

ilyas Vs. State of Karnataka

ilyas Vs. State of Karnataka

SooperKanoon Citation : sooperkanoon.com/381884

Court : Karnataka

Decided On : Aug-06-1993

Reported in : ILR1994KAR1596

Judge : R. Ramakrishna, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 22, 37 and 37(1)

Appeal No. : Crl. Petns. Nos. 1030 and 1126 of 1993

Appellant : ilyas

Respondent : State of Karnataka

Advocate for Def. : L. Krishna Murthy, HCGP

Advocate for Pet/Ap. : Shams A. Pathan, ;A.H. Bhagvan and A.N. Radhakrishna, Adv.

Disposition : Petition dismissed

Judgement :

R.Ramakrishna, J.

1. The Petitioner in Cr.P.No. 1030 of 1993 is accused No.3 in Crime No. 153 of 1993. The petitioner in Criminal Petition No. 1126 of 1993 is accused No.4 in the

said Crime. The petitioners hereinafter referred to as Accused Nos. 3 and 4.

2. The petitioners have filed these Petitions to release them on bail pending disposal of their case. The petitioners found to be in possession of Brown Sugar which attracts restrictions under the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (in short 'NDPS' Act). The case registered against the petitioners is punishable under Section 22 of the NDPS Act.

3. Before deciding the above Petitions, a short narration of facts leading to the arrest of the petitioners are necessary and they are as follows:

On 13.5.1993 at about 11 A.M. on some credible information, Surendra Naik, C.P.I, of Madiwal Sub-Division accompanied by M.M. Marihal, A.C.P., Ulsoor Gate Police Station and Ramalingam, P.S.I, of Adu Godi Police Station came near the MICO Factory Circle and arrested two persons by name M. Suhail and Shakil Ahmed, who are the original residents of Delhi and seized about 2 Kgs. and 300 gms. of Brown Sugar found in their possession valued at Rs. 10 lakhs. They were taken to Adu Godi Police Station and a case was registered in Crime No. 153 of 1993 for an offence punishable under Section 22 of NDPS Act.

4. On interrogation, they appeared to have volunteered a statement and on the basis of the said statement, they have apprehended A.3 Iliyas and on search of his house, they found Brown Sugar weighing 100 gms. along with weighing instrument.

5. On further interrogation, the investigating authorities, having learnt the involvement of A.4., apprehended him on 28.5.1993, within the limits of Banashankari Police Station and on his personal search, they were able to get 15 gms of Brown Sugar.

6. Both the petitioners have filed applications for their release on bail before the Principal City Civil and Sessions Judge, Bangalore City. Their applications came to be rejected.

7. The petitioners having committed offences punishable under the NDPS Act, their release on bail governs under the special provisions enacted in Section 37 of

the NDPS Act. It is a penal provision where, punishment for an offence under this Act, is for a term of imprisonment of five years or more and before releasing on bail, the Public Prosecutor should be allowed to oppose the application and after the application is being opposed, the Court should satisfy that there are reasonable grounds for believing that the applicant is not guilty of such offence and that he is not likely to commit any offence while on bail. The limitation specified under Clause (b) of Sub-section 1 are made in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force.

8. In *NARCOTICS CONTROL BUREAU v. KISHAN, LAL* 1991 Cr.L.J. 654 the Supreme Court laid down the principles regarding the application of Section 37 in the matter of granting bail under the Act. It is held:

'Section 37 as amended starts with a non-obstinate clause stating that notwithstanding anything contained in Criminal P.C. 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were satisfied. The N.D.P.S. Act is a special enactment and it was enacted with a view to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. That being the underlying object and particularly when the provisions of Section 37 of NDPS Act are in negative terms limiting the scope of the applicability of the provisions of Cr.P.C., regarding bail, it cannot be said that the High Court's powers to grant bail under Section 439, Cr.P.C. are not subject to the limitation mentioned under Section 37 of the NDPS Act. The non-obstinate clause with which the section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconsistency between S.439, Cr.P.C. and Section 37 of the NDPS Act, Section 37, prevails. The provisions of Section 4, Cr.P.C, also make it clear that when there is a special enactment in force relating to the manner of investigation, enquiry of otherwise dealing with such offences, the other powers under Cr.P.C. should be subject to such special enactment. In interpreting the scope of such a statute the dominant purpose underlying the statute has to be borne in mind. Consequently, the power to grant bail under any of the provisions of Cr.P.C. should necessarily be subject to the conditions mentioned in Section 37 of

the NDPS Act.'

9. Since the offence registered against the petitioners are under Section 22 of the Act, Section 439 of the Code of Criminal Procedure is subject to the Special enactment of Section 37 of the Act. The offence alleged against the petitioners is punishable under Section 22 of the Act, which is punishable with Rigorous Imprisonment for a term which shall not be less than 10 years but it may extend to 20 years and was also be liable to fine which shall not be less than Rs. 1 Lakh but it may extend to Rs. 2 Lakhs, due compliance of the procedural safeguards provided under the Act are intended to protect a person against false accusations and frivolous charges should be considered while dealing with the application for bail.

