**Anilkumar Vs. State of Maharashtra**

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**Court** : Mumbai

**Decided On :** Nov-15-1989

**Reported in** : 1990(1)BomCR506; 1990CriLJ2058

**Judge** : M.S. Ratnaparkhi, J.

**Acts** : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 2, 21, 23, 29, 36D, 41, 41(2), 42, 42(2), 43, 44, 50, 50(1), 50(2), 51, 51(1), 52, 52(1), 52(3), 56, and 57; Code of Criminal Procedure (CrPC) , 1973 - Sections 37, 37(1), 167, 437, 437(2) and 439(2)

**Appeal No.** : Criminal Revn. Appln. No. 198 of 1989

**Appellant** : Anilkumar

**Respondent** : State of Maharashtra

**Judgement** :
ORDER

1. The order passed by the Sessions Judge, Akola, on 23rd October, 1989 quashing the bail granted to the petitioner by the Judicial Magistrate, First Class, Akot and remanding the petitioner to the police custody has been challenged in the revision.

2. It is not much disputed that the present petitioner, who is working as an advocate at Akot in Akola District, was apprehended by the Akot Police on 11-9-

1989 in connection with an offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The case of the investigating machinery was that they had received some information that the petitioner was keeping with him packets of brown sugar and selling it to other persons. In pursuance of this information, so received, Mr. R. G. Deshmukh, the P.W.I. attached to the Akot Police Station, took the police party with him and kept in wait on the road leading to Court at about 11 a.m. or so. The petitioner was seen going towards the Riwarkhed Road in a cycle rickshaw. The rickshaw was accosted and the search of the petitioned was taken in the presence of the panchas. During the search 15 small packets containing 750 miligrams of brown sugar was found in the right pocket of the black coat of the petitioner. It was seized in the presence of the panchas. Thereafter the petitioner was apprehended, but he tried to run away from the spot. He was caught and taken in another auto-rickshaw-to the police station. An offence was registered at the police station and he was produced before the Judicial Magistrate, First Class, Akot for remand at about 1.45. A magisterial custody remand was obtained on 18-9-1989.

3. It appears that on the same day an application for bail came to be filed on behalf of the petitioner under section 437 of the Code of Criminal Procedure. This application was opposed by the assistant Public Prosecutor on the ground that the offence is punishable with imprisonment for 20 years and fine of rupees one lack or above. The learned Magistrate heard both the parties. He held that the offence is not punishable either with death or imprisonment for life; that the accused was coming from a good family; that he was a practising advocate and, therefore, passed the order releasing him on bail on personal bond of Rs. 2,000/- with a surety in the like amount. In the meanwhile so many applications were filed before the judicial Magistrate, First Class, Akot. One was an application for ill-treatment at the hands of the police, another was for calling the brief case before the Court and opening it etc. But we are not much concerned with the same However, in pursuance of the latter application the brief case was called to the Court at about 4.40 p.m. and some articles including one white tablet and another half tablet was found in that suit case after it was opened by the police. It is the subject-matter of investigation and nothing need be said in connection with the same at this stage.

4. As already stated, the learned Judicial Magistrate. First Class, Akot passed the order releasing the petitioner on bail on 11-9-1989. This order came to be challenged before the Session Judge, Akola obviously under Section 439(2) of the Code of Criminal Procedure. The application was very much contested by the petitioner. However, this application came to be allowed by the learned Sessions Judge on 23rd October, 1989 and by that order the order of bail granted by the learned Magistrate came to be cancelled, and the petitioner came to be remanded to the police custody. The petitioner was present in the Court when this order was passed. This order, however, was suspended by the learned Sessions Judge up to 6th November, 1989 enabling this petitioner to approach the High Court. The petitioner was, however, directed to present himself at the Police Station. Akot everyday between 6 to 8 p.m. It is this order, which has been challenged in the present revision application.

