

(2021) 06 GAU CK 0117

In the Gauhati High Court

Case No : Criminal Revision Petition No. 148 Of 2021

Warish Khan And Anr

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 22-06-2021

Acts Referred:

Constitution Of India, 1950 — Article 21
Code Of Criminal Procedure, 1973 — Section 167(2), 167(2)(a)(i), 167(2)(a)(ii), 397, 401, 436(1), 437(3), 437(3)(a), 437(3)(b), 437(3)(c), 439(1)(a), 440, 440(1), 440(2)
Customs Act, 1962 — Section 5, 7(1), 11, 104, 108, 110, 123, 135(1)(b)(i)(A), 135(1)(b)(i)(C), 439

Citation : (2021) 06 GAU CK 0117

Hon'ble Judges : Manish Choudhury, J

Bench : Single Bench

Advocate : N J Das, S C Keyal

Final Decision : Disposed Of

Judgement

1. The instant petition under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (the Code and/or CrPC, for

short) has been filed by the two petitioners viz.

(1) Warish Khan and (2) Md. Riyazuddin seeking modification of an order dated 08.06.2021 passed by the learned Additional Sessions Judge No. 2,

Kamrup (Metro), Guwahati in a bail application, B.A. no. 253/2021 preferred by them before the said Court.

2. It may be mentioned that by the order dated 08.06.2021, the two petitioners were allowed to go on default bail in terms of the proviso (a)(ii) to

Section 167(2), CrPC.

3. Heard Mr. N.J. Das, learned counsel for the petitioners and Mr. S.C. Keyal, learned Standing Counsel appearing for the respondent Directorate of

Revenue Intelligence (DRI).

4. The case of the investigating authority i.e. the Directorate of Revenue Intelligence (DRI), Guwahati which is an empowered authority under

Section 5 of the Customs Act, 1962, in brief, is as under : -

4.1. A specific information was received on 06.04.2021 to the effect that contraband gold bars of foreign origin were being transported from Imphal to

Guwahati in a Maruti 800 car bearing registration no. AS-01/BB-0892. Acting on the above information, the officers of DRI intercepted the said

Maruti 800 car near Jorabat Flyover, Guwahati at about 9-00 p.m. on 06.04.2021 in presence of two independent witnesses. Two persons were found

as occupants in the said Maruti 800 car so intercepted. On being asked, the two accused persons i.e. the present two petitioners gave their

introduction. When asked about carrying contraband gold bars inside the vehicle, both the petitioners had denied.

4.2. As the place of interception was a busy National Highway the DRI personnel decided to take the Maruti 800 car and the petitioners to their office

for a thorough checking and accordingly, the petitioners were summoned to accompany them along with the Maruti 800 car to the office of the DRI

located at Christian Basti, G.S. Road, Guwahati. The two petitioners and the two independent witnesses along with the Maruti 800 car accompanying

the DRI team reached the DRI office at 10-15 p.m.

4.3. After observing due formalities and as per the requests of the two petitioners, the two petitioners were personally searched in presence of a

Gazetted officer of the DRI. Nothing was, however, found from their possession during such personal search. Thereafter, the intercepted Maruti 800

car was checked but during the preliminary checking no contraband was recovered. As the intelligence input as regards transportation of contraband

gold bars by the said Maruti 800 car in question was specific, it was decided to take the said Maruti 800 car to a Maruti Service Centre on the next

day for a thorough checking.

4.4. Accordingly on 07.04.2021, the intercepted Maruti 800 car was taken to a Maruti Service Centre named M/s Mono Motor Works,

Bamunimaidam, Guwahati and it was thoroughly checked. During such checking, three bundles of similar size wrapped with old newspapers and

adhesive tapes were recovered from a special cavity made in the panel board

below the front windshield, above the engine of the said Maruti 800 car in presence of the two petitioners and the two independent witnesses. The two petitioners were requested to remove the packings and on removing the wrapped adhesive tapes and old newspapers, 20 yellow metal bars in biscuit form were recovered from each of the bundles i.e. a total of 60 yellow metal bars in biscuit form were recovered and those were reasonably believed to be of gold. The two petitioners were thereafter, asked to produce supporting documents, if any, in respect of those 60 nos. of suspected gold bars but they failed to produce any such supporting documents.

