

Kailash Rajput and Others Vs. Intelligence Officer, Air Intelligence Unit, Customs and Another

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Court : Mumbai

Decided On : Feb-18-2014

Judge : A.R. Joshi

Appeal No. : Criminal Bail Application Nos. 1344 of 2013, 1345 of 2013 & 1346 of 2013

Appellant : Kailash Rajput and Others

Respondent : intelligence Officer, Air Intelligence Unit, Customs and Another

Judgement :

Oral Order:

1) Heard the learned Counsels for the respective applicants. Also heard the learned Special Prosecutor for the Customs.

2) All the three Bail Applications are arising out of the investigation carried out by the Intelligence Officers, Air Intelligence Unit, Customs and subsequent filing of the complaint bearing NDPS Special Case No.51 of 2013 filed on 12th April, 2013 alleging commission of offences against all the three applicants for the offences punishable under Sections 29, 22, 28 read with Section 23 and 8(c) of NDPS Act, 1985.

3) At the threshold it must be mentioned that all the three bail applications under consideration are preferred not on the merits of the matter, but, under the provisions of Section 167(2) of Criminal Procedure Code on the ground that till date there is no complaint against the applicants for finding in possession of Ketamine and Methamphetamine. According to the applicants, they are entitled for bail as there is no complaint filed within the period of 180 days of the arrest of the applicants and specifically alleging that they are dealing in Ketamine and Methamphetamine.

4) Prior to dealing with the arguments advanced on behalf of the applicants, certain factual position is required to be mentioned concerning initiation of the investigation, continuance of the same, filing of the complaint on the prima facie assumption based on the Field Testing Kit as to finding of Methaqualone, subsequent finding from the Chemical Analysis report as to finding of Ketamine and Methamphetamine and also filing of the different proceedings before the Sessions Court and also before this Court on behalf of the applicants. This information is necessary in order to appreciate the rival arguments and to have proper perspective of the matter and to deal with the challenge, not on the merits, but on the technicalities.

5) On the specific information, the Officers of Air Intelligence Unit conducted a raid and inspected and seized three courier parcels at Courier Export Terminal at Mumbai Airport. Those parcels were booked by M/s. M.A. Express Logistics by using the license of M/s. Swift Air Clearing Agency (I) Pvt. Ltd.. Those parcels were destined for London. The said three courier consignments were packed in three separate cartons, which were declared as food stuff, tea and detergent packed in branded items packet. As such, total 30 packets were found and each containing inner silver packet containing white crystalline powder. On testing the contents of the said packets on Field Testing Kit, it was initially found to be Methaqualone “ a psychotropic substance. All the packets were weighing 14.920 kgs and apparently were supposed to be the psychotropic substance Methaqualone as per the field testing kit. Accordingly panchnama was drawn. After investigation, the complaint was lodged before the Special Court under NDPS Act. It was lodged on 12.4.2013. On the same day, cognizance was taken

by the Special Court and following order was passed:

ORDER

1. There are sufficient grounds for taking cognizance of the offence u/sec. 29, 22 and 28 r/w 23 and 8(c) of the NDPS Act against the accused persons. Accordingly the cognizance is taken of the aforesaid offences.

2. The accused to be produced before the court on 26/4/2013.

3. All the accused persons are remanded to judicial custody till next date.

4. The list of witnesses is given.?

6) Thereafter a discharge application was preferred vide Exhibit-7 before the Special Court. Said application for discharge along with another application Exhibit-17 was rejected by the Special Court vide order dated 17.6.2013. It was held that the accused would not be entitled for bail under Section 167(2) of Cr.P.C..

7) Three separate bail applications were preferred by the applicants before the Special Court and they were disposed of by the impugned order dated 21.6.2013. All the three bail applications were rejected. All the three applicants preferred separate bail applications before this Court. However, they were withdrawn on 5.8.2013 (Coram: K.U. Chandiwal, J.). Said order of withdrawal reads thus:

œHeard. Without making any submissions on merits, Mr Ayaz Khan, learned Counsel for respective applicants, on instructions, withdraws the bail applications for adopting appropriate proceedings. Permitted. Criminal bail applications are dismissed as withdrawn.?

