

**(1984) 07 RAJ CK 0007**

**In the Rajasthan High Court**

**Case No : Criminal Revision Petition No. 279/78**

Jethmal

APPELLANT

Vs

Khusalsingh

RESPONDENT

**Date of Decision : 09-07-1984**

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 109, 11, 110, 197, 200  
Penal Code, 1860 (IPC) — Section 342, 452

**Citation : (1984) RLW 545 : (1984) WLN 232**

**Hon'ble Judges : Shyam Sunder Byas, J**

**Bench : Single Bench**

## Judgement

S.S. Byas, J.—By this revision, the complainant Jethmal challenges the legality of the learned Munsif & Judicial Magistrate, Sojat dated August 14, 1978, by which he dismissed his complaint on the ground that the accused could not be prosecuted for want of sanction of the State Government u/s 197, Cr. PC There is no pronouncement of this Court on the point involved.

2. Briefly stated, the relevant facts giving rise to this revision petition are that the complainant filed a complaint against the accused Khusalaingh the then Station House Officer, Police Station, Sojat in the Court of the Judicial Magistrate on December 23, 1977. The averments disclosed in the complaint were that a case u/s 452, I.P.C. on F.I.R. No, 135/77 was registered against him at Police Station, Sojat by the accused. The accused was bent upon to arrest and handcuffe him. The complainant moved the Sessions Judge Pali u/s 438, Cr. PC for anticipatory bail and anticipatory bail was granted to him on December 3, 1977. The accused became highly annoyed when he failed in his attempt to arrest the complainant in the aforesaid case. In order to execute his ill-design to arrest the complainant, the accused registered a case u/s 110, Cr. PC against him after when the order of anticipatory bail was passed by the learned Sessions Judge. At about 5.00 A.M. on December 22, 1977, the complainant was called at Police Out Pot, Chandawal by the accused. The accused asked him to furnish bail-bonds in FIR No. 135/1977 as per directions of the Sessions Judge. The

complainant submitted the bail-bonds. The accused thereafter told the complainant that though he was released on anticipatory bail in the aforesaid case, he was being arrested in another case u/s 110, Cr. PC. The complainant told the accused that he be also released on bail in the proceeding u/s 110, Cr. PC as there was a provision for bail in that proceedings. The accused did not relent and refused to release him on bail. The complainant was brought from Chandawal to Police Station Sojat and was lodged there in the lock-up. At about 11.00 P.M. the complainant's Advocate Shri Rameshwer Lal along with some other persons approached the accused and requested him to release the complainant as there was a provision of bail in a proceeding u/s 11(sic), Cr. PC. The accused even then did not relent and refused to release the complainant on bail. Next day, the complainant was produced before the Sub-Divisional Magistrate, Sojat who ultimately enlarged him on bail. It was averred that the accused unlawfully arrested and detained the complainant and thus committed on offence u/s 342, IPC. The learned Magistrate after holding an enquiry u/s 200, Cr. PC summoned the accused to face trial u/s 342 IPC. The accused appeared before the learned Magistrate and submitted an application that he could not be prosecuted for want of sanction u/s 197, Cr. PC of the State Government. It was stated by him that he arrested the complainant while discharging his duties of a public servant in the maintenance of public order. The State Government by a notification has extended provisions o f Section 197(2) Code of Criminal Procedure to Police Officials of all rank charged with the maintenance of public order. Since no sanction of the State Government was obtained for his prosecution, no cognizance of the offence could be taken against him and the criminal proceedings should be dropped. The objection raised by the accused found favour with the learned Magistrate. Accepting the objection, the learned Magistrate dropped the proceedings in the criminal case. Aggrieved against the said order of the learned Magistrate, the complainant has come up in revision.

3. I have heard the learned Counsel for the parties and the learned Public Prosecutor.

4. The complainant was arrested in a proceeding u/s 110 of the Code of Criminal Procedure. After his arrest, he was not released on bail. It would be, therefore, proper and useful to briefly notice the provisions of law having a direct bearing and relevancy on the issues involved.

5. Section 41 of the Code of Criminal Procedure gives t(sic)e police the power to arrest persons without warrant. Sub-section (2) of this Section reads as under:

(2) any Officer Incharge of Police Station may in like manner arrest or cause to be arrested any person belonging to one more of the categories of persons specified in Section 109 or Section 110 Cr P.C.

