

(1997) 06 BOM CK 0043

In the Bombay High Court

Case No : Criminal Application No. 949 of 1997

Ghanshyam @ Chotu Waghare

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 17-06-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(8), 70, 71, 73(2), 82
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 22, 27, 29, 36

Citation : (1998) BomCR(Cri) 404 : (1997) 3 MhLj 370

Hon'ble Judges : V.K. Barde, J

Bench : Single Bench

Advocate : C.R. Deshpande, for the Appellant; K.M. Gadhve-Patil, Assistant Public Prosecutor, for the Respondent

Judgement

V.K. Barde, J.—This is an application for bail. The accused- petitioner is arrested in connection with Crime No. 10/95 registered at Police Station, Mohadi Nagar, Dhule, for offences punishable under sections 20, 22, 27 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985.

2. The facts giving rise to this petition are as follows :

On 24-8-1995 at about 12.35 Noon, Police of Mohadinagar Police Station effected raid on a godown at village Wadjai, on information that Ganja was stored in the godown by the present petitioner, Ghanshyam, and one other person. At the time of raid, the present petitioner was not at the place of raid. However, four persons were arrested and 124 bags of Ganja were seized. Police carried out further investigation. During the course of investigation, the present petitioner could not be arrested by police. So, without effecting arrest of the present petitioner, charge sheet was submitted before the Court of Sessions at Dhule and the present petitioner was shown as absconding. The Court of sessions, thereafter, issued non-bailable warrant against the present petitioner. The petitioner could not be arrested and, therefore, a proclamation was also issued. The proclamation

was duly published in daily "Lokmat" in March 1996. Even then, the petitioner could not be arrested by police. Ultimately, the petitioner was arrested on 14-4-1997. It is contended by the petitioner that he himself surrendered before police.

3. After effecting the arrest of the petitioner, instead of producing the petitioner before the Court of Sessions at Dhule, in Special Case No. 226/1995 which was pending against the present petitioner and other accused, Police Sub-Inspector of Mohadinagar Police Station, produced the petitioner before in-charge Judicial Magistrate (F.C), IIInd Court at Dhule, on 15-4-1997, along with remand report. The learned Magistrate remanded the accused-petitioner to police custody till 22-4-1997. It appears that, thereafter repeated remand reports were submitted before the learned Magistrate and the accused was put in magisterial custody as per orders issued by the learned Magistrate, till 15-5-1997, the date on which the impugned order was passed by the Additional Sessions Judge.

4. The petitioner filed Criminal Application No. 154/97 in the Court of Sessions Judge, Dhule, which was placed before the Additional Sessions Judge, Dhule, for hearing. The application was filed on 13-5-1997. The petitioner, therein contended that his detention by the learned Magistrate beyond the period of 15 days was illegal and unauthorised because of the provisions of section 36-A of the Narcotic Drugs and Psychotropic Substances Act, 1985. He also prayed for bail on other grounds.

5. The learned Additional Sessions Judge, after hearing the petitioner and the State, found that the learned Judicial Magistrate (F.C) had remanded the petitioner for a period of more than 15 days after 15-4-1997. It was an order not in conformity with the authority given to the Magistrate u/s 36-A of the Narcotic Drugs & Psychotropic Substances Act, 1985. So, the learned Additional Sessions Judge came to the conclusion that the detention of the petitioner beyond the period of 15 days was unauthorised and illegal and he therefore, directed that the petitioner be released. However, by the same order, the learned Additional Sessions Judge directed the Superintendent, District Jail, Dhule, in whose custody the present petitioner was, not to release the petitioner from custody and that he be produced before the Additional Sessions Judge on 16-5-1997. Being aggrieved by this second leg of the order, the accused has preferred this application and also there is prayer for bail on other grounds.

