IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 232 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

NAVABKHAN @ AYUBKHAN MOHMEDKHAN PATHAN

Appearance:

Shri K.T. Dave, APP for Petitioner

MR KP SHAH for Respondent No. 1

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 30/09/97

ORAL JUDGEMENT

This Revision Application is directed against the order dated 25th April 1995, passed by the learned Additional City Sessions Judge at Ahmedabad, in Criminal Misc. Application No. 1225 of 1995 on his file, releasing the opponent on bail.

2. It is the case of the applicant State that on 28th January 1995 at 7.00 p.m. when the opponent and two others were passing in suspicious manner, their search

was taken. From the opponent, 7 packets of brown sugar were found, while from the other two persons 5 packets and 2 packets of brown sugar were found. The police officer carrying out the search found that all the three had committed the offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short `the NDPS Act'). All the three were then arrested and later on sent to judicial custody. Thereafter,the present opponent preferred Criminal Misc. Application No. 1225 of 1995 before the lower court for being released on bail. The learned Additional Sessions Judge released the opponent on bail observing that mandatory provisions of the NDPS Act were not observed, and it was not made clear whether the brown sugar found was for sale, it might be for personal consumption also. The learned Judge also found that the opponent would not abscond as he was having his house and roots in Ahmedabad. Being aggrieved by such order the State prays for cancellation of bail.

3. Challenging the order, Mr. K.T. Dave, learned Additional Public Prosecutor submitted that the learned Judge ought to have kept Section 37 of the NDPS Act in mind and ought not to have exercised the discretion. The reasoning assigned were not appealing; and when the order was read, it would appear that it was totally bad from the inception and was passed on irrelevant consideration.

4. Before I proceed, two of the decisions of the Apex Court may be referred to, as in this case cancellation of bail is prayed for. In the cases of Bhagirathsinh Jadeja vs State of Gujarat - AIR 1984 SCC 372, and Dolat Ram & Others v. State of Gujarat - 1995 SCC (Cri.) 237, it is laid down that the rejection of the bail at the initial stage and the cancellation of bail already granted have to be considered and dealt with on different footings for cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted. Generally, the grounds for cancelation of bail would be interference with 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 materials placed on the record about the possibility of the accused absconding is yet another reason justifying the cancellation of the bail. The bail once granted is to not to be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered no longer conducive to a fair trial, or to allow the accused to retain his freedom by enjoying the concession of bail during the trial.

5. On query being made, Mr. K.T. Dave, learned APP was fair enough to admit that during 2 1/2 years after the bail was granted no incident had occurred which would indicate that the opponent No.2 misused his liberty, intimidated the witnesses, or absconded, or tampered with the evidence. When that is the case the bail once granted cannot be cancelled.

6. Faced with such situation, Mr. Dave mainly based his submission on Section 37 of the Act and also assailed the reasonings of the learned Judge. According to the learned Judge, mandatory provisions of the NDPS Act were not observed and therefore the investigation carried out was bad right from the inception which entitled the accused to have acquital on that count. A similar question arose before this court in the case ofState of Gujarat vs Shaikh Lala Shaikh Balu - 36(2) GLR 1709, wherein it is held that at the pre-trial stage while deciding the bail application the court is not justified in going into the technical question. In view of this decision, Mr. Dave is certainly right in submitting that the learned Judge erred in releasing the accused on the ground that the mandatory provisions were not complied with. But the crucial question now to be examined is whether on that count the bail can be cancelled.

7. It may be remembered that when Section 37 of the NDPS Act is perused, it vests the court with discretionary power. Before exercising the discretion the court has to issue notice to the Public Prosecutor and hearing the Public Prosecutor, the court may if there is a reason to believe that the accused is not likely to commit any offence while on bail, or is not guilty of such offence, release the accused on bail. The court has therefore to exercise the discretionary powers vested, considering the facts placed before it. If the discretion is exercised consistent with the sound principle of law, certainly this court would not interfere. If the discretion exercised is found to be arbitrary, capricious or perverse, certainly this court will interfere with the exercise of discretion by the lower court. It may be remembered that the decision on which the learned APP relies upon is dated 10th April 1995, and as the same was published in Second Volume of the Gujarat Law Reporter. It is hence clear that the same was published after June 1995. When the application came to be heard and decided by the lower court, the law which is made clear in the aforesaid decision was not available to the Judge, and the learned Judge, considering the then position of law, decided the

application and preferred to exercise the discretion. In view of such facts, it cannot be said that the discretion exercised is arbitrary,perverse or capricious. The order, therefore, cannot be said to be bad from its inception. In view of the matter, I see no justification to interfere with the order and upset the same. The Civil Revision Application is therefore required to be rejected.

8. Before I conclude, it would be better to deal with the last submission advanced on behalf of the State that if the court is not inclined to grant the relief, some stricter conditions may be imposed in order to have a check on the opponent, guard the interest of the prosecution and not to give free hand to the opponent to do any thing he likes and act injurious to the interest of the prosecution. In view of such submission which cannot be overlooked, the bail amount is increased from Rs. 5,000/- to Rs. 10,000/- and the opponent is also directed not to leave the City of Ahmedabad till the trial is over, and shall mark his presence before Astodia police station on every Sunday between 9.00 a.m. to 12.00 p.m. till trial is over and shall execute fresh bond before the lower court furnishing one solvent surety within 10 days failing which lower court will be free to take appropriate action.

9. In view of the foregoing reasons, the Revision Application is hereby rejected. Rule discharged. The Police Officer of Astodia police station & lower court be informed immediately.

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