

Frank Vitus vs Narcotics Control Bureau on 8 July, 2024

Author: Abhay S. Oka

Bench: Abhay S. Oka

2024 INSC 479

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. OF 2024
(Arising out of S.L.P. (CrI.) No. 6339-6340 of 2023)

Frank Vitus

versus

Narcotics Control Bureau & Ors.

ORDER

ABHAY S. OKA, J.

1. Leave granted.

FACTUAL ASPECTS

2. The appellant is being prosecuted for the offences punishable under Sections 8, 22, 23, and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (short 'NDPS Act'). The appellant was arrested on 21 st May 2014. By the first impugned order dated 31st May 2022, the appellant was ordered to be enlarged on bail subject to various terms and conditions incorporated in the said order. The terms and Reason: conditions incorporated were in terms of the directions issued by this Court in paragraph no.15 of its decision in the case of Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India & Ors. 1. The appellant was ordered to be enlarged on bail on his furnishing a bail bond in the sum of Rs.1,00,000/□with two sureties in the like amount to the satisfaction of the learned Special Judge under the NDPS.

3. The grievances in this appeal have been summed up in the order dated 21st July 2023 passed by this Court, which reads thus:

“The petitioner is aggrieved by the following condition imposed while granting bail:

“.. the learned Special Judge, NDPS seized of the trial in SC No.27/14 shall ensure that the certificate of assurance from the High Commission of Nigeria is placed on record that the applicants/accused shall not leave the country and shall appear before the learned Special Judge as and when required, in as much as, the complaint filed by the Narcotics Control Bureau under Sections 8/22/23/29 of the NDPS Act, 1985 indicates that the appellants are residents of Nigeria..” In the case of Supreme Court Legal Aid Committee vs. vs Union Of India [(1994) 6 SCC 731] Clause (iv) reads as under:

1 (1994) 6 SCC 731 “(iv)in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner□accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;” Prima facie, we are of the view that none of the Embassies/High Commissions may be able to give assurances as mentioned in Clause (iv).

The question is whether we need to refer this case to a larger Bench for re□consideration of Clause (iv).

Another condition imposed by the High Court reads thus:

“... they shall drop a PIN on the google map to ensure that their location is available to the Investigation Officer of the case;...” The question is whether this condition will offend rights of the accused under Article 21 of the Constitution of India.

We request Mr. Vinay Navare, learned Senior Advocate to assist us as amicus curiae on both the issues. Registry to provide a complete set of paper book to the learned Senior Counsel as well as a copy of this order.

List on 14.08.2023.” 3.1. We have heard Shri Vinay Navare, the learned senior counsel appointed as Amicus Curiae, Shri Varun Mishra, the learned counsel appearing for the appellant and Shri Vikramjeet Banerjee, the learned Additional Solicitor General of India for the first respondent□Narcotics Control Bureau.

CONDITIONS OF BAIL

4. Section 439 of the Code of Criminal Procedure,1973 (for short, ‘the CrPC’) deals with the power of a Court of Sessions or a High Court to grant bail in non□bailable offences. We are reproducing Section 439 for ready reference:

“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 sub-section (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:

[Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860), give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.] [(1A) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860)].

(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.” Section 437(3) reads thus:

“437. When bail may be taken in case of non-bailable offence.— (1) (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)” 4.1 In this case, we are concerned with the offences under the NDPS Act which are punishable with imprisonment of seven years or more. The provision relating to bail is contained in Section 37 of the NDPS Act, which reads thus:

“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]” Under Section 37 of the NDPS Act, the Court's power to grant bail is constrained by Sub-section 1(b)(ii). However, once a case is made out for a grant of bail in accordance with Section 37, the conditions of bail will have to be in terms of Section 437(3) of the CrPC. The reason is that because of Section 52 of the NDPS Act, the provisions of the CrPC apply to the arrests made under the NDPS Act insofar as they are not inconsistent with the NDPS Act.

5. Apart from conditions (a) to (c) in Section 437(3) of the CrPC, there is a power to impose additional conditions “in the interest of justice”. The scope of the concept of “interest of justice” in Section 437(3) of the CrPC has been considered by this Court in the case of Kunal Kumar Tiwari v. State of Bihar². In paragraph 9, this Court held thus:

“9. There is no dispute that clause (c) of Section 437(3) allows courts to impose such conditions in the interest of justice. We are aware that palpably such wordings are capable of accepting broader meaning.

