

State of Kerala Vs. Suraj

State of Kerala Vs. Suraj

SooperKanoon Citation : sooperkanoon.com/729793

Court : Kerala

Decided On : Oct-31-2003

Reported in : 2004CriLJ1995; 2004(1)KLT72

Judge : K. Padmanabhan Nair, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 438

Appeal No. : Crl.M.C. No. 3054 of 2003

Appellant : State of Kerala

Respondent : Suraj

Advocate for Def. : Bechu Kurian Thomas, Adv.

Advocate for Pet/Ap. : K.I. Abdul Rasheed, Public Prosecutor

Judgement :

ORDER

K. Padmanabhan Nair, J.

1. This is a petition filed by the State for cancelling the anticipatory bail granted to the respondent by the Sessions Judge, Ernakulam, in Crl.M.C. No. 219 of 2003 by order dated 14.2.2003.

2. The respondent is the 11th accused in Crime No. 286 of 2002 of Thrikkakara Police Station registered under Sections 120B of the Indian Penal Code, 55(a), (g),(h), and (i), 56 and 57 of the Kerala Abkari Act. The petitioner filed CrI.M.C. No. 219 of 2003 for anticipatory bail alleging that himself and one Majeed were falsely implicated as accused Nos. 10 and 11 in the case only on the allegation that the 10th accused for and CrI.M.C. No. 3054 of 2003. Decided on 31st October, 2003. on behalf of himself and for the petitioner herein took demand drafts in favour of the Assistant Excise Commissioner in order to help the 9th accused for taking toddy shops in Ernakulam Excise Range. It is further averred that even if the allegation against the petitioner is admitted as such, no offence under the provisions of the Abkari Act is made out against him. The learned Sessions Judge, accepting the case of the petitioner, granted anticipatory bail to the petitioner without any time limit so as to enure till the end of the trial.

3. At or about 4.15 a.m. on 30.11.2002, a search was conducted at the godown situated in Palachuvadu. 13,860 litres of toddy alleged to have been mixed with spirit and 400 litres of spirit and utensils used for mixing the toddy with spirit were seized. 8 persons who were found engaged in preparing the illicit toddy were arrested. 10 vehicles kept in the premises for transporting the illicit toddy were also seized. Crime No.286 of 2002 was registered under Sections 55(a), (g),(h), and (i) of the Abkari Act. A report was filed arraying E.P. Sakthidharan in whose name the licence stood for conducting the toddy shops Nos. 1 to 82 of Ernakulam Range as the 9th accused. He surrendered before the learned Magistrate. On 3.2.2003 another report was filed before the Magistrate to add the name of one Abdul Majeed and respondent as accused Nos. 10 and 11 in the case. On 11.2.2003, the Investigating Officer had filed a report adding the offences under Section 120B of the Indian Penal Code and Sections 57 and 58 of the Abkari Act. 10th accused was also arrested and subsequently released on bail. The respondent filed CrI.M.C. No. 219 of 2003 for anticipatory bail and it was allowed by the learned Sessions Judge as per the impugned order.

4. In the CrI.M.C. it is averred that anticipatory bail was granted to the respondent on the basis of a wrong submission made by the Additional Public Prosecutor which is contrary to the instructions given by the Investigating Officer. According to

the prosecution the respondent is the actual licensee and E.P. Sakthidharan is only a name lender. It is averred that the respondent paid the entire bid amount and the vehicles seized from the premises of the godown are owned by the respondent. It is also averred that custodial interrogation is indispensably necessary to unearth all links involved in the criminal conspiracy. Hence this Crl.M.C by the State for cancelling the bail granted to the respondent.