6. Heard, Mr. C.R. Deshpande, Counsel for the petitioner, and Mr. K.M. Gadhve-Patil, Additional Public Prosecutor, for the respondent-State. Record and proceedings of Special Case No. 226/1995, Criminal Application No. 154/1997 along with the remand reports and orders passed thereon by the Judicial Magistrate (F.C) are produced as per directions issued.

7. The facts brought before the Court clearly indicate that the learned Magistrate had acted beyond his authority while passing the orders regarding remand. It was brought to the notice of the learned Magistrate that the offence had taken

place on 24-8-1995. The petitioner was absconding since then. Charge sheet was submitted with respect to that offence before the Special Judge. Police had asked for Police custody for further investigation and it was being contended on behalf of the petitioner, that while filing the charge sheet before the Special Judge, Police had not sought permission to file supplementary charge sheet u/s 173(8) of the Code of Criminal Procedure, 1973. I am not going into other details of the order passed by the learned Judicial Magistrate (F.C.), on 15-4-1997. But one thing is certain, that on that day, the learned Magistrate was made aware that already charge sheet was filed before the Special Court, and in ordinary course, he ought to have directed that the accused be produced before the Special Court for any further orders. It was not proper on his part to entertain the application for remand and to grant remand without making reference to the Special Judge i.e. Sessions Court, Dhule.

8. Furthermore, the learned Magistrate, without applying his mind to the provisions of section 36-A of the Narcotic Drugs & Psychotropic Substances Act, 1985, on subsequent remand reports, remanded the petitioner to magisterial custody and failed to make a report to the Special Court as contemplated u/s 36-A of the Narcotic Drugs and Psychotropic Substances Act, 1985.

9. The learned Additional Sessions Judge has rightly held that the detention of the petitioner beyond the period of 15 days directed by the learned Magistrate was unauthorised detention and he, therefore, rightly directed that the petitioner be released from the custody which was unauthorised or illegal.

10. The next question is whether the learned Additional Sessions Judge had any authority to direct the Superintendent of Jail to detain the accused in Jail and to produce him before the Additional Sessions Judge on the next day i.e. on 16-5-1997.

11. The learned Counsel for the petitioner has argued that once it was held that the custody of the accused was unauthorised and once the release was directed, then accused ought to have been released from the custody forthwith. The learned Additional Sessions Judge had no jurisdiction to direct for further detention, even for a moment. This order passed by the learned Additional Sessions Judge is without jurisdiction and, therefore, instead of granting bail in this matter, the accused-petitioner be released because he is illegally detained in custody.

12. The learned Additional Public Prosecutor has argued that the charge sheet was submitted before the Special Court. The name of the accused was shown in the charge sheet as absconding accused. The learned Additional Sessions Judge, at that time, had issued non-bailable warrant against the accused. So, cognizance as against the present accused was already taken by the learned Additional Sessions Judge for the offences punishable under the Narcotic Drugs & Psychotropic Substances Act, 1985, and non-bailable warrant was directed. Not only that, as presence of the accused could not be secured order regarding

issuance of the proclamation as per provisions of section 82 of the Code of Criminal Procedure, 1973, was passed by the learned Additional Sessions Judge and thereafter, the proclamation was duly published. So, the petitioner is not only an absconding accused but also a proclaimed accused and, therefore, it was within jurisdiction of the learned Additional Sessions Judge to detain him further in the custody. The order is not illegal or without jurisdiction.

13. On going through the record and proceedings of Special Case No. 226/1995, it is seen that the learned Additional Sessions Judge had directed to issue non-bailable warrant on receipt of the charge sheet against the present petitioner and had also passed order for issuance of proclamation and the proclamation was actually published in the daily newspaper. So, the question arises, whether in these circumstances, the learned Additional Sessions Judge could have directed the detention.

14. In this respect, the provisions of section 73 of the Code of Criminal Procedure, 1973, can be taken into consideration. This section reads as follows :

"73. (1) The Chief Judicial Magistrate or a Magistrate of the First Class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non-bailable offence and in evading arrest.

(2) Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in , or enters on, any land or other property under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken u/s 71."