5. Mr. Manohar, learned advocate for the petitioner, strenuously urged before me that the order passed by the learned Sessions Judge was unsustainable in law. It was also urged at one stage that the learned Sessions Judge had absolutely no jurisdiction to cancel the order of bail, granted by the Trial Court and remanding the petitioner to the police custody. The material that is collected by the prosecution during investigation, according to Mr. Manohar, was not at all reliable and therefore, the learned Session Judge could not have quashed the order of bail. In any case, according to Mr. Manohar, the prayer at the very initial stage when the petitioner was produced before the Magistrate soon after his arrest was for magisterial custody remand and hence no remand in police custody could have been granted. It will, therefore, be necessary to consider the arguments of Mr. Manohar in details.

6. Admittedly the petitioner was arrested on 11-9-1989. It is alleged by the prosecution that during the course of search on the road, 15 packets containing 750 miligrams of brown sugar were found in the pocket. After the seizure of this contraband material the accused was produced before the Judicial Magistrate. First Class, Akot and the magisterial custody remand was sought and it was also granted. It was abviously under Section 167 of the Code of Criminal Procedure. Thereafter the petitioner filed an application for bail and this application was

considered by the learned Judge under Section 437(2) of the Code of Criminal Procedure. At that time the investigation was at the rudimentary stage inasmuch as what was done was merely a search of the person and the seizure of the contraband articles. No other investigation was commenced. Suffice it to point out at this stage that the petitioner was produced before the Magistrate within three hours of his apprehension and whatever material was available to the investigating machinery was put up before the Magistrate and on that material the learned Magistrate passed the under granting bail.

7. Mr. Manohar, the learned advocate for the petitioner, strenuously urged before me that the bail granted once could not have been quashed except on the pressing circumstances. He invited my attention to Section 439(2) of the Code of Criminal Procedure which reads as follows :

'The High Court or the Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit to custody.'

Mr. Manohar urged before me that though the Code has not specified the reasons on which the bail could be cancelled, he maintained that the precedents have well established the principles governing the cancellation. He invited my attention to the ratio laid down by the Supreme Court in Bhagirath Singh Jadeja v. State of Gujarat : 1984 CriLJ160 where the Supreme Court observed : 'The High Court completely overlooked the fact that it was not for it to decide whether the bail should be granted but the application before it was for cancellation of the bail. Very cogent and overwhelming circumstances are necessary for an order seeking a cancellation of bail. And the trend today is towards granting bail because it is now well-settled by a catena of decisions of this Court that the power to grant bail is to be exercised as if the punishment before trial is being imposed. The only material considerations in such a situation are whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with the evidence.'

8. Relying on this ratio, Mr. Manohar urged before me that the case in hand falls outside the purview of cancellation because there is neither any likelihood of the accused jumping the bail, nor is there likelihood of the accused tampering with the

evidence. It is true that it is none of the allegations of the prosecution that the accused is likely to indulge in either of these two. What the prosecution wanted to stress before the Sessions Judge was that the bail was granted when there was absolutely no material before the Court and the Court had no alternative at that stage but to release the accused on bail. But thereafter there was a considerable progress in investigation. They have obtained sufficient material showing that the packets (containing contraband brown sugar) were with the accused, that the accused was dealing in the business of selling these packets to the customers and whatever was found with the accused was a contraband material inasmuch as the Chemical Analyser on analysis of these packets opined that Heroin (diacetylmorphine) was detected in Exhibits Nos. 1 to 15 seized from the petitioner) along with other opium alkaloids. According to the Chemical Analyser the exhibit falls under Section 2(xvi)(e) of the Narcotic Drugs and Psychotropic Substances Act, 1985. It was urged that this material could not be put up before the learned Magistrate as it was not available then, but now the prosecution has collected this material which prima facie establishes that the 'opium derivative' was found with the petitioner during the search, 'Manufactured Drug' according to the prosecution means 'opium derivatives' also and as the opium derivative was found with the petitioner, there is a prima facie case made out under Section 21 of the said Act. What was urged by the prosecution in this behalf was that no such material could be produced before the Magistrate at the time when the prosecution was called upon to answer the bail application presented on behalf of the petitioner, but the investigation proceeded further and sufficient material has been collected by the prosecution to show that the petitioner was in fact found in possession of the contraband material which itself is an offence punishable under Section 21 of the said Act.