6. This Sub-section is a powerful weapon in the hands of a Police Officer. The use of word "may" shows that it is discretionary. Though the powers are discretionary, in nature, the arrest is not a matter of carprice, depending on the

whim or sweet will of the Police Officer. Since the arrest Under Sub-section (2) is an encroachment on the liberty of the subject, the powers should be exercised with care and caution. It follows from the word "may" that the power of arrest should be exercised by the Police Officer with circumspection and due diligence.

7. A proceeding u/s 110, Cr. PC is preventive in nature and not in respect of the commission of an offence. Though the powers of arrest are there in respect of a person against whom a proceeding u/s 110, Cr. PC is contemplated or pending, the legislature was anxious to see that this power u/s 41(2) granted to a Police Officer is not misused. The legislature, therefore, in their wisdom, inserted Section 50 in the Code of Criminal Procedure. Section 50 is a new Section which had no place in the old Code of Criminal Procedure, 1898. It reads as under:

50. Person arrested to be informed of grounds of arrest and of right to bail:

(1) Every Police Officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for arrest.

(2) Where a Police Officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

8. We are here concerned with the provisions of Sub-section (2) of the Code of Criminal Procedure. It lays down in explicit terms that every person arrested without a warrant should be informed of grounds of his arrest and if is not arrested for the commission of a non-bailable offence, he should be informed of his right to be released on bail. If he furnishes the bail bonds as required by the Police Officer, the subject is entitled to be released on bail. The use of the word "shall" in Sub-section (2) makes the provisions mandatory. It was the anxiety of the legislature that the powers granted to a Police Officer Under Sub-section (2) of Section 41 be not misused that mandatory provision for bail was made in Sub-section (2) of Section 50 is a corollary of the right of every citizen to be free from arrest guaranteed by these articles. The personal liberty of a citizen is inviolable and if it is to be curtailed or invaded, such an invasion and curtailment must be strictly in accordance with the provisions of law. The provisions of Sub-section (2) of Section 50, Cr. P.C. contains a valuable right and a non-performance of its mandatory provisions amounts to violation of the procedure established by law. Thus, where a person is arrested and his arrest is not in connection with the commission of a non-bailable offence, he must be released on bail by the Police Officer if the arrested person so wishes and arranges for sureties in his behalf.

9. The provisions of Section 50 get further from the provisions of Section 436, Cr. P.C which relates to bail. Sub-section (1) of Section 436, Cr. P.C again lays down in explicit terms that when any person other than a person accused of non-bailable offence is arrested or detained without warrant by an officer incharge of a Police Station and if he is prepared at any time while in custody of such officer

to give bail, such person shall be released on bail. These provisions enshrined in Sub-section (1) of Section 436, Cr. P. C. are mandatory and no exception can be taken to them. The first proviso to this Sub-section further lays down that a person not accused of a non-bailable offence, if arrested, may be released even on his executing a personal bond without sureties. Here again, the emphasis is on the liberty of the citizen that in petty matters, such a person against whom the allegation of the commission of a non-bailable offence is not there, can be released on his personal bond. The provisions of Sub-section (1) applies with full force to a person arrested Under Sub-section (2) of Section 41 is entitled to be released on bail. The intention of the law is that in such a case, namely where a person is arrested u/s 41(2), he should be set at liberty if he is able to arrange for sureties. In fit and proper case, he can be also released on his personal bond.

10. To sum up, the position boils down to this that when a citizen is arrested u/s 41(2), Cr. P.C. by the Police Officer, he is entitled to be released on bail as soon as his arrest is made provided he arranges the sureties as demanded by the Police Officer. In a fit and proper case, if the circumstances so demand, such arrested person may also be released on his personal bond.

