
(1995) 09 GUJ CK 0006
In the Gujarat High Court

Shakina

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 29-09-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 389, 389

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 21, 28, 28, 29, 29

Citation : (1996) 2 GLR 619

Hon'ble Judges : M.H. Kadri, J;K.J. Vaidya, J

Bench : Division Bench

Judgement

K.J. Vaidya, J.—Shakina, by this Misc. Criminal Application u/s 389 of the Criminal Procedure Code, 1973, has moved this Court inter alia praying for releasing her husband - Fakruddin Murshid on temporary bail, who at present is undergoing 10 years" RI at Central Prison, Sabarmati, Ahmedabad, on his coming to be convicted for the alleged offences punishable under Sections 21, 28 and 29 of the N.D.P.S. Act, 1985, by the learned Additional Sessions Judge, Bulsar at Navsari, vide his judgment and order dated 2-6-1994, rendered in Sessions Case No. 75 of 1991.

2. For this, she has pressed into service two grounds, viz. firstly, that her only son Hassan died on 24-9-1995 due to Leukemia (blood-cancer); and secondly, she as a result of the same is down and confined to bed shocked with grief and under serious illness. In support of these two grounds, the petitioner has also produced two medical certificates issued by Dr. Saifuddin, Medical Officer, Sagwada (Rajasthan).

3. On 27-9-1995, when this matter came up for admission, with a view to get verified and assure ourselves about the truthfulness and genuineness of the aforesaid two certificates, we directed the learned A.P.P. Mr. S.T. Mehta to inform us on the next date as to whether the same were truthful and genuine, by making necessary in depth inquiry despatching in right earnest the fax message

through the Commissioner of Police, Ahmedabad, contacting the D.S.P., Dungarpur.

4. Accordingly, today the learned A.P.P. has placed in our hands the report back fax message bearing No. 02964-31002 received from the D.S.P., Dungarpur addressed to the D.C.P., Control Room, Ahmedabad (Gujarat) vouchsafing that both the certificates issued by Dr. Saifuddin of the Government Hospital, Sagwada are true and genuine.

Now, the most material question that arises for our consideration is whether in view of Section 32-A of the N.D.P.S. Act placing total embargo upon the powers of the Court in the matter of suspending, remitting or commuting any sentence awarded under the said Act, it would be just, legal and proper to temporarily release convict prisoner on bail even on humanitarian ground? In other words, despite the said iron shutters of law expressly prohibiting Courts from suspending, remitting or commuting any sentences imposed, still however, bearing in mind the humanistic cry urging instant release piercing across the said shutters, the prisoner can still be released taking little liberty with Section 32-A of the N.D.P.S. Act, on temporary bail on human ground? In short the riddle, the puzzle is whether and how indeed this Court is to cross across the cross-roads one going in the direction of immediate justice to the needy wife of the prisoner and another just opposite, cutting across the same by way of provision contained in Section 32-A of the N.D.P.S. Act with board of "No Entry"? Law and substantial justice at cross-roads !! What is to be done? To meet with the stalemate, and to find out the possible reasonable way if any, let us first of all take a look at Section 32-A of N.D.P.S. Act, which reads as under:

32-A. No suspension, remission or commutation in any sentence awarded under this Act. -- Notwithstanding anything contained in the Code of Criminal Procedure 1973 (2 of 1974) or any other law for the time being in force, but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted.

5. When the aforesaid Section 32-A was read out, Mr. Kirit Raval, learned Advocate appearing for the applicant was quite fair and quick enough to admit that undoubtedly prima facie, there was a difficulty in his way in getting released concerned prisoner on bail much less the temporary bail because of the crystal-clear mandate contained in Section 32-A of the Act. However, according to Mr. Raval, on a humanitarian ground, in the overall interest of justice to the helpless, innocent petitioner who is certainly not an accused before this Court, an exception needs to be carved out, to spare her from the fall-out of punishment inflicted upon her prisoner-husband. Now some such identical question was also raised in Special Criminal Application No. 1082 of 1994 before this Court (Coram: K.J. Vaidya & B.J. Shethna, JJ.), wherein by an order dated 12-8-1994, the Hon'ble Chief Justice was requested to constitute a larger Bench to get resolved the point involved once and for all.