8) As such, from the above what emerges presently is the factual position that the discharge applications of the present applicants were rejected by the Special Court and the said order of rejection has not been challenged by the applicants. The earlier bail applications filed before the Special Court were rejected and bail applications filed before this Court were withdrawn without there being any liberty

reserved on behalf of the applicants. Under this factual position, present three applications being Bail Application Nos.1344/2013, 1345/2013 and 1346/2013 are preferred by the original accused Nos.2, 4 and 1 respectively. It is a factual position that accused No.1 is arrested on 15.10.2012 whereas accused Nos.2 and 4 are arrested on 23.10.2012 and since then they are in custody.

9) It is also to be mentioned that at the time of filing of the complaint it was mentioned by the respondent “ Customs, specifically in paragraph 40 of the complaint, as under:

œ40. The complainant submits that acquisition, possession, manufacture store, transport of any psychotropic substance, such as Methaqualone, is prohibited under Section 8(c) of NDPS Act, 1985.?

In paragraph 44 of the complaint, it is specifically averred as under:

œ44. The complainant, therefore, charges the accused with having committed offences punishable under section 29, 22, 28 r/w 23, of the NDPS Act, 1985 as aforesaid and prays for necessary process against them so that they may be dealt with according to law.?

10) As mentioned earlier, the order of taking cognizance of the offences was passed by the Special Court on 12.4.2013. After filing of the complaint and after the Special Court took cognizance of the offences, initially test report dated 8.10.2012 was filed which was obtained from Assistant Chemical Examiner, New Customs House, Ballard Estate, Mumbai i.e. the report of DYCC, New Customs House, Mumbai. For want of specified equipments, the final analysis could not be conducted by the Dy.CC and it was observed that the sample may be forwarded to CFSL, Hyderabad. Subsequently, the report of CFSL dated 12.6.2013 was obtained by the respondent “ Customs and the three samples bearing Parcel Identity SA/2, SB/2 and SC/2 were analyzed and the result of examination goes to show presence of Ketamine and Methamphetamine. The said final report is reproduced hereunder for the sake of advantage:

12. RESULTS OF EXAMINATION The exhibits were analyzed appropriately by Marquis test, Cobalt thiocyanate test, Mandelin test, Fourier Transform Infrared spectroscopy (FTIR) and Gas Chromatography mass spectrometry (GCMS). The results thus obtained by above methods have been analyzed and report is given below :

1. Ketamine has been detected in exhibit SA/2.

2. Methamphetamine has been detected in exhibits SB/2 and SC/2.

11) Admittedly, the Ketamine and Methamphetamine are psychotropic substances and for which the offences punishable under Section 22 and other offences are attracted.

12) Now coming to the arguments advanced on behalf of the applicants, it is common argument that the cognizance of the complaint was taken by the Special Court on the averments mentioned in the complaint and on the premise of finding of Methaqualone. In fact, the Methaqualone is not the substance which was found, but, according to the report from the CFSL, Hyderabad what is found is Ketamine and Methamphetamine and as such the cognizance taken for the presence of Methaqualone is erroneous and as such the complaint which is filed in the present case cannot be looked into and present applicants cannot be charged for or tried for the offence of having found in possession or dealing with Methaqualone. It is further argued that as and by way of corollary it is to be accepted that there is no complaint against the present applicants for finding of Ketamine and Methamphetamine and that no such specific complaint is filed against them within the statutory period of 180 days from arrest of the applicants, further argued.

13) In order to substantiate the above arguments, the learned Senior Counsel Shri Mundargi for the applicant in BA No.1344/2013 placed reliance on the following authorities:

i. (1976) 3 Supreme Court Cases 252 - Devarapalli Lakshminarayana Reddy Versus V. Narayana Reddy and others.

