

(1991) 08 BOM CK 0073

In the Bombay High Court

Case No : Criminal Application No. 1624 of 1991

Lawarance D"souza

APPELLANT

Vs

State of Maharashtra and another

RESPONDENT

Date of Decision : 17-08-1991

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 100, 248
Evidence Act, 1872 — Section 114
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 29, 35, 37, 41

Citation : (1992) CriLJ 399

Hon'ble Judges : M.G. Chaudhari, J

Bench : Single Bench

Advocate : P.R. Vakil, H.H. Keswani and H.K. Prem, for the Appellant; R.F. Lambay, Assistant Public Prosecutor, for the Respondent

Judgement

1. The Petitioner was arrested on 3-5-1990 and is an under-trial prisoner in N.D.P.S. Special Case No. 889 of 1990, for alleged offences u/S. 8(c) read with Ss. 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "N.D.P.S. Act") for having been found in possession of 5 K. Gms. of Brown Sugar on 3-5-1990 during a raid and search carried out by the Officers of the Narcotic Cell on information received by them. Prosecution relies upon the Panchanama of seizure heavily. According to the Petitioner he has been falsely implicated and nothing was found from his possession.

2. The Petitioner, inter alia, complains violation of S. 50 of the N.D.P.S. Act. That Section reads :

"50. Conditions under which search shall be conducted. -

(1) When any officer duly authorised u/S. 42 is about to search any person under the provisions of S. 41, S. 42 or S. 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of

the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Office or the Magistrate referred to in sub-sec. (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought, shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female." 3. It is argued by Mr. Vakil, learned Counsel for the Petitioner, that the Panchanama is rendered unreliable for non-compliance with the provisions of S. 50 and other reasons stated in the Petition and apart from statements of Police Officers, there is no other independent evidence to show involvement of the Petitioner and therefore he is entitled to be released on bail.

4. For the purpose of attacking the reliability of the Panchanama, following infirmities are pointed out in respect thereof :

i) Panchanama was not drawn up at the spot where the Petitioner was apprehended;

ii) That both the Panchas were under the thumb of the Narcotic Cell having been previously used by them in other cases and were carried all the way from Andheri to Mahim and they have obliged the Police by signing a ready-made Panchanama which is also type-written;

iii) that provisions of S. 50 of the N.D.P.S. Act have not been followed;

iv) that the First Information Report has been recorded after the Panchanama was drawn, and,

v) Copy of Panchanama was not given to the Petitioner (accused) on the spot and his signature was not taken.

5. On behalf of the Respondents an affidavit has been filed by P.S.I. Iugade. It is claimed therein that the Panchanama was drawn on the spot. It is also stated that P. I. Puntambekar himself was a Gazetted Officer and was present at the spot in whose presence search was taken and therefore the provisions of S. 50 have been complied with. It is also contended that the Panchanama was handwritten at the spot and not typed and copy was supplied to the Petitioner (accused) on the spot. It is denied that the Panchas are regular and professional Panchas of the Narcotic Cell and it is asserted that they are respectable and independent persons of the society. It is also contended that the questions raised by the Petitioner are matters to be considered at the stage of trial and not at the stage of granting bail. Thus, the application is opposed and resisted.

6. Mr. Vakil submitted that it is not correct to contend, as is sought to be done in the affidavit of the State, that the infirmities pointed out by the Petitioner in regard to the material relied upon by the prosecution and the violation of the

provisions of S. 50 could be considered only at the stage of trial and cannot be considered at the stage of bail. According to the learned Counsel, the true test is to consider - "Is sufficient material today ?" - He submitted that it is by now fairly settled that bail is the rule and custody is exception. The Petitioner (accused) is not meant to be penalised by refusing bail. He submits that the infirmities pointed out by the Petitioner in regard to the investigation go to the root of the matter and ought to be considered even at the stage of bail as these are signs of gross negligence, mischief or indifference in carrying out the investigation, and consequences thereof are serious to the petitioner whose liberty has been brought into peril. The learned Counsel argues that when S. 37 speaks of reasonable belief and satisfaction how that would be possible to be reached by the Court even for the purpose of considering question of bail while the entire process starts with suspicion that there is reason for non-compliance with the provisions of law. He pointedly referred to the affidavit filed by the State and argued that there is an attempt to justify the non-compliance with the provisions of the law, in particular, with S. 50 and not an attempt to offer any reasonable explanation for not being able to comply with the requirements. No case has been made out that because of exigencies compliance was not possible. He submits that the tenor of the affidavit is to oppose the bail, rather on moral grounds which is not a fair approach on the part of the State.