6. We have been informed at the bar that accordingly Full Bench was constituted matter was heard on 5-9-1995 and the judgment thereafter which was kept CAV is yet to be pronounced. In this view of the matter, as per today since no further light on the vexed problem being available, our hands are indeed quite tied by virtue of Section 32-A of the N.D.P.S. Act, and accordingly it is indeed not possible for us to accede to the request of Mr. Raval to temporarily release the prisoner on bail even for few days. At the same time, we can quite imagine and perceive the mental agony and bursting forth stress and hyper-tension of a mother who has seen just before her own eyes few days before the only son suffering from blood-cancer and his life gradually painfully vanishing to the point of no return, and that too, while her husband was miles away from her in jail and none by her side to bear, share her profound grief around and devouring her. In this utterly darkest and helpless hour of her grief and sorrow in her life, any human being, more particularly, the crest-fallen mother like the petitioner living forlorn and lonely life of extinction would indeed surely need somebody by her side to hug her and withstand the onslaught of mountain of grief that has unfortunately befallen her to sustain her life further and obviously under the circumstances there cannot be any other and better person than her husband. We feel that under such gravest and unenviable circumstances, if her husband is not taken out from jail to be by her side, and thereby her pent-up grief is made to suppress and suffer further and further her traumatic mind reacting and reaching the flashing point, it can certainly bring about any disaster in her life. One does not know the ultimate end result of this ! In this view of the matter, being fully conscious firstly of the gravity and seriousness of the offence, and secondly of the concern and anxiety of the Parliament which has enacted the special law, that is, the N.D.P.S. Act, in the overall interests of society, we indeed do not want to take any unjust liberty whatsoever with the said provisions contained in Section 32-A of the said Act by even temporarily releasing the prisoner on bail. But at the same time, having regard to the peculiar facts situation that has arisen in this case, while maintaining the respect for the reasonable law on the one hand and at the same time taking all possible care of some of the rarest of rare moments in the life of the near and dear relative of an accused or convict/ prisoner under the N.D.P.S. Act on the other, refusing to do mere robot/mechanical paper justice, we would indeed like to strike the balance between the two, that is to say, on the one hand by keeping the provision contained in Section 32-A intact by not allowing the release of prisoner on temporary bail, and on the other hand, by directing the jail authorities to permit the concerned prisoner for the time being taken out from the jail under tight police escort for some reasonable time so that he can well meet and console his bereaved wife at his village. By such permissible emergency oriented judicial engineering, which indeed appears to be the only unavoidable way under the circumstances, we have tried to strike a reasonable balance on the one hand between the wisdom of Parliament in upholding overall public interest in engrafting Section 32-A in N.D.P.S. Act, and on the other the extraordinary situation in the life of the wife of the prisoner which has unfortunately befallen

over her like a bolt from the blue. We believe that "Justice" means justice not only to the accused-convict and state thereby society alone, but the same also means to the family members also of the accused-prisoner wherever and whenever reasonably permissible within the bounds of law.

7. We believe, subject to the view taken by Full Bench CAV Judgment, that the restriction imposed by Section 32-A of the N.D.P.S. Act are indeed very much needed and accordingly its sanctity cannot be taken liberty with. However, unable to resist the response to the humanistic urge to our conscience of helping the petitioner by taking her across the cross-roads of law governing the fate of the convict prisoner, we have been just constrained to engineer judicial flyover over the cross-roads where the traffic to and fro across create no headlong problem.