By taking shelter of para No.12 of the said authority, it is submitted that the Magistrate of the First Class and Magistrate of the Second Class, specially empowered in this behalf, may take cognizance of any offence “

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

By pointing out this, it is submitted that the Special Court, being in the capacity of a Magistrate Court, is required to take cognizance of the complaint on the facts which constitute the offence. Further argued that in the present matters, the complaint of the Customs everywhere mentions regarding finding of Methaqualone as per the testing of the samples on Field Testing Kit, however in fact, as per the final report from the CFSL, Hyderabad it is not Methaqualone but other substances. Thus, the cognizance taken on the specific facts is not the cognizance for finding of Ketamine and Metamphetamine and as such there is no complaint at all so far as those two other substances are concerned against the applicants and hence even after 180 days of the arrest of the applicants, there is no lodging of the complaint and hence the applicants are entitled for bail under Section 167(2) of Cr.P.C..

[ii] (2008) 2 Supreme Court Cases 492 - S.K. Sinha, Chief Enforcement Officer Versus Videocon International Ltd., and others.

Again by pointing out the above authority, it is submitted that as per Section 190 of Criminal Procedure Code, on three contingencies the cognizance of the offence is taken by the Magistrate.

14) Here, the question is whether the cognizance is taken of the offence or of the specified events mentioned in the complaint pointing towards the commission of a particular offence. In the present case at hand, the Special Court has taken cognizance of the offences. Said order of the Special Court reproduced earlier clears the said position. Again in the matter, though initially in the complaint it was

mentioned that apparently what was found with the applicants is Methaqualone as per the testing on Field Testing Kit, subsequently the said substance is found to be Ketamine and Metamphetamine. Again in the present matter Methaqualone or Ketamine or Metamphetamine are punishable under the same Section 22 of the NDPS Act, 1985. As such, definitely at the time of framing of the charge against the present applicants, the Special Court need to take into consideration the findings of the CFSL, Hyderabad and appropriately the charges shall be framed. Under specific circumstances of the present case, it cannot be said that there cannot be a charge punishable under Section 22 read with other allied Sections of NDPS Act, 1985 as applied in the present complaint. Moreover, the complaint which is filed in the present case is for taking cognizance of the offences punishable under Sections 29, 22, 28 read with Section 23 of the NDPS Act, 1985. As such, the cognizance was taken within the period of limitation i.e. 180 days and as such in the considered opinion of this Court shelter of Section 167(2) of Cr.P.C. cannot be taken by the applicants herein. This is more so when the discharge applications on the same ground were rejected by the trial Special Court and that order has not been challenged before this Court. Moreover, the earlier bail applications filed by the applicants were withdrawn, as detailed above.

15) The learned Counsel Shri Ponda for the applicant in BA No.1345/2013 placed reliance on the following authorities:

[i] 2010 (3) Bom.C.R. (Cri.) 237 - State of Maharashtra Versus Pragyasinh Chandrapalsinh Thakur and Ors.

Para-20 of the said authority reads thus :

¶20. The term 'taking of cognizance' has not been defined under the Code. As per the Blacks Law Dictionary the word 'cognizance' means a Courts right and power to try and to determine cases, the taking of judicial or authoritative notice or acknowledgment or admission of an alleged fact. In the case of (R.R. Chari vs. State of U.P.) [AIR 1951 SC 207], the Supreme Court dealt with the question as to when cognizance of the offence could be said to have been taken by the Magistrate under Section 190 of the Code and it held as under:

It is clear from the wording of the section that the initiation of the proceedings against a person commences on the cognizance of the offence by the Magistrate under one of the three contingencies mentioned in the section. The first contingency evidently is in respect of non-cognizable offences as defined in Cr.P.C. on the complaint of an aggrieved person. The second is on a police report, which evidently is the case of a cognizable offence when the police have completed their investigation and come to the Magistrate for the issue of a process. The third is when the Magistrate himself takes notice of an offence and issues the process.....?

