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Superintendent of Customs Vs. Ummerkutty and ors.

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Court : Kerala

Decided On : Oct-05-1983

Reported in : 1986(23)ELT384(Ker)

Judge : U.L. Bhat, J.

Acts : [Customs Act, 1962](#) - Sections 104, 104(1), 104(2), 104(3), 104(4), 135 and 137; [Foreign Exchange Regulation Act, 1973](#) - Sections 35; Code of Criminal Procedure (CrPC) - Sections 4(2), 167, 167(2), 190(1), 191(1), 309, 309(2), 436, 437, 437(1), 437(2), 437(3), 437(4), 437(5), 437(7), 439 and 439(2); [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 344; Indian Penal Code

Appeal No. : Cri. M.C. No. 657 of 1983

Appellant : Superintendent of Customs

Respondent : Ummerkutty and ors.

Advocate for Def. : M. Ratna Singh,; N.V. Mathew and; V. Divakaran Potti

Advocate for Pet/Ap. : K. Kunhirama Menon and; P. Ramakrishnan Nair, Adv.

Judgement :

U.L. Bhat, J.

1. In Cri. M.P. Nos. 684 of 1983, 685 of 1983, 694 of 1983 and 695 of 1983, the petitioners therein, who are respondents 1 to 7 herein, were granted conditional bail by the Chief Judicial Magistrate, Tellicherry, overruling the objections raised by the Superintendent of Customs, Customs Intelligence Unit, Cochin. The latter has now filed this Cri. M.C. under Section 439(2) of the Code of Criminal Procedure (for short the 'Code') seeking cancellation of the interim bail as well as the regular bail ordered.

2. The facts as can be gathered from the order of the lower court, the averments in the petition and submissions made at the Bar, can be summarised as follows : Customs Officers concerned received information to the effect that contraband articles (smuggled goods) were likely to be landed at the Tellicherry coast on the night of 15th September, 1983, or early hours of the morning of 16th September, 1983. They organised a customs party and kept the coast line under watch. They found lorry KLN 4936 moving from the Tellicherry Beach (opposite to the District Court premises) to the main road. The lorry was driven by the second respondent herein. Respondents 3 to 5 were in the lorry. The lorry was stopped and the articles in the lorry were checked. The articles were found to be contraband articles consisting of electronic and textile goods, etc. The lorry contained 104 bundles in gunny bags valued at over Rs. 56,00,000. The customs party received information that the first respondent was also involved in the transport of these goods. Tracks of another lorry were found on the beach. The customs party had reason to believe that another lorry loaded with contraband goods had already left the beach. The garages in the town were kept under watch and ultimately lorry No. MYG 8229 was found on 16th September, 1983, in the garage attached to 'Subaida Manzil'. The lorry was found to contain 78 bundles of contraband goods valued at over Rs. 50,00,000. Information was received that respondents 6 and 7 herein were also involved with these goods. On questioning the respondents some more information was received. The customs party had reason to believe that even before the apprehension of lorry KLN 4936 some other contraband goods had been landed and the goods had already been sent to Bombay or on their way to Bombay. The customs party had also reason to believe that some more persons were actually involved in these transactions. It is stated that the respondents as well as others have committed offences punishable under Section 135 of the

[Customs Act, 1962](#) (for short the 'Act'), the maximum punishment imposable being rigorous imprisonment for a period of seven years and fine in some cases and rigorous imprisonment for a period of three years or fine or both in some other cases.

3. In due course five respondents were arrested on 18th September, 1983, and were produced by the petitioner before the Chief Judicial Magistrate, Tellicherry. The other two were arrested and duly produced in Court on 21st September, 1983. The petitioner made a request for remanding the respondents to judicial custody. The respondents thereupon filed petitions seeking release on bail. Interim bail was ordered initially and subsequently regular bail was also ordered. The learned Magistrate took the view that in regard to persons arrested on suspicion of commission of offences under Section 135 of the Act, the Magistrate acting under the provisions of the Code has no power to remand them to judicial custody. The learned Magistrate also took the view that there were no circumstances warranting denial of bail to them. Bail was granted with the condition that the respondents should report before the Assistant Collector of Customs at Calicut at 10 a.m. every day and shall not enter the Tellicherry Taluk unless and until otherwise directed.

