

Mari Appa Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Feb-06-1990

Reported in : 1990(0)MPLJ621

Judge : V.D. Gyani, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 37 and 37(1); Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1989; Code of Criminal Procedure (CrPC) , 1974 - Sections 248

Appeal No. : Misc. Cr. Case No. 2128 of 1989

Appellant : Mari Appa

Respondent : State of Madhya Pradesh

Advocate for Def. : Desai, Govt. Adv.

Advocate for Pet/Ap. : A.R. Tiwari and ;Pownekar, Advs.

Judgement :

ORDER

V.D. Gyani, J.

1. This and other connected petitions for bail, raise and involve a common question of law as regards the scope and amplitude of section 37 of the Narcotic

Durges and Psychotropic Substances Act, 1985 (as amended by Amendment Act No. 2 of 1989) for short hereinafter referred to as the. Act.

2. Learned counsel on both sides, who include Sarvashri H. S. Oberai, Joshi, and Tiwari for the applicants seeking bail and Shri Khan for the Department of Narcotics and Shri Desai, for the State have forcefully presented their view points. Both agree and rightly so, at this stage, that the factual allegations as made, cannot be disputed; yet Shri Oberai maintained that such procedural lapses on the part of the investigating agency, which would ultimately be materially affecting the prosecution case, would be one such circumstance which should be taken into consideration by the Court, while reaching the satisfaction that there are reasonable grounds for believing that accused is not guilty of the offence charged or levelled against him.

3. Shri Joshi advanced yet another argument, a chargesheet filed by the officers of the Narcotics Department being a complaint, the allegations made therein, are yet to be inquired into for deciding whether or not there is sufficient ground for proceeding? Thus relegating the case to the stage of inquiry under section 202, Criminal Procedure Code. This argument is based on want of proper and required Notification under section 53 of the Act.

4. Shri Khan has placed the Notification dated 4-2-1988 to counter the argument advanced by Shri Joshi. Shri Tiwari who appears for one of the applicants, has also taken the same stand as Shri Oberai.

5. The controversy associated with these petitions, as emphatically and briskly argued by Shri Oberai, is not merely legal in nature but constitutional as well. A significant departure has been made from the age old, time honoured cardinal rule of criminal jurisprudence that an accused is presumed to be innocent unless he is found to be guilty by a competent Court.

6. Shri Khan, for the Department and Shri Desai, for the State, joining him, have urged that the law has been enacted to preserve the society and the social well being order. It is primarily concerned with deferring crime not with finely adjusting individual rights when it comes to general good. They also incidentally referred to

the object of amendment to section 37 of the Act.

7. I, first think proper to deal with the provision of law, as it stands, on its plain reading and see, if it is necessary at all to go into the wider issues as raised by the learned counsel.

8. Section 37 of the Act reads as follows: -

'Offences to be cognizable: Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) (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 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 grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (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.'

9. The question of one of approach to this section; which not only concerns but also affects personal liberty of a citizen. It is well settled by now that a provision which curtails personal liberty should be most strictly construed in favour of the subject and the safeguards provided for protection of citizen's liberty must be liberally interpreted and applied, (see *Rameshwar Shaw v. District Magistrate*, AIR 1964 SC 334) with emphasis on their strict compliance.

10. Section 37 of the Act contemplates that before passing any order releasing an accused on bail, the Public Prosecutor has got to be given an opportunity to oppose the application for such release, and where the Public Prosecutor opposes the application, it is required of the Court to be satisfied that there are reasonable

grounds for believing that the accused-applicant is not guilty of such offence and that he is not likely to commit any offence while on bail.

11. Shri Tiwari, learned counsel appearing for one of the accused applicants, contended that non obstante clause in the section should not be construed as a blanket ban on the Court's discretion to release an accused on bail. Shri Khan, however, urged that before a bail order is passed, the Court must be satisfied and the satisfaction must be based on reasonable grounds for believing that the applicant is not guilty of the offence charged.

12. The crux of the matter lies in reaching the satisfaction as contemplated by sub-section (1)(B)(II) of section 37. It may be noted that this question of reaching the satisfaction required of the Court is only in the event the Public Prosecutor opposes the application for bail. In case he does not, the question of arriving at such a satisfaction would not arise, and when the Public Prosecutor opposes the application, the opposition must not be for the sake of opposition, it must be an opposition based on solid facts and sound principle. In other words it is for the Public Prosecutor, to show such material on record so as to enable the Court to assess the material before it; in order to decide the application one way or the other. If the accused applicant is to be released on bail, the Court has to record its satisfaction that there are reasonable grounds to believe that the accused is not guilty of the offence charged. The Public Prosecutor has a vital role to play in the whole process of reaching the required satisfaction by the Court. He can, by placing and pointing to the overwhelming material collected against the accused effectively and meaningfully, oppose the application for bail by showing that no such reasonable grounds exist for believing that the applicant is not guilty of the offence charged.

