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(2003) 1 CALLT 573

Calcutta High Court

Case No: C.R.M. No. 3586 of 2002

Sailesh R. Shah		APPELLANT
	Vs	
The Intelligence Officer, NCB, Eastern Regional Unit		RESPONDENT

Date of Decision: March 15, 2002

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) â€" Section 167(2)#Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€" Section 25A, 29, 9A

Citation: (2003) 1 CALLT 573

Hon'ble Judges: Malay Kumar Basu, J; Debiprasad Sengupta, J

Bench: Division Bench

Advocate: Sekhar Basu and Y. Dastoor, for the Appellant;Dipak Sengupta and Kallol Mondal, for the Respondent

Judgement

D.P. Sengupta, J.
This is an application for bail in connection with NDPS Case No. 36/2000 arising out of Crime No. 6/NCB/Cal 2000

u/s 9A/25A/29 of the Narcotic Drugs and Psychotropic Substance Act (hereinafter referred to as NDPS Act).

2. The aforesaid case originated from the seizure of 158.1kg. of white crystalline substance believed to be Ephedrine Hydrochloride recovered

from inside room No. 5 of 109 Old China Bazar Street, Calcutta-1, which belonged to one Sirish Doshi and one Praying Chandra Mehta @

Pravin Bhai Mehta. On the same date, i.e., on 20.6.2000 some officers of the Narcotic Control Bureau searched the office-cum-godown of the

present petitioner at 59A Rash Behari Basu Road, Calcutta-1 and seized some purchase and sale vouchers relating to Ephedrine Hydrochloride.

3. The present petitioner, namely Sailesh R. Shah was arrested on 20.6.2000 along with two other accused persons namely Pravin Mehta and

Vinod Jain. All the three accused persons were produced before the learned Special Judge (NDPS Act), VIth Bench, City Sessions Court,

Calcutta and they were remanded to custody.

4. All the aforesaid three accused persons filed applications for bail before the learned Special Judge (NDPS Act) on 21.8.2000. The learned

Judge by his order dated 30.8.2000 allowed the prayer for bail of Vinod Kumar Jain in view of the provision of 167(2) Cr.PC since investigation

of the case could not be completed within the statutory period of 60 days. But the learned Judge by the same order rejected the prayer for bail of

Pravin Kumar Mehta and the present petitioner.

5. Thereafter challenging the aforesaid order rejecting the prayer for bail two separate applications for bail were preferred before this Court by the

said Pravin Mehta and the present petitioner. The said two applications for bail were allowed by this Court by two different orders passed on

different dates on the ground that the cases of Pravin Mehta and Sailesh R. Shah are similar to that of Vinod Kumar Jain, who was granted bail by

the learned Special Judge under the provision of Section 167(2) Cr.PC as the charge sheet/complaint could not be submitted within the statutory

period.

6. Challenging the aforesaid two orders passed by this Court SLP was preferred the Hon''ble Supreme Court being SDP (Crl) No. 2624-

2625/2001. From the order of the Hon''ble Supreme Court dated 7.12.2001 it appears that at the time of hearing it was submitted by the learned

counsel appearing for the Union of India that he had instruction not to press the SLP filed against Pravin Chandra Mehta as his case is similar to

that of Vinod Kumar Jain, who was granted bail by the Special Judge u/s 167(2) Cr.PC and on such submission the SLP against Pravin Mehta

was dismissed. Then on the prayer of the learned advocate the SLP against the present petitioner was directed to be listed on 10.12.2001.

7. Thereafter by an order dated 11.1.2002 the Hon''ble Supreme Court set aside the order passed by this Court and remitted the matter to this

Court for disposing of the bail petition of the present petitioner afresh in accordance with law, keeping in mind the provision of Section 37 of the

NDPS Act.

8. Mr. Basu, learned advocate appearing for the petitioner draws our attention to the amended provisions of Narcotic Drugs and Psychotropic

Substances (Amendment) Act, 2001 (Act 9 of 2001) which came into force on 9.5.2001. Mr. Bose draws our attention to the provision of

Section 41 of the Amended Act of 2001, which runs as follows:-

41. Application of this Act to pending cases. (1) Notwithstanding anything contained in Sub-section (2) of Section 1, all cases pending before the

Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as

amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before

such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the

commission of such offence:

Provided that nothing in this section shall apply to cases pending in appeal.

