

(1987) 10 MAD CK 0011

In the Madras High Court

Case No : Criminal Miscellaneous Petition No. 9487 of 1987

The Assistant Collector of Customs Prosecution Cell

APPELLANT

Vs

Shanmugam and The Superintendent, Central Prison

RESPONDENT

Date of Decision : 12-10-1987

Acts Referred:

Customs Act, 1962 — Section 135

Citation : (1988) 14 ECR 108

Hon'ble Judges : Padmini Jesudurai, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Padmini Jesudurai, J.—This petition coming on for orders upon perusing the petition and the affidavit filed in support thereof and the counter

affidavit filed therewith and upon hearing the arguments of Mr. P. Rajamanickam Central Government Prosecutor on behalf of the petitioner and of

Mr. G. Padmanabhan, Advocate for the 1st Respondent, the Court made the following order:

The Assistant Collector of Customs, Madras who is investigating into a case registered against the first respondent found to be in possession of 33

gold bars, valued at Rs. 11,59,116/- while arriving as a passenger from Singapore by flight No. MH 030 on 13.8.1987 at Madras Airport, kept

concealed in the cloth belt tied around his waist has filed this present petition to set aside the order of the learned Principal Sessions Judge,

Madras, granting bail to the first respondent.

2. Facts Briefly are : On 13.8.1987 the first respondent allged at the Madras Airport from Singapore flight and on search it was found that in a

cloth belt tied around his waist 33 gold bars, totally weighing 330 tolas, valued at Rs. 11,59,116/- were kept concealed and the same were seized

under a mahazar. There was no valid import permit from the Reserve Bank of India for the above gold nor was the gold declared to the Customs

at any stage. The first respondent, when questioned by the Customs Officer, gave a voluntary statement admitting the fact that he had concealed

the above gold on his body without any valid import permit. A case was registered against the respondent for an offence u/s 135 of the Customs

Act and is being investigated into by the petitioner. The first respondent was arrested and remanded to judicial custody. At that stage, the first

respondent filed Crl. M.P. No. 3107 of 1987 before the Principal Sessions Judge, Madras seeking bail. The petitioner filed a counter and

objected to the grant of bail on the ground, that the respondent was a Malaysian National, holding a Malaysian passport, having no roots in India

and did not have any employment status or length of residence in the community in India and, since the gold was found actually on his person,

concealed and he himself had given a voluntary statement, which statement he had not chosen to retract, he was likely to abscond in view of the

fact that the offence, which he had committed was one which called for a minimum imprisonment of one year.

3. Learned Sessions Judge over-ruled the objections of the petitioner and passed the impugned order on 9.9.1987 granting bail to the respondent

on his executing a bond for Rs, 10,000/- with two sureties each for a like sum, of which one atleast should be a local surety and with a further

direction that the first respondent should report before the trial court daily at 11 a.m. The present application is filed to set aside the above order

granting bail to the 1st respondent.

4. In view of the fact that admittedly the respondent has no roots in India and is a foreign national and in view of the circumstance that the gold was

found concealed on his body and he had accepted the same in his voluntary statement, which he had not chosen to retract, this Court by an interim

order dated 10.9.1987 in Crl. M.P. No. 9488 of 1987 after hearing Thiru P. Raja Manickam, Standing Counsel for Customs and Thiru G.

Padmanabhan, learned Counsel for the first respondent, directed stay of the order granting bail till the disposal of the main petition.

5. Thiru P. Rajatnanickam, Standing Counsel for Customs, contended that the order passed by the learned Sessions Judge granting bail to the 1st

Respondent, is in violation of well established principles relating to grant of bail laid down by the Supreme Court in several decisions and

consequently, the order suffer from serious infirmities and interests of justice require that the order should be set aside. Learned Counsel relied on

certain decisions, which I shall refer to later.