4.5. Thereafter, the two petitioners were apprised about the provisions contained in Section 123 of the Customs Act, 1962 and were asked to

discharge the burden of proof that the 60 nos. of suspected gold bars were not smuggled goods but the petitioners had failed to discharge the said

burden. The 60 nos. of suspected gold bars were thereafter, serially numbered from 1/60 to 60/60. One registered goldsmith was called and the

goldsmith after preliminary examination of the said 60 nos. of bars in biscuit form by conventional method, had certified that the 60 nos. of yellow bars

were gold of high purity. The said 60 nos. of gold bars were thereafter, weighed by the goldsmith on an electronic weighing machine and the

respective weight of each of the 60 nos. of gold bars was incorporated in a weighment sheet. The cumulative weight of all the 60 nos. of gold bars

was found to be 9,959.370 grams and was valued at Rs. 4,72,07,414/-.

4.6. The gold bars, 60 in nos., so recovered, the pieces of transparent adhesive tapes and old newspapers, the Maruti 800 car used for concealment

and transportation of those gold bars and other articles recovered from the possession of the two petitioners and from the Maruti 800 car were seized

vide seizure list under Section 110 of the Customs Act, 1962 as they are believed to be gold imported into India from a foreign country through a route

other than the routes specified under Section 7(1) of the Customs Act, 1962 in violation of Section 11 thereof.

4.7. A case being DRI Guwahati's Seizure Case no. 01/CL/IMV/GOLD/DRI/GZU/2021-22 dated 07.04.2021 has been registered after following due formalities.

4.8. The goldsmith cut a small portion from each of the recovered gold bars as representative sample, collectively weighing at 56.25 grams. Those

drawn samples were correspondingly numbered serially from 1/60 to 60/60 in polythene sachets and thereafter, were put in an envelope which was sealed with the official brass seal. The remaining gold bars were also packed and sealed with the use of official brass seal. All the legal formalities of seizure were completed at around 4-00 p.m. on 07.04.2021.

4.9. The two petitioners' statements were recorded under Section 108 of the Customs Act, 1962 and on the basis of those statements and other

documentary and circumstantial evidence and the manner of concealment and transportation of those gold bars in a special cavity made inside the

Maruti 800 cars, the DRI has found that the two petitioners were consciously involved and had committed an offence punishable under Section 135(1)

(b)(i)(A) and Section 135(1)(b)(i)(C) of the Customs Act, 1962 and the same are punishable with rigorous imprisonment which may extend upto a

period of 7 (seven) years and with fine. The two petitioners were accordingly arrested under Section 104 of the Customs Act, 1962 with due approval

from the competent authority and following all required formalities.

5. After such arrest, the two petitioners were produced before the Court of learned Chief Judicial Magistrate, Kamrup (Metro), Guwahati on

08.04.2021 and after such production, they were remanded to custody on 08.04.2021.

6. An application, B.A. no. 253/2021 was moved on behalf of the two petitioners before the Court of learned Additional Sessions Judge No. 2,

Kamrup (Metro), Guwahati under Section 439, CrPC. On 08.06.2021, the said application was listed before the said Court. When it was found that the

DRI had failed to file the final complaint within the statutory period of 60 (sixty) days after completing the investigation from the date of first remand

i.e. 08.04.2021, the said Court had granted default bail to the two petitioners in view of the proviso (a)(ii) of Section 167(2), CrPC. While granting

default bail on the said ground, the two petitioners were asked to furnish bail of Rs. 1,00,000/- each with two sureties each of the like amount to the

satisfaction of the learned Elaka Magistrate, Kamrup (Metro), Guwahati along with the following three conditions :-