7. Then, analysing the provisions of S. 50 of the N.D.P.S. Act, the learned counsel argues that it affords an in-built safeguard to the Petitioner. It casts a duty on the Gazetted Officer or Magistrate to be satisfied that nothing is planted and search is necessary to be taken. Where he is not so satisfied, he can discharge the accused. Thus, he has not to act mechanically. A member of the raiding party, even if he himself may be a Gazetted Officer or a superior officer of the Department, cannot himself perform the dual tasks of being a party to the search and arriving at a satisfaction that search is warranted or not as required by S. 50. According to the learned Counsel, it is the duty of the Officer intending to search a person on suspicion that he has a right to be taken to a Gazetted Officer or a Magistrate if he so requires and in the instant case not even the fact that the Petitioner did so require or not has been recorded in the Panchnama.

8. Thus, according to the learned Counsel, the violation of the law complained of by the accused is a vital consideration to be taken into account even at the stage of bail. He submitted that harsher the law, stricter vigilance by the Court is required. Hence, particularly as the Petitioner has no opportunity to cross-examine the witnesses at this stage, it becomes still necessary to examine the question of violation of S. 50 and other Sections of the Act, no matter, the provisions of Ss. 41 to 58 of the N.D.P.S. Act are read as mandatory or directory and even if in the ultimate analysis at the stage of trial the Petitioner may be required to establish prejudice by reason of violation of any of the above Sections. The learned Counsel, therefore, urges upon me to critically consider the material relied upon by the prosecution even at this stage of bail in order to be satisfied whether bail should be granted or denied. Learned counsel relies upon

the decision in *Mari Appa and Vs. State of M.P. and etc.*, of Madhya Pradesh High Court.

9. Ms. Tehilramani, learned Additional Public Prosecutor, who argued for Mr. Lambay of the Respondent, submitted that the State is strongly opposed to the granting of bail to the Petitioner having regard to the serious nature of the crime and urged that having regard to the limitations contained in S. 37 of the N.D.P.S. Act, inasmuch as, the evidence Prima facie discloses the commission of the crime, bail ought to be refused. As far as alleged violation of S. 50 and other infirmities pointed out by the Petitioner, the learned Additional Public Prosecutor submitted that it is now firmly established by several decisions of this Court that the provisions contained in Ss. 41 to 58, though mandatory in character, any violation thereof does not ipso facto vitiate the conviction unless any prejudice thereby caused is established by the accused. Likewise, it is also established that merely because Panchas used are from different locality or were used in some earlier cases does not by itself render their evidence unreliable or untrustworthy. Learned Additional Public Prosecutor also submitted that the evidence of officers of the Department also ought not to be disbelieved simply on the ground that they are Police Officers. She argues in this connection that ordinarily presumption of honesty should arise about their actions u/S. 114(e) of the Evidence Act. Thus, according to her, all these aspects can only be gone into at the stage of trial and at this prima facie stage they cannot be gone into.

10. The learned Additional Public Prosecutor submitted that the Panchnama shows that a senior officer of the Department who was also a Gazetted Officer was present in the raiding party and in his presence the search was taken; hence, there is no substance in the ground of non-compliance with S. 50, and in any event at this prima facie stage that cannot be considered because unless the Petitioner (accused) would be able to establish prejudice due to the same at the trial, that would not render that evidence bad. Similarly, according to the learned Additional Public Prosecutor there was nothing objectionable in taking Panchas from the place where the Panchnama was commenced and which was a continuing Panchnama. She maintained that both the Panchas were respectable persons from society and simply because they had acted as Panchas in some earlier cases, that itself does not affect their version of what they saw and did as recited in the Panchanama.

11. The learned Additional Public Prosecutor relied on the following decisions :

(a) *Shakal v. Union of India* (1991) 1 Bom CR 270. (S. Manohar & Kamat, JJ.)

(b) *Abdul Sattar v. State* 1989 Cri LJ 430 (Couto and Kamat, JJ.)

(c) Criminal Appeal No. 752 of 1987 - *Wilfred Joseph Dawood Lema Vs. State of Maharashtra*,

(d) *Hemant Vyankatesh Agwan Vs. State of Maharashtra*, ; (Deshpande and Deo JJ.)

(e) 1990 M LJ 785; (Deshmukh and Shah JJ.) (Sic)

(f) Criminal Appeal No. 215 of 1988. (Kantharia & Cazi, JJ.)

(g) State of Kerala Vs. M.M. Mathew and Another,

(h) Deepak v. State 1989 M LJ 276 : 1989 Cri LJ 118 (Kantharia and Kamat, JJ.)

(i) Khandu Sonu Dhobi and Another Vs. State of Maharashtra, ;

Some other decisions relevant to the points under discussion are :

(a) (1988) 2 Crimes, 812, (Bombay)

(b) Rattan Lal Vs. State,

1991 Cri LJ 1537, (A. A. Desai, J.)

(d) Usman Haidarkhan Shaikh Vs. The State of Maharashtra, - (Tipnis and Shah, JJ.)

