
(1990) 11 BOM CK 0022

In the Bombay High Court

Case No : Criminal Appeln. No. 1712 and 1614 of 1990

Assistant Collector of Customs

APPELLANT

Vs

Leidomann Heinrich

RESPONDENT

Date of Decision : 20-11-1990

Acts Referred:

Customs Act, 1962 — Section 135

Citation : (1991) 53 ELT 224

Hon'ble Judges : H.W. Dhabe, J

Bench : Single Bench

Advocate : Shri C.T. George, Spl. P.P., Mr. R.Y. Mizra, P.P, for the Appellant; Shri G.G. Lalla, instructed by M/s. Lalla and Lalla, for the Respondent

Judgement

1. These two Criminal Applications can be, conveniently, disposed of by a common judgment. Reference to the parties would, however, be as in Criminal Application No. 1614 of 1990 preferred by the Original Accused.

2. Briefly, the facts are that on 10th of March, 1989, while the Applicant/Accused was in the process of boarding the Swiss Air Flight for Zurich from Sahar Airport, Bombay, he was intercepted and his baggage was searched by the Customs Department. From his baggage, the Department recovered 2.500 Kgs. brown powder, i.e. Hashish valued at Rs. 25,000/-. The Applicant/Accused was produced before the learned Magistrate, and later on the Assistant Collector of Customs filed a case against him u/s 8(c) r/w. Sections 20, 23 and 28 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (For short "N.D.P.S. Act") and u/s 135 of the Customs Act.

3. The Applicant/Accused was arrested on 10-3-89. However, the chargesheet was not filed against him within a period of 90 days, i.e. until 9-6-1989. He, therefore, filed an application for bail on 19-7-1990 u/s 167(2) of the Code of Criminal Procedure, (For short "Cr.P.C."). In the meanwhile, the chargesheet was filed on 26-6-1989. The learned Spl. Judge i.e. Addl. Sessions Judge, Greater Bombay, rejected the bail application on the ground that the question of

applicability of Sec. 167(2) of the Cr.P.C. to the person accused of an offence under the N.D.P.S. Act was preferred to the Division Bench by Deshpande J. in Criminal Application No. 1702 of 1989 with Criminal Application No. 2105 of 1989, since he disagreed with the view taken by Suresh J. in a previous decision holding that Sec. 167(2) of the Cr.P.C. is not applicable to the persons accused of offences under the N.D.P.S. Act. He, therefore, held that it would not be Applicant/ Accused has preferred the instant Criminal Application No. 1614 of 1990 in this Court claiming interim bail under Sec. 167(2) of the Cr.P.C. pending the decision of the Division Bench in the above case referred to it by Deshpande J.

4. On 23-7-1990, Patil J. passed an order in Criminal Application No. 1614 of 1990 which is as follow :

"Heard both sides.

Since chargesheet was not filed within prescribed time, the Petitioner is entitled to bail u/s. 167(2) of the Criminal Procedure Code which can be cancelled after filing of chargesheet. Now the Additional Public Prosecutor states that charge-sheet is filed on 7th March, 1990. In the circumstances, even if the Petitioner is entitled to technical bail, the same is liable to be cancelled as chargesheet has been filed. Considering the facts of this case, I am of the view that such action is necessary, but before opportunity will have to be given to the Petitioner.

Issue notice to Petitioner to show cause why such action be not taken."

The case was adjourned to 31st July, 1990. On 31-7-1990 the Assistant Collector of Customs filed Criminal Application No. 1712 of 1990 that the bail which is granted to the Applicant/Accused u/s 167(2) of the Cr.P.C. should be cancelled. Both these applications are, therefore, being disposed of by this common judgment.