5. The learned Public Prosecutor has argued that the finding of the learned Sessions Judge is against the materials available on record and the concession made by the Additional Public Prosecutor regarding facts is against the instructions given to him by the Investigating Officer in this case. The learned counsel appearing for the respondent has argued that there is absolutely no material available in the case diary to connect the respondent to the offence alleged. It is argued that accused No. 10 who was arrested and produced before the Magistrate was released on bail by the Magistrate on the same day. It is also contended that the learned Sessions Judge granted the relief of anticipatory bail as there is no material to connect the petitioner with the offences alleged. It is argued that the jurisdiction of the Sessions Court and High Court under Section 438 of the Code of Criminal Procedure is concurrent and hence the High Court cannot cancel the anticipatory bail granted to the respondent invoking the powers under Section 439(2) of the Code of Criminal Procedure. It is argued that the State ought to have filed the petition under Section 482 or a Criminal Revision Petition challenging the order passed by the learned Sessions Judge. It is also argued that the learned Sessions Judge has written a well considered order and has given cogent and convincing reasons for granting the relief to the respondent. It is also argued that in this particular case, bail was granted strictly in accordance with the provisions contained in Section 41A of the Abkari Act and the State is not entitled to seek cancellation of the bail. Hence he prayed for dismissal of the petition.

6. I shall first consider the contention raised by the learned counsel for the respondent that this Court cannot cancel the bail granted by the Sessions Judge invoking the provisions under Section 439 of the Code of Criminal Procedure. In *Puran v. Rambilas* (2001 (6) SCC 338) the Supreme Court has considered the power of the High Court to cancel the bail granted by the Sessions Court and

found that as the High Court is a superior court in hierarchy of courts, its power under Section 439(2) can also be exercised in relation to bail orders passed by the Sessions Court. So there is no merit in the contention raised by the counsel for the respondent that this Court has no jurisdiction to cancel the bail.

7. The learned Sessions Judge in the impugned order had stated that the sole allegation against the respondent is that he had financed the licensee who is arrayed as accused No.9 in the case. The learned Sessions Judge had stated as follows:-

'The only allegation against the petitioner in this case is that he had financed the licensee, who is arrayed as accused No. 9 in the crime, by issuing 13 demand drafts of Rs. 45,000/- each in the name of the Asst. Excise Commissioner, towards the bid amount for the Ernakulam range. The learned Additional Public Prosecutor conceded that as per the case diary, except this allegation, no other allegation is made, which would incriminate the petitioner. No allegation is made against the petitioner relating to possession of liquor, manufacture or sale. The only overt act alleged is that he has advanced amount by way of demand drafts issued to the Excise Official towards bid amount. This is seen from the remand report also.'

In para 4 of the order it is again stated that the Additional Public Prosecutor conceded that the respondent is a financier only. The learned Sessions Judge has found that the acts alleged against the respondent would not amount to any offence under the Abkari Act. It is further found that accused No. 10 who is similarly placed as that of the petitioner, was granted bail by the Magistrate himself. It was further found as follows:-

'Taking all these facts into consideration, I do not find any ground to refuse anticipatory bail to the petitioner. Keeping him behind the bars for a few days will not, in any way, help the investigation in any manner.'

8. The question arising for consideration in this case is whether the reasons stated by the learned Sessions Judge, which, according to the counsel for the respondent are really true, sound and cogent. The learned Sessions Judge found that the only allegation levelled against the respondent is that he lent money to the licensee for

depositing the licence fee. A reading of the impugned order gives an impression that the learned Sessions Judge had perused the case diary before passing the impugned order.