(e) Usman Haidarkhan Shaikh Vs. The State of Maharashtra, .

The position that emerges from a survey of these decisions is that in so far as Bombay High Court is concerned, the view taken is that although the provisions of Ss. 41 to 58 may be read to be mandatory, the violation thereof where shown does not ipso facto vitiate the conviction of the accused unless prejudice is established by the accused. It also emerges that the question of reliability of the evidence of the Panchas has also to be decided on the touchstone of prejudice to be established by the accused apart from its inherent trustworthiness. However, the question whether the violation of the provisions of Ss. 41 to 58 of the Act and/or of S. 100(4) of the Criminal Procedure Code has not been decided in the context of bail applications. In my opinion, different test will have to be applied at the stage of bail for two important reasons. Firstly, at that stage, the accused has no opportunity to cross-examine the witnesses or to establish prejudice which he can hope only to do at the stage of trial.

12. Secondly, the provisions would be applicable right from the inception of the investigation. It would be fallacious and pernicious to leave the question of their compliance to be looked into only at the stage of trial. Such a situation is fraught with the danger of the prosecution agency ignoring altogether the compliance of the provisions which contain in-built safeguards to the accused, with impunity and with ulterior purpose in a given case. That would bring into peril the liberty of the citizen guaranteed under Art. 21 of the Constitution. It would enable the officers to exercise their powers and indeed, very vast powers are vested in them under the Act, in an untrammelled and arbitrary manner. It would lead to leaving the doors wide open for mischief. The accused therefore should be entitled to rely upon the infirmities with all its rigour even at the stage of bail. The consequences of a person being trapped in a Narcotic Case are indeed serious and grave. There are stringent limitations on grant of bail u/S. 37 of the Act. Once a person is denied bail, he has to languish in jail for several years as

experience shows that trials do not take place at least for couple of years. It would be cruel to tell a person that you may have been arrested because officers of the Cell say that you have committed the offence, and no matter we do not bother to comply with the provisions of law, you may languish in jail for several years and establish prejudice at the trial and may be, you may then be found to have been innocent. Courts must therefore be vigilant to protect the rights of the accused. It is pertinent to note that even though the object of the Act is to punish the Narcotic offences severely and prevent their recurrence the Act itself provides for several internal checks. There can be no quarrel that an offender under the Act must be apprehended, and severely punished, provided however, that he is found guilty. That possibility has to be found to exist at the stage of bail on prima facie consideration of the matter and only after reaching satisfaction that he is reasonably believed to be guilty. The burden u/Ss. 54 and 35 of the N.D.P.S. Act would shift upon the accused only after the prosecution discloses, prima facie, that he is guilty. For that purpose, the compliance with procedural requirements must be insisted upon and must be shown, at least, prima facie, at the stage of bail. A rider to this however may be added, namely, there may be independent material collected which may with reasonable explanation as to why any particular requirement in a given case could not have been followed and would not affect the weight of that other independent material, in which case, the material may be considered in its totality. In this connection, I find myself in complete agreement with the view taken by the Madhya Pradesh High Court in Mari Appa and Vs. State of M.P. and etc., . That is a decision directly on the point of bail. The Court has examined the provisions of Ss. 42 and 50 as also of S. 37 and has held thus (Head note) :

"If the procedure laid down under the Act is not followed, it would not be proper for the Court to refuse bail; particularly when the procedural safeguards violated have a material bearing on trial of the case. Therefore in the instant case non-compliance with the provisions of Ss. 42 and 50 entitled the accused to be released on bail.

In view of the presumptions, not only as regards culpable mental state of the accused but also as regards certain documents seized from custody and control from any person any possession of illicit articles made punishable under Chapter IV of the Act coupled with the statements of the accused being made relevant u/ S. 53(A), of the Act, it is all the more incumbent and desirable on the part of the prosecution to establish that the procedural safeguards provided under the Act have been scrupulously followed by the officers concerned and the Court will be perfectly right and justified in considering the compliance of such safeguards while dealing with bail petitions as some of these safeguards have a material bearing on the result of the prosecution and will help in forming the necessary belief in tentatively making up of mind whether the accused is not guilty of the offence charged.

The Court while considering an application for bail with reference to S. 37 of the

Act is not called upon to record a finding of not guilty. S. 37 of the Act, is not to be equated with S. 248, Cr.P.C. which demands acquittal on finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and record its satisfaction about the existence of such grounds, i.e. not to say that the Court has to consider the matter as if, it is pronouncing a judgment of acquittal recording a finding of not guilty. One is question of "belief" u/S. 37 of the Act and the other is question of "finding" u/S. 248, Cr.P.C. and they should confuse any Court.