5. The learned Counsel for the Applicant/Accused has urged before me that since there is a difference of view between the two learned Judges of this Court and since the Division Bench of this Court is not likely to resolve the said difference of view by its judgment within a reasonable time, the Applicant/Accused should be granted interim bail u/s 167(2) of the Cr.P.C. pending decision in the above case by giving him the benefit of the view of the learned Single Judge of this Court. Deshpande J. who has held that Section 167(2) of the Cr.P.C. is applicable to the person accused of an offence under the N.D.P.S. Act. According to him, Deshpande J. has granted interim bail to the Applicant/Accused before him.

6. Sine the question of applicability of Sec. 167(2) of the Cr.P.C. is pending before the Division Bench as per the reference made by Deshpande J. I asked the learned Counsel for the parties to enquire whether the said case is likely to be heard in near future. The Counsel for the parties have reported to me that the said case is not likely to be heard in near future. Since the said case is not likely to be heard in near future, and since the Applicant/Accused is languishing in jail

for a long time since 10-3-1989, the learned Counsel appearing for him has urged before me that the view favourable to the Accused should be followed and he should be granted interim bail under Sec. 167(2) of the Cr.P.C. pending decision by the Divn. Bench in regard to the applicability of the said section to the offences under the N.D.P.S. Act. In my view, the above submission made on behalf of the Applicant/Accused deserves consideration. It has, therefore, to be seen whether the provisions of Sec. 167(2) of the Cr.P.C. are attracted in the instant case.

7. There is not much dispute on facts. The learned Counsel appearing for the Department does not dispute that the chargesheet was not filed within 90 days and, therefore, as per the provisions of Section 167(2) of the Cr.P.C., if it was applicable, the Applicant/Accused would be entitled to get bail. However, what he contends is that although technically bail can be granted to the Applicant/Accused, it should be immediately cancelled looking to the fact that the offence with which he is charged is a serious offence under the N.D.P.S. Act and that the Accused/Applicant is likely to flee from India. The learned Counsel appearing for the Applicant/Accused has, however, opposed the above submission made on behalf of the Department.

8. As regards the entitlement to bail u/s 167(2) of the Cr.P.C., it is well settled that the proviso to sub-section (2) of section 167 of the Cr.P.C. creates an absolute right in favour of the Applicant/Accused to get bail, if the chargesheet is not filed against him within 90 days, as required by the said sub-section. It is further well settled that the order granting bail under the proviso to Section 167(2) of the Cr.P.C. is not an order on merits but it is an order-on-default, as described by the Supreme Court in the case of Rajnikant Jivanlal and Another Vs. Intelligence Officer, Narcotic Control Bureau, New Delhi, . It is also well settled that even though in the meanwhile the chargesheet may be filed, the Applicant/Accused is entitled to bail u/s 167(2) of the Cr.P.C., although it may be open to the State to apply for cancellation of his bail after the chargesheet is filed.

9. The first question which, however, arises for consideration, is whether, as urged on behalf of the Applicant/Accused, the Department can apply for cancellation of bail even before the Applicant/Accused is released on bail. To appreciate the above submission, it is necessary to refer to some of the provisions of the Cr.P.C. It is clear from the proviso to Section 167(2) of the Cr.P.C. that to a person released on bail under the said sub-section, the provisions of Chapter XXXIII of the Cr.P.C. are made applicable, as if he is a person released under the provisions of the said Chapter. The provisions of Section 437 to 439 of the Cr.P.C. are, thus, applicable to him. It is pertinent to see that sub-section (5) of Section 437 of the Cr.P.C. empowers the Court which has released the Accused on bail to direct that he be arrested and committed to custody, if it considers necessary so to do. A similar power is conferred on this Court, as well as the Sessions Court under sub-section (2) of Section 439 of the

Cr.P.C.

