

(1987) 12 BOM CK 0029

In the Bombay High Court

Case No : Criminal Application No"s. 2291 and 2316 of 1987

Sunil Chainani and Others

APPELLANT

Vs

Inspector of Police, C.B. Control and Another

RESPONDENT

Date of Decision : 14-12-1987

Acts Referred:

Constitution of India, 1950 — Article 22(5)

Criminal Procedure Code, 1973 (CrPC) — Section 437(5), 50

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 22, 29, 8

Citation : (1988) 2 BomCR 118

Hon'ble Judges : V.P. Tipnis, J

Bench : Single Bench

Advocate : R.G. Merchant, in Criminal A. No. 2291/87, V.U. Belose, P.P. in Cri. A. No. 2291/87, for the Appellant; R.G. Merchant in Cri. A. 2316/87 and V.U. Belose, Public Prosecutor in Cri. A. 2316/87, for the Respondent

Judgement

V.P. Tipnis, J.—On 26th of October, 1987 on the receipt of certain information the officers of C. B. Control (Drugs) C.I.D., Bombay along with the panchas went to Block No. 2, Ground Floor, Gurukripa Building, Road No. 14, Bandra (West), Bombay at about 5.00 p.m. The door was knocked. The door was locked from inside which was opened after some time. The police along with the panchas entered the room and found that one person was standing at the entrance of the block. The police heard the noise of flowing water from inside the block. Therefore, they went to the bathroom along with the panchas. One Sunil Chainani, accused No. 1, was found holding a plastic bag containing white powder and one Sanjay Raheja, accused No. 2, was standing near the toilet pot and starting the water taps. The plastic bag containing the white powder was taken charge from the hands of accused No. 1. Some white powder was also noticed inside the toilet pot in the flowing water. The powder was suspected to be heroin. About one kilogram powder was seized. Five gram sample was taken under a panchnama and accused were arrested and brought to the police station. A case under C.R. No. 39/87 for charges u/s 8(c) read with 22 and 29 of N.D.P.S.

Act 1985 was registered.

2. On 27th of October, 1987 all the three accused were produced before the learned Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Bombay. An application for remand to police custody was made to facilitate further investigation in the case. The application mentioned that the police have strong objection for bail of the above accused persons.

3. It appears that at the very same time the accused persons applied for bail to the learned Magistrate. It was submitted on behalf of the accused that the arrest of all the accused persons was illegal inasmuch as the ground of their arrest were not at all communicated to them. Reliance was placed on the judgments reported in 1975 Criminal Law Journal, page 1254, and 1976 Criminal Law Journal, page 1303. The Police Sub Inspector Mr. Birje who presented the remand application was questioned by the learned Magistrate and he stated before the learned Magistrate that a copy of the panchnama has not been given to the accused as the owner of the premises was not found present at the time of the seizure. The Police Sub-Inspector also stated that all the accused were orally communicated the grounds of their arrest. The learned Magistrate observed that the provisions of section 50 of the Code of Criminal Procedure are mandatory and as there was no compliance therewith he was of the opinion that the application made by the accused shall have to be granted. The learned Magistrate observed that all the accused are charged for the commission of the alleged offence under N.D.P.S. Act, one kilogram of white powder valued at Rs. 1 lac has been allegedly seized by the police from the accused and that these allegations are very serious. The learned Magistrate further observed that the accused have submitted their affidavits before him contending that the grounds of their arrest have not been communicated by the police and that in the face of the admissions of P.S.I. Birje it is not necessary to call upon the police to file a reply. Ultimately the learned Magistrate by his order dated 27th of October, 1987 was pleased to enlarge each accused on bail in the sum of Rs. 40,000/- or in the alternative to deposit cash bail in the same amount till the hearing and final disposal of the case. Each accused was also directed to report C.B. Control (Drugs) C.I.D., Bombay, between 2.00 p.m. and 5.00 p.m. on all the working days.

4. It appears that the prosecution immediately made an application for stay of the said order granting bail. The said application mentioned that the accused were not in the custody of the police even for 24 hours and if the accused are released on bail it will be difficult to carry out the investigation. It was further mentioned that the State intends to prefer a revision application against the bail order and therefore the order of bail may be stayed for a week to enable the State to approach the higher Court. The learned Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Bombay, passed the order staying execution of the order of bail till 3rd of November, 1987.