4. The learned Magistrate took the view that he has no power to remand the respondents to judicial custody on the basis of a decision of a Division Bench of the Delhi High Court reported in *Dalam Chand Baid v. Union of India*-1982 CrL. L.J. 747. In that case, a person by name Dalam Chand Baid, was suspected of having committed an offence punishable under the [Foreign Exchange Regulation Act, 1973](#). He was arrested and produced before the Magistrate concerned at New Delhi. His bail application was rejected and he was remanded to judicial custody repeatedly. Thereupon, the Delhi High Court was moved in the matter. It was argued before that High Court that the Magistrate has no power to remand a person facing an accusation for violation of the provisions of the Foreign Exchange Regulation Act. The provisions of Section 35 of the [Foreign Exchange Regulation Act, 1973](#), are similar to those under Section 104 of the Customs Act. Under Section 35 of the former Act an authorised officer has power to arrest a person believed to be guilty of an offence punishable under that Act, the arrested person has to be taken to a Magistrate without unnecessary delay; the officer has the

same power for releasing the arrested person on bail or otherwise as are available to an officer incharge of a police station. The offence is not a cognizable one. The Foreign Exchange Regulation Act does not contain any provision stating what the Magistrate should do when a person accused of an offence under that Act is produced before him. The High Court took the view that though the power conferred on the authorised officer under Section 35 of that Act is analogous to the power vested in an officer in-charge of a police station under the Code in the matter of bail, thereby the authorised officer cannot be treated as an officer in-charge of a police station. That being so, the provisions of Section 167(2) of the Code empowering the Magistrate to authorise detention of the person in custody for a term not exceeding 15 days (total period being 60 days or 90 days, as the case may be) does not apply to a person dealt with under Section 35 of that Act. Though the High Court -took the view that Section 344 of the Code of 1898 would have enabled the Magistrate to remand the petitioner therein, the power no longer subsists in view of the changes in the corresponding Section of the Code, viz., Section 309; that is because Section 309(2) of the Code applies only after the stage where the Court takes cognizance of an offence. Cognizance could not have been taken and had not been taken in the case because cognizance could be taken only on a complaint by the officer concerned. The Court also noticed that there is no provision in the Foreign Exchange Regulation Act or the Code conferring power to pass an order of remand on a Magistrate in such a case and came to the conclusion that the Magistrate had no power to remand. At the same time, the Court took the view that Section 437 of the Code would not imply a power to order remand. In this view, the Court came to the conclusion that there is a lacuna in the provisions of the Foreign Exchange Regulation Act and the Code requiring legislative intervention.

5. For the purpose of this petition, the learned counsel for the petitioner does not rely on either Section 167 or Section 309 of the Code. According to the learned counsel, the power to remand can be seen to vest in a Magistrate by a combined reading of the provisions in Section 104 of the Act and Sections 4(2) and 437 of the Code. It is true that Section 104 of the Act is analogous to Section 35 of the Foreign Exchange Regulation Act, which was considered by the Delhi High Court. However, I may at once notice that while the Delhi High Court rejected without

consideration the argument based on Section 437 of the Code, it did not consider the effect of Section 4(2) of the Code at all.

6. There is no dispute that an officer acting under the provisions of the Act is not a police officer or an officer in-charge of a police station as contemplated in the Code. Therefore, he cannot initiate action under Section 190(1)(b) of the Code. He is not entitled to send 'a police report of such facts'. However, he is entitled to submit 'a complaint of facts which constitute an offence' contemplated under Section 190(1)(a) of the Code. It has to be noticed that by virtue of Section 104(4) of the Act, an offence under the Act is a non-cognizable one, though an officer concerned acting under the Act has power to arrest without a warrant subject to the limitation that the person so arrested shall without unnecessary delay be taken to a Magistrate. Under Sub-section (3) of Section 104 of the Act, an officer arresting a person has, for the purpose of releasing the arrested person on bail or otherwise, same powers and be subject to the same provisions as the officer in-charge of a police station has and is subject to under the Code. I may also notice that before laying a complaint under Section 191(1)(a) of the Code before a competent Magistrate, the complaint has to obtain the sanction as contemplated under Section 137 of the Act. Under Section 135 of the Act a sentence of rigorous imprisonment up to three years or up to seven years, as the case may be, can be imposed. Therefore, the offence is a non-bailable one.