In the case of *Narayandas Bhagwandas Madhavdas vs. State of W.B.* [AIR 1959 SC 1118], it was observed that when cognizance is taken of an offence depends upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. In the case of *Ajit Kumar Palit vs. State of W.B.* [AIR 1963 SC 765], the Supreme Court observed thus,

The word 'cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means become aware of and when used with reference to a Court or Judge to take notice of judicially. It was stated in *Gopal Marwari v. Emperor* (AIR 1943 Pat 245) by the learned Judges of the Patna High Court in a passage quoted with approval by this Court in *R.R.Chari v. State of Uttar Pradesh* (1951 SCR 312, 320) that the word, 'cognizance' was used in the Code to indicate the point when the Magistrate or Judge takes judicial notice of an offence and that it was a word of indefinite import, and is not perhaps always used in exactly the same sense. As observed in *Emperor v. Sourindra Mohan Chuckerbutty* (1910 ILR 37 Cal 412, 416), 'taking cognizance does not involve any formal action; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence.' Where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled.?

In the case of *Darshan Singh Ram Kishan vs. State of Maharashtra* [AIR 1971 SC 2372], the Supreme Court held that taking cognizance does not involve any formal action or in deed action of any kind or occurs as soon as a Magistrate applies his

mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. In the case of *State of W.B. vs. Mohd. Khalid* [(1995) 1 SCC 684], the Supreme Court, after taking note of the fact that the expression 'taken cognizance' had not been defined in the Code, stated as under:

œIn its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons.?

In the case of *Raghubans Dubey vs. State of Bihar* (Supra), the Supreme Court held that, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders, really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence. In the case of *CREF Finance Ltd.* (Supra), the Supreme Court held,

œ..... The cognizance is taken of the offence and not of the offender and, therefore, once the court on perusal of the complaint is satisfied that the complaint discloses the commission of an offence and there is no reason to reject the complaint at that stage, and proceeds further in the matter, it must be held to have taken cognizance of the offence. One should not confuse taking of cognizance with issuance of process. Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the Court decides to proceed against the

offenders against whom a prima facie case is made out.....?

[ii] I(2012) CCR 266(SC) - Subramanian Swamy (Dr.) Versus Manmohan Singh (Dr.) and Anr.

Para-20 of the said authority reads thus:

¶20. The argument of the learned Attorney General that the question of granting sanction for prosecution of a public servant charged with an offence under the 1988 Act arises only at the stage of taking cognizance and not before that is neither supported by the plain language of the section nor the judicial precedents relied upon by him. Though, the term 'cognizance' has not been defined either in the 1988 Act or the Cr.P.C., the same has acquired a definite meaning and connotation from various judicial precedents. In legal parlance cognizance is ¶ taking judicial notice by the Court of Law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially??

16) Counter to the above arguments, the learned Special Prosecutor placed reliance on the following authority:

[i] (2008) 110 BOMLR 3392 - Rafael Palafox Garcia Versus The Union of India (UOI) and Anr.

Contents of paras-12, 13 and 14 of the said authority reads thus:

¶12. On the backdrop of above facts and decisions, the question which arises for my consideration in the present case is whether mere filing of charge-sheet within the prescribed time, unaccompanied by material papers as contemplated under Section 173(5) of the Code renders it incomplete and such filing of charge-sheet amounts to failure to file the same, which in turn confers on the accused right to be released on bail under section 167(2) of the Code, as the Court would not be competent to take cognizance of the offence on the basis of such incomplete charge-sheet/report.

13. On perusal of all the decisions, it is seen that in the said cases there is no reference to test of the contraband at the spot by field test kit. In the present case, the complaint as well as panchnama specifically mention about field testing kit being taken to the spot and the samples of the seized material being tested at the spot using field testing kit and the test answering positive for pseudoephedrine. In Sunil Phulbandes case (supra) which is a case similar to the present case, there is no reference at all to any test kit report.

