

3. Before, however, we advert to the said question, we may notice the factual matrix involved in the matter.

On or about 14.08.2004, the luggage of two persons, viz., Abdul Munaf and Zahid Hussain, who were traveling in a bus were searched and allegedly contraband weighing 2 kgs. was recovered. A purported statement was made by the said accused persons that the said contraband (heroin) was meant to be delivered to the appellant. Nothing was recovered from him. Apart from the said statements of the said accused persons, no other material is available on record to sustain a charge against him. On the basis of the said statement, the appellant was arrested on 15.08.2004. Allegedly, a statement was made by him in terms of Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act"). Appellant contends that he was tortured and the statement was obtained forcibly from him on some blank documents. He later on retracted therefrom. Indisputably, the seized articles were sent for chemical examination to the Government Opium and Alkaloid Works, Neemuch. A report was sent to the investigating officer on 23.09.2004 stating that the sample did not contain any contraband substance. Appellant thereafter filed an application for discharge. The prosecution moved the court for sending the substance allegedly recovered from the co-accused persons for its examination by the Central Revenue Control Laboratory, New Delhi. It was rejected by the court opining that there was no provision in the Act for sending the sample to another laboratory. The court, however, did not pass an order of discharge in favour of the appellant but released him on bail, stating:

"Accordingly, as mentioned above, there is no ground that by accepting the application of the complainant and order be passed for sending the second sample for examination to another laboratory. If the investigating officer so desires, then in accordance with the ruling expounded as above, he is free to send the second sample to any of the laboratories for its examination at his own level. On the basis of the abovementioned observations, the application of the complainant is rejected."

4. The prosecution, however, sent another sample to the Central Revenue Control Laboratory, New Delhi. A report dated 6.01.2005 was sent opining that the sample under reference was tested positive for Diacetyl-morphine (Heroin), which according to the said report was found to be 2.6% of the sample tested.

5. Thereafter, an application for cancellation of bail was filed on 4.02.2005. By an order dated 15.03.2005, the bail granted to the appellant was cancelled relying on or on the basis of the second report obtained by the respondent from the Central Revenue Control Laboratory, New Delhi stating:

"While receiving guidance from the abovementioned citations, I arrive at the conclusion that under the present facts, the second sample which was sent for examination and according to its receipt the seized substance was heroine, and on the basis of which charges have been levelled against the accused persons, and the prosecution has right to send second sample for chemical examination, and as such there are charges of serious nature against the accused persons in which there provisions (sic) to award punishment of imprisonment of the term of at least ten years and fine of rupees one lakh, as well as under Section 37 of the Act, in case of recovery of psychotropic

substances in the quantity of commerce & trade, bail cannot be granted until the court does not arrive at the conclusion to the effect that the accused is not guilty of such an offence, and in case of granting him bail such an offence will not be committed by him during the course of his remaining free on bail."

6. A revision application filed thereagainst by the appellant before the High Court, which was marked as S.B. Criminal Revision Petition No. 277 of 2005, was dismissed by reason of the impugned judgment.

7. Appellant is, thus, before us.

8. Mr. Sushil Kumar Jain, learned counsel appearing on behalf of the appellant, would contend that in the peculiar facts and circumstances of this case there was no justification at all for cancellation of bail which had already been granted to the appellant.

The learned counsel would contend that a bail granted must be cancelled only if the requirements contained in Sub-section (2) of Section 439 of the Code of Criminal Procedure are fulfilled.

In any event, as the Central Revenue Control Laboratory, New Delhi is not a designated chemical examiner as defined in the Narcotic Drugs and Psychotropic Substances Rules, 1985 (for short "the Rules"), reliance thereupon could not have been placed particularly when the laboratory which comes within the definition of the term "Chemical Examiner" had opined otherwise.

The learned counsel would contend that unlike the provisions of Section 13(3) of the Prevention of Food Adulteration Act, 1954, no provision exists in the Act for sending one sample to one laboratory and the second to another laboratory.

The learned counsel would further contend that the miniscule percentage of heroin which has been found, i.e., 2.6%, would not come within the purview of commercial quantity.

9. Mr. B.B. Singh, learned counsel appearing on behalf of the respondent, on the other hand, submitted that as Section 37 of the Act contains a special provision providing that (i) no court shall grant bail without hearing the public prosecutor; (ii) the court is of the opinion that there is reasonable ground to believe that the accused is not likely to commit the said offence, no order of bail could have been passed in derogation of the provisions thereof.

