High Court, the respondent have fully been cooperating with the Investigating Officer and except for four days, they have scrupulously complied with the conditions imposed by interim order passed by the High Court as also the conditions imposed upon them by the High Court in the impugned judgment.

It was furthermore pointed out that during the aforementioned period, they subjected themselves to medical examination and took part in the test identification parade, but no recovery was made from them. It was pointed out that chargesheet had been submitted against six persons who are in custody and in that view of the matter, it is not a case where custodial interrogation would be necessary.

The learned counsel would contend that although there exists a distinction in regard to the exercise of jurisdiction of this Court on an appeal from an order granting or refusing the prayer for grant of anticipatory bail and one of cancellation of bail; it is trite that this Court ordinarily would not interfere. Strong reliance, in this behalf, has been placed on *State of U.P. through CBI v. Amarmani Tripathi etc.*, [2005] 8 SCC 21 and *Jagdish and Ors. v. Harendrajit Singh*, [1985] 4 SCC 508]

10. When the matter came up before us on 27.07.2007, a report

A was called for from the Superintendent of Police, Crime Investigation Department, Aurangabad. The said authority has sent a report to this Court wherein it has, *inter alia*, been pointed out, that the respondents-accused persons had been absconding for a long time and they during the course of interrogation have been giving evasive answers.

B 11. It was furthermore stated that from the residence of Accused No. 3, thirteen CDs of blue films and books instigating sex had been seized. It was also submitted that recovery of vehicles used by the respondents from time to time for commission of the offence are yet to be seized and if they are released on bail, they would tamper with evidence.

C 12. Section 438 of Cr.PC has been amended by the State of Maharashtra. by Act No. 24 of 1993, which reads as under :

“438 Direction for grant of bail to person apprehending arrest.-

D (1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest, he shall be released on bail; and that Court may, after taking into consideration, E *inter alia*, the following factors:-

(i) the nature and gravity or seriousness of the accusation as apprehended by the applicant;

F (ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court previously undergone imprisonment for a term in respect of any cognizable offence;

(iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested, and

G (iv) the possibility of the applicant, if granted anticipatory bail, fleeing from justice,

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

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Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this subsection 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.”

13. The four factors, which are relevant for considering the application for grant of anticipatory bail, are :

- “(i) the nature and gravity or seriousness of accusation as apprehended by the applicant;
- (ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court, previously undergone imprisonment for a term in respect of any cognizable offence;
- (iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested; and
- (iv) the possibility of the appellant, if granted anticipatory bail, fleeing from justice.”

14. It is not in dispute that if the prosecutrix was a minor, consent on her part will pale into insignificance. She had been medically examined and her approximate age on the basis of radiological test was determined to be between 14 to 16 years. Her date of birth was recorded on 04.07.1996 by the Parbhani Municipal Council, Parbhani. as '28.06.1991'. The name of her father was also mentioned therein as 'Sahebrao Mhaske'. The said certificate was issued on 29.05.2007, but evidently the date of registration of the said certificate was 04.07.1996 i.e. much before any controversy arose. Three school leaving certificates had been placed before us which have been issued by : (i) Sarjudevi Bhikulal Bharuka Arya Kanya Vidyalaya, Hingoli; (ii) Bal Vidya Mandir, High School Parbhani; and (iii) Model English Educational Societies, Sharda Vidya Mandir, Parbhani, wherein her date of birth was shown as 28.06.1991. She had been, as per the said certificates, studying in 9th standard. She dropped out from the school.

15. It may be true that the date of issuance of the certificates had

- A not been stated, but evidently such certificates had been obtained by the prosecution. It may be true that in the First Information Report as also in her first supplementary examination, her age was recorded as 18 years, but she had been examined medically. The possibility of her trying to shield her from prosecution at the time of her arrest and for that purpose disclosing her age to be 18 years cannot be ruled out.
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16. So far as the fact that the respondents have not been named in the First Information Report is concerned, suffice it to say that the First Information Report may be encyclopedic.

- C 17. In *Vinod G. Asrani v. State of Maharashtra*, (2007) 3 SCALE 241], this Court stated :

D “As pointed out by Mr. Ahmed, this Court in the case of Kari Choudhary v. Sita Devi and Ors., had while considering a similar question observed that the ultimate object of every investigation is to find out whether the offences alleged to have been committed and, if so, who had committed it. The scheme of the Code of Criminal Procedure makes it clear that once the information of the commission of an offence is received under Section 154 of the Code of Criminal Procedure, the investigating authorities take up the investigation and file charge sheet against whoever is found during the investigation to have been involved in the commission of such offence. There is no hard and fast rule that the First information Report' must always contain the names of all persons who were involved in the commission of an offence. Very often the names of the culprits are not even mentioned in the F.I.R. and they surface only at the stage of the investigation...”

