

(1991) 10 OHC CK 0028

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 1196 of 1991

Satyabrata ' Sarat Mallia and Another

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 04-10-1991

Acts Referred:

Constitution of India, 1950 — Article 21

Criminal Procedure Code, 1973 (CrPC) — Section 167(2), 167(2A), 248, 439

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 36A, 36A(1), 36D, 37, 37(1)

Citation : (1991) 2 OLR 475

Hon'ble Judges : K.C. Jagadeb Roy, J

Bench : Single Bench

Advocate : N.C. Panigrahi, K.P. Nanda, S.C. Dash and A. Chand, for the Appellant; Addl. Standing Counsel, for the Respondent

Judgement

K.C. Jagadeb Roy, J.—These two petitioners have preferred this application for bail u/s 439 Cr.P.C. the short facts of the prosecution case are as follows :

2. The Sub-Inspector of Police, Baliana police station lodged an F.I.R. before the Officer-in-Charge, Baliana police station at 2 A.M. on 3-8-1991 alleging that the present petitioners while going on a Bajaj scooter bearing registration No. ORB-6970 were searched at Baliana bazar at 12.30 A.M. that night and a cash of Rs. 801/- was found with the accused persons besides 7 grams of Brown sugar was found in the dikky of the scooter. On 3-6-1991 itself the accused persons were forwarded to the Court of the Sub-Divisional Judicial Magistrate, Bhubaneswar on the allegation of having committed the offence under Secs. 18 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The SDJM for- warded the petitioners to the Court of the Sessions Judge, Puri who sent back the case record and accused persons to the Court of the SDJM, Bhubaneswar to deal with the case as no Special Court was established in Puri district to hear the cases under the N.D.P.S. Act. On remand the accused persons were again produced before the SDJM, Bhubaneswar on 5-8- 1991 and the

application of the accused persons for bail was moved before the learned SDJM who rejected it on the ground that the offences are exclusively triable by the Special Court against which order the petitioners preferred a Criminal Misc. Case bearing No. 330 of 1991 before the learned Addl. Sessions Judge, Bhubaneswar which was also rejected on 23-8-1991. On 26-8-1991 the accused persons again filed another application before the SDJM, Bhubaneswar praying for their release as they were already in custody beyond 15 days, but the learned SDJM again rejected the said application on the ground that the decision of this Court reported in 1991 (1) OLR 549 (Sauti Jena and Anr. v. State) cited by the petitioners had no application to the present case as the referred case related to Cuttack district where there is Special Court, but in the district of Puri there being no Special Court for hearing of the cases under the N.D.P.S. Act, 1985, the directions indicated in that case had no application to the present case. The petitioners again moved the learned Addl. Sessions Judge, Bhubaneswar in Criminal Misc. Case No. 391 of 1991 for bail who again passed the order on 4-9-1991 rejecting the bail application of the petitioners. Finding no other alternative the petitioners have moved this Court for bail.

3. Heard the learned counsel for both the petitioners and the State at length. The facts as alleged in this petition have not been challenged by the State. As it appears from the petition for bail, the petitioners have urged that the incriminating materials that was found in the dikky of the scooter had not yet been examined chemically. There was no conscious possession of the materials as the scooter belongs to another person by name Harekrishna Mallia from whom the petitioner No. 1 had borrowed it for visiting some relations in a distant village and while returning from that village the scooter was searched and the material was found. They had no mens rea for the offence or knowledge of having Brown Sugar in the dikky and have not committed the offence u/s 21 of the Act. The seizure of the incriminating material was made in violation of the procedure mandatorily required under the Act to be followed at the time of seizure as contained in Sec. 50 of the Act which resulted in making the seizure illegal which is fatal for the prosecution as this by itself will be a ground for their acquittal. It was further argued on behalf of the petitioners that in view of the provisions contained in Section 36-A(1)(b) of the Act, the petitioners could not be held in custody for a period more than 15 days after they were presented before the Judicial Magistrate in connection with the offence committed under the Act and their detention was authorised by the said Magistrate and as such, the S. D. J. M., Bhubaneswar was obliged under the law to direct their release after 15 days of their being in custody under the detention order passed by him namely after the 20th of August, 1991, they having been detained since 5-8-1991 which has not been done and they are unlawfully detained thereafter.