But such conditions cannot be arbitrary, fanciful or extend beyond the ends of the provision. The phrase “interest of justice” as used under the clause (c) of Section 437(3) means “good administration of justice” or “advancing the trial process” and inclusion of broader meaning should be shunned because of purposive interpretation.” (emphasis added)

6. In view of Section 438(2)(iv) of the CrPC, while granting anticipatory bail, the Court is empowered to impose the conditions as provided in Section 437(3) of the Cr. PC. While dealing with the condition which can be imposed while 2 (2018) 16 SCC 74 granting anticipatory bail, this Court, in the case of *Munish Bhasin v. State (NCT of Delhi)*³, held thus:

“10. It is well settled that while exercising discretion to release an accused under Section 438 of the Code neither the High Court nor the Sessions Court would be justified in imposing freakish conditions. There is no manner of doubt that the court having regard to the facts and circumstances of the case can impose necessary, just and efficacious conditions while enlarging an accused on bail under Section 438 of the Code. However, the accused cannot be subjected to any irrelevant condition at all.” (emphasis added)

7. A broader meaning cannot be assigned to the words “interest of justice” in Section 437(3) of Cr. PC. By borrowing the language used by this Court in the above decisions, we can say that the bail conditions cannot be fanciful, arbitrary or freakish. The object of imposing conditions of bail is to ensure that the accused does not interfere or obstruct the investigation in any manner, remains available for the investigation, does not tamper with or destroy evidence, does not commit any offence, remains regularly present before the Trial Court, and does not create obstacles in the expeditious conclusion of the trial. The Courts have imposed a condition that the accused should cooperate with the investigation when bail is granted before filing the final report or

³ (2009) 4 SCC 45 chargesheet. Cooperating with the investigation does not mean that the accused must confess. The conditions incorporated in the order granting bail must be within the four corners of Section 437(3). The bail conditions must be consistent with the object of imposing conditions. While imposing bail conditions, the Constitutional rights of an accused, who is ordered to be released on bail, can be curtailed only to the minimum extent required. Even an accused convicted by a competent Court and undergoing a sentence in prison is not deprived of all his rights guaranteed by Article 21 of the Constitution. This Court, in the case of *State of A.P. v. Challa Ramkrishna Reddy*,⁴ reiterated the settled position by holding as follows:

“22. Right to life is one of the basic human rights. It is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that right. A prisoner, be he a convict or undertrial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his fundamental rights including the right to life guaranteed to him under the Constitution. On being

convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights.”
(emphasis added)

4 (2000) 5 SCC 712 7.1. We are dealing with a case of the accused whose guilt is yet to be established. So long as he is not held guilty, the presumption of innocence is applicable. He cannot be deprived of all his rights guaranteed under Article 21. The Courts must show restraint while imposing bail conditions. Therefore, while granting bail, the Courts can curtail the freedom of the accused only to the extent required for imposing the bail conditions warranted by law. Bail conditions cannot be so onerous as to frustrate the order of bail itself. For example, the Court may impose a condition of periodically reporting to the police station/Court or not travelling abroad without prior permission. Where circumstances require, the Court may impose a condition restraining an accused from entering a particular area to protect the prosecution witnesses or the victims. But the Court cannot impose a condition on the accused to keep the Police constantly informed about his movement from one place to another. The object of the bail condition cannot be to keep a constant vigil on the movements of the accused enlarged on bail. The investigating agency cannot be permitted to continuously peep into the private life of the accused enlarged on bail, by imposing arbitrary conditions since that will violate the right of privacy of the accused, as guaranteed by Article 21. If a constant vigil is kept on every movement of the accused released on bail by the use of technology or otherwise, it will infringe the rights of the accused guaranteed under Article 21, including the right to privacy. The reason is that the effect of keeping such constant vigil on the accused by imposing drastic bail conditions will amount to keeping the accused in some kind of confinement even after he is released on bail. Such a condition cannot be a condition of bail.

8. In view of sub-section (2) of Section 441 of the CrPC, the conditions imposed by the Court while granting bail always stand incorporated in the bail bond executed by the accused. Therefore, the accused is bound by the conditions imposed while granting bail. If the accused, after being enlarged on bail, commits a breach of bail conditions or commits any offence, the Courts always have the power to cancel the bail.

9. A condition cannot be imposed while granting bail which is impossible for the accused to comply with. If such a condition is imposed, it will deprive an accused of bail, though he is otherwise entitled to it.