5. The accused filed an application before the learned Magistrate complaining about the ex parte order of stay and prayed that the order of stay should be

vacated forthwith. The said application was presented before the learned Magistrate at about 4.15 p.m. on 27th of October, 1987. The learned Magistrate heard the Advocate for the accused and observed that he had no power to vacate the orders passed by him and when the order itself was challenged he had no option than to grant the stay. The learned Magistrate was therefore pleased to reject the application of the accused for vacating the stay.

6. The accused have filed the present Criminal Application No. 2291 of 1987 against the said order of granting stay of order of bail.

7. The State on its part has filed Criminal Application No. 2316 of 1987 challenging the order of granting bail to the accused by the learned Magistrate.

8. As far as the challenge by the accused to the order of the learned Magistrate staying his earlier order is concerned. Shri Merchant, the learned Advocate for the petitioners, submitted that the learned Magistrate had no jurisdiction to stay his own order and there is no provision under the Code of Criminal Procedure under which the learned Magistrate could pass such order. Shri Merchant relied upon the case reported in 1981 BOM CR 193, Dr. Dattatraya Samant v. State of Maharashtra, wherein this Court having granted the application of Dr. Samant for bail was requested by the learned Counsel appearing for the State for staying the operation of the order enlarging on bail the petitioner therein for a reasonable time. This Court in paragraph 48 of the said judgment observed as under:

".....I am afraid, in the peculiar facts and circumstances of this case, such a course is not permissible. The order which is the ultimate outcome of this proceeding, results in granting liberty to the petitioner and once an order has been passed on merits of the proceeding, it would not be proper and fair that the operation thereof should be stayed as it would be nothing but tantamount to denying bail to the petitioner even for a shorter period, though on merits, this Court has directed that he is entitled to bail....."

9. I do not think that this case and the observations are any authority for the proposition that the learned Magistrate had no jurisdiction to stay his own order. Smt. Belose, the learned Public Prosecutor appearing for the State in this case, conceded that there is no provision in the Code of Criminal Procedure which enables the Magistrate to stay his own order. However, she contended neither there is any prohibition to do so if the circumstances so require. Smt. Belose submitted that the learned Magistrate could possible order such stay under the provisions of sub-section (5) of section 437 of the Code of Criminal Procedure. I am afraid that this submission cannot be accepted because provisions of sub-section (5) of section 437 clearly provide that any Court which has released a person on bail under sub-section (1) or sub-section (2) may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody. On hearing both sides it appears doubtful whether the learned Magistrate has the power to stay his own earlier order. However, in view of the events that have taken place in this particular matter, the decision on this issue

will be purely academic and I do not think it necessary to decide this issue in this proceeding, inasmuch as after the stay was obtained by the State for approaching this Court against the order of grant of bail, the State has in fact filed a revision application in this Court against the order of grant of bail, and the order of the learned Magistrate releasing the accused on bail has been stayed by this Court.

10. This brings me to the consideration of the application filed by the State being Criminal Application No. 23316 of 1987 challenging the order of the learned Magistrate granting bail to the accused. Smt. Belose contended that the order of the learned Magistrate granting bail to all the accused is absolutely illegal and improper. She contended that the reason and the only reason given by the learned Magistrate is that the grounds or reasons of arrest were not communicated to the accused. Smt. Belose contended that the reasons were communicated orally by the Police Officer concerned. Secondly all the accused persons were nabbed almost red-handed. It was found that they were destroying the white powder by flushing it through the toilet and under these circumstances it cannot be said that the accused were not knowing as to why they were arrested. Smt. Belose contended that on proper reading of section 50 of the Code of Criminal Procedure it cannot be inferred that the accused must be informed in writing. Smt. Belose further contended that not even a period of 24 hours elapsed between the arrest of the accused and their release by the learned Magistrate on bail. The copies of the panchanama were not given as the signature of the owner of the flat was to be obtained and it is common ground that the copy of the panchanama was given to the accused on the evening of 27th of October, 1987. Smt. Belose further contended that all the accused were arrested on a very serious charge. By relying upon the affidavit filed by the Police Officer, she further contended that accused No. 2 appears to be a person dealing in narcotics on a large scale. She therefore, contended that even on merits this was hardly a case where the accused could have been released on bail without affording any time for further investigation.