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G 18. Out of the eight respondents, five are police officers, two are politicians and one is owner of a hotel. It is not in dispute that after having come to learn that their names had been taken by the prosecutrix in her supplementary statement, they had been absconding for a long time. It is not necessary for us to record their respective period of abscondance. We may furthermore notice that the respondents had not scrupulously complied with the conditions imposed upon them. Admittedly, at least on four occasions, some of them were not present.

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19. We need not go into the question as to whether they had been cooperating with the Investigating Officer or not. We may, however, point out that before us a copy of the affidavit dated 10.05.2007 affirmed by Sunita Sahebrao Mhaske was placed, wherein she alleged that Puja was born on 30.12.1988. On that basis the Gram Panchayat, Dhanki had also issued a certificate showing the same to be her date of birth. We have an uncanny feeling that evidently the evidences are being collected by somebody who intends to save the accused.

20. There cannot be any direct proof that the respondents have been tempering with evidence, but that question will have to be considered by the appropriate authority at the appropriate stage.

21. Immoral trafficking is now widespread. Victims, who are lured, coerced or threatened for the purpose of bringing them to the trade should be given all protection. We at this stage although cannot enter into the details in regard to the merit of the matter so as to prejudice the case of one party or the other at the trial, but it is now well-settled principle of law that while granting anticipatory bail, the court must record the reasons therefor.

22. The High Court has in regard to the first factor envisaged under the Maharashtra Amendment of Section 438 of the Code of Criminal Procedure proceeded on the basis that the prosecutrix was a girl of easy virtue. This may be so but the same by itself may not be a relevant consideration. [See *State of U.P. v. Pappu alias Yunus and Anr.*, [2005] 3 SCC 594].

23. A case of this nature should be allowed to be fully investigated. Once a criminal case is set in motion by lodging an information in regard to the commission of the offence in terms of Section 154 Cr. PC, it may not always be held to be imperative that all the accused persons must be named in the First Information Report. It has not been denied nor disputed that the prosecutrix does not bear any animosity against the respondents. There is no reason for her to falsely implicate them. It is also not a case that she did so at the behest of some other person, who may be inimically disposed of towards the respondents. The prosecution has disclosed the manner in which she was being taken from place to place which finds

A some corroboration from the testimonies of the other witnesses and, thus, we can safely arrive at a conclusion that at least at this stage her evidence should not be rejected outrightly.

B 24. Parameters for grant of anticipatory bail in such a serious offence, being under Section 376, 376(2)(g) IPC, in our opinion, are required to be satisfied. [See e.g. *D.K. Ganesh Babu v. P.T. Manokaran and Ors.*, [2007] 4 SCC 434].

C 25. A mistake in regard to her age as recorded in the First Information Report or the first medical document or even in her supplementary affidavit should yield to the public documents which have been produced by the prosecution at this stage. Even before the learned Chief Judicial Magistrate, she disclosed her date of birth to be 22.06.1991. Therefore, even according to that she was below 16 years of age.

D 26. Immoral conduct on the part of police officers should not be encouraged. We fail to understand as to how the police officers could go underground. They had been changing their residence very frequently. Although most of them were police officers, their whereabouts were not known. During the aforementioned period attempts had been made even by Mahananda to obtain the custody of the girl at whose instance, we do not know. On the one hand, Mahananda had been praying for the custody of the girl and Sunita, the mother of the girl, as noticed hereinbefore, had affirmed an affidavit in relation to her date of birth. These may not be acts of voluntariness on their part. It, therefore, in our opinion, is a case where no anticipatory bail should have been granted.

F 27. Reliance has been placed by Mr. Patwalia on *Amarmani Tripathi* (supra). This Court therein opined that in an application for cancellation of bail, conduct subsequent to release on bail and the supervening circumstances alone are relevant. But the court while considering an appeal against grant of anticipatory bail would keep in mind the parameters laid down therefor. The matter, however, may be different for deciding an appeal from an order granting bail, where the accused has been at large for a considerable time, in which event, the post-bail conduct and other supervening circumstances will also have to be taken note of.

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This Court in *Amarmani Tripathi* (supra) aforementioned case upon considering even the subsequent events came to the conclusion that the accused therein had tried to interfere with the course of the investigation, tamper with the witnesses, fabricate evidence, intimidate or create obstacles in the path of investigation officers and derail the case. In that case, the appeal granting bail was set aside. B

28. We may also notice that the High Court itself has refused to grant regular bail to the accused against whom charge-sheet has been submitted. The learned Session Judge also did not grant bail to some of the accused persons. If on the same materials, prayer for regular bail has been rejected, we fail to see any reason as to why and on what basis the respondents could be enlarged on anticipatory bail. C

29. In the peculiar fact and circumstances of the case, we are of the opinion that the High Court ought not to have granted anticipatory bail to the respondents. The impugned judgment, therefore, cannot be sustained which is set aside accordingly. The appeal is allowed. D

30. The respondents may surrender before the Chief Judicial Magistrate and move an application for regular bail, which may be considered on its own merit without being influenced, in any way, by the judgment of this Court. E

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Appeal allowed.