4. The learned Addl. Standing Counsel Mr. Das has raised the objection that Section 37 of the N. D. P. S. Act is a bar for their release and non-observance of the requirements of Section 50 are merely directory and not mandatory and it, therefore, cannot be a ground of their being released on bail particularly when

the accused persons in their statement before the police during the investigation have stated that they had visited the village in question for procuring Brown Sugar, and that accused No. 1 indulged in selling the Brown Sugar in the locality, there was no reasonable ground for satisfaction of the Court for believing that the petitioners were not guilty of the offence charged and as such there was no ground for releasing the petitioner or either of them on bail.

5. These allegations and counter allegations raise substantial questions of law which need close scrutiny. The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as "the Act") is an Act making stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances and provides for the forfeiture of property derived from, or used in illicit traffic and has made the offences punishable under this Act not only cognisable but has made the offences punishable with rigorous imprisonment for a term not less than ten years which may extend to 20 years also making the persons liable for fine which is not less than one lakh and may be extended to two lakh of rupees. Section 36-A of the Act provides that all offences under this Act shall be triable by the Special Court constituted for the area in which the offences have been committed and Clause (1) (b) of Section 36-A requires that where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under Sub-section (2) or Sub-section (2-A) of Section 167 of the Cr. P.C., 1973, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days on the whole where such Magistrate is a judicial Magistrate and seven days on the whole where such Magistrate is an Executive Magistrate provided that when such a Magistrate considers : (1) when such person is forwarded to him as aforesaid, or (ii) upon or at any time before the expiry of the period of detention authorised by him, the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction. Thereafter, the Special Court may exercise, in relation to the person forwarded to it under Clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise u/s 167 of the Cr P.C., 1973.

Section 36-D of the Act provides for transitional provisions, according to which any offence committed under this Act on or after commencement of the N. D. P.S. (Amendment) Act, 1988, until a Special Court is constituted u/s 36, shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973, be tried by a Court of Session.

6. As it appears, neither the S. D. J. M. nor the Addl. Sessions Judge had kept these provisions contained in Section 36-D and 36-A of the Act in view while passing their orders as referred to earlier in this order. There was no justification for the Sessions Judge, Puri to send back the records to the Court of the S. D. J. M. Bhubaneswar with a direction that since no Special Court has been constituted for trial of the offences under the N. D. P. S. Act, the matter has to be dealt with

by the S. D. J. M. in according with law. Since he was empowered u/s 36-D of the Act to function as the Special Court for the said offences, the petitioners were unnecessarily harassed in approaching the S. D. J. M. again on 5-8-1991. Their application again having been rejected by the S. D. J. M , the petitioners had approached the Addl. Sessions Judge, Bhubaneswar who again rejected their application for bail on 23-8 1991. The S. D. J. M. no doubt, committed the mistake in observing that the ruling made in Sauti Jena and Another Vs. State of Orissa, is not applicable to Puri district where Special Court is not constituted. The petitioners have been running from pillar to post and from post to pillar for their liberty whereas the Courts below continued to reject the applications of the petitioners on wrong notice about the legal position applicable to the case.

7. Sub-section (2) of Section 167 Cr.P.C. reads as follows :

"167 (2): I he 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 on the whole, and if he has no jurisdiction to try the case or commit 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 purpose of that Chapter.

xx xx xx."

Sub-section (2-A) deals with the duties of the Executive Magistrate in the event the accused has been forwarded to him but we are not concerned about those provisions in the present case. The maximum period of detention u/s 167(2) is 90 days under Clause (a) (i) of Sub-section (2) where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and under Sub- Section (2) (a) (ii), 60 days