11. Shri Merchant, the learned Counsel for the accused, submitted that provisions of section 50 of the Code of Criminal Procedure are with a view to bring the procedure in accordance with the provisions of Article 22(1). Shri Merchant also relied upon the provisions of Article 22(5) of the Constitution of India and submitted that on proper reading of provisions of section 50 and provisions of Article 22, it is mandatory that the Police Officer should immediately communicate the person arrested full particulars of the offence for which he is arrested or other grounds for such arrest. He submitted that not only this must be in writing but also must be in the language understood by the person arrested. Shri Merchant submitted that while interpreting any statute same words appearing in the same statute should be interpreted in the same manner and the word "communication" used in Article 22(5) of the Constitution of India and the word "communicate" in section 50 of the Criminal Procedure Code, must be interpreted in the same manner. Shri Merchant also submitted

that different offences are mentioned under the various provisions of the N.D.P.S. , Act, and as such communication of full particulars of the offence for which the accused are arrested assumes great importance. Shri Merchant further submitted that if there is any breach of this mandatory provision, the arrest ab initio becomes without the authority of law and must be held to be invalid and the person must be released forthwith on that count alone Shri Merchant in this behalf drew my attention to the case reported in Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others, Shri Merchant also in this behalf relied upon the cases reported in (1) Govind Prasad Vs. The State of West Bengal, . Shri Merchant therefore, contended that the learned Magistrate was fully justified in releasing the accused persons of bail.

12. So far as the merits of the case are concerned , there can be hardly any doubt that the order of the learned Magistrate is absolutely improper and unjust. In fact the learned Magistrate himself in conscious that the alleged offence is under N.D.P.S. Act, one kilogram of white powder valued at Rs. 1 lac has been allegedly seized from the accused by the police and these allegation are very serious. In the facts and circumstances of the case it is abundantly clear that the accused could not have been released on bail within 24 hours when no further investigation could be caused at all. In view of the facts and circumstances of the case, the petitioners could not have been released on bail within 24 hours of their arrest. However, the order of grant of bail challenged before me is passed by the learned Magistrate solely on the ground that there is non-compliance of the mandatory provisions of section 50 of the Code of Criminal Procedure and, therefore, that is the only aspect which needs consideration in this proceeding.

13. Now as far as the contention of Shri Merchant regarding the requirement of provisions of section 50 of the Code of Criminal Procedure being interpreted in the light of provisions of Article 22(5) is concerned I think the submission cannot be accepted. There is basic and funds mental difference between the person detained under the provisions of law providing for preventive detention and detention of person arrested on accusation of commission of an offence. In the case of preventive detention the person is detained without trial and he has only the right to make a representation. The purpose of communication of the grounds to the detenu is to enable him to make a purposeful and effective representation. Therefore, under Article 22(5) the basic facts constituting the "grounds" have to be imparted effectively and fully to the detenu in writing in a language which he understands. However, in the case of a person arrested on accusation, he is required to be produced before the Magistrate within 24 hours. He has the right to consult and to be defended by a legal practitioner of his choice. The purpose of communication of the grounds of arrest is to enable him to apply for release on bail when he is produced before the Magistrate. Therefore, the principles laid down and decisions in cases of preventive detention and the provision of Article 22(5) cannot be pressed into service for appreciating the ambit and scope of provisions of section 50 of the Code of Criminal Procedure. However, provision of Article 22(1) are relevant which lays down that