11. Let us now turn to the instant case in hand. As per allegations of the complainant, anticipatory bail was granted to him in police case No. (sic)5/77 pending at Police Station, Sojat, of which the accused was the Officer Incharge. He was called at Police Out Post, Chandwal at about 5.00 P.M. on December 22, 1977 by the accused and was asked to furnish bail bonds in accordance with the order passed by learned Sessions Judge for anticipatory bail. The accused accepted the surety executed by one Mohandas in that case (Case No. 135/77). Thereafter, the complainant was arrested then and there u/s 41(2), Cr. PC by the accused as he was going to initiate a proceeding u/s 110, Cr. PC against him (complainant). The complainant alleged that this arrest was motivated and (sic)malicious because the accused got annoyed as anticipatory bail was granted to him by the learned Sessions Judge. It was also alleged in the complaint that the complainant requested the accused to release him on bail and he offered the same Mohandas and one Kaludas as his sureties but the accused refused to release him on bail. The pertinent question, therefore, arises is whether this action of the accused was committed by him while discharging his duties with the maintenance of public order.

12. Section 197, Cr. P. C. in terms does not apply to the accused who holds the substantive rank of a Sub-Inspector of Police. A Sub-Inspector of Police is no doubt a public servant. But he is not a public servant not removable from his office save by or with the sanction of the State Government. As such, the provisions of Sub-section (1) offers him no shelter. Sub-section (3) of Section 197, Cr. PC lays down that the State Government may by notification directed that the provisions of Sub-section (2) shall apply to such classes or categories of the members of the forces charged with the maintenance of public order as may be specified therein. If the State Government so desires, may issue a notification

giving the protective umbrella to the members of tie forces so that the members the forces may not be prosecuted without the sanction of the State Government.

13. The State Government, vide notification dated July 31, 1974 (S.O. 89) made, the following provisions:

S.O. 89--In exercise of the powers conferred upon it Under Sub-section (3) of Section 197 of the Code of Criminal Procedure 1973, the State Government hereby direct that the provisions of Sub-section (2) of the said Section shall apply to police officials, of all ranks, charged with the maintenance of public order, where-ever they may be serving.

14. The learned Magistrate granted shelter to the accused taking the view that the complainant was arrested by the accused while the latter was charged with the maintenance of public order.

15. The pertinent question which arises for decision in whether the refusal of bail to the complainant by the accused in the circumstances alluded to above was in connection with the maintenance of public order. Of course, the accused had the powers to arrest the complainant u/s 41(2). Cr. PC. But the difficulty is whether the arrest was made for the maintenance of the public order. The complainant was called in the afternoon at the Police Out Post, C(sic)andiawal by the accused and was released on bail as per the directions of the learned Sessions Judge granting anticipatory bail to the complainant. As soon as the complainant furnished the bail bonds for anticipatory bail, the accused arrested him then and there at the Police Out Post with no loss of time. In my view, the accused while re-arresting the complainant then and there u/s 41(2), Cr. PC was not acting for the maintenance of public order. Where was the question of maintaining the public order that the Police Out Post where the complainant was at the mercy of the accused? The view taken by the learned Magistrate cannot be, therefore, maintained. The learned Magistrate made a futile exercise while dealing with the question of public order, law and order and security of the State. These were not the questions involved in the instant case, looking to the commissions and omissions of the accused.

16. Assuming now that the accused acted for the maintenance of public order in arresting the complainant, the questions arising for consideration are whether he was justified in refusing the bail and whether the refusal of bail by him was the act charged with the maintenance of public order. As held above, a citizen is entitled to be released on bail when he is arrested u/s 41(2), Cr. PC in connection with a proceeding u/s 110. The complainant was released on anticipatory bail by the accused as per directions of the learned Sessions Judge on the complainants furnishing the sureties of Mohandas. The complainant was thereafter arrested then and there at the Police Out Post without any loss of time. His sureties were present where at the Police Out Post. He had a right to be released on bail & yet the accused did not release him on bail even though the complainant was prepared to offer bail bonds of the same Mohandas. In view of these

circumstances, it cannot be held by any stretch of imagination that the act of the accused refusing to release the complainant on bail was committed by him while charged with the maintenance of public order. The refusal of bail to the complainant when he had a right to be released on bail was not the act of the accused related with the maintenance of public order. As such the protection guaranteed to the Police official by the aforesaid notification of the State Government is not available to the accused. In other words, the act of the accused in not releasing the complainant on bail has no nexus with the maintenance of public order.

17. For the reasons stated above, the impugned order of the learned Magistrate is bad in law and must be quashed. The order of the learned Munsif and Judicial Magistrate. Sojat dated August 14, 1978 is set aside. The case is sent back to him to proceed with trial of the case in accordance with law.