

(2020) 01 GUJ CK 0162
In the Gujarat High Court

Case No : R/Criminal Revision Application No. 72 Of 2019

Okhabhai Harjibhai Patel

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 16-01-2020

Acts Referred:

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 17, 17(b), 29, 36(A)
(4), 37, 37(1), 37(1)(b), 37(2)
Indian Penal Code, 1860 — Section 120B
Code Of Criminal Procedure, 1973 — Section 167, 167(2), 437

Citation : (2020) 01 GUJ CK 0162

Hon'ble Judges : B.N. Karia, J

Bench : Single Bench

Advocate : Sanjay Prajapati, MH Bhatt

Final Decision : Allowed

Judgement

B.N. Karia, J

The applicant has challenged the impugned order dated 07.01.2019 passed by learned 2nd Additional Sessions Judge, Banaskantha at Tharad in

Criminal Misc. Application No. 2 of 2019 of default bail.

Heard learned advocate for the applicant and learned APP for the respondent-State.

It was submitted by learned advocate for the applicant that order of rejecting the default bail of applicant is contrary to law, against the provisions of

statutes and against evidence on record. That, learned Sessions Judge has materially erred in law while rejecting the default bail of the applicant and

such order is resulted into miscarriage of justice. That, learned Sessions Court has not properly considered the provisions of law and not consideration

the fact that alleged opium is 1 kg and 277 grams and alleged quantity is less than commercial quantity. That as per provisions of Section 36(A)(4) of

NDPS Act, charge sheet should be filed within a period of 60 days, as present offence is not fall under the commercial quantity. That, learned

Sessions Court has wrongly considered that period of filling of charge sheet is 90 days and 180 days, which is against the provisions of law. That,

learned Sessions Court ought have to considered that the period of filing of charge sheet is of 60 days and applicant was ready to furnish his surety,

but without considered the same, has passed the order of rejecting the default bail of applicant which is illegal at prima facie stage. It was requested

by learned advocate for the applicant to quash and set aside the order dated 07.01.2019 passed by learned 2nd Additional Sessions Judge,

Banaskantha at Tharad in Criminal Misc. Application No. 2 of 2019 rejecting the default bail of the applicant and release the applicant on bail.

Learned APP for the respondent-State has strongly objected the arguments advanced by the learned advocate for the applicant and submitted that the

charge sheet was duly filed by the Investigating Officer against the present applicant on 5th January 2019 under Section 17 and 29 of the NDPS Act

and Section 120B of the Indian Penal Code, and therefore, learned Judge has rightly dismissed the application of the applicant. It is further submitted

that quality of contraband of opium was seized from the applicant was more than the small quantity because it was 1 kg 277 gram and as per the

schedule, small quality is 25 gram. It is further submitted that application for regular bail preferred by present applicant before this court was also

withdrawn on 04.12.2018. As the applicant is involved in the serious offence, prayer made by the applicant cannot be granted and ultimately, it was

requested to dismiss the present application.

Having considered the facts of the case, submissions made by learned advocate for the applicant as well as learned APP for the respondent-State, it

is undisputed fact that offence was registered against the present applicant under Section 17 and 29 of the NDPS Act and Section 120B of the Indian

Penal Code. The offence was registered on 2nd October 2018 and present applicant was arrested on 31st October 2018. His remand was granted

from 1st November 2018 to 3rd November 2018. The applicant preferred regular bail application before this Court ie., Criminal Misc. Application No.

22314 of 2018, which was withdrawn by him on 04.12.2018. As the charge sheet was not filed within a period of sixty days and maximum punishment provided for 10 years for the offence committed by the applicant, default bail was requested by the applicant before the Sessions Court, which was rejected vide order dated 7th January 2019.

Admittedly, the contraband opium seized from the possession of the present applicant was less than the commercial quantity and more than the small quantity means it was 1 kg 277 grams. Under Section 17(b) of the NDPS Act 1985, where the contravention involves quantity lesser than commercial quantity but greater than small quantity, the person would be punished with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees. Here, in the offence allegedly committed by the present applicant, he may be punished up to 10 years, if offence is proved by the prosecution.

Section 167 of Cr.PC provides as under:

167. Procedure when investigation cannot be completed in twenty four hours.

(1) xxx

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a

Magistrate having such jurisdiction: Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if

he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this

paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than

ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may

be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section

shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter:

Hon'ble Supreme Court in case of Intelligence Officer, Narcotics Control Bureau v. Arif U. Patel, reported in AIR(SCW) 254 3has observed as

under:

10. The question, therefore, is: Whether Section 37 of the N.D.P.S. Act is an inconsistent provision of this kind to exclude the applicability merely of

the proviso to sub-section (2) of Section 167 Cr.P.C. when sub-section (2) of Section 167 is expressly made applicable by the N.D.P.S. Act? The

non- obstante clause at the beginning of sub-section (1) of Section 37 indicates that the provisions in clauses (a) and (b) thereof are inconsistent with

the corresponding provisions of the Code. Clause (a) makes every offence punishable under this Act to be cognizable. Clause