CONDITION OF DROPPING PIN ON GOOGLE MAP

10. Firstly, we will deal with the issue of the condition of dropping a PIN on Google Maps. The condition imposed on the appellant of dropping a PIN on Google Map gives an impression that the condition will enable the first respondent Narcotics Control Bureau (NCB) to monitor the movements of the accused on a real-time basis, which will be violative of the right to privacy guaranteed under Article 21 of the Constitution of India. To understand the technical aspects of “dropping a PIN on Google Map”, we issued a notice to Google LLC, having its office in the USA. Accordingly, Shri R. Suresh Babu, authorised signatory of Google LLC, has filed an affidavit. Paragraphs 5 to 10 of his affidavit read thus:

“5. Google Maps is a web and app-based service that enables users to search for and navigate to local places. It inter alia offers real-time traffic conditions, and route planning for travelling by foot, car, bike, air, and public transportation. Google Maps can be accessed through the Google Maps application available on mobiles or through a web browser at www.google.com/maps.

6. One of the features available to users on Google Maps is the ability of users to drop a ‘PIN’ on a location of their choosing on the map. Dropping a PIN, allows the user to mark or identify a location on the map without necessarily requiring access to the user’s location data. Users may drop a PIN either on the mobile application or on the web browser. To drop a PIN, a user may either:

a. press and hold the desired location where the PIN is to be dropped on the map on the mobile application; or b. click on the desired location on the map on a web browser.

7. Upon dropping the PIN, the user dropping the PIN can identify the specific coordinates of the location on the map.

Through the Google Maps app or through a web browser, the user dropping the PIN may opt to get directions to the location, mark the location with a label, add a business address to the location, or share the location with another user.

8. The PIN identifies and marks a specific location of the user’s choosing on Google Maps. The PIN need not be dropped at the location where the user/the user’s device is located at the time of sharing the PIN. The PIN dropped and shared need not be the real-time location of the user sharing the PIN.

9. Google Maps allows users to share information, such as the PIN, with third parties. This is explained in Google’s privacy policy, which is available at <https://policies.google.com/privacy?hl=en> US, and shares as follows: “Many of our services let you share information with other people, and you have control over how you share [emphasis supplied]”.

Users consent to the privacy policy when they create a Google Account. In this case, if a user wants to share a PIN, they can do so by clicking on the ‘share’ button. This generates a link to Google Maps that the user can share with others through messaging platforms or other modes of online communication. When clicked, the link directs users (having access to the link) to the location where the PIN was dropped on the map.

10. The Google Maps PIN feature, which includes the creation of a PIN or the sharing of such a PIN with another user, does not impinge on the user’s privacy as the user has full control over sharing of such information. The user with access to the link can only access the static location pinned and shared on Google Maps. The pinned location does not enable real-time tracking of the user or their device. Even if the PIN were to coincide with a user’s location at a given time, this would (a) be the

static location pinned by the user; and (b) only be accessible to others when a user affirmatively shares the PIN with them by clicking on the share button.” (emphasis added) 10.1. In paragraph 10 of the affidavit, Google LLC stated that the user has full control over sharing PINs with other users. Moreover, it does not impinge on the user’s privacy, as the user retains full control. Most importantly, it is stated that the PIN location does not enable real-time tracking of the user or the user’s device. Therefore, the condition of the accused dropping a pin on Google Maps, as it stands, is completely redundant as the same does not help the first respondent.

10.2. Imposing any bail condition which enables the Police/Investigation Agency to track every movement of the accused released on bail by using any technology or otherwise would undoubtedly violate the right to privacy guaranteed under Article 21. In this case, the condition of dropping a PIN on Google Maps has been incorporated without even considering the technical effect of dropping a PIN and the relevance of the said condition as a condition of bail. This cannot be a condition of bail. The condition deserves to be deleted and ordered accordingly. In some cases, this Court may have imposed a similar condition. But in those cases, this Court was not called upon to decide the issue of the effect and legality of such a condition.

THE CONDITION OF FURNISHING CERTIFICATE OF THE EMBASSY

11. Now, we come to the decision of the Supreme Court Legal Aid Committee¹ relied upon by the High Court. In the first part of paragraph 15, the prayers made in the petition filed before this Court have been set out. We are quoting the relevant part of paragraph 15, which reads thus:

“15. But the main reason which motivated the Supreme Court Legal Aid Society to file this petition under Article 32 of the Constitution was the delay in the disposal of cases under the Act involving foreigners. The reliefs claimed included a direction to treat further detention of foreigners, who were languishing in jails as undertrials under the Act for a period exceeding two years, as void or in any case they be released on bail and it was further submitted by counsel that their cases be given priority over others. When the petition came up for admission it was pointed out to counsel that such an invidious distinction between similarly situate undertrials who are citizens of this country and who are foreigners may not be permissible under the Constitution and even if priority is accorded to the cases of foreigners it may have the effect of foreigners being permitted to jump the queue and slide down cases of citizens even if their cases are old and pending since long. Counsel immediately realised that such a distinction if drawn would result in cases of Indian citizens being further delayed at the behest of foreigners, a procedure which may not be consistent with law. He, therefore, rightly sought permission to amend the cause-title and prayer clauses of the petition which was permitted. In substance the petitioner now prays that all undertrials who are in jail for the commission of any offence or offences under the Act for a period exceeding two years on account of the delay in the disposal of cases lodged against them should be forthwith released from jail declaring their further detention to be illegal and void and pending decision of this Court on the said larger issue, they should in any case be released on bail.” (emphasis added) In the

same paragraph 15, directions have been issued which read thus:

“We, therefore, direct as under:

(i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs 50,000 with two sureties for like amount.

(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided, he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial accused is charged for the commission of an offence punishable under Sections 31 and 31A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport, he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause

(ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.” (emphasis added) However, paragraph 16 is relevant, which reads thus:

“16. We may state that the above are intended to operate as one-time directions for cases in which the accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Court's power to grant bail under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases. The Special Court will, notwithstanding the directions, be free to cancel bail if the accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order.” (emphasis added) 11.1. The directions contained in paragraph 15 were to operate as one-time directions applicable only to the pending cases of the accused who were in jail on the date of the judgment. These conditions were required to be incorporated in the order while releasing an accused on bail as a one-time measure. Paragraph 16 clarifies that if a bail application is made to the Special Court with a grievance regarding inordinate delay in the disposal of pending cases, the Special Court will be empowered to exercise power to grant bail in light of what is held in paragraph 15. Therefore, it is not necessary that in every case where bail is granted to an accused in an NDPS case

who is a foreign national on the ground of long incarceration of more than 50% of the minimum sentence, the condition of obtaining a 'certificate of assurance' from the Embassy/High Commission should be incorporated. It will depend on the facts of each case.

12. Even if such a condition is incorporated, on an application made by the accused, the concerned Embassy/High Commission declines or fails to issue the certificate within a reasonable time, say within a period of seven days, the Court always has the power to dispense with the said condition. Grant of such a certificate by the Embassy/High Commission is beyond the control of the accused to whom bail is granted. Therefore, when the Embassy/High Commission does not grant such a certificate within a reasonable time, as explained above, the accused, who is otherwise held entitled to bail, cannot be denied bail on the ground that such a condition, which is impossible for the accused to comply with, has not been complied with. Hence, the Court will have to delete the condition. If the Embassy/High Commission records reasons for denying the certificate and the reasons are based on the adverse conduct of the accused based on material, the Court can always consider the reasons recorded while considering an application for dispensing with the condition. However, the Courts must remember that the accused has no right to compel the Embassy/High Commission to issue such a certificate. There can be very many reasons for recording adversely which again cannot be the basis to deny bail already granted. In such a case, instead of the condition of obtaining such a certificate, the condition of surrendering the passport and regularly reporting to the local police station/Trial Court can always be imposed, depending upon the facts of each case.

13. Coming to the facts of the case, bail has been granted to the appellant firstly on the ground that the appellant has been implicated based on statements recorded under Section 67 of the NDPS Act, and that such statements are entirely inadmissible in view of the decision of this Court in the case of Tofan Singh v. State of Tamil Nadu 5. So, bail has been granted on merits as well. Secondly, the bail has also been granted relying upon what is held in paragraph 15 of the decision in the case of Supreme Court Legal Aid Committee¹. As the bail was granted on merits by relying upon the decision of this Court in the case of Tofan Singh², there was no reason for the High Court to have imposed all the onerous conditions incorporated in paragraph 15 of the decision in the case of Supreme Court Legal Aid Committee¹.

14. Therefore, in view of the above discussion, we are of the view that it is not necessary to refer the case to a larger Bench for reconsideration of condition No. (iv) in paragraph 15 of the decision in the case of Supreme Court Legal Aid Committee¹.

15. Based on our findings on the two issues mentioned above, we direct that the two conditions in the order granting bail to the appellant, namely, obtaining a certificate from the Embassy/High Commission and dropping a pin of Google Maps, shall stand

deleted.

5 (2021) 4 SCC 1

16. The case shall be listed on 15 July 2024 for passing final orders after considering the compliances made by the appellant so far.

.....J. (Abhay S. Oka)J. (Ujjal Bhuyan) New Delhi;

July 08, 2024.