(2) For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which

would not have been so punishable if this Act has not come into force.

9. Referring to the aforesaid provision it is submitted by Mr. Bose that in view of the provision of Section 41 of the Amendment Act, which lays

down that notwithstanding anything contained in Sub-section (2) of Section 1 all cases pending before the Courts or under investigation shall be

disposed of in accordance with the provisions of the principal Act as amended by the Act of 2001, the present case is to be disposed of according

to the provisions of Amended Act of 2001 (Act 9 of 2001).

10. Mr. Bose next refers to the provision of Section 37 of the amended Act which is as follows:-

37. Offence to be cognizable and non-bailable.-

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

(a) *****

(b) no person accused of an offence punishable for (offences u/s 19 or Section 24 or Section 27A and also for offences involving commercial

quantity) 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 ground for believing that he is not guilty of

such offence and that he is not likely to commit any offence while on bail.

(2) *****

11. Referring to the aforesaid amended provision of Section 37 Mr. Bose submits that the rigors of Section 37 applies only to the offences u/s 19,

Section 24 or Section 27A and also to the offences involving ""'Commercial Quantity"". ""Commercial Quantity"" has been defined in Section (2) (VII-

a) and it relates to only Narcotic Drugs and Psychotropic Substances. Mr. Bose points out that in the present case the article seized is a

Controlled Substance"" as defined in Section (2) (VII-d) of the Act. Such ""Controlled Substance"" does not find place in the schedule which

specifies the ""small quantity"" and ""Commercial Quantity"". According to Mr. Bose since the seized article is a ""Controlled Substance"" and not

Narcotic drug or Psychotropic Substance and since such controlled substance does not find place in the schedule, specifying ""small quantity"" and

Commercial quantity"", the provision of Section 37 of the Act is not at all applicable in the present case.

12. In reply to the aforesaid argument of Mr. Bose, it is submitted by Mr. Sengupta, learned advocate appearing for the N.C.B. that the rigors of

Section 37 of the NDPS Act is very much applicable in the present case. Mr. Sengupta points out the serial No. 152 and 159 of the schedule,

which refers to ""'Amfetamine"" and ""Methamphetamines"" respectively, and submits that these two items are manufactured from Ephedrine, which

has been seized from the possession of the accused persons. But Mr. Sengupta at the same time admits that these two items are the end product of

Ephedrine, which is not included in the schedule. Mr. Sengupta further submits that although Ephedrine is not included in the schedule, it can very

well come within the ambit of serial No. 239 of the schedule. But we are unable to accept such contention. Serial No. 239 of the schedule refers to

any mixture or preparation that of with or without a neutral material, of any of the above drugs"". A reading of the said serial No. 239 makes it

clear that the articles described there are the mixture of any of the drugs mentioned in the schedule. In our considered view by no stretch of

imagination Ephedrine can be included in the said serial No. 239 of the schedule.

13. Mr. Sengupta also submits that in case it is held by this Court that Section 37 is not applicable in the present case, this Court should not grant

bail to the petitioner considering the grave nature of the offence.

14. In view of the discussions made above, we find sufficient merit in the submission of Mr. Bose, learned advocate of the petitioner. In view of the

amended provision of Section 37, it is clear that the rigors of Section 37 of the Act is only applicable in the offence u/s 19, Section 24 or Section

27A and also to the offences involving ""commercial quantity"". Now, a reading of the definition of ""commercial quantity"" makes it clear that it refers

to only Narcotic Drugs and Psychotropic substances. The seized commodity (Ephedrine) is admittedly a ""Controlled Substance"". It is neither a

Narcotic Drug nor a Psychotropic Substance. So it cannot come within the purview of ""commercial quantity"". Apart from this, the seized article,

namely Ephedrine is not included in the schedule of Narcotic Drugs and Psychotropic Substance. All these, in our opinion suggest that the

provision of Section 37 of the Act is not applicable in the present case.

15. Now, let us take up the question of applicability of Section 167(2) Cr.PC in the present case. At the very outset, Mr. Sengupta raises a

preliminary objection to this and submits that the Hon''ble Supreme Court has remitted the matter back to this Court for fresh disposal of the bail

application of the petitioner afresh, keeping in mind the provision of Section 37 of the NDPS Act. In such circumstances, it is submitted by Mr.