13. The expression 'reasonable grounds' as used in section 37 of the Act, means something more than prima facie grounds. It connotes substantial probable cause for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated by section 37(1)(b)(ii) in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that' the accused is not guilty of the offence charged.

14. Black's Law Dictionary gives the following meaning of the expression 'reasonable grounds'; although it is in the context of authorising arrest without warrant:

'Reasonable grounds within statute authorising arrest without warrant by officer who has reasonable grounds for believing that person to be arrested has committed criminal offence means substantially probable cause. Beyer v. Young, 32 Colo. App. 273, 513, P. 2d 1086. See also probable cause; Reasonable and probable cause; Reasonable cause.'

15. Some help can also be derived from section 26 of the Indian Penal Code which defines as -

'A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise.'

The expression reason to believe has also been used in sections 42(1), 43(1) and the expression 'reasonable grounds for believing' has been used in section 165, Criminal Procedure Code. Section 165 which relates to search by a Police Officer, employs the expression reasonable grounds for believing which has been the subject matter of interpretation by the Supreme Court in its various judgments.

16. The expression reason to believe occurring in section 34 of the Income Tax Act, 1922 and section 19(2) of the Prevention of Food Adulteration Act (as it stood prior to amendment), has been interpreted by the Supreme Court in several cases and it has been held that the belief must be that of an honest and reasonable person based on reasonable grounds. The belief must be held in good faith. It cannot be merely putting it differently. It was stated in A.S. Narayan Appa v. Commissioner of Income Tax, Bangalore, AIR 1967 SC 523 that the reason must have a rational connection or relevant bearing to the formation of belief.

17. The requirement of 'reason to believe' contemplates intelligent and objective determination and not mere subjective consideration of facts.

18. Although section 37 of the Act does not employ the expression 'reason to believe' but the expression 'reasonable grounds for believing' as has been used in

section 37 of the Act, necessarily points to the existence of grounds which afford the reason to believe and it is in this sense that the change in expression does not make any material difference.

19. Learned counsel appearing for the applicants very rightly submitted that the factual allegations at this stage of consideration of bail petition, cannot be disputed but they emphasised that the material placed before the Court must be judicially considered for reaching the required satisfaction and in doing so, such material which ex facie cannot be legally admitted in evidence, must as of necessity, be excluded from consideration. It is here that the procedural safeguards as provided under the law come into play.

20. Shri Tiwari, learned counsel referred to a decision of the Supreme Court, as reported in K.L. Subbaya v. State of Karnataka, AIR 1979 SC 711 in this connection. This case deals with sections 53 and 54 (containing same expression) of the Mysore Excise Act (21 of 1966). The Supreme 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 was held to be one without jurisdiction and as a logical corollary thereof the conviction was held to have been vitiated. It was urged by the learned counsel that if the procedural safeguards, in respect of search, are so strictly insisted upon as to result in vitiation of conviction, it should be applied with greater strictness in the matter of arrest, as it deprives a man of his personal liberty.

21. When bail is refused it necessarily results in deprivation of person's liberty as observed by the Supreme Court in G. Narsimhlu v. P.P., Andhra Pradesh, AIR 1978 SC 429. A person's liberty is too precious a value of our Constitutional System recognised by Article 21 of the Constitution which lays down 'no person shall be deprived of his life or personal liberty except according to procedure established by law'. 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. The Supreme Court turned a new leaf by laying down the concept of reasonableness, justness and fairness in Menka Gandhi's case, AIR 1978 SC 597. The Supreme Court

reiterated similar principle in *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180 in the following words -

'It is for too well-settled to admit of any argument that the procedure prescribed by law for the deprivation of 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, even 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. As Justice Frankfurter of the U. S. Supreme Court said in *Viteralli v. Seton*, 3 L ed 2d 1012. 'He that takes the procedural sword shall perish with the sword.'

22. Due compliance of the procedural safeguards provided under the Act and intended to protect a person against false accusation and frivolous charges should be considered by the Court while dealing with an application for bail in such cases. Section 50 of the Act provides for condition under which search of a person is to be conducted. Failure to do so, would constitute violation of the imperative requirement of law, ultimately resulting in acquittal of the accused (see 1988 (1) Crimes 446).

23. Shri Desai, learned Panel Lawyer, at this stage submitted that it is for the accused to opt for search in presence of a Magistrate or a Gazetted Officer, as is clear from the words 'if such person so requires' as occurring in sub-section (1) of section 50 of the Act. Reading the section as a whole along with other provisions

of the Act pertaining to search, seizure and arrest, what emerges is the duty of the authorised officer to inform the person, who is about to be searched, of his lawful right. It is only on being so informed by the authorised officer that the question of exercising an option would arise.

