

Bombay High Court

Stefan Mueller vs Through Senior Inspector Of ... on 23 June, 2010

Bench: J. H. Bhatia

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2939 OF 2009

Stefan Mueller,)
(German Citizen) Bearing Passport)
No.830103127, Age 26 years,)

residing at Anterpau, Germany, presently)
at 69, Lane No.3, Koregaon Park,)
Pune 411 001.).. Petitioner.
Vs.
State of Maharashtra)

Through Senior Inspector of Police,)
Haveli Police Station, Pune (Copy to be)
ig)
served upon the Public Prosecutor, High)
Court, Bombay).)..Respondent

Mr. K.M.Irani, i/b. Mr. A.A.Kocharekar, Advocate, for the petitioner.
Ms. S.V.Gajare, APP, for the respondent State.

CORAM: J.H.BHATIA, J.

DATE : 23rd June, 2010.

JUDGMENT

1. Rule. Rule made returnable forthwith. Heard the learned Counsel for the petitioner and the learned APP.

2. On 4.3.2007, Police Inspector Sanjay Pawar, attached to the Haweli Police Station, Pune, got information that 300 to 400 youngsters were enjoying a party called "Rave Party" on the land of one Chandrakant Hagawane, police raided that place and some persons were arrested. The present petitioner was accused No.4. A plastic bag containing Ganja and 15 grams of Charas were allegedly found with him. The weight of Ganja is not given. After investigation, charge-sheet was filed by the police under different provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act") against 15 persons. The accused Nos. 8 to 15 were discharged by the Court. By order dated 4.10.2008, the learned Special Judge under NDPS Act, Pune, directed to frame different charges against different accused. The learned Judge directed to frame charge against accused Nos. 4 to 7 for the offence punishable under Section 20(b)

(ii)(A) and Section 27 of the NDPS Act. The petitioner was granted bail by order dated 21.3.2007, when the police had levelled charges against the present petitioner under Section 20(b), 25, 27, 18 of the NDPS Act and Section 14 of the Foreigners Act. By the said order, the learned Special Judge had directed the petitioner to deposit his passport in the Court and also that he shall not leave India without permission of the Court. On 27.8.2007, the petitioner made an application before the learned Special Judge seeking permission to go abroad and to return his passport to him on the ground that his mother was seriously ill and was hospitalised and therefore he wanted to meet her in Germany. The petitioner is a citizen and resident of Germany. That application was rejected by order dated 1.9.2009 by the learned Special Judge mainly on the ground that the petitioner is a foreigner and if he is released on bail, he may not come back and also observed that in view of the provisions of Section 37(2) of the NDPS Act, the limitations for grant of bail under the said Section are in addition to the limitations under the Code of Criminal Procedure. That order is challenged in the present Writ Petition.

3. The learned Counsel for the petitioner vehemently contended that as per the order dated 4.10.2008, the learned Special Judge, had specifically directed that the present petitioner be charged for the offence punishable under section 20(b)(ii)(A) and Section 27. Each of the said offences is punishable with imprisonment which may extend to six months, or with fine, or with both. The learned Counsel contends that in view of the amendment in the NDPS Act in the year 2001, the stringent conditions of grant of bail as prescribed under Section 37(1)(b) are applicable only to the offences punishable under sections 19, 24 and 27-A and also to the offences involving commercial quantity. The said conditions are not applicable to any other offence. He also contended that section 37 does not declare in so many words that all the offences under the NDPS Act are non-

bailable. He contends that whether an offence is bailable or non-bailable, will have to be considered in the light of the Part II of the Schedule to the Cr.P.C. He contends that as per Part II of the Schedule, the offences against other laws other than IPC, if punishable with imprisonment for less

than three years or with fine only are non-cognizable, bailable and triable by Magistrate. The learned Counsel contends that even though the title of Section 37 is "Offences to be cognizable and non-bailable", in the body of Section, it is only declared that offences shall be cognizable, but it is not declared that all the offences shall be non-bailable. He contends that by virtue of Part II of the Schedule, depending on the sentence which can be awarded for particular offence under the NDPS Act, the particular offence will be bailable or non-bailable. and if it is non-bailable, stringent conditions provided by clause (b) of Section 37(1) will be applicable in addition to the conditions for bail which may be imposed under the Cr.P.C. as per the provisions of sub-section (2) of Section 37. The learned Counsel also contended that if the offence is bailable, no conditions can be imposed while granting bail under Section 436 Cr.P.C. and therefore, the Court cannot prohibit the accused from travelling abroad and also cannot put a condition that the accused shall not travel abroad without the permission of the Court. According to him, the passport cannot be directed to be deposited with the Court.