Sengupta that the scope of this Court is very limited and it should confine itself only to the question of applicability of the provision of Section 37 of

the NDPS Act. But we are unable to accept such contention. It is clear from the order of the Hon''ble Supreme Court that this Court has been

directed to dispose of the bail application of the petitioner afresh in accordance with law keeping in view the provision of Section 37 of the Act.

So, in our considered view, when the Hon''ble Supreme Court has directed this Court to dispose of the bail petition in accordance with law, this

Court is not debarred from considering the legality and correctness of the order of the learned Special Judge, who denied the benefit of Section

167(2) Cr.PC to the present petitioner, although such benefit was given to other accused persons, who were granted bail u/s 167(2) Cr.PC for

non-submission of chargesheet within the statutory period.

16. Mr. Bose, learned advocate of the petitioner submits that in the present case all the three accused persons were arrested on the same date,

i.e., on 20.6.2000. They were produced before the learned Judge, Special Court on 21.6.2000. It further appears that on 21.8.2000 the present

petitioner along with other two accused persons namely Pravin Mehta and Vinod Kumar Jain filed bail petition before the learned Special Judge,

who fixed 28.8.2000 for hearing of the said bail applications. On 28.8.2000 the matter was adjourned till 29.8.2000 on the prayer of the

prosecution. On 29.8,2000 the applications for bail were taken up for hearing by the learned Judge. After hearing the learned advocate of the

accused persons, the matter was again adjourned on the prayer of the learned senior Public Prosecutor for making his submission. On 30.8.2000

the Officer of the Narcotic Control Bureau submitted the complaint. By an order dated 30.8.2000 the learned Judge, Special Court (NDPS Act)

granted statutory ball to the accused Vinode Kumar Jain in view of the provision of Section 167(2) Cr.PC, but he rejected the prayers for bail of

the present petitioner and Pravin Chandra Mehta, who were also arrested on the same date, i.e., on 20.6.2000.

17. The reason given by the learned Special Judge in his order dated 30.8.2000, while allowing the prayer for bail of Vinod Jain was that in the

bail petition filed by Venod Jain there was a specific averment that the accused had a statutory right to be released on bail. But since there was no

such averment in the bail petitions filed by the other two accused persons namely Pravin Mehta and the present petitioner, the learned Judge was

of the view that they should not have any indefeasible right to be released on bail. Mr. Bose points out that such an observation of the learned

Judge was proved to be incorrect in the case of Pravin Mehta when the SLP against him was not pressed in the Supreme Court and it was

submitted by the learned counsel of the NCB that the case of Pravin Mehta is similar to that of Vinod Jain, who was granted statutory bail by the

learned Special Judge.

18. In so far as the present petitioner is concerned, it is submitted by Mr. Bose, he is also entitled to the same benefit, which was given to other

two accused persons. It is pointed out by Mr. Bose that there was a specific averment in the bail petition filed by the present petitioner that in

connection with the said case the petitioner was arrested on 20.6.2000. Mr. Bose further points out that on 21.8.2000 an application was filed by

the Narcotic Control Bureau praying for remanding the accused persons, including the petitioner, to jail custody. In the said petition also it was

specifically mentioned by the NCB that the date of first production was 21.6.2000 and the date of next production was 21.8.2000. So, it was very

much within the knowledge of the learned Judge that all the three accused persons were arrested and produced on the same date. Mr. Bose also

explains the circumstances for which specific averment could not be made by the petitioner that he was statutory entitled to get bail. The

petitioner''s applications for bail was served upon the NCB on 18.8.2000, which was the 59th day of the petitioner''s arrest and for that reason if

any statement was made in the ball petition that the petitioner was entitled to statutory bail that would have been a untrue statement by the

petitioner. Mr. Bose submits that in any event the petitioner was entitled to statutory bail and that is evident from a reading of the application filed

by the Narcotic Control Bureau on 21.8.2000, which was fixed on 62nd day of petitioners'' custody.

19. Mr. Bose relies on a judgment of the Hon''ble Supreme Court reported in Hussainara Khatoon and Others Vs. Home Secretary, State of

Bihar, Patna, . In the said judgment it was held by the Hon''ble Supreme Court as follows:-

It is difficult, to believe that on each of the countless occasions on which these under trial prisoners were produced before the Magistrates and the

Magistrates made orders of remand, they must have applied their mind to the necessity of remanding those under trial prisoners to judicial custody.