No doubt the Court is expected to keep the object of the Act before it while dealing with bail petition u/S. 37 of the Act; but the object of the Act, cannot be allowed to defeat the basic rights available even to an accused under the Art. 21 of the Constitution. No Court would be justified in ignoring the procedural safeguards, as provided in the Act, having a vital bearing on the constitutional rights.

If the accused applicant is to be released on bail, the Court has to record its satisfaction that there are reasonable grounds to believe that the accused is not guilty of the offence charged. The Public Prosecutor has a vital role to play in the whole process of reaching the required satisfaction by the Court. He can, by placing and pointing to the overwhelming material collected against the accused effectively and meaningfully, oppose the application for bail by showing that no such reasonable grounds exist for believing that the applicant is not guilty of the offence charged.

The expression "reasonable grounds" as used in S. 37 of the Act, means something more than prima facie grounds. It connotes substantial probable cause for believing that the accused is not guilty, of some offence charged and this reasonable belief contemplated by S. 37(1)(B)(II) in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged."

13. For my own reasons indicated above, which find support from the aforesaid ruling, while I am inclined to follow as, with respect, it does not come in conflict with the ratio of any of the decisions of this Court referred to above because these do not relate to the stage of bail, I am inclined to follow the test laid down in the above decision thus :

"The material placed before the Court must be judicially considered for reaching the required satisfaction and in doing so, such material which ex-facie cannot be legally admitted in evidence, must as of necessity, be excluded from consideration. It is here that the procedural safeguards as provided under the law come into play."

14. Turning now to the facts in the instant case the material that is available at this stage consists of :

- 1) Panchnamas of raid and seizure;
- 2) First Information Report;
- 3) Statements of Panchas and Police witnesses;

The Petitioner has made a categorical allegation in the application that both the Panchas are regular and professional Panchas of Narcotic Cell, M.I.D.C. Bombay, and have acted previously and he has given the C.R. Numbers in which they were used. It is pertinent to note that in the affidavit filed by the State that fact is not denied. It is stated only in general terms that the contention of the Petitioner is denied. It would not therefore be safe at this stage to act upon the Panchanamas and statements of Panchas in the absence of any other independent corroborative material being available. In the circumstances the Statements of Police witnesses cannot be treated absolutely independent. The entire Panchnama is rendered doubtful. Violation of S. 50 is writ large for the grounds stated in the Petition and these circumstances have not been satisfactorily explained in the Affidavit filed on behalf of the State. The infirmity pointed out in respect of the First Information Report is not such as can be lightly brushed aside. It is not satisfactorily explained in the Affidavit as to why independent Panchas could not be called on the spot when there was sufficient time available since it was a pre-arranged and planned raid on the basis of information received earlier. The so-called difficulty in getting Panchas on the spot does not impress me as nothing is shown even to suggest that such attempt was made. The prosecution has not tried to justify what has been done on the specious ground that it would be a matter to be gone into at the stage of trial. This is clearly ignoring the law. I, therefore, find that ex-facie, the material relied upon by the prosecution is not such as the Court can reasonably be satisfied that the accused has been shown prima facie to have committed the alleged offence. I am not so satisfied and do not consider it just and proper to deny bail. This however is my prima facie conclusion at this stage and does not mean that at the trial the offence may not be proved against the Petitioner on the basis of the evidence as may be adduced at that stage and its consideration by the Court in the light of decisions of this Court and the provisions of law.

15. Once the above prima-facie conclusion is reached, the extent of quantity of the contraband allegedly recovered and its value or the fact that in the past the Petitioner had been in Dubai could not be sufficient to deny bail to him. It is stated in the Application that the Petitioner is a permanent resident of Bombay and has roots in Bombay. Coupled with that, I shall impose stringent conditions upon him in order to allay the fears of his absconding. He has been in custody for more than 14 months and there is no possibility of early trial.

16. Thus, following order :

The Petitioner Lawarance D'Souza be released on bail (in N.D.P.S. Special Case No. 889 of 1990) conditional on his furnishing a personal bond in the sum of Rs. 20,000/- (Rupees twenty thousand) to the satisfaction of the Special Judge,

Bombay, for his appearance before the Court on the dates as may be fixed by the Special Judge in this behalf and on further following conditions :-

(a) The Petitioner shall not leave India without leave of the Special Judge, Bombay;

(b) He shall report attendance to the Narcotic Cell, M.I.D.C., Andheri, Bombay, once every fortnight on any day between 1st and 5th, and 15th and 20th of each month for a period of one year from the date of his release;

(c) He shall keep the Narcotic Cell informed about his whereabouts in India during the intervening period between his reporting attendance as above;

17. Application accordingly made absolute.

18. Order accordingly.