4. On the other and, Mrs. Gajare, learned APP, vehemently contended that all the offences under the NDPS Act are non-bailable and the conditions can be imposed while granting bail under Section 437 or under Section 439 Cr.P.C.

She contends that one of the accused, who was also foreigner, was permitted to go abroad, but he did not return and now he is absconding. According to her, if the present petitioner is also granted leave to go abroad, there is every possibility that he may abscond and will not be available for trial. According to her, in view of the legal position and the circumstances, the trial Court was justified in putting conditions and then refusing permission to go abroad.

5. There is no dispute that the petitioner is charged for the offences punishable under Section 20(b)(ii)(A) and Section 27 of NDPS Act and both the offences are punishable with imprisonment which may extend to six months, or with fine, or with both. Admittedly, he was found in possession of small quantity of Ganja and Charas. Section 37, as amended by the Amendment Act 9 of 2001 with effect from 2.10.2001, reads as follows :-

"37. Offences to be cognizable and non-bailable

- (1) 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 [offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity] 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 (2 of 1974) or any other law for the time being in force, on granting of bail."

The heading or the marginal note of Section 37 reads "Offences to be cognizable and non-bailable". On the first reading of this marginal note, one may get an impression that all the offences under the NDPS Act are cognizable and also non-

bailable. However, on reading the language of Section 37, it becomes clear that in clause (a) to sub-section (1), the legislature has unequivocally declared that notwithstanding anything contained in the Code of Criminal Procedure, every offence punishable under this Act shall be cognizable. If this provision would not have been there, certain offences under the NDPS Act punishable with imprisonment for less than three years or with fine, would be non-cognizable in view of Part II of Schedule to Cr.P.C., but they are made cognizable because of the specific provision in clause (a) of Section 37(1). If the marginal note or the heading of Section 37 is kept aside for a moment, nowhere Section 37 specifically declares that every offence punishable under the NDPS Act shall be non-bailable. Clause (b) specifically provides that a person accused of offence punishable under Sections 19, 24, 27-A and the offences involving commercial quantity shall not be granted bail unless the Public Prosecutor is given an opportunity of hearing and if the Public Prosecutor opposes the application, unless 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. Sub-section (2) declares that the limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Cr.P.C. or any other law for the time being in force on granting bail.

The conditions imposed by clause (b) are not applicable to the offences punishable under sections 20(b)(ii)(a) and sec. 27.

6. Now the question is whether any conditions can be imposed while granting bail for these offences under the Cr.P.C. For that purpose, it will be necessary to find out whether these offences are bailable or non-bailable, as the language of Section 37(1) nowhere declares that all the offences under the NDPS Act shall be non-bailable. It will also be necessary to find out whether the

conditions can be imposed under Cr.P.C. while granting bail for the offences under section 20(b)(ii)(A) and Sec.27 which are punishable with imprisonment which may extend to six months, or with fine, or with both.

7. In *Thakurain Balraj Kunwar & Anr. vs. Rae Jagatpal Singh* L.R.Vol.XXXI page 132, the Privy Council observed as follows :-

"It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago.

There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament."

8. In *M/s. Frick India Ltd. vs. Union of India & Ors.* (1990) 1 SCC 400, the Supreme court observed thus in para 8 :-

"8. It is well settled that the headings prefixed to sections or entries cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision."

After referring to the different opinions relating to use of headings or titles prefixed to sections or entries, in *Raichurmatham Prabhakar Rawatmal Dugar* (2004) 4 SCC 766 at page 775, the Supreme Court observed as follows in para 14 :-

"In our opinion, it is permissible to assign the heading or title of a section a limited role to play in the construction of statutes. They may be taken as very broad and general indicators of the nature of the subject-matter dealt with thereunder. The heading or title may also be taken as a condensed name assigned to indicate collectively the characteristics of the subject matter dealt with by the enactment underneath; though the name would always be brief having its own limitations. In case of conflict between the plain language of the provision and the meaning of the heading or title, the heading or title would not control the meaning which is clearly and plainly discernible from the language of the provision thereunder."

9. In view of these observations, now it is settled position that a limited role to play in the construction of statute may be assigned to the heading or title of a section. The title or heading of section 37 of NDPS Act shows that offences shall be cognizable and non-bailable. However, as noted above, in the body of the section, the legislature has only declared that all the offences under the Act

shall be non-cognizable, but the legislature has not declared that all the offences under the Act shall be non-bailable. In clause (b) only it speaks about the limitations on granting of bail in addition to the limitations under the Cr.P.C.

while granting bail. Therefore, the provisions of Cr.P.C. will have to be looked into to find out whether offences under the NDPS Act are bailable or not.