We are also very doubtful whether on the expiry of 90 days or 60 days, as the case may be, from the date of arrest, the attention of the undertrial

prisoners was drawn to the fact that they were entitled to be released on bail under proviso (a) of Sub-section (2) of Section 167. When an

undertrial prisoner is produced before a Magistrate and he has been in detention for 90 days or 60 days, as the case may, the Magistrate must,

before making an order of further remand to judicial custody, point out to the under trial prisoner that he is entitled to be released on bail.

20. The next judgment relied upon by Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, In the said judgment the Hon''ble

Supreme Court, relying upon the judgment of Hussainara Khatoon (supra), held as follows:-

With the amendment of Clause (b) of Sub-section (4) of Section 20 read with the proviso to Sub-section (2) of Section 167 of Cr.PC an

indefeasible right to be enlarged on bail accrues in favour of the accused if the police fails to complete the investigation and put up a challan against

him in accordance with law u/s 173 Cr.PC. An obligation, in such a case, is cast upon the Court, when after the expiry of the minimum period

during which an accused could be kept in custody, to decline the police request for further remand except in cases governed by Clause (bb) of

Section 20(4). There is yet another obligation also which is cast on the Court and that is to Inform the accused of his right of being released on bail

and enable him to make an application in that behalf. (Hussainara Khatoon case). This legal position has been very ably stated in Aslam Babalal

Desai v. State of Maharashtra where speaking for the majority, Ahmadi, J. referred with approval to the law laid down in Rajnikant Jivanlal Patel

v. Intelligence Officer, Narcotic Control Bureau, New Delhi wherein it was held that: (SCC p. 299, para 9).

The right to bail u/s 167(2) proviso (a) thereto is absolute. It is a legislative command and not Court''s discretion. If the investigating agency fails to

file chargesheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of

the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days.

He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds.

21. Mr. Bose submits that the aforesaid two judgments of the Hon''ble Supreme Court was also followed in a later decision of the Hon''ble

Supreme Court reported in Uday Mohanlal Acharya Vs. State of Maharashtra, .

22. Relying upon the aforesaid judgment of the Hon''ble Supreme Court it is submitted by Mr. Bose that on the expiry of the statutory period of 60

days or 90 days, a duty is cast upon the Court to inform the accused of his valuable right of being released on bail and to enable him to make an

application. It is further submitted by Mr. Bose that in the present case all the three accused persons were arrested on the same date, i.e., on

20.6.2000 and were produced before the learned Judge on the same date i.e. on 21.6.2000. In their application for bail which was filed on

21.6.2000 it was specifically mentioned that the present petitioner was arrested on 20.6.2000. In the petition filed by the NCB praying for remand

of the accused, the date of first production was specifically mentioned as 21.6.2000. It was very much within the knowledge of the learned Special

Judge that the present petitioner was in custody since 20.6.2000. But surprisingly the learned Judge, although he granted statutory bail to one of

the accused namely, Vinod Jain, denied such benefit to the other accused person although his date of arrest was the same. There was no special

reason for the learned Special Judge to deny such statutory right to the present petitioner u/s 167(2) Cr.PC.

23. We have heard the learned advocates of the respective parties. We have also perused all the relevant papers and documents. In our

considered view, the order passed by the learned Special Judge denying the statutory right of the present petitioner to be released on bail in view

of the provision of Section 167(2) Cr.PC, suffers from serious illegality. The learned Judge should have considered that the present petitioner

namely. Sailesh R. Shah was equally entitled to the same benefit of the provision of Section 167(2) Cr.PC as it was in the case of Vinod Jain.

24. In view of the discussion made above we find sufficient merit in the submission of Mr. Bose, learned advocate of the petitioner. Accordingly

we allow the present application and direct the present petitioner to surrender before the learned Special Judge (NDPS) Act, VIth Bench, City

Sessions Court within a period of 7 days. After such surrender the petitioner shall be taken into custody and, if any, prayer for bail is thereafter

made on his behalf, the learned Judge shall grant him bail in view of the provision of Section 167(2) Cr.PC.

The present application is accordingly disposed of.

M.K. Basu, J.

I agree.