24. It would not be out of place at this stage to refer to the Miranda Rule, as prevailing in the United States. It is a salutary safeguard against custodial interrogation and the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 held that unless and until the warnings (Miranda Rules as noted below) or a waiver of these rights are demonstrated, no evidence obtained in the interrogation may be used against the accused.

Miranda Rule - Prior to any custodial interrogation (that is, questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his freedom in any significant way) the person must be warned: 1, That he has a right to remain silent; 2. That any statement he does make may be used as evidence against him; 3. That he has a right to the presence of an attorney; 4. That if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.'

25. The constitutional foundation and justification which Chief Justice Warren found (as quoted below) for the underlying principle of this Rule is equally obtainable and applicable under the Indian Constitution:

'..The constitutional foundation underlying the privilege is the respect a Government - State or federal - must accord to the dignity and integrity of its citizens. To maintain a 'fair state- individual balance,' to require the Government to shoulder the entire load'...to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth... We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion

described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or often official investigations, where there are often impartial observers to guard against intimidation or trickery.'

26. In view of the presumptions, not only as regards culpable mental state of the accused but also as regards certain documents seized from custody and control from any person and possession of illicit articles made punishable under Chapter IV of the Act coupled with the statements of the accused being made relevant under section 53(a), of the Act, it is all the more incumbent and desirable on the part of the prosecution to establish that the procedural safeguards provided under the Act have been scrupulously followed by the officers concerned and the Court will be perfectly right and justified in considering the compliance of such safeguards while dealing with bail petitions as some of these safeguards have a material bearing on the result of the prosecution and will help in forming the necessary belief in tentatively making up of mind whether the accused is not guilty of the offence charged.

27. The Court while considering an application for bail with reference to section 37 of the Act is not called upon to record a finding of not guilty, section 37 of the Act, is not to be equated with section 248, Criminal Procedure Code which demands acquittal on finding not guilty. It is for the limited purpose, essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and record its satisfaction about the existence of such grounds, i.e. not to say that the Court has to consider the matter as if, it is pronouncing a judgment of acquittal recording a finding of not guilty. One is a question of 'belief' under section 37 of the Act and the other is question of 'finding' under section 248, Criminal Procedure Code and they should not confuse any Court.

28. Shri Khan, urged that the object of the amendment, should be kept in view by the Court while deciding the application for bail. No doubt the Court is expected to keep the object of the Act before it while dealing with bail petition under section 37 of the Act; but the object of the Act, cannot be allowed to defeat the basic rights

available even to an accused under the Article 21 of the Constitution.

29. No Court would be justified in ignoring the procedural safeguards, as provided in the Act, having a vital bearing on the constitutional rights - personal liberty of the accused in preference to the object of the Act.

30. It needs to be clarified that any observation made while considering the individual bail petition is strictly confined to the bail order and shall not in any manner affect the evidence which may ultimately be adduced in the case/cases.

31. Now, while considering application Mari Appa v. State, M. Cri. C. 2128/89; going through the record and taking into account the non-compliance of section 50 it cannot be said that the required satisfaction based on reasonable grounds for believing that the applicant is not guilty of offence charged, can be reached or could have been reached by the Court on proper consideration of the material. He is ordered to be released on bail on his furnishing a personal bond in the sum of Rs. 20,000/- (twenty thousand) with surety in the like amount to the satisfaction of the Addl. Chief Judicial Magistrate, Mhow, for his appearance before the Court on the dates as may be fixed by the J.M.F.C., Mhow.

32. In M. Cri. C. 2035/89, Amritram v. Union of India - considering the fact that one of the co-accused has been admitted to bail and the nature in face of the uncontroverted allegations made by the applicant, even without going into the technical objections, as raised by Shri Joshi, the satisfaction as required by section 37 of the Act, on the part of the Court, cannot be arrived at. More so, the case of the present applicant Amritram s/o Hiralal, is in no way distinguishable from that of Kaluram, who has been ordered to be released on bail by the Sessions Judge. Considering the information received by Narcotic Department, which is on record, the Panchnama relating to the arrest of Applicant Amritram is shown to have been prepared at 6.00 p.m. Going through the Panchnamas relating to the arrest and seizure of opium, it is not borne out that the accused had been apprised of their rights to be searched in presence of a Magistrate or Gazetted Officer. There is an insertion as regards the place where the applicant was arrested and personal search. It is for this reason, without going into the technical objection raised by the learned counsel that the applicant is ordered to

be released on bail conditional on his' furnishing a personal bond in the sum of Rs. 20,000/- (twenty thousand) with surety in the like amount to the satisfaction of the CHIEF JUDICIAL MAGISTRATE Mandsaur for his appearance before the Court on the dates as may be fixed by the CJM in this behalf.