14. Useful reference may be made to the decision of the Supreme Court in the case of Jagdish Budhroji Purohit vs. State of Maharashtra reported in AIR 1998 SUPREME COURT 3328. In the said case, it was contended that Chemical Analysers report Exh.61 to 67 were not admissible in evidence. The Supreme Court observed that:

"Moreover, in this case the prosecution had led evidence on P.W.1 Vijay Kumar Shahasane and P.W.3 Sidram Dhange, members of the raiding party, to prove that the powder which was found from the factory was Methaqualone and that the tablets which were found from the factory were methaqualone tablets. Both of them have stated that they have received sufficient training and thus have sufficient knowledge about narcotic substance and the methods of testing them. They had carried with them a kit for the purpose of testing when they had raided the factory. On analysis by them the powder was found to be methaqualone and tablets were found containing methaqualone. Therefore, even if Exhibits 61 to 67 are ignored there is sufficient evidence on record to show that methaqualone powder and tablets were found from the appellants factory. Thus the appellants conviction under Section 22 of the N.D.P.S. Act is quite proper. Both the witnesses have further stated that on analysis the green substance which was found from one of the cabins was hashish. Therefore, conviction of the appellant under Section 20(b)(ii) of the N.D.P.S. Act is also quite proper."

Further the contents of para-22 of the said decision reads thus:

œ22. A Full Bench of the Punjab and Haryana Court in the case of State of Haryana v. Mehal Singh and another reported in 1978 CRI.L.J.1810 has held that when a charge-sheet is submitted without the reports of experts well within the

period of 60/90 days from the date of arrest, merely because the report of the expert was not filed along with it, the accused is not entitled to be released on bail under Section 167(2) of Cr.P.C. In the said case it was observed that:

"The investigation of an offence cannot be considered to be inconclusive merely for the reason that the investigating officer, when he submitted his report in terms of sub-sec. (2) of S.173 to the Magistrate, still awaited the reports of the experts or by some chance, either inadvertently or by design, he failed to append to the police report such documents or the statements under S.161 of the Code, although these were available with him when he submitted the police report to the Magistrate. Therefore, when a charge-sheet is submitted without the reports of experts well within the period of 60 days from the date of arrest, the accused is not entitled to be released on bail under Section 167(2).

It was further observed that:

... Since a report to qualify itself to be a police report is required to contain only such facts as are mentioned in sub-section (2) of S.173, so if once it is found that the police report contained all those facts, then so far as the investigation is concerned the same has to be considered to have been completed. It is not incumbent on the investigating officer to reduce in writing the statements of the witnesses; he may merely include their names in the list of witnesses in support of the prosecution case when submitting the charge-sheet. Surely, if the charge-sheet thus submitted would be complete as enabling the Magistrate to take cognizance of the offence, there is no rational basis for holding that similar charge-sheet would not be a police report of the requisite kind if the statements of the witnesses although had been recorded under S.161 (3), but either by design or by inadvertence are not appended with the report and that the investigation of the case for that reason alone would be considered to be incomplete thus entitling the accused to claim release on bail in view of the proviso to sub-sec. (2) of Section 167 of the Code if his detention had exceeded sixty days. So far as the investigation part of the job of the investigating officer is concerned, it is complete the moment he had collected all evidence and facts that are detailed in sub-sec. (2) of S. 173 and from the evidence thus collected he is satisfied that the case

deserves to be initiated against the accused. And further even if the investigating officer had not received the report of the expert, so far as his job of collecting of the evidence is concerned, that is over the moment he despatches the material for the opinion of the expert and incidentally cites him as a witness if he relies on his testimony."

17) In the matter at hand in the above authorities, this Court has dealt with the aspect of availability of provisions of Section 167 Cr.P.C. to the accused when the CA report was not filed when the complaint was already lodged and this Court has held that the accused is not entitled for the relief on said technicality. Strictly speaking in the present matter at hand the complaint was lodged only on the findings of the Field Testing Kit and after the Special Court took the cognizance of the offences, the CFSL Hyderabad report was filed. Needless to mention that the penal section remains the same after filing of the CFSL report and as such hardly it can be said that the Court had initially not taken the cognizance against the present applicants as there was no complaint against the present applicants within the period of 180 days. In any event, in the opinion of this Court the present applicants are not entitled for the reliefs on the technicalities by way of application of 167(2) of Cr.P.C. and as this is the only argument on technicalities and there is no argument on the merits of the matter, all the three applications are accordingly disposed of with following order:

ORDER

[i] Criminal Bail Application Nos.1344/2013, 1345/2013 and 1346/2013 are dismissed and accordingly disposed of.

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