(Emphasis to sub-section (2), supplied)

15. Here, it has to be noted that section 36 of the Narcotic Drugs & Psychotropic Substances Act, 1985, provides for establishment of Special Court for the speedy trials of the offences under the said Act. Sections 36-A, 36-D deal with the procedural aspect and section 36-D of the said Act provide that until a Special Court is constituted u/s 36, notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offences be tried by the Court of Sessions. So, the Court of Sessions, till a Special Court is established, works as Special Court. Now, it is established position under the law., that when such Special Court is functioning to try the offences under the Special Act, it becomes a composite Court having powers of the Judicial Magistrate and also the powers of Sessions Court to deal with the matters coming under the special Act. The Narcotic Drugs & Psychotropic Substances Act, 1985, makes it clear that it is not necessary that the case be committed to the Court of Sessions for trial. This view is expressed by this Court, in the matter between Suryakant Ramdas More and others Vs.

State of Maharashtra, (Xerox copy of the judgment is made available by the learned Counsel for the petitioner). I fully agree with the view expressed in the said judgment and hold that the Court of Sessions which is working as Special Court, has all the powers with respect to the trial of the offences under the Narcotic Drugs & Psychotropic Substances Act, 1985.

16. In such circumstances, the powers which are vested u/s 73 of the Code of Criminal Procedure, 1973, can be exercised by the Court of Sessions (Special Court) functioning under the provisions of the Narcotic Drugs & Psychotropic Substances Act, 1985. It cannot be said that only the Chief Judicial Magistrate or Judicial Magistrate (First Class) and no other Court having power to try the offence can exercise the powers u/s 73 of the Code of Criminal Procedure, 1973. The Additional Sessions Judge who was acting as Special Court and before whom the special case was pending, had every authority to issue warrant u/s 73 of the Code of Criminal Procedure, 1973 and in such circumstances, the order passed by the learned Additional Sessions Judge is fully within his powers.

17. The learned Counsel (or the petitioner has argued that the Additional Sessions Judge, in that case, ought to have issued a warrant in the prescribed form. But no such warrant was issued by the learned Additional Sessions Judge. Merely copy of the order passed by the Additional Sessions Judge was communicated to the Superintendent of Jail and, therefore, it was not compliance of section 73 of the Code of Criminal Procedure, 1973.

18. No doubt, section 70 of the Code of Criminal Procedure, 1973, provides that every warrant of arrest issued by a Court under this Code shall be in writing, signed by the Presiding Officer of such Court and shall bear the seal of the Court and the Code of Criminal Procedure has also provided the form of the warrant regarding arrest of the accused. That is Form No. 2 in Second Schedule. However, the provisions u/s 70 and the form prescribed under Schedule 2 cannot be considered as mandatory provisions. That is to say, if the order is not communicated in the prescribed form, it will be treated as invalid or illegal order. In ordinary course, the form as prescribed under Second Schedule of the Code of Criminal Procedure, 1973, has to be used while issuing the warrant. But merely because the form is not used, but the order passed by the Court is properly communicated to the person concerned with signature and seal of the Court Officer then that order will not be illegal to say that obeying of that order will be unauthorised detention of the person.

19. The record shows that on 15-5-1997 itself, operative order passed by the learned Additional Sessions Judge was communicated to the Superintendent of District Prison, Dhule, in writing. The order was bearing signature of the officer of the Court and also seal of the Court. So, otherwise there was proper communication regarding the order passed by the Court of Sessions.

