

DR. BIPIN SHANTILAL PANCHAL

v.

STATE OF GUJARAT

JANUARY 8, 1996

[A.M. AHMADI, C.J., B.P. JEEVAN REDDY AND N.P. SINGH, JJ.]

*Narcotics Drugs and Psychotropic Substances Act, 1985 :*

*S.37(1)(b)—Limitation on granting bail—Held not applicable where bail is claimed for under proviso (a) to sub-section (2) of s.167 Cr.P.C.*

*Code of Criminal Procedure, 1973 : S.167(2)—Right of accused to be granted bail for failure of prosecution to file challan within stipulated period—Held, cannot be exercised after challan has been filed.*

The appellant was arrested under the Narcotic Drugs & Psychotropic Substances Act 1985 on 8.11.1993. The Sessions Judge as well as the High Court, taking into consideration Section 37 of the Act and the Judgment of this Court\* rejected the appellant's applications for bail. Aggrieved, the appellant filed the present appeal.

It was contended for the appellant that he was entitled to be released on bail, as the prosecution failed to submit the challan within the period provided by Proviso (a) to sub-s.(2) of Section 167 of the Code of Criminal Procedure, 1973, and at that stage Section 37 of the Act would not apply.

Dismissing the appeal, this Court

HELD : 1. Section 37 of the Narcotics Drugs and Psychotropic Substances Act, 1985 does not exclude the application of the proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure even in respect of persons who are accused of offences under the Act. [195-A]

\**Narcotics Control Bureau v. Kishan Lal and Others*, [1991] 1 SCC 705, held inapplicable.

2. If an accused fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet within the maximum time allowed by law, he cannot claim that he had an indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the charge-

sheet is filed. But on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet. [195-G]

*Sanjay Dutt v. State through C.B.I. Bombay (II)*, [1994] 5 SCC 410 and *Aslam Babalal Desai v. State of Maharashtra*, [1992] 4 SCC 272 relied on.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 26 of 1996.

From the Judgment and Order dated 19.4.94 of the Gujarat High Court in Misc. CrI. Application No. 1587 of 1994.

Ms. Meenakshi Arora for the Appellant.

Mrs. H. Wahi for the Respondent.

The Judgment of the Court was delivered by

**N.P. SINGH, J.** Leave granted.

This appeal has been filed against an order dated 19.4.1994 passed by the High Court, rejecting the prayer of the bail, made on behalf of the appellant, who is an accused for offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the N.D.P.S. Act).

It appears that the appellant was arrested on 8.11.1993. A petition for bail on merit was rejected by the city Sessions Judge on 4.2.1994 in view of the judgment of this Court in the case of *Narcotics Control Bureau v. Kishan Lal and Others*, AIR (1991) SC 558 = [1991] 1 SCC 705, taking into consideration Section 37 of the said Act. The High Court also rejected the prayer for bail, made on behalf of the appellant, in view of Section 37 of the Act, after making reference to the judgment of this Court in the case of *Narcotics control Bureau v. Kishan Lal and Others* (supra).

The learned counsel, appearing for the appellant, urged that the statutory period prescribed by proviso (a) to sub-section (2) of Section 167 of Code of Criminal Procedure during which the appellant could have been kept in custody, pending investigation, had expired, because of which the appellant should have been released on bail and at that stage there was no question of application of Section 37 of the Act. Recently, this Court has considered the question of applicability of proviso to sub-section (2) of Section 167 of the Code in respect

of an accused under N.D.P.S. Act in the case of *Union of India v. Thamisharasi & Ors.*, JT (1995) 4 SC 253 and it has been held that Section 37 does not exclude the application of the proviso to sub-section (2) of Section 167 of the Code, even in respect of persons who are accused for offences under N.D.P.S. Act. But it is an admitted position that the charge-sheet has been filed on 23.5.1994 and now the appellant is in custody on the basis of orders of remand passed under the other provisions of the Code. Whether the accused who was entitled to be released on bail under proviso to sub-section (2) of Section 167 of the Code, not having made an application when such right had accrued, can exercise that right at a later stage of the proceeding, has been examined by a Constitution Bench of this Court in the case of *Sanjay Dutt v. State through C.B.I. Bombay (II)*, [1994] 5 SCC 410 and it has been said :

"The "indefeasible right" of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in *Hitendra Vishnu Thakur* is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at that stage".

Therefore, if an accused person fails to exercise his right to be released on bail for the failure of the prosecution to file the charge-sheet within the maximum time allowed by law, he cannot contend that he had an indefeasible right to exercise it at any time notwithstanding the fact that in the meantime the charge-sheet is filed. But on the other hand if he exercises the right within the time allowed by law and is released on bail under such circumstances, he cannot be rearrested on the mere filing of the charge-sheet, as pointed out in *Aslam Babalal Desai v. State of Maharashtra*, [1992] 4 SCC 272.

The learned counsel, appearing for the appellant, did not press the appeal

on merit, saying that in the facts and circumstances of the case, the City Sessions Judge, should have held that there were reasonable grounds for believing that the appellant was not guilty of any offence under that Act, as required by sub-section 1(b)(ii) of Section 37. Accordingly, the appeal fails and it is dismissed. However, we direct that the trial of the appellant be expedited.

Appeal dismissed.