10. The learned Advocates for the petitioners have urged that there is no compliance of Sections 42, 50, 51, 52 and 57 of the Act regarding search, seizure, non-informing the right of the accused, non application of the procedures laid down in respect of search and seizure as per the provisions of Section 100 of the Code of Criminal procedure and non-furnishing of the report of arrest and seizure to the immediate official superior, this question of non-compliance is a matter required to be considered at the time of bail application. They have relied on a Decision of Bombay High Court reported in 1992 CrI.L.J. 399 Lawrence D'Souza v. State of Maharashtra wherein the learned Judge held:

'The provisions of Sections 41 to 58 of the Act would be applicable right from the inception of the investigation. It would be fallacious and pernicious to leave the question of their compliance to be looked into only at the stage of trial. Such a situation is fraught with the danger of the prosecution agency ignoring altogether the compliance of the provisions which contain in-built safeguards to the accused, with impunity and with ulterior purpose in a given case. That would bring into peril the liberty of the citizen guaranteed under Article 21 of the Constitution. The accused therefore should be entitled to rely upon the infirmities with all its rigour even at the stage of bail. There are stringent limitations on grant of bail under Section 37 of the Act. Courts must, therefore, be vigilant to protect the rights of the accused. There can be no quarrel that an offender under the Act must be

apprehended, and severely punished, provided, however, that he is found guilty. That possibility has to be found to exist at the stage of bail on prima facie consideration of the matter and only after reaching satisfaction that he is reasonably believed to be guilty. For that purpose, the compliance with procedural requirements must be insisted upon and must be shown, at least, prima facie, at the stage of bail.'

11. In *OLGA TELLIS v. BOMBAY MUNICIPAL CORPORATION* : AIR 1986 SC180 the Supreme Court held:

'The procedure prescribed by law for the deprivation of the right conferred by Article 21 must be fair, just and reasonable. Just as a mala fide act has no existence in the eye of law, so unreasonableness, vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right must conform to the norms of justice and fairplay. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two Standards the action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it. If a law is found to direct the doing of an act which is forbidden by the Constitution or to compel, in the performance of an act, the adoption of a procedure which is impermissible under the Constitution, it would have to be struck down.'

12. In 1990 Cr.L.J. the learned Judge of the Madhya Pradesh High Court held at page 1993:

'If the procedure laid down under the Act is not followed, it would not be proper for the Court to refuse bail; particularly when the procedural safeguards violated have

a material bearing on trial of the case. Therefore in the instant case non compliance with the provisions of Sections 42 and 50 entitled the accused to be released on bail.'

13. A similar view has been taken by this Court in : ILR 1991 KAR1820 A.V. Dharmasingh and Ors v. State of Karnataka

'Under Section 57 of the Act it is clearly laid down that whenever any person makes any arrest or seizure under this Act he shall within 48 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. In the instant case, there is material enough in the evidence of P.W.1 to show that no such report was made by him. He admits that even warrant was not returned to the officer who had issued it.....Failure to comply with mandatory provisions of Section 57 has certainly resulted in prejudice to the accused.'

14. In the background of the above Decisions, the application of the petitioners is to be examined.

15. Section 36 of the NDPS Act provides for Constitution of Special Courts presided over by a Sessions Judge or Additional Sessions Judge who is to be appointed by the Government with the concurrence of the Chief Justice of the High Court. Under Section 36A all the offences under this Act should be triable by the Special Court. The Special Court exercises the powers of a Magistrate under Section 167 of the Code. The Special Court takes cognizance of the case. In other words, Special Court under the NDPS Act performs the functions of a Magistrate which the Magistrate performs in respect of other offences punishable under the Indian Penal Code. In view of this the Special Court must also exercise the powers of granting Bail in the manner a Magistrate exercises under Section 437 of the Code. The non-obstinate Clause contained in Section 37 curtails the power of Special Court by Clause (1)(b)(ii) which is presently enjoying under Section 439 of the Code. Thus the High Court retains the power of granting Bail under Section 439 of the Code in all cases including the cases under the NDPS Act but subject to conditions enumerated under Clause 1(b)(ii).

16. Before considering the merit of the petitions to grant bail on the ground of procedural irregularities, one of the grounds urged by the petitioner in Cr.P.No. 1030 of 1993 is that, he is suffering from serious injury and infection to his left hand for which he has undergone four operations and he has been advised to undergo one more operation. This hand is developing gangrene and needs expert and specialised treatment which are not available in Bangalore.

17. This ground is not strongly urged by the learned Advocate for the petitioner as expert and specialised facilities are available in the Government Hospital at Bangalore.