where the investigation relates to any other offence and after expiry of 90/60 days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail. The maximum period of detention u/s 167(2) (a)(i) of the Cr.P.C, is restricted by Section 36-A(1)(b) of the N. D. P. S. Act to 15 days only when a person alleged to have been committed an offence under the N. D. P. S. Act is detained by a Judicial Magistrate and 7 days where detained by an Executive Magistrate. But when such Magistrate orders that such persons to be forwarded to the Special Court under Sub-section (1)(c) of Section 36-A the Special Court assumes full power to deal with the accused and can exercise the powers contained in Sub-section (2) of Section 167 of the Cr P.C. permitting a maximum period of 90/60 days depending upon the nature of the case as indicated in the sub-section. Therefore, non-exercise of the power by the Courts below in considering the bail application in its proper prospective keeping the correct provisions of law in view, has caused the petitioners serious prejudice to their rights as guaranteed to them under Art. 21 of the Constitution of India. Having failed in the forums of the S. D. J. M. and that of the Sessions Judge and Addl. Sessions Judge, ultimately the petitioners have come before this Court with a prayer to be released on bail.

8. The two points those are now raised for consideration of this Court are whether Section 37 of the Act will stand as a bar to their being released on bail and secondly, if non-observance of the mandatory provision contained in Section 50 of the Act is by itself a ground for releasing the petitioner on bail.

9. Section 35 of the Act raises presumption of the existence of the culpable mental state which reads as follows :

"Section 35 : Presumption of culpable mental state :

(1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution;

(2) for the purposes of this section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and merely when its existence is established by a preponderance of probability."

Section 53-A of the Act speaks that a statement made and signed by a person before any officer empowered for the investigation of offences during the Course of any inquiry or proceedings by such officer shall be relevant for the purpose of proving in any prosecution for an offence under this Act. Because of these provisions and considering the severeness Of the charge, it is more incumbent and desirable on the part of the prosecution to establish that procedural safeguards provided under the Act have been scrupulously followed by the officer concerned and the Court will be perfectly justified in considering the compliance or non-compliance of these safeguards while dealing with the bail applications as

these safeguards have a material bearing in the prosecution and even weigh in the mind of the Court in making up the mind whether the accused is guilty of the offence charged. Secs. 50, 52 and 57 of the Act are mandatory in character. Section 52(1) of the Act requires that the grounds of arrest be communicated to the accused which may help him to prepare his defence. Section 57 requires that the person making the seizure and arrest shall make a full report to his immediate superior officer within 48 hours, thereby creating a safeguard against concocting evidence against the accused and Section 50 deals with the conditions in which search of person shall be conducted. Section 50 of the Act reads as follows :

"Section 50 : Conditions under which search of persons shall be conducted : (1) When any officer duly authorised u/s 42 is about to search any person under the provisions of Section 41, Section 42 or Section 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 Officer or the Magistrate referred to in Sub-section (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."

10. The provisions contained in Secs. 50, 52 and 57 are no doubt mandatory provisions which are to be strictly followed. Section 50(1) provides that the designate officer is bound to inform the person who is to be searched, of his right to be taken without delay to the nearest Gazetted Officer mentioned in Section 42 of the Act or to the nearest Magistrate so that he could be searched in his presence. This is an extremely valuable right which the legislature has clothed him with and has been incorporated in the Narcotic Act keeping in view of the severity of the sentence. The rationale behind this provision is manifest. The compliance of this provision would avoid false case being started against the person under the Act intending to harass him. The search before a Gazetted Officer or a Magistrate would lend authenticity or credit to the proceeding to be initiated on the basis of such search and would strengthen the prosecution case. Therefore, there is no reason why the designate officer should shirk to provide a real opportunity to the person concerned to avail such right, if he so desires. The words "if so desires" occurring in Section 50(1) of the Act does not mean that the person going to be searched would come out with a request to be searched in presence of a Magistrate or a Gazetted Officer, as the case may be. Very likely the person to be searched may not have the knowledge of this provision and to be fair, the person doing the search must come out and inform to the said person

about his inherent right afforded to him under the section of the Act. But for this, the valuable right would become illusory and a force. The designate officer should, as far as practicable make the offer in question to the person in the presence of two independent and respectable witnesses of the locality. The witnesses are required to be there for the purpose of seizure and if he fails to do so, onus is on the prosecution to prove that presence of such witnesses was not possible in the facts and circumstances of the particular case.