9. What was urged before the learned Sessions Judge was that when the prosecution collects the material and puts it before the Court, then the Court has powers to cancel the earlier bail and direct the accused in custody. Reference was also made to the ratio laid down in Gurucharansingh v. The State (Delhi Administration) : 1978 CriLJ129 . The Supreme Court observed that when the accused is produced before the Magistrate initially on his arrest, at that stage the Magistrate will have no reasons to hold that there are no reasonable grounds for

believing that he has not been guilty of such offence. The bail at this stage would be out of question. The only limited enquiry may relate to the material for suspicion. The position will naturally change as the investigation progresses and more facts and circumstances come to the light. The Supreme Court observed that the new material collected by the prosecution would be one of the grounds relevant for cancelling the bail already granted. It is true that the Supreme Court has observed that different considerations are involved in (1) granting or refusing bail under Section 439(1) and (2) cancellation of the bail, already granted. For the latter relief, something more is required to be established. The paramount considerations (1) likelihood of the accused cleaned from justice and he is tampering with the prosecution with the prosecution evidence would be relevant.

10. The ratio laid down in Gurucharansingh's case : 1978 CriLJ129 (Supra) thus helps the prosecution inasmuch as the subsequent material collected during the investigation has to be considered at the time of cancelling the bail already granted. It is exactly this point which has been considered by the learned Sessions Judge. The learned Sessions Judge found that when the petitioner applied for bail, there was hardly any material except the suspicion, but as the investigation proceeded further, some material was found and that material is in itself relevant for cancellation of the bail.

11. The learned Public Prosecutor strenuously urged before us that the Narcotic Drugs and Psychotropic Substances Act, 1985 is a Code in itself and this statute overrides some provisions of the Code of Criminal Procedure. There is a special provision covering bail and that provision can be found in S. 37 of the said Act. S. 37 of the said Act reads as follows :

'37(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 -

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless -

(i) the Public Prosecutor has been given 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 grounds for believing that he is not guilty of such offence while on bail.

(2) The limitations on granting of bail specified in Cl. (b) of sub-sec. (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail.'

Thus what was urged before me was that this Act is a self-contained Code as far as bail is concerned and, therefore, it would be appropriate to consider whether bail can be granted or refused, in view of the stringent provisions. It is no longer disputed before me that the main purpose for enacting this special Code was to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances and for matters connected therewith. The historical background which led the Legislature to enact this provision has been well stated by this Court in suo more petition No. 1 of 1988 and the Criminal Appln No. 1917 of 1988, decided by this Court on 18th October, 1988. The danger threatening the whole human community by these pernicious drugs cannot be under emphasized. That is why stringent provisions are made. One of the stringent provisions enacted by the statute is regarding the bail and perhaps the principle of deterrence might be the underlying factor. Anyhow it is not much relevant for as to go into that part. Enough to point out at this stage that the provisions regarding grant of bail have been made very stringent under this Act. If we read S. 37(1)(b)(ii) of the said Act, it virtually means that no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit such offence while on bail. The Court has thus to satisfy itself with these two requirements before it can grant bail. A special forum has been created for trial of the cases under this Act, special powers are invested and special procedure has

been prescribed for different offences. It is an admitted position that no special courts have been established by the State Government and now the matters are dealt with by the Sessions Court under S. 36D.