9. The case diary shows that on receipt of reliable information that the licensee of shop Nos. 1 to 82 of Ernakulam Excise Range by name Sakthidharan was storing huge quantity of toddy and spirit for the purpose of manufacturing illicit toddy by mixing toddy with spirit, the Assistant Commissioner of Police authorised the S.I. of Police, Thrikkakara to conduct a search in a godown belonging to the licensee. At 4.15 a.m. on 30.11.2002, a search was conducted in the godown. 13,860 litres of illicit toddy alleged to have been mixed with spirit, 400 litres of spirit and utensils which were used for preparing illicit toddy were found kept inside the godown. All those articles were seized. 8 workers who were found engaged in the manufacture of illicit toddy were arrested. 10 vehicles kept in the premises for transporting the adulterated toddy from the godown to various toddy shops were also seized. On the side of some of the vehicles seized, the name of the respondent was written as the owner. The case diary shows that thereafter, one T.S. Sanil and his wife Shony Sanil, who are the owners of the godown, filed CrI.M.C. No. 11192 of 2002 before this Court for anticipatory bail, which was subsequently granted. On 10.12.2002, E.P. Sakthidharan, in whose name, the licence was granted for shop Nos. 1 to 82, surrendered before the Judicial First Class Magistrate, Aluva. On 16.12.2002, the respondent along with his brother K.R. Roshy represented by their Power of Attorney K.S. Lakshmanan filed a petition before the Judicial First Class Magistrate No. 1 Aluva claiming custody of the 10 vehicles seized. In the petition filed for interim custody, the respondent had stated that he along with his brother K.R. Roshy had executed a power of attorney in the name of K.S. Lakshmanan for the purpose of managing his vehicles and Lakshmanan had entered into an agreement with E.P. Sakthidharan the licensee and the vehicles were hired by E.P. Sakthidharan. The case diary also shows that the respondent was involved in another case, Crime No. 300 of 2000 of Palluruthy Police Station registered under Section 55(a) of the Abkari Act. The case diary also shows that from the office of the godown the Investigating Officer seized a note book and printed receipt book in the name of 'Ernakulam Liquors'. Those documents contain two land phone numbers and one mobile phone number. The land phone numbers are 2347884

and 2428951 and the respondent is the subscriber of those two telephones. The mobile phone supplied by Escotel with number 9847045229 9847045229 is issued to the Manager, M/s. Elite Solvent Extract Private Limited, Door No. 28/343, 344, Market Road, Changanachery. According to the prosecution, M/s. Elite Solvent Extracts is a company owned by the respondent and others.

10. The definite case of the prosecution as discernible from the case diary is that E.P. Sakthidharan is only a paid employee of the respondent Sooraj and the respondent is the kingpin behind the crime. The materials available in the case diary show that the father of the respondent, late K.S. Ramakrishnan was an abkari contractor and after his death, the respondent along with his brother, K.R. Roshy is doing abkari business. It also shows that Sakthidharan is living in a small house situated in a plot having an extent of 25 cents which belongs to his wife. As per the certificate issued by the Village Officer, the annual income of Sakthidharan from the landed properties is only Rs. 2500/-. As per the ration card issued to Sakthidharan, the photo copy of which is available in the case diary, the monthly income of Sakthidharan is Rs. 400/-. The materials on record show that one of his sons is working as a salesman in a Bakery and another son is working as a Receptionist in a Bar attached Hotel. It also shows that Sakthidharan was working as a waiter in a hotel run by the father of the respondent. Police had questioned K.S. Lakshmanan, the power of attorney holder. The materials available in the case diary show that he was working as a waiter in the toddy shops and thereafter as an office boy of the business concern of the respondent. The materials available in the case diary also show that he is only a name lender and he was not the person who was managing the affairs of the vehicles. The materials available in the case diary show that the rent of the building belonging to Shony Sanil was paid not by E.P. Sakthidharan but by K.S. Ramakrishnan Group, Ernakulam. The statements of various witnesses show that K.S. Lakshmanan and Sakthidharan are only employees of the respondent and it was the respondent who took the building from Shony Sanil with the help of one Ramdas and Mohanan who is the 8th accused. The statements of the witnesses along with the documentary evidence show that E.P. Sakthidharan is only a name lender. Since the respondent is already involved in another abkari case he bid the right to conduct the toddy shops 1 to 82 in the name of Sakthidharan and deposited the kist