33. In M. Cri C. 1663/89, Babulal s/o Laxminarayan v. Central Bureau of Narcotics and Anr. on completion of investigation, a charge sheet was filed, which is available for perusal. The accused was intercepted while travelling in a bus. A bag containing opium was found underneath the seat occupied by the accused. The Panchnama relating to the search is shown to have been prepared at Dewas Gate Bus Stand, Ujjain while admittedly the bus authorities had entered the bus which was stopped and checked. On personal search 25 gms. opium is said to have been recovered from the possession of the accused. The first Panchnama in point of time was drawn at 11-45 a.m. and the next at 12-45 p.m. The first Panchnama does not bear any endorsement to show that it was drawn in presence of a Gazetted Officer. The other Panchnama drawn at 12-45 p.m. and the seizure, do bear such endorsement. Shri Khan, for the Department tried to explain by saying that the Gazetted Officer was called on the spot.

34. Shri Joshi, however, pointed out that the law requires the accused to be taken to the Gazetted Officer for effecting search. The delay for of one hour; that accused was in custody before he was searched. The arrest as such is not a formal term and does not depend on mere drawing of formal Panchnama. It is evident from record that the accused had in fact been taken into custody, prior to or before drawing of Panchnama at 12-45. In the circumstances even without going into the technical objection and points relating to investing of police powers and the Notification issued and the Narcotic Officers to search and seize, in view of the facts as noted above, it cannot be said that the Court could have reached the satisfaction as contemplated by section 37 of the Act so as to refuse bail to the applicant. In the circumstances he is ordered to be released on bail on his furnishing a personal bond in the sum of Rs. 20,000/- (twenty thousand) with surety in the like amount to the satisfaction of the CHIEF JUDICIAL MAGISTRATE, Mandsaur for his appearance before the Court on the dates as may be fixed by the CJM, in this behalf.

35. In M. Cri. C. 35/90, Nathulal s/o Bhuwan Singh and Hiralal s/o Mangilal v. State of M. P., it was on 19-12-1989 that, in the early hours of the day, the applicants were found to be carrying opium weighing about 18 kgs. on a motor cycle. They were intercepted at the Basai Toll Barrier in Mandsaur. Going by the FIR it is clear that no intimation of the credible information received, was sent to the superior Police Officer for want of time, as noted in the FIR which was recorded on 19-12-1989 at 10.00 a.m. The incident is shown to have taken place at 5.45 a.m. on 19-12-1989. The credible information according to the FIR was received on 18-12-1989. Where was the paucity of time, does not stand to reason that even the information could not be sent when the constables and ASI were very much available on the spot? It is the prosecution case that the accused dashed the Barrier. As per report submitted by the Police, a Police force consisting of ASI and three constables, was posted at the Barrier around 2.30 a.m. as per statements of witnessess Shambhulal and Harinarayan. Yet no intimation was sent to the Official Superior during all this time. Section 42(2) has a salient purpose behind it and non-compliance of this provision without justification is a serious flaw. However, without commenting on merits for the limited purpose of reaching the required satisfaction under section 37 of the Act, it is enough to. tilt the balance in favour of the accused. For the foregoing reasons the applicants are ordered to be released on bail, on their furnishing a personal bond in the sum of Rs. 20,000/- (twenty thousand) each with surety in the like amount to the satisfaction of the CHIEF JUDICIAL MAGISTRATE, Mandsaur for their appearance before the Court on the dates to be fixed by the CJM in this behalf.

36. In M. Cri. C. 97/90, Badrunnisa v. State, the applicant is a woman. She was intercepted at Ratlam in the afternoon on 14-1-1990 and as noted by the learned Judge, she was allegedly found to be carrying 9 tablets of 'charas' in her purse.

Shri Shukla for the petitioner contends that no lady was either present nor any woman constable was employed for taking personal search of the applicant. Shri Desai, however, countered this submission seating that the memos prepared do refer to such presence. However, going through the case diary, there is neither any reference to the presence of any lady constable nor lady Panch in the matter of personal search or arrest. It is not merely a case of violation of the provisions of

law either under the Act or Code of Criminal Procedure, but also the very foundation of her constitutional right of as a woman - inviolability of her person, and privacy, as recognised under the Constitution.

The case diary does not show compliance of the section 42(2) of the Act, it is salient purpose behind it. The applicant was admitted to interim bail by the order dated 24-1-1990, for non-production of case diary despite repeated opportunities having been granted. Now that it has been produced, and on consideration of the allegation, the order as passed on- 24-1-1990, is made absolute.

37. It may be noted that in none of the abovementioned cases, the question of likelihood of repetition of crime was urged by the State.

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