

## Kapil Dev vs The State on 24 May, 2005

**Equivalent citations: 121(2005)DLT380**

**Author: Badar Durrez Ahmed**

**Bench: Badar Durrez Ahmed**

### JUDGMENT

Badar Durrez Ahmed, J.

1. It is a case for the prosecution that a recovery of 500 grams of heroin is said to have been made from the present petitioner. The learned counsel for the petitioner submitted that no such recovery was made at all and the petitioner has been framed in this case. He further submitted that the petitioner's father Shri Gulab Singh has, for several years prior to the date of incident, been writing letters and articles with regard to the spread of narcotic drugs and the fact that the people involved in narcotic drugs and psychotropic substances were not being apprehended. To substantiate this aspect the learned counsel for the petitioner submitted that the petitioner's father had written various letters including letters to the Prime Minister, copies of some of which are placed on record in the present petition.

2. The learned counsel for the petitioner also submitted that this is the second bail application before this court. The first bail application was rejected by an order of this court on 04.05.2004 in the following terms:

"Heard.

The petitioner has been allegedly found in possession of 500 gram smack. Bail is claimed mainly on the ground that case has been fabricated against the petitioner who had lodged complaint against some of members of the Sansi Community and the police officials. Since the quantity allegedly recovered is commercial quantity, the rigours of section of section 37 NDPS apply.

No ground is made out for grant of bail. Rejected."

3. He submitted that after the said order rejecting the bail application of the petitioner was passed, certain developments have taken place which completely alter the fact situation. The first and most important development, according to the learned counsel for the petitioner, was the examination of one Ratanbir (PW5) who is said to be the only independent public witness of the recovery. The other circumstance is the examination of PW4, ASI Paramjit Singh. Pointing to the deposition of PW5 on

28.02.200, the learned counsel for the petitioner submitted that the witness was declared to be hostile inasmuch as he had clearly stated that he did not know the accused person present in court and he had categorically stated in his examination-in-chief that no contraband was ever recovered in the present case in his presence from the possession of the accused. In cross-examination by the learned APP for the State also, the said PW5 categorically stated that he had placed his signatures on various documents which were not prepared in his presence and he had only signed them in the police station and had not given any statement to the police. In other words, according to the learned counsel for the petitioner, the only independent witness of the recovery said to have been made from the present petitioner has completely denied the recovery. He also referred to the deposition of PW4 (ASI Paramjit Singh) to show that the documents filed in court and the documents produced at the time of examination by the prosecution were different. In this context, it is the submission of the learned counsel for the petitioner that the prosecution has gone to such lengths in this case as to even fabricate the documents. He specifically referred to that part of the statement of PW4 wherein he says that there is no difference between the documents Exhibit DX and Exhibit PW4/ A at point C to C. The court observation in this regard is as under:

"In register No.19 the words "Form FSL Bhi Saath Main Hai" is added with different ink and these words are not appearing in the copy supplied to the accused and filed in the Court i.e. Ex D".

4. The learned counsel for the petitioner, therefore, submitted that these developments which have taken place after the passing of the order dated 04.05.2004 clearly entitled the petitioner to the grant of bail and for the consideration of the second bail application.

5. The learned counsel for the State opposed the grant of bail. He firstly submitted that once this court has rejected a bail application on merits, a second application would not lie. Secondly, he submitted that merely because one witness has turned hostile it does not mean that all the other witnesses have to be disbelieved. In this context, he submitted that at the time of recovery, a Senior Police Officer being the ACP was also present and he is the one who has signed the seizure memo.

6. The learned counsel for the State also submitted that a mere defect in the search per se will not vitiate the trial and would not necessarily result in the acquittal of the petitioner. In support of this contention, he placed reliance on the decision of the Supreme Court in case of State of Punjab vs. Balbir Singh 1994 JCC 303 (Para 27 (4B) page 319).

7. This is a case where there is an alleged recovery of 500 grams of heroin and admittedly the provisions of Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") would be applicable. Accordingly, in terms of the provisions of the Act as also the decision of the Supreme Court in the case of Union of India v Ram Samujh 1999(3) C.C. Cases (SC) 22, the mandatory provisions of Section 37 have to be complied with before an order of bail can be passed by this court. For the sake of convenience the relevant provisions of Section 37 are reproduced hereinabove:

"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 Sec. 19 or Sec. 24 or Sec. 27 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 limitation on granting of bail specified in Cl. (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 grant of bail.

8. Similar provisions exist in the Maharashtra Control of Organized Crime Act, 1999 and in particular Section 21 thereof. The Supreme Court in the recent case of *Ranjitsingh Brahmajetsingh Sharma v State of Maharashtra* and another 2005 AIR SCW 2215 had occasion to consider the said provision in great detail. In that provision also restrictions on the power of the court to grant bail have been imposed. However, the Supreme Court observed that the restrictions on the power to grant bail should not be pushed too far and it was of the opinion that if the court, having regard to the materials brought on record, is satisfied that in all probability the accused may not be ultimately convicted, an order granting bail may be passed. It further held that the satisfaction of the court as regards his likelihood of not committing any offence while on bail must be construed to mean an offence under the very Act and not any offence whatsoever be it a minor or major offence. It further observed that for the purpose of considering the application for grant of bail, although detailed reasons are not necessary to be assigned the order granting bail must demonstrate an application of mind, at least in serious cases, as to why the applicant has been granted or denied the privilege of bail. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities.

9. Insofar as the successive bail applications are concerned, the Supreme Court in the case of *Kalyan Chandra Sarkar etc v Rajesh Ranjan alia Pappu Yadav* and another 2005 AIR SCW 536 has stated that ordinarily the issues which had been canvassed earlier would not be permitted to be re-agitated on the same grounds as the same would lead to speculation and uncertainty in the administration of justice and may lead to forum hunting. However, the Supreme Court observed as under:

"20. The decisions given by a superior forum, undoubtedly, is binding on the subordinate for a on the same issue even in bail matters unless of course, there is a

material change in the fact situation calling for a different view being taken. Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application. Therefore, we are not in agreement with the argument of learned counsel for the accused that in view the guaranty conferred on a person under Article 21 of the constitution of India, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by courts earlier including the Apex Court of the country."

10. Therefore, it is clear that a second bail application can be entertained if there is a change in the fact situation which requires the earlier view being interfered with. In the backdrop of these legal principles one has to examine the situation arising in the present case. The case is of a recovery of 500 grams of heroin from the present petitioner. The only independent public witness Ratanbir (PW5) has turned hostile and has indicated that no such recovery was at all made in his presence from the present petitioner. There is the added aspect of differences in documents as observed by the court conducting the trial. These considerations were not there before the court when the order dated 4.5.2004 was passed. Therefore, these are clearly changes in the fact situation and these changes go to the root of the matter in the sense that they cast a doubt on the recovery itself. While the learned counsel for the State may be correct in stating that mere defects in the search per se would not vitiate the trial, this is not what we are considering here. What is being considered here is whether, on the basis of material on record, the broad probabilities indicate that the recovery was not made. I think it is so indicated. I am satisfied that there are reasonable grounds to believe that the petitioner may not be ultimately convicted of the offences in this case. There is nothing brought to my notice to indicate that the petitioner would be likely to commit an offence if granted bail. He has no criminal antecedents and that is a relevant factor in coming to the opinion that there is no likelihood of the petitioner committing an offence under the NDPS Act while on bail.

11. In this view of the matter, the petitioner is directed to be released on bail on furnishing a personal bond in the sum of Rs.15,000/- with one surety of the like amount to the satisfaction of the concerned court.

This application stands disposed of.