6. Per contra, Thiru G. Padmanabhan, learned Counsel for the first respondent filed a counter contending that the first respondent, being a

foreigner cannot be expected to have any roots in the society in India and that the requirement of solvent sureties is a sufficient safeguard against

the first respondent absconding from India and that the other reasons given by the petitioner for requiring the order of bail to be set aside, are

legally untenable. Learned Counsel also relied on certain decisions, which I shall discuss later.

7. The question that arises for consideration is whether the impugned order suffers from any serious infirmity, so as to justify invoking the inherent

powers of this Court to set aside the order in the interests of justice.

8. Under the Criminal Procedure Code, the provision primarily intended to have a bail already granted cancelled is Section 439(2), under which

the High Court or the Court of Sessions could direct that any person who has been released on bail be arrested and committed to custody. In an

application u/s 439(2) Cr.P.C. the initial decision of the court in granting bail is not assailed but what is sought for is, a review of that decision

already made, necessitated by circumstances supervening the grant of bail, as when the accused after gaining his liberty consequent to the bail

order abuses the same, either by threatening the witnesses or interfering with the smooth progress of investigation. Through several of its

pronouncements, the Supreme Court has indicated the various considerations that should weigh with the courts when called upon to cancel bail u/s

439(2) Cr.P.C. On preponderance of probabilities, the truth or falsity of the allegations on the basis of which cancellation is sought for, should first

be decided, and thereafter it has to be determined, whether interests of justice would require cancellation of bail.

9. The present application is not one u/s 439(2) Cr.P.C. Invoking the in herent

powers of this Court u/s 482 Cr.P.C. the petitioner seeks having the order granting bail set aside, not on the ground of any supervening circumstance calling for cancellation of the bail and re-arrest of the 1st Respondent but seeks setting aside the order on the ground that the order being in violation of the principles laid down by the Supreme Court, suffers from serious infirmity and interests of justice require that the order be set aside. This Court is conscious of the fact that this Court is not sitting in appeal, as it were, over the order of the learned Sessions Judge granting bail. Grant of bail is a matter exclusively within the discretion of the court passing the order. The discretion is wide. It could not be circumscribed by any rigid formula or set canons. The discretion, however has to be exercised judiciously on established judicial principles. Even if the case on hand is a case for rejecting bail, this Court will not be justified in interfering with the exercise of the discretion by the learned Sessions Judge in favour of the accused, unless the order is shown to suffer from some infirmity and reversal of the order is a compelling necessity in the interests of justice.

10. In fact in *Gurcharan Singh v. State (Delhi Admn.)* AIR 1978 S.C. 179 , the Supreme Court, while canvassing the correctness of the order of the Delhi High Court, cancelling the bail granted to the accused by the Sessions Judge, Delhi, posed the question as follows:

In the present case the Sessions Judge having admitted the appellants to bail, by recording his reasons, we will have to see whether that order was vitiated by any serious infirmity, for which it was right and proper for the High Court, in the interest of justice, to interfere with his discretion in granting the bail.

It is in the above spirit that the order of the learned Sessions Judge is being scrutinised by this Court.

11. Reliance was placed both by the standing counsel for Customs and the learned Counsel for the 1st Respondent, upon the following decisions of the Supreme Court, to indicate the different considerations that should weigh with Courts while considering bail in *The State Vs. Captain Jagjit Singh*, , the Supreme Court laid down that the Court granting bail....

....should then have taken into account the various considerations, such as, nature and seriousness of the offence, the character of the evidence,

circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable

apprehension of witnesses being tampered with, the larger interests of the public or the State, and similar other considerations which arise when a

court is asked for bail in a non-bailable offence. It is true that u/s 498 of the Code of Criminal Procedure, (present Section 439) the powers of the

High Court in the matter of granting bail are very wide, even so where the offence is non-bailable, various considerations such as those indicated

above have to be taken into account before bail is granted in a non-bailable offence.