7. Under the provisions of the Code a person lawfully arrested has to be produced before the nearest Magistrate and the Magistrate can either grant bail or order detention in custody by ordering remand. The Act is silent as to what the Magistrate has to do in a case where a person arrested for an offence punishable under the Act is produced before him.

8. The argument of the learned counsel for the respondents is that since Sections 167 and 309 of the Code do not apply in the case of a person arrested on suspicion of committing an offence punishable under Section 135 of the Act, when such a person is produced before the Magistrate, the Magistrate has no power to pass an order of detention or remand. That is because, so the argument proceeds, the relevant provisions of the Code do not apply and the Act does not contain any

provision authorising the Magistrate to order detention or remand. But, then, the Act does not also contain any provision stating what the Magistrate has to do when such a person is produced before him; the Act does not contain a provision authorising the Magistrate to grant bail also. Does this mean that the Magistrate cannot grant bail in such a case? At one stage, the learned counsel for the respondent? took the extreme contention that the Magistrate cannot order bail either, but can only direct release of the person produced before him. But, then, the Act does not contain a provision authorising the Magistrate to direct release. If this argument is to be accepted, it means that under the provisions of the Act, the officer concerned can arrest a person under Section 104 of the Act for having committed an offence under Section 135 of the Act and is duty bound to produce him before a Magistrate without unreasonable delay, only to be released or let off at once by the Magistrate. This would certainly be an absurd position. Courts of law should not be too anxious or eager to discern absurdity in the scheme of any enactment. In the words of Thakkar, C. J. (as he then was), speaking for the Division Bench of the High Court of Gujarat at Ahmedabad in Criminal Application No. 585 of 1982:

'...it is impossible to assent to the proposition that the whole purpose of empowering a Customs Officer to arrest a person reasonably believed to have committed an offence under the Customs Act is to enable the Magistrate (before whom he is required to be produced within twenty-four hours) to see his face and permit him to go without anything more.'

9. Obviously, when such a person is produced before a Magistrate, the Magistrate is not immediately to let him go or release him without anything more. If the person arrested prays for bail the Magistrate has to apply his judicial mind to the matter and decide whether bail is to be granted or not. But, then, the Act does not contain any provision empowering the Magistrate to take any such decision. Obviously, the repository of the Magisterial power in this behalf is Section 437 of the Code. There is nothing in Section 104 of the Act to indicate that in a case of a person arrested under the provisions of the Customs Act and produced before the Magistrate, the Magistrate can have recourse to Section 437 of the Code. It is in this context that Section 4(2) of the Code becomes relevant.

10. Section 4(2) of the Code reads thus :

'4. Trial of offences under the Indian Penal Code and other laws.-(1)...

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.'

For the purpose of the Code, the Act is 'any other law', and the offence under the Act is 'offence under any other law'. The effect of Section 4(2) of the Code is to state that an offence under the Act shall be investigated, enquired into or tried or otherwise dealt with according to the provisions of the Code. But this statutory provision is subject to the provisions of the Act, if any, regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences. We have already seen that the Act does not contain any provision regulating the manner in which a person arrested on suspicion of having committed an offence punishable under Section 135 of the Act and produced before a Magistrate, is to be dealt with by the Magistrate. The Act does not State whether the Magistrate can grant bail to such a person. Therefore, by virtue of Section 4(2) of the Code the provisions in Section 437 of the Code which regulate this aspect of the matter would be applicable to a person arrested under the provisions of the Act. There is nothing in the provisions of the Act or Section 437 of the Code indicating that whenever a person arrested under the Act is produced before the Magistrate, it is obligatory on the part of the Magistrate to grant bail. This is not a case where Section 436 of the Code applies since the offence involved is a non-bailable offence. Necessarily in the context, the only inference possible is that power to grant bail involves power to refuse bail also.