10. First schedule to the Cr.P.C. 1973 is about classification of offences.

Against each offence, it is specifically mentioned whether offence is cognizable or non-cognizable, whether it is bailable or non-bailable and by what court it is triable. Part I of the Schedule deals with offences under the Indian Penal Code, while Part II deals with offences against other laws. Therefore, Part II will be relevant to find out whether offences under the NDPS Act are bailable or not. In part II, the first entry provides that if the offence is punishable with death, imprisonment for life or imprisonment for more than 7 years, it is non bailable.

As per second entry, if the offence is punishable with imprisonment for 3 years and upwards but not more than 7 years, it is also non-bailable. The third entry which is the last entry in this Part, declares that if the offence is punishable with imprisonment for less than 3 years or with fine only, it is bailable and non-

cognizable. There are several offences under the NDPS act which are punishable with imprisonment which may extend to 10 years and for period which may extend to 20 years.

There are certain offences which are punishable with imprisonment for less than 3 years or with fine. The offences under Section 20(b)

(ii)(A) and Sec. 27 are such offences as they are punishable with imprisonment which may extend to six months or with fine. In view of the punishment prescribed for these offences, they fall in third entry in part II of the Schedule and, therefore, these offences will be bailable. As noted earlier, S.37(10(a) declares that all the offences under the NDPS Act are cognizable notwithstanding the provisions of Cr.P.C. If that provision would not be there, by virtue of classification in Part II, these offences would have been non-cognizable, but they are made cognizable by specific provision of Section 37(1)(a).

11. As these offences are bailable, we will have to find out whether under the provisions of Cr.P.C. any restrictions could be imposed while granting bail.

Section 436 reads as follows :-

"436. In what cases bail to be taken - (1) When any person other than a person accused of a non- bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the

proceeding before such Court to give bail, such person shall be released on bail :

Provided that such officer or Court, if he or it thinks fit, [may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail] from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 [or section 446-A].

[Explanation - Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.

(2) Notwithstanding anything contained in sub- section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446."

It is well settled position of law that if the offence is bailable, the accused is entitled to be released on bail and even where he does not make an application for bail, it is the responsibility of the concerned police officer, if he has arrested or detained the accused for a bailable offence, to inform him about his right to be released on bail. Similarly, it is also settled position of law that where a person accused of bailable offence appears or is produced before a Magistrate, it is responsibility of such Magistrate to inform him of his right to be released on bail.

Under sub-section (2), he may be refused bail even in bailable offence if he had failed to comply with the conditions of the bail bonds as regards the time and place of attendance, when on a subsequent occasion in the same case he appears before the Court or is brought in custody. This may be illustrated thus: If a person accused of a bailable offence, appears or is brought before the Magistrate, he is entitled to be released on bail and while granting bail, he is naturally required to undertake that he would regularly appear before the Court on the date which may be given to him. Having been released on bail if he remains absent and if the Court is required to issue a warrant for his arrest, the Court may refuse to grant bail to him on the subsequent occasion if he appears or is brought before the Court. Thus only condition, which can be imposed while granting bail in bailable offence is about his appearance before a particular court at a particular place and on a particular time and date and none else. If these conditions are not complied with, on a subsequent occasion, he may be refused bail.

12. Section 437 Cr.P.C. provides for grant of bail in a non-bailable offence by a Court other than the High Court or Court of Sessions . Section 439 provides for grant of bail in non-bailable offence by the High Court or Court of Sessions. Section 437 reads as follows :-

437. When bail may be taken in case of non-bailable offence -

[(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but -

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years]:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.] Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.] (2)

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the Court shall impose the conditions -

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the

Court or to any police officer or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary.

(4).....

(5)

(6)

(7)"

Section 437 (3) provides for the conditions which can be imposed while granting bail in a non-bailable offence. On reading the section, it appears that the conditions can be imposed only if a person is accused or suspected of commission of non-bailable offence punishable with imprisonment which may extend to seven years or more or if he is accused of offence under Chapter VI pertaining to offence against the State, or under chapter XVI offences human body or chapter XVII offences against property. Besides the conditions mentioned in clauses (a), (b) and (c), the Court may put such other conditions as it may consider necessary in the interest of justice.