It was furthermore submitted that having regard to the fact that the appellant himself had confessed his guilt by making a statement in terms of Section 67 of the Act, a judgment of conviction could be based thereupon. Even a retracted confession, according to the counsel, can form basis for recording a judgment of conviction.

10. The Act although is a self-contained code, application of the provisions of the Code of Criminal Procedure, 1973, however, either expressly or by necessary implication, have not been excluded. There exists a distinction between an appeal from an order granting bail and an order directing

cancellation of bail. While entertaining an application for cancellation of bail, it must be found that the accused had misused the liberty granted to him as a result whereof :

- (a) he has attempted to tamper with evidence;
- (b) he has attempted to influence the witnesses;
- (c) there is a possibility of the accused to abscond and, therefore, there is a possibility that the accused may not be available for trial.

11. It is true that the general principles of grant of bail are not applicable in a case involving the Act. The power of the court in that behalf is limited. Section 37 of the Act reads as under:

"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 27A 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."

12. However, a distinction even is made as regards grant of bail in relation to a commercial quantity and a small quantity. Commercial quantity has been defined in Section 2(viia) of the Act to mean "any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette".

13. We will advert to the question of the definition of "Chemical Examiner" a little later. The question, however, as to whether the contraband found came within the purview of the commercial quantity within the meaning of Section 2(viia) or not is one of the factors which should be taken into consideration by the courts in the matter of grant or refusal to grant bail. Even, according to the Central Revenue Control Laboratory, New Delhi, only 2.6% of the sample sent was found to be containing heroin. Small quantity in terms of the notification issued under Sections 2(viia) and

2(xxiiia) is as under:

S.No	Name of Narcotic Drug or Chemical	Small Commercial	Psychotropic Substance	Name	Quantity	Quantity (International Non-
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proprietary Name (INN))

77. Morphine	Morphine	5 gms.	250 gms.
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The quantity, thus, alleged to have been recovered from the co-accused persons could be said to be intermediate quantity and, thus, the rigours of the provisions of Section 37 of the Act relating to grant of bail may not be justified.

In *Ouseph alias Thankachan v. State of Kerala* [(2004) 4 SCC 446], this Court held:

"8. The question to be considered by us is whether the psychotropic substance was in a small quantity and if so, whether it was intended for personal consumption. The words 'small quantity' have been specified by the Central Government by the notification dated 23-7-1996. Learned Counsel for the State has brought to our notice that as per the said notification small quantity has been specified as 1 gram. If so, the quantity recovered from the appellant is far below the limit of small quantity specified in the notification issued by the Central Government. It is admitted that each ampoule contained only 2 ml and each ml contains only 3 mg. This means the total quantity found in the possession of the appellant was only 66 mg. This is less than 1/10th of the limit of small quantity specified under the notification.

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11. On account of the aforesaid fact situation, we are inclined to believe that the small quantity of buprenorphine (Tidigesic) was in the possession of the appellant for his personal consumption and, therefore, the offence committed by him would fall under Section 27 of the NDPS Act."

[See also *E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau* (2008) 5 SCC 161]

14. The Central Government in exercise of its power conferred upon it under Section 9 read with Section 76 of the Act made the Rules. "Chemical Examiner" has been defined in Rule 2(c) of the Rules to mean "the Chemical Examiner or Deputy Chief Chemist or Shift Chemist or Assistant Chemical Examiner, Government Opium & Alkaloid Works, Neemuch or, as the case may be, Ghazipur".

15. It is not necessary for us to consider the matter in depth as to whether the aforementioned definition is exhaustive but then we are concerned with a question involving cancellation of an order of bail. The authorised laboratory at Neemuch categorically found that the seized substance did not

contain any contraband. For the purpose of grant of bail, the court cannot be said to have committed any illegality in relying thereupon.

There exists a difference of opinion insofar as the Central Revenue Control Laboratory, New Delhi, has since opined that the sample contained 2.6% heroin. The effect of said contradictory report must be gone into only at trial. A person's liberty is protected in terms of Article 21 of the Constitution of India. When two views are possible, the view which leans in favour of an accused must be favoured.

16. It is not the stage where the court is required to take into consideration the submission of Mr. B.B. Singh that a judgment of conviction is possible to be recorded on the basis of a confessional statement made by an accused. It may be so but the question is that when the prosecution itself had failed to show that the seized substance contained any narcotic substance or psychotropic substance, the question of reliance on the confession of the accused does not arise; at least at this stage.

In *Noor Aga v. State of Punjab & Anr.* [2008 (9) SCALE 681], this Court held:

"92. We may, at the outset, notice that a fundamental error has been committed by the High Court in placing explicit reliance upon Section 108 of the Customs Act.