(b) imposes limitations on granting of bail specified therein which are in addition to the limitations under the Code of Criminal Procedure on granting of

bail as stated in sub-section (2) of Section 37. Clause (b) of sub-section (1) specifies the two limitations on granting of bail, namely, (1) an opportunity

to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court that there are reasonable grounds for believing that the accused

is not guilty of such offence and that he is not likely to commit any offence while on bail. The learned Additional Solicitor General contends that these

limitations on granting of bail specified in clause (b) of sub-section (1) of Section 37 indicate that the applicability of the proviso to subsection (2) of

Section 167 Cr.P.C. is excluded in such cases. We are unable to accept this contention.

14. Accordingly, provision in Section 37 to the extent it is inconsistent with Section 437 of the Code of Criminal Procedure supersedes the

corresponding provisions in the Code and imposes limitations on granting of bail in addition to the limitations under the Code of Criminal Procedure as

expressly provided in sub-section (2) of Section 37. These limitations on granting of bail specified in sub-section (1) of Section 37 are in addition to the

limitations under Section 437 of the Code of Criminal Procedure and were enacted only for this purpose; and they do not have the effect of excluding

the applicability of the proviso to sub-section (2) of Section 167 Cr.P.C. which operates in a different field relating to the total period of custody of the accused permissible during investigation.

15. In our opinion, in order to exclude the application of the proviso to sub-section (2) of Section 167 Cr. P.C. in such cases an express provision indicating the contrary intention was required or at least some provision from which such a conclusion emerged by necessary implication. As shown by us, there is no such provision in the N.D.P.S. Act and the scheme of the Act indicates that the total period of custody of the accused permissible during investigation is to be found in Section 167 Cr. P.C. which is expressly applied. The absence of any provision inconsistent therewith in this Act is significant.

17. It is settled that 'the court will have no power of remand of an accused to any custody unless the power is conferred by law'". (See Natabar Panda

Bisnu Charon Panda Batakwhna Panda Babaji Panda v. State of Orissa, [1975] Supp. SCR 137). The power must, therefore, be traced to some

provision of the statute. There is clear mention of Section 167 Cr. P.C. in the N.D.P.S. Act for the exercise of this power. Ordinarily, there must also

be an outer limit prescribed by specification of the total period of permissible remand during investigation. This too is provided in Section 167. To

exclude merely this part of Section 167, an express provision in the statute was necessary, assuming there could be conferment of power of remand

unlimited in point of time which, in substance, is the argument of the learned Additional Solicitor General. The effect of the proviso to sub-section (2)

of Section 167 Cr.P.C. was stated in Natabar Parida (supra),

The same view was also taken by the High Court of Delhi in Bail Application No. 2238 of 2017.

It is apparent with the contentions of the learned advocate for the applicant that the applicant was arrested on 31st October 2018. He was produced

before the court on 1st November 2018. Learned trial Court has not considered the aspect of filing of the charge sheet on completion of 60 days from

the arrest of the present applicant/accused, as the charge sheet was to be filed on or before 31st December 2018. As the applicant was willing to join

investigation and it was not completed till the submission of the charge sheet on 5th January 2019 cannot be overlooked and thus cannot extinguish the

indefeasible right of default bail to the applicant.

In the result, present Criminal Revision Application is allowed and the impugned the impugned order dated 07.01.2019 passed by learned 2nd

Additional Sessions Judge, Banaskantha at Tharad in Criminal Misc. Application No. 2 of 2019 is hereby quashed and set aside. The applicant is

directed to be released on bail on submission of a bail bond for a sum of Rs. 50,000/- with one surety of the like amount subject to the satisfaction of

the learned Trial Court and subject to the conditions that appellant shall;

[a] not take undue advantage of liberty or misuse liberty;

[b] not act in a manner injurious to the interest of the prosecution;

[c] surrender passport, if any, to the lower court within a week;

[d] not leave India without prior permission of the concerned Trial Court;

[e] furnish the present address of residence to the Investigating Officer and also to the Court at the time of execution of the bond and shall not change

the residence without prior permission of the Sessions Court, Banaskantha at Tharad.

The authorities will release the applicant only if he is not required in connection with any other offence for the time being. If breach of any of the

above conditions is committed, the Sessions Judge concerned will be free to issue warrant or take appropriate action in the matter. Bail bond to be

executed before the lower Court having jurisdiction to try the case. It will be open for the concerned Court to delete, modify and/or relax any of the

above conditions, in accordance with law.

At the trial, Sessions Court shall not be influenced by the prima facie observations made by this Court in the present order.

Rule is made absolute to the aforesaid extent.

Direct service is permitted.