10. The learned Counsel appearing for the Applicant/Accused has drawn my attention to the language used in sub-section (5) of Section 437 or sub-section (2) of Section 439 of the Cr.P.C. He has submitted before me that unless the Accused is actually released on bail, there is no question of his arrest and committal to custody. He has, therefore, urged that unless the Applicant/Accused is first granted bail and is actually released on bail, there is no right in the Respondent/Department to apply for his arrest and committal to custody which, in other words, is described as cancellation of bail. In support of his submission, the learned Counsel appearing for the Applicant/Accused has relied upon the judgment of Rajasthan High Court in the case of Dewan and Others Vs. State, and also the judgment of the Gujarat High Court in the case of Parshotam Soma v. State (1972) 13 GLR 585. On the other hand, it is submitted on behalf of the Respondent/Department that this Court can cancel the bail in exercise of its inherent power u/s 482 of the Cr.P.C. even before the Accused/Applicant is released on bail. In support, the learned Counsel appearing for the Department has placed reliance upon the judgment of this Court in the case of Department of Central Excise v. Rajesh Tulsidar (1988) (3) Bom. C.R. 466.

11. The judgments of the Rajasthan and Gujarat High Courts upon which reliance is placed by the learned Counsel for the Applicant/Accused, no doubt, support him. Moreover, the language used in sub-section (2) of Section 439 of the Cr.P.C. is very clear and explicit. When it uses the expression "any person who has been released on bail", it would mean that the accused is not only granted bail but has availed of the same and is released from his jail custody. It is only then that this Court can direct a person to be arrested and committed to custody as provided in Section 439(2) of the Cr.P.C. In fact, no question of his rearrest or recommittal to custody can arise unless the Accused is actually released on bail granted to him continues to be in custody and no question of his arrest and committal to custody can therefore arise. Thus, apart from the judgments cited Supra, the clear language of sub-section (2) of Section 439 of Cr.P.C. thus supports the submission canvassed on behalf of the Applicant/Accused.

12. Faced with this difficulty, the learned Counsel for the Department has taken recourse to the inherent powers of this Court u/s 482 of the Cr.P.C. in support of his submission that even before the Accused is released on bail, the bail granted to him can be cancelled by this court. As regards the inherent powers of this Court u/s 482 of the Cr.P.C., it is well settled that where there is an express provision in the Cr.P.C., no recourse can be had to the inherent jurisdiction of this Court u/s 482 of the Cr.P.C. See R.P. Kapur Vs. The State of Punjab, . As already pointed out, sub-section (5) of Section 437 and sub-section (2) of Section 439 of the Cr.P.C. are express provisions made for cancellation of bail in regard to a non bailable offence. As regards the judgment of this Court cited Supra relied upon on behalf of the Department for the exercise of power u/s 482 of the Cr.P.C., the exact question which had been raised in the instant case was not raised in the

said case. In the said case, the facts were that the learned Magistrate had granted bail to the three accused, but as regards the security furnished by them for the two accused only. An application was, therefore, made against the aforesaid order of the learned Magistrate in this Court in which suo motu notice for cancellation of bail granted to all the Accused was issued by this Court. Since this contention is not specifically raised or considered in the said case, no assistance can be derived from the said case.

13. It may then be seen that when the Accused is released on bail even u/s 167(2) of the Cr.P.C., the bail granted to him can be cancelled after the filing of the chargesheet only upon the well-known principles laid down by the Supreme Court in its various judgments. The case of Raghubir Singh and Others Vs. State of Bihar, is a case in point about the cancellation of bail where the bail was granted u/s 167(2) of the Cr.P.C.