no person who is arrested shall be detained in custody without being informed as soon as may be of the grounds of such arrest, nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice. Provisions of section 50 of the Code of Criminal Procedure lay down that 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 such arrest. Now the provisions of the Code of Criminal Procedure contemplate that the accused person arrested on the accusation of non-bailable offences has to be produced before the nearest Magistrate within a period of 24 hours and his further detention in custody, whether police or judicial, beyond 24 hours has to be under the authorisation of the learned Magistrate which authorisation cannot be for more than 14 days at a time. Secondly depending upon the nature of the offence and the punishment prescribed therefore, such authorisation cannot go beyond 60 days or 90 days and thereafter whatever may be the offence if the accused offers bail and charge-sheet is not filled, the Code provides that such persons shall be released on bail. Provisions of section 50 of the Code of Criminal Procedure will have to be appreciated, understood and interpreted in the light of all these provisions. In the light of these provisions. I do not think that the communication referred to in section 50 of the Code of Criminal Procedure must be every case in writing. What is important is communication or knowledge or information regarding the particulars of the offence for which the arrest is made or other grounds for such arrest. Provisions of section 50 of the Code of Criminal procedure provide that the Police Officer shall "forthwith communicate to him full particulars of the offence for which he is arrested." An act can be said to be done forthwith if it is done with all reasonable dispatch and without avoidable delay. It can also be interpreted to mean as soon as possible without any. In the facts and circumstances of the case before me it is clear that the accused were arrested while they were in possession of white powder suspected to be heroin weighing about a kilogram. The facts further disclose that in fact accused Nos. 1 and 2 were attempting to flush out the said powder in the toilet. The Police Officer has stated before the Court that he had orally communicated the reasons of their arrest to the accused. Further in the remand application full particulars of the offence are disclosed and admittedly this remand application is made at about 11.00 a.m. on 27th of October, 1987. Copy of the panchanama disclosing further details was also admittedly served upon the accused within 24 hours. If these glaring facts are taken into consideration the plea of the accused on the next day before the learned Magistrate that they were not communicated the full particulars of the offence for which they were arrested or the other grounds for their arrest, appears to me palpably unreasonable. Secondly, the words used in Article 22(1) are that no person arrested shall be detained in custody without informing as soon as may be, of the grounds of such arrest. Thus if the person is not informed as soon as may be, his further detention may become invalid or unlawful. But it cannot be said that his initial arrest itself becomes illegal. If these facts are taken together with the plea of the police inspector that he had orally communicated the particulars of the offence to the accused and with the

further background that the accused in the present case were caught in possession of heroin weighing one kilogram, I think that the provisions of section 50 of the Code of Criminal Procedure in this case were fully complied with and it would be unreasonable to hold, as unfortunately the learned Additional Chief Metropolitan Magistrate has held, that the provisions of section 50 are not complied and the therefore the accused are entitled for bail.

14. As far as the three case relied by Shri Merchant and referred to above by me are concerned, with great respect to the learned Judges I am unable to subscribe to the view that the non-compliance with the provisions of section 50 of the Code of Criminal Procedure renders the arrest of the person concerned illegal. At best the further detention without complying with the provisions of section 50 may become illegal. However, in view of the fact that I am holding that in the facts of the case before me, provision of section 50 of the Code of Criminal Procedure are fully complied with, it is not necessary for me to decide this issue as to the effect or the non-compliance of the provisions thereof.

15. In view of this, the order of the learned Additional Chief Metropolitan Magistrate, 37th Court, Esplande, Bombay, is improper and illegal and the same is hereby quashed and set aside.

16. Shri Merchant, the learned Counsel appearing for the accused, contended that long period has gone since the accused persons had been taken into custody and there is no progress in investigation worth the name. He also complained of assault by the Police Officers on the accused. As far as these aspects are concerned, the record shows that the accused had made an application against the officers to the learned Magistrate and he will deal with the said application in accordance with law. As far as Mr. Merchant's plea that at least at this juncture they should be released on bail as enough time has been afforded to the prosecution, I am not inclined to consider his application at this stage here, but I make it clear that the accused will be entitled to move the learned Magistrate at proper stages and the prosecution will also be entitled to ask for the remand and the learned Magistrate will deal with these applications on merits and in accordance with law in that behalf.

17. Accordingly, as far as Criminal Application No. 2291 of 1987 is concerned the Rule is discharged and Criminal Application No. 2316 of 1987 by the State is concerned, the Rule is made absolute and the order of the learned Additional Chief Metropolitan Magistrate, 37th Court, Esplanade Bombay, dated 27th October, 1987 releasing the accused on bail is quashed and set aside. I am making it clear that the learned Magistrate will also consider on its own merits and in accordance with law any application by the accused persons made for committing them to judicial custody instead of police custody.