amount. Of course, the prosecution has also got a case that some amount was advanced by the 10th accused Sri. Abdul Majid also. But it was the respondent who spent money for taking 13 Demand Drafts each for Rs. 45,000/-. The case diary also shows that the amount for the Toddy Welfare Scheme was also deposited in the name of Sri. E.P. Sakthidharan by the respondent. The vouchers issued by the K.S.R. Group, Ernakulam, Telephone Bills and statements of various witnesses unerringly point out the complicity of the respondent with the crime. The prosecution has alleged criminal conspiracy. In view of the materials so far collected, it is a case in which custodial interrogation is absolutely essential. But for reasons best known to the learned Sessions Judge, she had entered into a finding to the effect that the role of the second respondent is that of a financier only ignoring the materials on record. The learned Sessions Judge had found that keeping the respondent behind the bars for a few days will not in any way help the investigation in any manner. The observation made by the Apex Court in *Muraleedharan v. State of Kerala* (2001 (4) SCC 638) is very relevant in this context. The learned Sessions Judge granted anticipatory bail to the accused who was one of the kingpins in a series of crimes. This Court cancelled that order. Confirming the order of this Court, the Apex Court held as follows:-

'We are at a loss to understand what would have prompted the Sessions Judge to conclude, at this early stage, that the investigating agency would not be able to collect any material to connect the appellant with the crime. The order of the Sessions Judge, blessing the appellant with a pre-arrest bail order, would have remained a bugbear of how the discretion conferred on Sessions Judges under Section 438 Cr.P.C. would have been misused.'

11. The learned counsel appearing for the respondent has argued that the bail application was not opposed by the Public Prosecutor and hence the State is not entitled to challenge the order of the Sessions Judge. Section 41 A of the Abkari Act provides that if the Public Prosecutor or the Assistant Public Prosecutor, as the case may be, opposes the application, bail can be granted only if the court finds that the conditions contained in that section are satisfied. In this case, a reading of the order passed by the learned Sessions Judge does not show that the Public Prosecutor has made any endorsement to the effect that he has no

objection in granting bail to the respondent. If the Prosecutor had made a statement to the effect that he had no objection in granting bail to the respondent, the learned Sessions Judge ought to have recorded that fact in the order. The learned Sessions Judge had only stated that the Public Prosecutor conceded that as per the case diary, the only allegation against the respondent is that he financed the licensee. The learned Sessions Judge granted pre-arrest bail finding that the allegations levelled against the respondent will not amount to any offence under the Abkari Act.

12. Though the Public Prosecutor had not made an endorsement to the effect that anticipatory bail can be granted to the respondent, he also did not point out the evidence on record to the court below. The allegation that he was acting against the instructions given to him by the Investigating Officer appears to be correct. The fact remains that the Additional Public Prosecutor did not argue the case with relevant material facts. The conduct of the Public Prosecutor is highly suspicious. The exact reasons which prompted the Public Prosecutor to help the respondent are to be found out. Since I have not issued notice to the Additional Public Prosecutor, I refrain from passing further orders regarding his conduct. A copy of this order will be forwarded to the Government for taking a decision whether the Additional Public Prosecutor shall be retained in that post.

13. The learned counsel for the respondent has vehemently argued that the reasons stated by the State are not sufficient to cancel the bail. It is argued that it may be sufficient to refuse the bail but that is not sufficient to cancel the bail already granted. He relied on the decision reported in *Latheef v. State of Kerala* (1987 (1) KLT 127), *Dolatram v. State of Haryana* (1995 (1) SCC 349), *Mahant Chand Nath Yogi v. State of Haryana* (2003 (1) SCC 326) and *Takht Singh and Ors. v. State of M.P.* ((2003) SCC (Cri.) 800) and argued that the order granting anticipatory bail cannot be cancelled. In *Latheefs* case, a learned Single Judge of this Court considered whether any condition can be imposed while granting anticipatory bail. The principle laid down in that decision can have no application to the issue to be decided in this case. In *Dolatram's* case, the Apex Court considered the factors to be taken into consideration while ordering cancellation of bail. It was held as follows:-

'Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail.'

The principle laid down in Dolatram's case was followed in Mahant Chand Nath Yogi's case and the Supreme Court reiterated the law that there is distinction between rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted. It was held that normally very cogent and overwhelming grounds or circumstances are required to cancel the bail already granted. The principle laid down in Takht Singh's case can have no application to the facts of this case. There the Supreme Court granted bail to a convict as there was no possibility of early hearing of the appeal pending before the High Court.