13. Section 439 reads as follows :-

"439. Special powers of High Court or Court of Session regarding bail.-

(1) A High Court or Court of Session may direct-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in subsection (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified :

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

From the language of sub-section (1)(a), it is clear that the High Court or the Court of Sessions may impose the conditions of granting bail, if the offence is of the nature specified in sub-section (3) of

Sec.

437. Thus the legislature has made it clear that the conditions can be imposed only if the accused is facing the offence of a particular nature specified in Section 437(3). There are no such conditions which can be imposed while granting bail in a bailable offence under sec. 436.

14. In Cri. W.P. No.865 of 2007, Sultan Kamruddin Dharani vs. The Union of India & Ors., decided by this Court on 19th September, 2008, a question arose, as to whether in a bailable offence under Customs Act, while granting bail, Court could impose condition to deposit Passport and not to travel abroad without permission. This Court (Coram A.S.Oka J.) observed thus in para 19 :-

"Thus, the position of the law is that a person who is alleged to have committed a bailable offence has an unfettered and absolute right to be enlarged on bail and the Court or the Police Officer concerned, as the case may be, has no discretion to grant or refuse bail. Subject to first proviso to sub-section (1) of section 436 of the Code of 1973, the Court may modulate the condition of bail as regards the bail amount and the number of sureties. However, the Court cannot impose a condition which is not a term as to the bail. The condition of requiring a person accused of a bailable offence to surrender his passport to the court is not a term as to bail. If in such a case a condition is imposed that bail is granted subject to condition of deposit of passport, such a condition will defeat the absolute right of the accused under section 436(1) of the said Code to be set at liberty. In the circumstances, while enlarging the Petitioner on bail in a bailable offence, the learned Magistrate has no jurisdiction to direct deposit of the passport. The Magistrate cannot impose a condition while granting bail in a bailable offence of not leaving India without the permission of the Court. Whenever the Petitioner is enlarged on bail he is bound to attend the concerned Court on the date fixed or whenever he is called upon to do so. This obligation is created by the bail bond. If he desires to remain absent, he will have to seek an exemption from the Court. In a given case if there is an apprehension that the accused is likely to abscond, steps can also be taken under the appropriate provisions of law. Steps can be also taken for impounding the passport."

15. Under Sec. 37(1)(b) of the NDPS Act, additional conditions or limitations under that Section are applicable only to specified offences in that section. The offences under Section 20(b)(ii) (A) and Sec. 27 are not such offences and therefore, the conditions or limitations put in Section 37(1)(b) are not applicable to them and as they are bailable offence under Cr.P.C. also, no conditions can be imposed except about appearance before a Court at particular place or on particular date. In view of this, it will be clear that the conditions not to travel abroad without permission of the Court is also not permissible under the law for these offences. As such, the conditions which were imposed by the Court while granting bail could not have been imposed. However, it may be noted that those conditions were imposed while granting bail to the accused on 21.3.2007 when the offence was registered under different provisions of the NDPS Act along with section 14 of the Foreigners Act. However, the learned Special Judge, while directing to frame charges by order dated 4.10.2008, has discharged the petitioner for the offence punishable under Section 14 of the Foreigners Act. In view

of these circumstances, the conditions not to travel abroad without permission of the Court is liable to be quashed and the impugned order whereby the Special Judge had refused permission to the petitioner to travel abroad is also liable to be quashed.

16. Before concluding, it may be noted that the learned Counsel for the petitioner made a statement before this Court that if the trial can be finished within three months, the petitioner would not go abroad, however, if the trial is to take a longer period, then he needs to go abroad, particularly to Germany as he is a citizen and resident of that country. The learned APP, after taking instructions, makes a statement that the trial has not commenced so far and the prosecution has cited as many as 60 witnesses and at least about 20 to 25 witnesses may be examined. Taking into consideration the number of witnesses, who are required to be examined and the pendency before the said Court, I find that it may not be possible to finish the matter within 3 months. However, in view of the statement made by the learned Counsel, I pass the following order:-

The Petition is allowed. The impugned order putting conditions to deposit the Passport with the Court and not to travel abroad without permission of the Court and also the order refusing permission to the petitioner to travel abroad are hereby quashed and set aside. However, in view of the statement made by the learned Counsel for the petitioner, if the trial is commenced and finished within three months, the petitioner would not travel abroad during that period as his presence will be required for the purpose of trial. However, if the trial is not finished within a period of three months from this day, the petitioner shall be at liberty to travel abroad subject to his depositing amount of Rs.50,000/- as security to return and to attend the Court as and when the case is fixed for trial.

(J.H.BHATIA,J.)