8. Once a while in one Court or the other some such trying tricky issues, situations do arise taxing and vexing its intelligence and testing the overall wisdom. Some Courts finding the shutters on that is to say, provision of law literally quite impregnable feel and declare its utter helplessness in meeting with the situation. This of course and certainly cannot be said to be an illegal approach, but at the same time in a given case it can as well prove and turn out to be pure and mere legalistic and not quite just approach in background of the overall peculiar facts and circumstances of that particular case. Quite obviously so because the legislature ordinarily cannot always and for all time to come foresee certain unprecedented situations, circumstance and issues arising where the pure and simple application of law may in a given case deny the substantial justice or say in a given case even perpetrate patent injustice to the person unconcerned with the offence. Thus, the legislature in a given case may also possibly overlook the situation where if indeed made alive to it by its conscious alert members, it would not fail to take the desired notice and accordingly care to meet and save the unforeseen situation. Further, under the ordinary circumstances, for doing of day-to-day justice, the same can as well be done by an average ordinary literal interpretation of law which meets with the fact-situation. But for certain peculiar unforeseen unpredictable one fact-situation like the one in the instant case (which indeed can certainly arise any time, any moment in anybody's life, in any case), the Court may not always possess that rough and ready workable formula, rather Court legally speaking justifiably feels powerless and helpless to squarely meet with such situation because of the existing legal impediment.

9. Under such extraordinary trying circumstances what indeed the Court when inclined to do the real and substantial justice if possible is required to do? To sit embarrassed and helpless reading the section? The answer to this is "No". The law is ultimately enacted to do "The Justice" rather the justice and nothing but the justice alone is the only goal and only concern of law. The relationship between law and justice is like that of the beating heart and that in turn which keeps a person living, giving life. Existence of Law like heart is ultimately to

sustain justice like life. Therefore, if heart is unable to function and deliver its ultimate aim to sustain life it can create problem to life. Therefore, sometimes to sustain the life bypass surgery is needed. That is to say, by keeping the heart intact, without taking liberty with it, by bypass surgery arteries clotting the veins are removed and replaced and thereby ultimately life is saved. Accordingly also, for doing ultimate substantial justice, keeping law intact if some quite needed bypass surgery is/could be done, then it is the duty of the Court to do so. This can be done only and only if we properly understand the duty of the Court vis-a-vis ultimate justice, true object and spirit of the law and justice and once again its ultimate relationship inter se. The law is meant for doing justice and cannot bear injustice at its own behest and accordingly, where the law is humble enough to admit that it exists for justice and but for justice it has indeed no other existence, it is here where accepting the low profile of law and thereby its humility and humbleness that the Court should endeavour to find out the honest humble way to do the real and substantial justice. Of course, to strike the just balance between the law and substantial justice as far as possible, this exercise is open, exceptionally only and only to the constitutional functionaries like the High Court and the Apex Court, which is indeed quite equipped with the necessary wisdom earned from life-long trying experiences, where once a while we have to admit that the life is larger than the law, a continuous question-mark and constant problem one way or the other and accordingly law and justice in its proper humanistic perspective could be better viewed, understood and appreciated by the said experienced constitutional functionaries alone.

10. Bearing in mind the aforesaid discussion, while rejecting the temporary bail application of the petitioner, on exceptional humanitarian ground in the facts and circumstances of this case, we direct the jail authorities to hand over the custody of the prisoner to the police to take him out of jail to his place of ordinary residence for the limited period of four days to enable him to console his bed-ridden bereaved wife and thereafter to take him back inside the jail.

11. Opposing this approach of the Court, Mr. Mehta, learned A.P.P. submitted that even on some humanitarian grounds, like the present one, when an accused person is ultimately found to have committed an offence as serious as one under the N.D.P.S. Act he should not and accordingly cannot be permitted to be taken out of the jail even for a day. Now, it is indeed impossible to agree with the diehard stand of Mr. Mehta, learned A.P.P. When the Court is sentencing the accused, it is the accused only who is supposed to be punished, and none other. In the instant case, by taking such hardened uncompromising stand as suggested and taken by the learned A.P.P. if we are not to permit the convict-prisoner to be taken out of the prison to console his bereaved and seriously ill bed-ridden wife, then in that case, we are quite afraid, indirectly we are extending the Court's punishment imposed upon the convict prisoner, to her also for no fault of her except being the wife of the prisoner if that is at all considered to be her fault. Could this ever be done? In fact, in words of Portia if the prosecution has a right of pound of flesh, it can take a pound of flesh only and