14. In *Puran v. Rambilas* (2001 (6) SCC 338), the Apex Court considered the principle laid down in the earlier decisions in Dolat Ram's case and Gurcharan Singh's case and held as follows:-

'Generally speaking, the grounds for cancellation of bail are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. However, these instances are merely illustrative and not exhaustive. One such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of this nature and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the society.

Therefore, an arbitrary and wrong exercise of discretion by the trial court has to be corrected.

Further, it is to be kept in mind that the concept of setting aside the unjustified, illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation.'

So there is absolutely no merit in the contention raised by the counsel for the respondent that this Court can cancel the bail only on the two principles laid down in Dolat Ram's case. The Supreme Court has held that if the bail is granted ignoring the material evidence on record, the same is liable to be quashed. In this case, the learned Sessions Judge granted bail ignoring the material evidence on record.

15. In Muraleedharan's case, after considering the reasoning of the learned Sessions Judge, who granted anticipatory bail, the Apex Court has made the following observations:-

'It is disquieting that a Sessions Judge has chosen to adopt such inane reasoning for granting anticipatory bail in cases involving offences for which the Legislature has imposed stringent restrictions even in regard to the grant of regular bail. Custodial interrogation of such an accused is indispensably necessary for the investigating agency to unearth all the links involved in the criminal conspiracies committed by the persons which ultimately led to the capital tragedy. No court can afford to presume that the investigating agency would fail to trace out more materials to prove the accusation against an accused. It is not understandable as to what would have prompted the Sessions Judge to conclude, at this early stage, that the investigating agency would not be able to collect any material to connect the appellant with the crime.'

According to me, the observations made by the Apex Court against the learned Sessions Judge in Muraleedharan's case apply to this case also with equal force.

16. The learned counsel for the respondent has argued that the Government has not challenged the regular bail granted to the 10th accused and the roles of the 10th and 11th accused are exactly identical. I do not think I will be justified in making any observation in respect of the order passed by the learned Magistrate granting bail to the 10th accused in the absence of a challenge by the State against that order. I may state that with the materials available in C.D. it is not possible to hold that the position of the 10th and 11th accused are identical. Merely because one of the accused in a criminal case was granted regular bail, the relief of anticipatory bail cannot be granted to another accused.

17. The materials available on record lead to the irresistible conclusion that there are materials prima facie showing the complicity of the respondent. Though the licence stands in the name of the 9th accused, the materials would prima facie show that the real person who was conducting the toddy shops was the respondent. That being the position, the order passed by the learned Sessions Judge suffers from illegality. The same is perverse, illegal and unsustainable.

18. The order passed by the learned Sessions Judge suffers from another illegality. The learned Sessions Judge had granted anticipatory bails as if that will enure till the final disposal of the case. The order of anticipatory bail should be only for a limited duration. In *Salauddin Abdulsamad Shaikh v. State of Maharashtra* (1996) 1 SCC 667) it was held by the Apex Court as follows:-

'When the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration, the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.'

The matter was again considered by a Bench of three Judges of the Supreme Court in *K.L. Varma v. State* (1998) 9 SCC 348). Explaining the principle laid down in *Salauddin's* case, the Supreme Court has held as follows:-

' An order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher court, if they so desire. It cannot be said that as soon as the accused persons are produced before the regular court the anticipatory bail ends even if the court is yet to decide the question of bail on merits.'

The learned Sessions Judge has passed the order to enure till the end of the trial. On that ground also, the order passed by the learned Sessions Judge is illegal and liable to be set aside.

In the result, the Crl. M.C. is allowed. The order passed by the learned Sessions Judge, Ernakulam in Crl.M.C. No. 219 of 2003 on 14.2.2003 granting anticipatory bail to the respondent is set aside.

Forward a copy of this order to the Government for taking appropriate action against the Additional Public Prosecutor.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com