12. Looking to the scheme of the Act, what transpires is that the offence was exclusively triable by the Court of Session; that the bail was granted by the learned Magistrate though the case was exclusively triable by the Court of Session and the material that petitioner was in fact found in possession of narcotic drugs or psychotropic substance was not produced before the Magistrate, was left on only suspicious when he granted the bail. Subsequently the prosecution did collect the material to prima facie show that it was the petitioner and petitioner only who was found in possession of the narcotic drugs or psychotropic substances, which call for a very heavy punishment and it is an offence exclusively triable by the Court of Session.

13. From this point of view, the principle enunciated in Gurucharansingh's case : 1978 CriLJ129 (Supra) would be applicable and the Sessions Judge would be justified in cancelling the bail under S. 439(2) of the Code of Criminal Procedure. The provisions of S. 439(2) would well be applicable inasmuch as they do not contravene any provisions of the Narcotic Drugs and Psychotropic Substances Act. The Sessions Judge would have the power to cancel the bail in appropriate circumstances and these appropriate circumstances are present in the present case.

14. The Sessions Judge has considered all these aspects and relying upon the principles laid down in : 1990 CriLJ62 , the judgment in Criminal Application No. 197 of 1988 and : 1987 CriLJ1061 , he was justified in cancelling the bail already granted.

15. Mr. Manohar, the learned advocate for the petitioner urged before me that the provisions of the statute are very stringent and, therefore, it would be well expected from the investigating authorities to follow these provisions stringently, else the investigation or the trial could be vitiated. He invited my attention to S. 42(2), 50(1), 52(1) and 57 of the Act and strenuously urged before me that unless there is a compliance with these provisions, the whole investigation is liable to be

vitiated. This argument of Mr. Manohar contains the factual aspect which has not been stated in the revision petition nor has the other side an occasion to controvert the factual aspect. S. 42 of the Act speaks of power of entry, search, seizure and arrest without warrant or authorisation. Enough to point out at this stage that the officer has to be empowered by a general or special order of the State Government and it is only such officer who can effect search even of a person.

16. Section 50(1) lays down that when any officer duly authorised under S. 42 is about to search any person under the provisions of S. 41, S. 42 or S. 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the department mentioned in S. 42 or to the nearest Magistrate. S. 50(2) lays down that if such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-sec. (1) S. 51 lays down that the provisions of the Code of Criminal Procedure, 1973 shall apply in so far as they are not inconsistent with the provisions of the Act S. 52(1) lays down that any officer arresting a person under S. 41, S. 42, S. 43 or S. 44 shall, as soon as may be, inform him of the grounds for such arrest, S. 52(2) lays down that the person so arrested and article seized under warrant shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. Sub-section (3) of S. 52 lays down that the person arrested and article seized under sub-sec. (2) of S. 41, Sections 42, 43 and 44 shall be forwarded without unnecessary delay to the officer-in-charge of the nearest police station. S. 57 requires that whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure make a full report of all the particulars of such arrest or seizure to his immediate official superior.

17. What Mr. Manohar strenuously urged before me is that there has been no compliance of any of the requirements contained in these different sections. As already pointed out, this argument contains a factual aspect and these statements have not been made either in the petition before the Sessions Judge or in the revision petition filed before this Court. Had these points been raised before the Sessions Judge, he could have decided these points on merits. These are not the pure points of law which can be decided by this Court only on legal arguments.

Whether the person is authorised is a point of fact and had this fact been contended the prosecution could have come with the necessary reply and the authorisation. As far as the requirements of Sections 52 and 57 of the Act are concerned, the learned Public Prosecutor brought to my notice that they have been complied with inasmuch as within three hours of the apprehension, the petitioner had been sent before the Magistrate. He further urged before me that immediately on the same day, the report has been sent to the Superintendent of Police and the Superintendent of Police has entrusted this investigation to the higher authority. It was urged, and rightly so, by Mr. Badar, that unless the report was made to the Superintendent of Police, the investigation could not have been entrusted to the higher authority. Thus even without statement of the factual aspects, the learned Public Prosecutor had shown before this Court that the compliance has been made. He could not state before the Court about the authorities contemplated under Sections 42 and 43, but had this aspect been contended, that could have been done. Regarding the so-called breach of S. 50(2). Narcotic Drugs and Psychotropic Substances Act, Mr. Badar urged that unless there is requisition from the accused, the Gazetted Officer need not be called. He is correct to that extent.