20. Section 73 of the Code of Criminal Procedure, 1973, gives authority to the Court to issue warrant of arrest to any person and the person who has received

the warrant of arrest, to acknowledge it and has to execute it. Here, the Superintendent of Jail received the order from the Court and he was bound to execute it. The present petitioner was in jail when the Superintendent of Jail received order from the Court. Sub-section (2) of section 73 of the Code of Criminal Procedure, 1973, makes it clear that when the person to be arrested, "is in, or enters on, any land or other property under the charge of the person" who is directed to effect execution of the arrest warrant, then he must execute the arrest warrant. Here, the present petitioner-accused was in jail which was the property under charge of the Superintendent of Jail and he, therefore, was bound to detain the accused in the jail as per directions issued by the Court of Sessions. If all these things are taken into consideration, it cannot be said that the detention of the accused, after passing the order to release him because his earlier detention by the learned Magistrate was unauthorised, can be called illegal or unauthorised. The learned Additional Sessions Judge has exercised his power as contemplated u/s 73 of the Code of Criminal Procedure, 1973, and the Superintendent of Jail rightly detained the accused-petitioner. It is admitted fact at the Bar, that the present petitioner was produced before the Additional Sessions Judge on 16-5-1997, and thereafter, he was further remanded to custody by the learned Additional Sessions Judge. So, the detention which is in force after passing of the order on 15-5-1997, cannot be illegal or unauthorised. So, to this extent, the application of the petitioner, that he be released on the ground that this detention is illegal, cannot be accepted.

21. Now, the question arises regarding whether the accused - petitioner can be released on bail.

22. The learned Counsel for the accused- petitioner has argued that there is absolutely no evidence against the accused. He was not present when the raid was effected. The godown which was searched and from where Ganja was seized was not owned and occupied by the present petitioner. There is only a statement of the co-accused before the police, that some portion of Ganja was owned by the present petitioner. But that cannot be the evidence to hold that there is prima facie case against the accused. It is also contended that this is a case for offence regarding possession and transportation of Ganja. The maximum punishment prescribes u/s 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985, may extend upto five years. There means, sentence of five years is not prescribed and, therefore, provisions of clause (b) of sub-section (1) of section 37 of the said Act will not be applicable. So, the accused-petitioner be released on bail.

23. The learned Additional Public Prosecutor has argued that huge quantity of Ganja was recovered at the time of raid. There was information that the present accused had kept Ganja in that godown and, therefore, the raid was effected. The accused was absconding for nearly two years since the date of raid. If all these circumstances are taken into consideration, it will not be proper to release the accused on bail. If the accused is released on bail he is likely to abscond and

there will be further difficulties in the proceedings. So, application for bail be also rejected.

24. I find force in the contention of the learned Counsel for the petitioner, that there is no prima facie direct evidence indicating that the accused had kept in possession Ganja or accused had transported Ganja to the place where it was stored. There are statements made by the co-accused and on that basis, the accused is being prosecuted. The prosecution may have other evidence and that can be produced at the time of trial. But so far as present circumstances are considered, there is no such evidence.

25. The accused was absconding since the date of raid. That is one of the circumstances that may give permission to the learned trial Judge to draw adverse conclusion against the accused. But that circumstance, by itself, will not be strong in the present case because no other evidence is collected against the present petitioner by police. I therefore, hold that the accused can be released on bail. But some strict conditions will have to be imposed.

26. In the result, Criminal Application is allowed. The accused-petitioner be released on bail, during the pendency of Special Case No. 226/95 in the Court of Sessions at Dhule, arising out of Crime No. 10/95 registered at Mohadinagar Police Station, Dhule, for offence punishable under sections 20, 22, 27 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985, on he furnishing P.R. Bond for Rs. 10,000/- (Rupees ten thousand) with one solvent surety for the like amount, or two solvent sureties of Rs. 5,000/- each. The accused-petitioner is directed not to leave Dhule town till the trial is over, without prior permission from the Court of Sessions at Dhule. The accused-petitioner is also directed to remain present in the Court of sessions at Dhule, as and when Special Case No. 226/1995 is fixed for hearing. The accused-petitioner to note that this condition must be followed strictly. Any non-compliance of the conditions would entail cancellation of the bail.

27. Criminal Application, thus, disposed of.

28. Record and proceedings be returned forthwith.

29. Criminal application allowed.