11. That apart, under Chapter-V of the Act procedures have been indicated for search and arrest of the accused. According to Section 52(1), the person arrested is to be informed as soon as may be about the grounds of his arrest. Section 52(2) provides that the person arrested and the article seized are to be forwarded to the Magistrate by whom the warrant was issued. But in the case of arrest without warrant, the person arrested and article seized are to be forwarded to the Officer-in-charge of nearest police station or to the officer invested with the power of Officer-in-charge of the police station for investigation. Sub-section 3 of Sec, 52 and Section 55 of the Act cast a duty on the Officer-in-charge of the police station to keep the articles in safe custody, to put his seal and take samples. Section 57, thereafter however postulates that any person making arrest or seizure shall make a full report to his immediate superior officer within 48 hours. The provisions contained in Sers."52 (1) and 57 are mandatory in character while the remaining provisions are merely directory. The reason being that the right to be informed about the ground of arrest contained in Section 52(1) and the requirement of Section 57 to the effect that any person making arrest and seizure is to make full report to his immediate superior officer within 48 hours, therefore, conferred valuable right on the accused. Without informing about the grounds of arrest at the earliest opportunity, the accused must be aware of, what he has to meet in the long run. Failure to do so, would certainly prejudice his defence. The making of report within 48 hours u/s 57 of the Act will also bring to an end the possibility of improving the prosecution version after that time. If these provisions are not strictly complied with, the prosecution must fail, but, the same cannot be said with respect to the remaining provisions incorporated in Secs. 52(2), 52(3) and 55. As in the latter cases, the defence will have to show that he has been prejudiced and failure of justice has resulted due to their non- compliance.

12. In a case (State of Himachal Pradesh v. Sudarshan Kumar and etc.) with State of Himachal Pradesh Vs. Sudarshan Kumar and etc., , the Court held thus :

"xx xx xx. It has been hotly debated before us whether the designated officer is or is not bound to inform the person whom he is about to search of his right to be taken without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate to be searched in their presence. It appears that he must do so to enable the person concerned to exercise his aforesaid right. This is an extremely valuable right which the legislature has clothed him with and has been incorporated in the

Narcotic Act keeping in view the severity of the sentence., xx xx xx. This provision thus cannot but be regarded as mandatory and violation thereof per se would be fatal to to the prosecution case."

It further held in paragraph 13 of the judgment thus :

"While determining whether the above provisions to be followed after the search and arrest are directory or mandatory, it will have to be kept in mind that the provisions of a statute creating public duties are, generally speaking, directory. The purpose is to incorporate certain procedural instructions for a strict compliance by public functionaries. Nevertheless, non-compliance of these instructions per se cannot render the acts done as null and void. In other words it will have to be shown that such non-compliance has caused prejudice and failure of justice in which case alone the provisions would partake the nature of being mandatory, judging the provisions in the light of the touch-stone indicated above, we have no hesitation, whatsoever, in holding that the provisions which stand incorporated in Section 52(1) and Section 57 are mandatory in character, but that the remaining provisions are merely directory, xx xx.""

In that case before the Himachal Pradesh High Court, the order of conviction and sentence passed on the accused persons for the alleged offence under the N.D.P.S. Act was under challenge.

13. In the present case, the provisions of Section 50(1) of the Act has not been followed. The State has shown nothing to the satisfaction of the Court that the officer conducted search of the accused persons and the scooter after the petitioners were informed that they had right to demand the search to be made in presence of a Magistrate or the Gazetted officer. Non-compliance of it was a clear violation of statutory safeguard allowed under the Act to the accused which may have a bearing in the final disposal of the case initiated against them.

14. The learned Addl. Standing Counsel appearing for the State had further contended that in view of Section 37 of the Act and the statement of the petitioners before the police admitting their involvement in selling Grown Sugar in the public, there was no material before the Court from which the Court could be satisfied that there was reasonable ground for believing that the petitioners were not guilty of the offence and they are not likely to commit such offence while on bail. Section 37 of the Act is quoted below :

"Section 37 : Offences to be cognisable and non-bailable :

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) :

(a) every offences punishable under, this Act shall be cognisable;

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless_

(i) the public prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the public prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely, to commit any offence while on bail.

(2) The limitations on granting of bail specified in Clause (b) of Sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or, any other law for the time being in force on granting of bail."