18. In view of specific wording contained in Clause 1(b)(ii) of Section 37 of the NDPS Act, which not only concerns but also affects' the personal liberty of an individual citizen, the approach to the question should be broad and liberal. If a provision which curtails personal liberty should be construed with some strictness, the protection provided to safeguard the liberty, must be liberally interpreted.

19. The learned Government Pleader filed objections in Cr.P.No.1030 of 1993. According to the objection the police after collecting the panchas, drawn the mahazar in the presence of the Assistant Commissioner of Police, Panch witnesses and recovered 100 gms. Of Brown Sugar. Therefore, the provision of Section 42 is followed. The other ground of objection is that in the event of grant of bail, the petitioners tamper the prosecution witnesses, hampers the prosecution case, commits similar offence and finally, they would flee from Justice.

20. The limitations on granting of bail under Section 439(1)(a) of the Code is to impose necessary conditions to safeguard the interest of prosecution. The limitations contained in Section 437(1)(ii) though absent in Section 439, the procedural safeguards contained in Section 437(3)(b) is to be followed while granting bail under Section 439(1)(a) of the Code.

21. The words 'the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is likely to commit any offence while on bail' has got a special significance. This satisfaction be arrived on the basis of materials placed before the Court. If such materials are available then

only the Court can record a finding of satisfaction contained in Clause 1(b)(ii).

22. It is submitted that the materials placed before the Court must be considered Judicially for reaching the required satisfaction and in doing so, such material which ex-facie cannot be legally admitted in evidence be excluded from consideration. Here the procedural safeguards as provided under the Law come into play.

23. In K.L. SUBBAIAH v. STATE OF KARNATAKA : 1979 CriLJ651 the procedural safeguards contained in Sections 53 and 54 of the Mysore Excise Act (21 of 1966) being violated, the Court held that:

'where the valuable safeguard providing for the liberty of the, citizen protecting him against the ill-founded or frivolous prosecution or harassment were not complied with, the search held to be one without jurisdiction and therefore, the conviction held to have been vitiated.'

24. One of the objections taken by the petitioner in Cr.P.No. 1030/93 is that, the quantity of Brown Sugar seized from the possession of A.1 and A.2 were not correctly indicated in the records maintained by the prosecution which prima facie throws doubt regarding the recovery of Brown Sugar from the house of the petitioner and this doubt further amplified by the procedural defects in conducting the search.

25. The learned Advocate made, available the certified copies of Remand Applications. The first remand application dated 14.5.1993 shows the quantity of Brown Sugar as 2kgs. and 300 gms. In the complaint registered on 13.5.1993 the quantity shown was about 2 1/2 kgs. The remand application dated 18.5,1993 shows the quantity as 2Kgs. 400 gms. What the petitioner making out is due to these inconsistent figures the possibility of manipulation to implicate the petitioner, cannot be ruled out.

26. It can be seen that, on a credible information, the investigating authorities immediately went to the spot and found A.1 and A.2 indulging in selling the Brown Sugar and they have been caught red handed. A mahazar was drawn immediately

indicating the quantity of Brown Sugar found in possession of A.1 and A.2. It was shown as approximately 2 1/2 kgs. On 14.5.1993, the approximate weight of the articles was shown as 2 Kgs. and 300 gms. which does not include 100 gms. seized in the house of the petitioner. On 18.5.1993, the quantity is shown as 2 Kgs. and 400 gms. that is after the arrest of the petitioner. These discrepancies cannot be held to be a ground to extend the benefit to the petitioner as it is premature and the same cannot be accepted.

27. Section 42 of the NDPS Act deals with power of entry, search, seizure and arrest without warrant or authorisation. According to Proviso, a search warrant or authorisation is necessary to conduct search but if the officer believes that the delay in obtaining results in escape of the offender, he may do so after recording the grounds of his belief. Under Sub-clause (2) any information taken down in writing or his records of belief the same shall be intimated to the official superior by sending a copy,

28. The learned Government Advocate by invoking Section 51 of the NDPS Act, where a direction is made that the action under Section 42 of the Act should be in conformity with Section 100 of the Code of Criminal - Procedure, 1973 and the provisions contained thereon under Sub-clauses (4) and (7) are not complied with.

29. These objections of the learned Advocate are not substantiated by providing any materials. It is only the oral say and in the absence of any material particulars, it is very difficult to accept the said contention, especially so, when the stringent provision is made under Section 37. It is to be noted that this recovery is made on the voluntary statement of A.1 and A.2. Since the matter is one of importance the investigating authorities, without any loss of time, secured the mahazardars and after arresting the petitioner, his house was searched and the article was attached under the mahazar.

30. The trial Court while dealing the Bail Petition of this petitioner, has also noted that this petitioner is indulging in similar type of offences and though he is acquitted in three cases, one case in S.C.No. 266/92 is still pending.