11. What is to happen where a Magistrate finds that it is not a fit case to grant bail or that it is a fit case to refuse bail Suppose the Magistrate decides that it is a fit case to grant bail, but imposes certain conditions and the person seeking bail is unable or does not want to fulfil the conditions. In either case, the person seeking bail cannot be released on bail. What is to happen to him One can perhaps think of three possible alternatives or contingencies. The first is to release him

unconditionally. That would certainly be absurd. The second alternative is to ask the Customs Officers concerned to take him away. That would also be absurd since that will render meaningless and purposeless the statutory mandate to produce the arrested person before the Magistrate ; unless it be that for good reasons the Magistrate directs such custody. The other possible alternative is to direct him to be retained in judicial custody.

12. Sub-section (1) of Section 437 of the Code deals with the power of Court other than the High Court or a Court of Sessions in the case of person accused or suspected of the commission of any non-bailable offence arrested or detained without warrant by a police officer or a person, who appears or is brought before such Court. Subject to the qualification regarding the offence punishable with death or imprisonment for life, the Court has discretion to grant bail. It is unnecessary to refer to the provisos to Sub-section (1). Sub-section (2) deals with cases where even though reasonable grounds for believing that the accused has committed a non-bailable offence are made out, but there are grounds for further enquiry, he could be released on bail. Sub-section (3) authorises the Court to impose conditions contemplated therein in the case of persons accused or suspected of the commission of offence punishable with imprisonment extending up to 7 years or more or the other offences specified therein. Sub-section (4) requires reasons to be recorded in writing in the event of release of any person on bail under Sub-section (1) or Sub-section (2) of Section 437. Sub-section (5) states that any Court which has released a person on bail under Sub-section (1) or (2) may, if it considers necessary so to do, direct that such person be arrested and commit, him to custody. Sub-section (6) deals with the case of a person accused of any non-bailable offence detained in the custody during the whole of a period of 60 days. Sub-section (7) deals with cases of grant of bail after the conclusion of the trial.

13. Section 439 deals with the special powers of the High Court or the Sessions Court regarding bail. Sub-section (2) of Section 439 states that the High Court or the Sessions Court may direct that any person, who has been released on bail under this chapter be arrested and commit him into custody. Section 436 of the Code deals with grant of bail in bailable cases.

14. I have already indicated that Section 437 of the Code is the repository of Magisterial power to grant bail in case of persons concerned with non-bailable offences and by virtue of Section 4(2) of the Code. Section 437 would be applicable to the case of a person arrested by a Customs Officer under the provisions of the Act. Such a person, of course, is not a person arrested or detained without warrant by an officer in-charge of a police station as contemplated in Sub-section (1) of Section 437; but 'he is a person suspected of the commission of a non-bailable offence' and 'is brought before Court.' and therefore, Sub-section (1) of Section 437 is attracted. The Magistrate may direct release on bail of such a person in exercise of the judicial discretion of the Magistrate. This necessarily means that in an appropriate case, the Magistrate has discretion to refuse to release such a person on bail. In such an event, the Magistrate cannot simply shut his eyes and refuse to deal with the person who is brought before him. The power of ordering remand or detention in custody is necessarily implied in the power vested in the Magistrate to refuse to grant bail. Such a contingency may also occur where conditions contemplated under Section 437(3) are imposed in an order granting bail and the person is unable or declines to fulfil the conditions so imposed. By virtue of Sub-section (5) of Section 437 in regard to a person arrested under the Customs Act and released on bail by the Magistrate, the Magistrate has power to direct at a later stage that the person be arrested. Sub-section (5) of Section 437 of the Code specifically recognises the power of the Magistrate to commit such person to custody. If the Magistrate has power to direct a person to be committed to custody after cancelling the bail granted earlier to that person, certainly the Magistrate has power to direct the person to be committed to custody even while rejecting the bail application initially. Sub-sections (1) and (5) of Section 437 of the Code read together, will clearly spell out the power vesting in the Magistrate to commit a person produced before him to custody. By virtue of Section 4(2) of the Code such power could be exercised in the case of a person arrested under the Act.