1. The accused persons shall co-operate with the I.O. during the investigation of the case if the I.O. so desires;

2. That the accused persons shall not try to influence the witnesses of the case

directly or indirectly; and

3. The accused persons shall submit a copy of their Voter Card/Aadhar Card while submitting bail bonds.â??

7. Learned counsel for the petitioners has submitted that the condition of furnishing bail bond of Rs. 1,00,000/- each is onerous and because of

imposition of such onerous condition, the petitioners are still in custody as they have failed to arrange the bailors. He has submitted that the petitioners

are poor villagers hailing from the State of Manipur. As they are also not financially sound, they are not in a position to provide cash deposits. As a

result, it has become burdensome and onerous for them to abide by those conditions. Considering the status of the petitioners, the amount of bail bond

may be reduced, he submits. He has submitted that the position has further aggravated because of the prevailing situation for Covid-19 pandemic. In

support of his submission, he has referred to the decision of the Supreme Court of India in Moti Ram and others vs. State of Madhya Pradesh,

reported in (1978) 8 SCC 47. He has also referred to the Explanation to sub-section (1) of Section 436, CrPC and an order dated 08.04.2021 passed in

B.A. no. 810/2021 by a coordinate bench of this Court where the Court allowed the accused therein to go on bail bond of Rs. 25,000/-.

8. Opposing the submissions made on behalf of the petitioners, learned counsel for the DRI has submitted that the petitioners are involved in the

smuggling of gold of foreign origin. It is his submission, as are discernible, from the case of DRI, that the huge quantity of gold were recovered from

their possessions i.e. 9,959.370 grams and the value of the seized gold bars is Rs. 4,72,07,414/-. As such, no modification is called for in respect of the

conditions imposed by the learned Court while granting default bail to the petitioners. It is his further submission that the crime of gold smuggling is an

organized activity and the materials clearly indicate that the petitioners are very much part of an organized gang. The ratio of Moti Ram (supra) is to

be applied by taking into consideration the situation in the year 1978 with the situation prevailing in the year 2021 by factoring in the value of money in

these two periods. As regards the order passed in B.A. no. 810/2021, he has submitted that in that case, the value of gold seized was about Rs. 1

crore. The amount of bail bond has a correlation with the value smuggled contraband gold. As the value of contraband gold is four times higher, the

amount of surety to be provided, has been accordingly fixed.

9. I have considered the submissions of the learned counsel for the parties and also perused the materials available on record.

10. In so far as the submission regarding Explanation to sub-section (1) of Section 436, CrPC is concerned, it is found that the said Explanation is not

applicable to the case in hand. The substantive part of sub-section (1) of Section 436, CrPC is in respect of a person other than a person accused of a

non-bailable offence. It has been provided therein that when any person other than a person accused of a non-bailable offence is arrested or detained

without warrant by an Officer In-Charge of a Police Station, or appears or is brought before a Court, and is prepared at any time while in the custody

of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail. It is not in dispute that the two

petitioners were arrested in connection with a non-bailable offence and not in connection with a bailable offence. As an Explanation to a statutory

provision is relatable to the substantive statutory provision, I find the submission of the learned counsel for the petitioners in that regard is inapplicable

to the case of the petitioners.

11. Section 440 of the Code has mentioned about the amount of bond and reduction thereof. Sub-section (1) of Section 440 has provided that the

amount of every bond executed under Chapter XXXIII (Provisions as to Bail and Bonds) of the Code shall be fixed with due regard to the

circumstances and shall not be excessive. Sub-section (2) of the said Section has further provided that the High Court or the Court of Sessions may

direct that the bail required by a police officer or Magistrate be reduced. From a reading of the aforesaid provisions it is discernible that the amount of

a bail bond has to be fixed with regard to the circumstances of the case and at the same time, it is to be kept in mind that such amount is not

excessive. The High Court or the Court of Sessions has been given the discretion to reduce the amount of bond but such reduction in a case can be

made only after taking into consideration the twin conditions, firstly, the circumstances of the case and secondly, the amount shall not be excessive.