14. The Supreme Court has observed in para 22 of the above judgment that an order for release on bail made under the proviso to Section 167(2) is not defeated by lapse of time, the filing of the chargesheet or by remand to custody u/s 167(2) of the Cr.P.C. However, it can be cancelled u/s 437(5) or Section 439(2) of the Cr.P.C. It has then referred to the grounds for cancellation of bail which are basically relating to the abuse of the liberty granted to the Accused by his release on bail and has then observed that when the Accused is granted bail under proviso to Section 167(2) of the Cr.P.C. the prosecution can seek cancellation of his bail on the ground that he has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody for which the Court would expect very strong grounds. It is clear that cancellation of bail depends upon the conduct of the Accused after his release on bail. The application for cancellation of bail of the Accused before his release on bail would thus be premature. The learned Counsel for the Applicant/Accused has brought to my notice another judgment of the Supreme Court in this regard in the case of Bashir and Others Vs. State of Haryana, which is in fact considered in Raghubir Singh's case cited Supra. The recent decision of the Supreme Court in this regard is in the case of Rajnikant Jivanlal and Another Vs. Intelligence Officer, Narcotic Control Bureau, New Delhi, in which it is held that the bail granted u/s 167(2) of the Cr.P.C. is a bail in default and after the chargesheet is filed it is open to the State to move for cancellation of bail on the ground that the Accused is charged with a serious offence. The said case is incidentally also a case under the N.D.P.S. Act and it appears from the facts in the said case that the Application for cancellation of bail was made in the said case after the Accused therein was released on bail.

15. The learned Counsel for the Department has then urged before me that notice was issued to the Accused by Patil J. on 23-7-1990, because, according to him, the grant of bail was technical and the same was liable to be cancelled on the chargesheet being filed. Although the grant of bail is technical in the sense that it is not a bail granted on merits but on default of the State to file the

chargesheet within 90 days as required by the proviso to Section 167(2) of the Cr.P.C., it is clear from the decisions of the Supreme Court cited Supra that a ground for cancellation of bail has to be made out by the State and merely because a chargesheet is filed, the bail granted to the Accused under the proviso to Section 167(2) cannot be cancelled. Further, when the notice was issued, the question of construction of sub-section (2) of Section 439 of the Cr.P.C. which enables the State to apply for cancellation of bail was not before him.

16. In view of the clear and explicit language of Section 439(2) of the Cr.P.C. I am of the view that the application for cancellation of bail filed by the Department, i.e. The Criminal Application No. 1712 of 1990 is premature since no bail is granted as yet to the Applicant under the proviso to Sec. 167(2) and as such he is also not released on bail. Criminal Application No. 1712 of 1990 is thus liable to be dismissed on this short ground.

17. In the view I have taken, Criminal Application No. 1614 of 1990 deserves to be allowed and the Applicant/Accused is entitled to interim bail under the proviso to Section 167(2) of the Cr.P.C. pending the decision of the Division Bench on a reference made to it in Criminal Application No. 1702 of 1989 with Criminal Application No. 2105 of 1989 by Deshpande J. on the question of applicability of Section 167(2) of the Cr.P.C. to the persons accused of offences under the N.D.P.S. Act.

18. In the result, the Criminal Application No. 1712 of 1990 is dismissed as premature. Criminal Application No. 1614 of 1990 is allowed. Interim bail is granted to the Applicant/Accused pending the decision of the Division Bench on a reference made to it in Cri. Application No. 1702 of 1989 with Cr. Application No. 2105 of 1989 by Deshpande J. on the question of applicability of Section 167(2) of the Cr.P.C. Bail is granted to him in the sum of Rs. 25,000/- with two sureties in the like amount on the condition that the passport of the Applicant/Accused shall be detained by the Department. The Applicant/Accused shall attend the office of the Assistant Collector of Customs (Prosecution Cell) New Customs House, Bombay, twice a week on Monday and Thursday, between 9 a.m. to 11 a.m. He shall give address of his residence with the aforesaid authority and without its permission he shall not leave the place of his residence. He shall faithfully attend the Court on each day of hearing. He shall not tamper with the prosecution evidence in any manner. Breach of any of the above conditions can result in cancellation of his bail.

19. The learned Counsel for the Department has, at this stage, requested to stay the operation of the above order for a period of one month to enable him to challenge this order in the Supreme Court. The learned Counsel appearing for the Applicant/Accused has objected to the same. However, an interim stay of operation of the above order is granted for one month from today as prayed.