15. Thus, even apart from the provisions, of Sections 167 and 309 of the Code, the power to commit a person to custody is implicit in the provisions of Section 4(2) of the Code. The Act does not contain any provision laying down in what way a Magistrate has to proceed in the case of a person produced before him by a

Customs Officer in pursuance of Section 104(2) of the Act. Therefore, by virtue of Section 4(2) of the Code, the person so arrested by a competent Customs Officer in regard to an offence under the Act, and brought before the Magistrate has to be dealt with according to Section 437 of the Code. Thus, it is clear that the Magistrate dealing with the person arrested by virtue of the power under Section 104(2) of the Act and produced before a competent Magistrate under Section 104(2) of the Act has power to commit him to custody.

16. In *Dalam Chand Baid v. Union of India-1982* CrL. L.J. 747, the Delhi High Court did not consider the impact of Section 437 of the Code and the effect of Section 4(2) of the Code. With great respect I find myself unable to agree with the view taken in that case. In *N.H. Dave, Inspector of Customs v. Shri Mohamed Akhtar Hussain, Ibrahim Iqbal Kadar Amad Wagher and Ors.- (CrL. Application No. 585 of 1982)* the High Court of Gujarat, on the other hand, considered the matter in the light of these provisions in the Code. I am in respectful agreement with the following observations of the Division Bench of the Gujarat High Court in the above case :

'...Thus, in respect of a person suspected of the commission of an offence under the Customs Act who has been arrested by the officer of customs and produced before the Court he can also be committed to custody if the Court considers it necessary to do so even after he has been released by the Court under Sub-section

(1) or Sub-section (2). Thus, Section 437 in terms contemplates that the Court has the power to commit him to custody. Now it must be realised that since Section 437 empowers the Magistrate concerned to release him on bail and also obliges to record reasons in writing whenever Clause

(4) is attracted, and to impose conditions envisaged in Clause (3), it follows of logical necessity that the Court has the power to remand the person suspected of the commission of an offence under Section 135 of the Customs Act, who has been arrested and produced before the Court, to judicial custody in a case where he does not consider it proper to release him on bail or where the person refused to be released on bail, If the power to release on bail of necessity includes the

power to refuse to release him on bail, the power to refuse to release him on bail, by necessary implication, confers on the Magistrate power to remand him to judicial custody. This position is made abundantly clear by Sub-section

(5) of Section 437 to which we have made reference a short while ago, which empowers the Magistrate in terms to direct that such a person be arrested and committed to custody, that is to say, judicial custody even after such a person has been released on bail under Sub-section

(1) or

(2) upon considering it necessary to do so. There is, therefore, no escape from the conclusion that the Magistrate before whom the person suspected by the officer of customs, upon the officer concerned entertaining a reasonable belief that he has committed an offence under Section 135 is produced, has the power to commit such a person to judicial custody. Unless the provision contained in Section 104 of the Customs Act to arrest the person and to produce him before the Magistrate is to be considered to be meaningless, purposeless and a futile exercise undertaken for no purpose and unless we shut our eyes to Section 4(2) and Section 437, no other view is possible.'

17. The question which next arises for consideration is whether the order of release on bail passed by the learned Magistrate in this case is liable to be cancelled. It is true that an order of release on bail granted by a competent Magistrate could not be lightly interfered with. According to the learned Magistrate no substantial or reasonable grounds have been made out to refuse bail to the bail petitioners. On behalf of the department, it was submitted before the learned Magistrate that the bail petitioners may obstruct the investigation and that some more contraband goods already smuggled 'into the country are to be recovered, etc. The learned Magistrate was of the opinion that the possibility of the bail petitioners obstructing the investigation and tampering with the evidence, is not sufficient to refuse bail as the entire machinery of the State is behind the department. The learned Magistrate also thought that stringent conditions could obviate the possibility of the bail petitioners obstructing investigation and tampering with the evidence.