93. It refers to leading of evidence, production of document or any other thing in an enquiry in connection of smuggling of goods. Every proceeding in terms of Sub-section (4) of Section 108 would be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. The enquiry contemplated under Section 108 is for the purpose of 1962 Act and not for the purpose of convicting an accused under any other statute including the provisions of the Act.

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98. It was pointed out that the power of a Police Officer as crime detection and custom officer as authorities invested with a power to check the smuggling of goods and to impose penalty for loss of revenue being different, they were not Police Officers but then the court took notice of the general image of police in absence of legislative power to enforce other law enforcing agencies for the said purpose in the following terms:

23. It is also to be noticed that the Sea Customs Act itself refers to police officer in contradistinction to the Customs Officer.

Section 180 empowers a police officer to seize articles liable to confiscation under the Act, on suspicion that they had been stolen.

Section 184 provides that the officer adjudging confiscation shall take and hold possession of the thing confiscated and every officer of police, on request of such officer, shall assist him in taking and

holding such possession. This leaves no room for doubt that a Customs Officer is not an officer of the Police. 24. Section 171-A of the Act empowers the Customs Officer to summon any person to give evidence or to produce a document or any other thing in any enquiry which he be making in connection with the smuggling of any goods.

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100. When, however, the custom officers exercise their power under the Act, it is not exercising its power as an officer to check smuggling of goods; it acts for the purpose of detection of crime and bringing an accused to book."

But, as indicated hereinbefore, the said question need not be gone into at this stage.

17. We may, however, incidentally refer to a recent decision of the Privy Council in *State of Mauritius v. Khoyratty* [2006] UKPC 13 : [2006] 2 WLR 1330 wherein a similar provision curtailing the power of court to grant bail was held by the Supreme Court of Mauritius to be ultra vires of the doctrine of separate of power. A constitutional amendment by simple majority was carried out. Even that constitutional amendment was held to be unconstitutional. The Privy Council in the aforementioned case upheld the said decision stating:

"In *A v Secretary of State for the Home Department* [2005] 2 AC 68 Lord Bingham gave the leading judgement. He stated at para 42:

". . . It is also of course true . . . that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic."

While not conclusive of the issue presently before the Board, these decisions give important colour to the words of section 1 of the Constitution, viz that Mauritius shall be a democratic state.

14. There is another aspect to take into account. The Supreme Court observed that decisions on bail are intrinsically within the domain of the judiciary. At the very least that means that historically decisions on bail were regarded as judicial. The importance of the historical perspective was emphasised in the Australian jurisprudence cited in *Anderson*. This factor too gives colour to the words of section 1."

18. Furthermore, for the purpose of cancellation of bail, the statutory requirements must be satisfied. Appellant has failed to do so.

We may notice that in *State (Delhi Administration) v. Sanjay Gandhi* [(1978) 2 SCC 411], this Court held:

"13. Rejection of bail when bail is applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. The fact that prosecution witnesses have turned hostile cannot by itself justify the inference that the accused has won them over. A brother, a sister or a parent who has seen the commission of crime, may resile in the Court from a statement recorded during the course of investigation. That happens instinctively, out of natural love and affection, not out of persuasion by the accused. The witness has a stake in the innocence of the accused and tries therefore to save him from the guilt. Likewise, an employee may, out of a sense of gratitude, oblige the employer by uttering an untruth without pressure or persuasion. In other words, the objective fact that witnesses have turned hostile must be shown to bear a causal connection with the subjective involvement therein of the respondent. Without such proof, a bail once granted cannot be cancelled on the off chance or on the supposition that witnesses have been won over by the accused. Inconsistent testimony can no more be ascribed by itself to the influence of the accused than consistent testimony, by itself, can be ascribed to the pressure of the prosecution. Therefore, Mr. Mulla is right that one has to countenance a reasonable possibility that the employees of Maruti like the approver Yadav might have, of their own volition, attempted to protect the respondent from involvement in criminal charges. Their willingness now to oblige the respondent would depend upon how much the respondent has obliged them in the past. It is therefore necessary for the prosecution to show some act or conduct on the part of the respondent from which a reasonable inference may arise that the witnesses have gone back on their statements as a result of an intervention by or on behalf of the respondent."

19. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The order dated 15.03.2005 cancelling the bail is set aside and the revision application filed in the High Court stands allowed. The appeal is allowed.

.....J. [S.B. Sinha]J. [Cyriac Joseph] New Delhi;

November 07, 2008