12. As per the proviso (a)(i) and (a)(ii) of Section 167(2), CrPC, the Magistrate can authorize the detention of the accused person in custody upto a

total period of 90 (ninety) days, where the investigation relates to an offence

punishable with death, imprisonment for life or imprisonment for a term not less than 10 (ten) years, and 60 (sixty) days, where the investigation relates to any other offence. If the investigation is not completed within the prescribed period, the accused is entitled to bail as per the said provision, provided the accused person is prepared to and does furnish bail and the accused person released on bail under Section 167(2), CrPC shall be deemed to be so released under the provisions of Chapter XXXIII (Provisions as to Bail and Bonds) for the purposes of that chapter.

13. The petitioners in the instant case have been granted default bail as per the proviso (a) (ii) of Section 167(2), CrPC as the investigating authority could not submit the final complaint within the prescribed period of 60 (sixty) days considering the fact that the offences under Section 135(1)(b)(i)(A) and Section 135(1)(b)(i)(C) of the Customs Act, 1962 are punishable with rigorous imprisonment which may extend upto a period of 7 (seven) years and fine.

14. As the provisions of Chapter XXXIII (Provisions as to Bail and Bonds) are applicable also in respect of the default bail granted as per the proviso (a)(ii) and (a)(ii) to Section 167(2), CrPC, the Court is empowered to impose the conditions (a), (b) and (c) as per sub-section (3) of Section 437, CrPC and it may also impose such other conditions as it considers necessary in the interests of justice. Section 439(1)(a) of the Code has also empowered the Court to impose any condition which is considered necessary for the purpose.

15. It has been observed by the Supreme Court of India in *Parvez Noordin Lokhand Walla vs. State of Maharashtra*, reported in (2020) 10 SCC 77, that though the competent Court is empowered to exercise its discretion to impose any condition for the grant of bail under Section 437(3) and Section 439(1)(a) of the Code, the discretion of the Code has to be guided by the need to facilitate the administration of justice, to secure the presence of the accused and to ensure that the liberty of the accused is not misused to impede the investigation, to prevent overawe of the witnesses or obstruction in the course of justice. In *Moti Ram* (supra) the issue dealt by the Supreme Court of India pertained to the petitioner, a mason by profession, who was asked to furnish sureties for Rs. 10,000/- and considering his status, he was directed to be released on bail on his own bond in a

sum of Rs. 1000/-.

16. On the basis of the discussion made above, though no exception can be taken in respect of the order of the learned jurisdiction Court for release of the petitioners on default bail on furnishing bail of Rs. 1,00,000/- each in today's context and in view of the purported involvement of the petitioners in an offence involving smuggling of gold bars of huge quantity of substantial value but considering the fact that they have failed to furnish the bail bonds for the said sum since 08.06.2021 till date, this Court in the interests of justice and taking into consideration the right to personal liberty of a person, as ingrained in Article 21 of the Constitution of India, has found it to be a fit case to exercise the discretion available under sub-section (2) of Section 440 of the Code to reduce the amount of bail bond from Rs. 1,00,000/- each to Rs. 50,000/- each. Accordingly, it is ordered that the two petitioners i.e. the two accused in DRI Guwahati's Seizure Case no. 01/CL/IMV/GOLD/DRI/GZU/2021-22 dated 07.04.2021 shall be released on bail on furnishing a bail bond of Rs. 50,000/- each with 2 (two) sureties each of the like amount. There shall be no change to the other terms and conditions set forth in the order dated 08.06.2021 passed by the learned Additional Sessions Judge No. 2, Kamrup (Metro) in B.A. no. 253/2021.

17. With the observations made and the directions given above, this revision petition stands disposed of.