18. I have no doubt in my mind that the approach made by the learned Magistrate is untenable and ignores the present realities. Smuggled goods of the value of above one crore rupees were detected practically in the course of a single day and night. The contraband goods were obviously landed at Tellichen Beach, practically in the heart of the Tellicherry town; certainly a daring and well-planned act. From the information collected by the Customs Officers concerned it is suspected that part of the contraband goods so landed had already been sent out of Tellicherry. These goods are suspected to be on their way to Bombay. The customs department has to look into all these matters. There is every possibility that the occurrence has inter-State ramifications with some other persons also involved in it. Considering the value of the contraband goods already seized, the manner in which the goods were received in this country and attendant circumstances, there can be no doubt that the occurrence is flagrant violation of the provisions of the Customs Act. The relevant provisions of the Customs Act are intended to protect the fiscal and commercial interests of the nation. An offence like this must be viewed with all seriousness by Courts of law. It is necessary that the State must be enabled to find out the ramifications of such smuggling activities. There can be no doubt that the instant release of the persons involved in such activities would hamper the investigation and act as a damper to further attempts to collect information. The learned Magistrate was in serious error in looking at the offence involved in this case as if it is a minor property offence.

19. A case more or less similar in nature and of similar dimensions came to be considered by the Supreme Court in *State of Maharashtra v. Nainmal Punjaji Shah* 4 (1969) 3 S.C.C. 904. The case related to illegal transactions in smuggled goods such as gold, textile, watches, etc. After several remand extensions the Magistrate concerned directed release on bail of the persons involved and imposed stringent conditions also. The High Court, while confirming the order passed by the Magistrate directed that the order shall operate after the expiry of two months from the date of the High Court's order and in the meantime directed the prosecution to approach the Magistrate concerned for remand from time to time as required by law. The High Court also made it clear that even after the expiry of two months, it would be open to the Magistrate to consider if the exigencies of investigation or any other important circumstance justifies the grant of further remand. The State

was not satisfied with these directions and sought outright rejection of the request for bail. The State also contended that a direction should be issued that no bail should be granted during the pendency of the whole of the enquiry of investigation. Dealing with this request, the Supreme Court observed as follows :

'...While we are impressed with the extraordinary nature of the facts of this case and that the investigations should proceed fairly and efficiently, it is impossible to say that no bail should be granted to the respondents during the pendency of the whole of the investigations. It was stated on behalf of the Customs before Gatna, L, that the complaint would be filed within six months from that date. We are of the view that the respondents cannot be detained in custody longer than the periodThe third consideration is the larger interest of the State, as pointed out by this Court in State v. Jagjit Singh AIR 1962 S.C. 253. We feel that this interest was not adequately kept in view by the High Court and this requires that the respondents should be in custody for six months from the date of the order of the High Court dated 1st August, 1969.'

20. I am satisfied that the considerations mentioned by the Supreme Court in the above decision would apply with equal force to the facts of the present case, considering the colossal extent of the smuggling activity involved in the case, its adverse effect on the national interests, possible extent and inter-State ramifications of this activity which requires to be detected and dealt with, and the influence and power which persons who indulged in such activities will be able to bring to bear on the situation and the possible witnesses. The orders of bail passed by the learned Magistrate are perverse and contrary to the well-established norms laid down by the Supreme Court and by this Court. The orders passed by the learned Magistrate granting bail to the respondents herein therefore deserve to be and are hereby set aside. The bail granted to the respondents herein by the learned Magistrate is cancelled and it is directed that the respondents, if they have been released already, be arrested and committed to custody in terms of the request made by the petitioner before the learned Magistrate. It is made clear that the petitioner has to move the learned Magistrate from time to time for extension of remand and such motions shall be disposed of by the learned Magistrate in accordance with law.

21. The Crl. M.C. is allowed in the manner indicated above.

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