31. Though it is contended that the trial Court has made this note without any opportunity to the petitioner, the Court which is aware of the matters connected to the offences of an individual, can suo motu take notice of the conduct of a person before considering the application for bail. It is to be noted that the liberty of an individual is a fundamental right to safeguard the conditions laid down under the provisions of law; this liberty can be curtailed temporarily.

32. Though it is submitted that Sub-clauses (4) and (7) of Section 100 of Code of Criminal Procedure, are not complied with, it is a matter that is to be appreciated when such mahazar, withstands the test of cross-examination.

33. In Crl.Petn.No. 1126 of 1993, Sri, A.M. Bhagavan, learned Advocate for the petitioner, submits that, in this case also, the investigating authorities have not complied with the mandatory provisions laid down under Sections 42, 50, 51, 52 and 57 of the NDPS Act and as per the settled law on other points, the petitioner is entitled to be released on bail due to procedural irregularities.

34. Under Section 50 of the NDPS Act, when any Officer duly authorised under Section 42 of the Act is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires take such person without unnecessary delay to the nearest Gazetted Officer of any of the Departments mentioned in Section 42 or to the nearest Magistrate.

35. Much emphasis was made of the word 'if such person so requires' meaning thereby the investigating authorities should intimate the legitimate right enjoined to the accused before conducting search.

36. This provision is made with a view to safeguard the individuals, as it is, easy to catch a person and put some Narcotic Drugs in his pocket and then make a show of search with panch witnesses who are under the thumb of the police. Therefore, it gives an opportunity for the person accused of these offences to inform the Gazetted Officer that what actually took place. There is no doubt that this provision is to be followed very strictly. However, the mahazar discloses that the police did inform him that he will be searched before the Gazetted Officer, for which, the petitioner was not agreeable and requested the authorities to search in the

absence of a Gazetted Officer. Here the interpretation of the word come into play; it means, after informing the right of the accused, if he. so requires, then, he would be taken before the Gazetted Officer. If the accused expresses that it is not necessary, then it is not the obligation for the Police Officer to fulfil this condition.

37. Sri. Bhagavan, learned Advocate, further submitted that, in the event this Court reject this submission, the violation of mandatory provision of other Sections should be considered. It is further submitted that the petitioner is a permanent resident of Rampur and for the purpose of this case, the arrest was shown as 27.5.1993 at Bangalore within the jurisdiction of Banashankari Police Station.

38. A typed copy of the case diary connected to this petitioner is produced by the petitioner. It shows that this petitioner was arrested on 27.5.1993 at about 10 P.M. near a place called Iliyasnagar, Banashankari, Bangalore. On enquiry, this petitioner gave his address to a place at Uttar Pradesh which was also noted. They have requested for police custody as he has to be taken to Uttar Pradesh and Rajasthan which are the places where the Brown Sugar is distributed to other places.

39. In Kishanlai's case (cited supra), the Supreme Court has distinguished the grant of bail under the Criminal Procedure Code with NDPS Act and held that the grant of bail under the provision of the Code of Criminal Procedure is subject to the conditions mentioned in Section 37 of the NDPS Act.

40. I fully agree with the views expressed in Lawrence D'Souza v. State of Maharashtra and Mari Appa etc. v. State of M.P. and Ors. that procedural safeguards violated have a material bearing on trial of the case.

41. But the question is when the case is still under investigation stage, where the investigating authorities are still building up the case for submitting challan, whether the Court can express itself the procedural irregularity without those factors being high-lighted in the evidence of the witnesses. The stage of evidence is much later and the revelation of any irregularity helps the Court to record an order of acquittal if such material irregularity has prejudiced the investigation, procedural irregularity by itself is not sufficient for an accused to have the order of

Bail as a matter of right. The Court should satisfy the conditions laid down under Clause (1)(ii) of Section 37 of the Act. Without a finding on this aspect, a person accused of an offence punishable under Section 22 of the Act is not entitled to be released on bail.

42. It is difficult to hold that there are reasonable grounds for believing that the petitioners are not guilty and they are not likely to commit any offence while on bail.

43. The petitioner in Cr.P.No. 1030/93 prima facie involved in number of cases under this Act which are decided earlier and one case is still pending. The police have seized 100 gms. of Brown Sugar and the measuring instrument.

44. The petitioner in Cr.P.No. 1126/93 is admittedly a person from Rampur at Uttar Pradesh who has been caught red-handed at Banashankari Police Station Limit. There is no material that he was arrested at Rampur and brought to Bangalore. If that is so, it is not difficult for him to prove the same. The investigating authorities also detected the source through which Brown Sugar is supplied to this place.

In the light of the circumstances discussed above, the petitioners are not entitled to be released on bail.

In the result, the above Petitions fail and they are hereby dismissed.