The Court while considering the application for bail in connection with the offence committed under the N.D.P.S. Act, is not called upon to record the finding of not guilty with reference, to Section 37 of the Act. Section 37 of the Act is not equated with the Section 248 Cr.P.C. which call for an acquittal on finding of not guilty. It is meant only for the limited purpose. While releasing the accused on bail, the Court is called upon to see if there is reasonable ground for believing that the accused is not guilty of the offence to record its satisfaction about the same. u/s 37 of the Act, the Court is to only develop a belief and not to make a finding of not guilty u/s 248, Cr.P.C.

15. Art. 21 of the Constitution of India reads as follows :

"Art. 21 : No person shall be deprived of his life or personal liberty except according to procedure established by law."

If a person is arrested, his personal liberty is under jeopardy. Therefore, the arrest must be strictly in accordance with the procedure established by law. The Court, therefore, though expected to keep the object of the Act before it while dealing with the bail petition u/s 37 of the Act, cannot by-pass the guarantee afforded under Art. 21 of the Constitution of India requiring application of procedural safeguard as provided under the Act. If the procedural safeguards are not followed and the person has been arrested, I have no hesitation to say that it will be a vital ground for the accused to be enlarged on bail.

16. In the case of Mari Appa and Vs. State of M.P. and etc., , the Court held thus :

"When bail is refused it necessarily results in deprivation of person's liberty as observed by the Supreme Court in Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh, A person's liberty is too precious a value of our constitutional system recognised by Art. 21 of the Constitution which lays down" "no person shall be deprived of his life or personal liberty except according to procedure established by law." If the procedure laid down under the Act is not followed, it would not be proper for the Court to refuse bail. xx xx"

The Supreme Court reiterated the view earlier taken by it in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another,) and in Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, in which it was held thus :

"It is far too well-settled to admit of any argument that the procedure prescribed

by law for the deprivation of right conferred by Art. 12 must be fair, just and reasonable. Just as a mala fide act has no existence in the eye of law, even so unreasonableness vitiates law and procedure alike. It is, therefore, essential that the procedure prescribed by law for depriving a person of his fundamental right must conform to the norms of justice and fair play. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiates the law which prescribes that procedure and consequently, the action taken under it, and action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards. The action must be within the scope of the authority conferred by law and secondly, it must be reasonable, it must mean that the procedure established by law under which that action is itself unreasonable. The substances of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it. As Justice Frankfurter of the U. S. Supreme Court rightly said in *Vitaralli Seton v.* (1959) 3 L.Ed. 2d. 1012 that "He that takes the procedural sword shall perish with the sword."

if the accused 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. Sub-sec, (i)(b)(ii) of Section 37 of the Act requires that the Public Prosecutor has to be given an opportunity to oppose such application for such release. This has a definite purpose and the Public Prosecutor has a vital role to play in the whole process of reaching the satisfaction by the Court and is required to present the entire material collected against the accused effectively and in opposition to the application of bail showing that no reasonable ground exists for believing that the accused is not guilty of the offences charged.

17. In the present case, the State has not produced any material excepting the statement of the petitioners before the police, that they indulged in transaction of selling drugs which statement itself is not an admissible evidence in the case upon which the prosecution can succeed without other materials. In view of violation of the statutory safeguards contained in Sec, 50(1) of the Act and in the absence of any other independent material to show that these petitioners were in conscious possession of the incriminating substance since the scooter which they were using was a borrowed one and belonged to someone else which is born out from the Registration Book of the vehicle, the xerox copy of which is submitted to the Court and in view of the fact that the Magistrate to whom they were referred, has kept the petitioners in custody for more than 15 days in contravention of Section 36-A(1)(b) of the Act and there is no material before me to hold that they may likely to cause any such offence while on bail, I allow each of the petitioners to be released on bail of Rs. 20,000/- (Twenty thousand) each with two sureties for the like amount to the satisfaction of the Addl. Sessions Judge, Bhubaneswar. The SDJM, Bhubaneswar is directed to transmit the connected case record to the Court of the Addl. Sessions Judge, Bhubaneswar forthwith who shall proceed with the case in view of Section 36-D

of the Act.

The Criminal Misc. Case is disposed of.