12. In *Gurcharan Singh v. State (Delhi Admn.)* AIR 1978 S.C. 179 the Supreme Court observed:

We may repeat the two paramount considerations, viz., likelihood of the accused fleeing from justice and his tampering with prosecution evidence

relate to ensuring a fair trial of the case in a court of justice. It is essential that due and proper weight should be bestowed on these two factors

apart from others. There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the

exercise of judicial discretion in granting or cancelling bail.

13. Similar observations, though in different language, have been made by the Supreme Court in *Bhagirath Singh Jdeja v. State of Gujarat* 1984

Crl. L.J. 160 , emphasising the bifocal considerations, as follows:

But even where a prima facie case is established, the approach of the court in the matter of bail is not that the accused should be detained by way

of punishment but whether the presence of the accused would be readily available for trial or that he is likely to abuse the discretion granted in his

favour by tempering with evidence.

14. It, therefore, follows that one of the major factors on which the Court should give anxious consideration when admitting bail is the possibility of

the accused fleeing from justice. In the case of nationals of the same country, the possibility of their leaving the country is comparatively more

remote than in the case of foreign nationals. If a foreign national succeeds in leaving the country through some illicit channel, the possibility of re-

arresting him and bringing him back to face trial is almost an impossibility. In such cases it would be no adequate safeguard to require execution of

bonds with sureties. However high the bond amount may be, in economic offences, like the one on hand, any amount would be a cheap price to secure one's freedom or liberty.

15. The reasons given by the learned Sessions Judge that at the stage of granting bail, it is not open to the Court to look into the materials available against the accused regarding the commission of the offence is also erroneous. The further observations of the learned Sessions Judge, that the case is still under investigation and the presumption of innocence is in favour of the first respondent and the guilt of the first respondent has to be proved at the trial and the question of the possible sentence that would be awarded could not also be considered since that would be a contingency that would arise only in the event of a conviction, are directly opposed to the law laid down by the Supreme Court in the passage already extracted from *The State Vs. Captain Jagjit Singh*, that considerations such as the nature and seriousness of the offence, the character of the evidence, and circumstances which are peculiar to the accused trial are also relevant considerations.

16. Learned Counsel for the first respondent relied upon a decision of the Supreme Court in *Mod Ram v. State of M.P.* 1978 CrL. L.J. 1703 . The above decision, has little bearing on the present question. The Supreme Court in that case modified the order of the learned Magistrate requiring the accused who was a poor mason to furnish sureties for Rs. 10,000/- from his own District, rejecting the suretyship of his brother since it was in another District. On account of his poverty the accused was unable to furnish the required sureties. The Supreme Court, under those circumstances, modified the order of the learned Magistrate and ordered the release of the accused on his own bond for Rs. 10,000/-. The principle laid down in the above cases has no application to the present one:

17. In the instant case it is common ground that, the first respondent is a foreign national and has absolutely no roots in India; nor has he claimed any employment status or association in India. The gold bars, had been concealed in a cloth belt, tied around his waist and they had not been declared at any stage; nor did the first respondent have any valid permit to possess them. The above gold was seized in the presence of independent witnesses. The first respondent, has also made a statement

admitting possession of the gold without any valid document. The offence, if proved, calls for a minimum imprisonment of one year. In this background, the apprehension of the petitioner that the first respondent who has absolutely no roots in India would flee from justice crossing the Indian border through illicit channel, if need be, by forfeiting the amount of the bond, is a reasonable apprehension. Securing the presence of the accused for trial is one of the two paramount considerations, the court has to keep in mind while considering bail. The discretion exercised by the learned Sessions Judge in granting bail suffers a serious infirmity in that it is in violation of the principles laid down by the Supreme Court in several of its decisions referred to above. Interests of justice, required that this Court interfere with the discretion of the learned Sessions Judge in granting bail. The order of the learned Sessions Judge has, therefore, to be set aside.

18. In the result, the petition is allowed and the order of the Principal Sessions Judge, Madras made in CrI.M.P. No. 3107 of 1987 dated

9.9.1987 is set aside. The petitioner, will complete investigation without any delay and, if a complaint is filed, expedite trial.