18-19. Mr. Manohar, the learned advocate for the petitioner, invited attention to the principles laid down in Bhajan Singh v. State of Haryana, (1988) I Crimes 444 (Punj & Har) where the Punjab and Haryana High Court has held that the provisions of Sections 41, 42, 43, 50, 51, 52 and 56 of the Narcotic Drugs and Psychotropic Substances Act are mandatory and contravention thereof vitiates the investigation and trial. My attention was invited to Gopal v. State of Rajasthan (1988) 3 Crimes 485 and Roland Markas Soonthar v. State of Rajasthan (1988) 3 Crimes 737. Enough to point out at this stage that all these rulings were in cases decided on merits. The appeals were out of conviction and there the Court considered whether the lacuna in the procedure vitiated the trial or not. The case before us is at a very rudimentary stage where the investigation is in progress. These points regarding the defects in the trial can be decided only on trial Similarly the principles laid down in State of Himachal Pradesh v. Sudarshan Kumar do not render any assistance to the petitioner because it is not a stage where such points are to be scrutinised, particularly when factual allegations are not made.

20. A more appropriate authority which can assist this Court is Rajanikant Jivanlal v. The Intelligence Officer, Narcotic Bureau, New Delhi : 1990 CriLJ62 . In that case the accused persons arrested for the offences under Sections 21, 23 and 29 of the Narcotic Drugs and Psychotropic Substances Act were sent to the judicial custody. The charge-sheet was filed and the Enquiry Magistrate released them on bail on the ground that the possession had failed to submit the charge-sheet within 90 days. The High Court cancelled the bail. The matter was agitated before the Supreme Court. The Supreme Court held that the order passed by the Magistrate was an order on default. At that stage merits of the case are not to be examined at all.

21. Thus what is established prima facie is that the bail was granted by the Magistrate under S. 437 of the Code of Criminal Procedure when there was no material collected by the prosecution. After the prosecution collected the material, sufficient to entangle the petitioner, they applied before the Sessions Judge. The Sessions Judge considered all the aspects of the case and exercised his powers under S. 439(2) of the Code of Criminal Procedure. The provision of S. 439(2) of the Code are not inconsistent with the Narcotic Drugs and Psychotropic Substances Act. The investigation is in progress. There is nothing on record to show that there is no compliance with the mandatory provisions. The factual aspect has not been raised either before the Sessions Judge or in the revision petition. Thus prima facie the learned Sessions Judge was quite justified in cancellation of the bail. This Court does not find any reason to interfere with the order of the learned Sessions Judge.

22. There is one more aspect which Mr. Manohar brought to my notice. The learned Session Judge by his order has directed the petitioner to be put in police custody. In fact this police custody remand was never sought when at the initial stage the petitioner was produced before the Magistrate on 11-9-1989. Even the learned Public Prosecutor could not bring to my notice any requisition for police custody made by the investigating machinery What he pointed out before me was that during the pendency of the proceedings before the Sessions Judge a request was made for police custody. I do not think that the circumstance justifies the police custody remand. Therefore, though this Court finds no fault with the

cancellation of the order of bail, it cannot agree with the final order passed by the Session Judge putting the petitioner in police custody.

23. The revision is thus partly allowed. The order cancelling the bail granted by the Sessions Judge is confirmed. However, the order putting the petitioner in police custody is hereby quashed and set aside and in place of it, it is directed that he shall be put in Magisterial Custody. As this Court has confirmed the order of cancellation of bail, the investigating machinery is directed to expedite the investigation and put up the charge-sheet as expeditiously as possible. The rule is made absolute in terms above.

24. Order accordingly.