not a drop of blood more, particularly in the facts-situation of the case like the present one. Not to exercise judicial discretion in a way which keeping the provisions contained in Section 32-A intact by permitting the prisoner to be taken out of jail for few days under quite an extraordinary circumstance like the present one is perhaps shedding blood over and above the pound of flesh and that also of a person not accused of any offence. Court sentence is not a contagious disease which any relative of convict-accused coming in contact automatically gets inflicted with that disease to get extended the punishment unto themselves also. This cannot be done. Accordingly, while deciding the most sensitive issues like the present one, the Court is not expected to be inhumanistic, stripped of mercy and revengeful ignoring the misfortune which has befallen her.

12. It is certainly not expected to be helpless passive observer making no honest effort to find out some reasonable way, if possible. In that view of the matter, we are not supposed to administer justice in a blind ritualistic manner the outfall of which may bring about unwarranted, unfortunate injustice to the person totally unconcerned with the crime, namely, in the instant case the needy craving wife expecting her husband to be by her side in her darkest hour of extreme grief, more particularly when she is confined to bed because of shock due to passing away of her only son. In this view of the matter, it is indeed not possible to accept this contention of the learned A.P.P. However, we make it quite clear that any and every ground cannot be labelled as humanistic unless the case is made out by the petitioner that but for the temporary taking out of the prisoner from jail, consequences would be too harsh, heartless and inhumanistic and perhaps persons not concerned with crime would suffer irreparably.

13. Thus, having failed on above ground, the learned A.P.P. further submitted that if the Court is ultimately inclined to permit the convict prisoner to visit his house to console and share the grief of his wife, under police escort, then the entire cost for the same should be borne by the petitioner and/or the convict-prisoner. The learned A.P.P. further submitted that as per his rough and ready instructions, police escort per day costs the State Government about Rs. 500/- or more and that will be multiplied by as many number of days for which the prisoner is ordered to be taken out of the jail. Under the circumstances, if the petitioner is not directed to pay first for the police escort, this will be an unnecessary burden on the public exchequer for no fault of the State. Now, the learned A.P.P. in this regard is indeed quite right, but he is right to the extent if the petitioner and/or prisoner is not poor, incapable to meet with the said expenses.

14. In case if the petitioner or prisoner is found to be poor, then in that case once a while State shall have to bear the expenses of police escort. Accordingly, ordinarily when such convict prisoners are required to be taken out of jail under the police escort in the circumstances as the present one, then the expenses towards the same shall have to be borne by the petitioner or the accused/convict

prisoner, as the case may be. However, at this stage, we have no material before us to know whether the petitioner is in sound financial position to bear the said expenses. Further, having regard to the urgency of the problem, we have indeed no time to call for and examine material that may be produced to appreciate and judge the financial strength. It is under these peculiar and hard-pressing circumstances that we feel that the State for the time being shall have indeed no alternative but to bear the expenses of taking out the prisoner out of jail under the police escort. However, we would like to make it abundantly clear that on the learned A.P.P. ultimately satisfying this Court by producing some tangible material on the record that the petitioner is financially strong enough to bear the burden of expenses of the police escort, then in that case she shall have to reimburse the same at the earliest and the non-compliance of that order can as well amount to contempt of the Court. Apart this, every prisoner is ordinarily paid some wages towards the work he does in jail. To some extent the expenses and outstanding dues like the present one can as well be met and be adjusted against the balance available in account of the convict/ prisoner.

15. In view of the aforesaid discussion, we direct the jail authorities to permit Fakruddin Murshid to be taken out of the jail to be carried to village Nasampura, Sagwada, Dist. Dungarpur, Rajasthan State under strict police escort today itself for 4 (four) days, from the time he is taken out from the jail for the said purpose. Rule made absolute accordingly.