

Court No. - 12

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 8401 of 2023

Applicant :- Shoeb

Opposite Party :- State Of U.P. Thru. Prin. Secy. Home Lko.

Counsel for Applicant :- Furkan Pathan, Mohd. Arshad, Shishir Pradhan

Counsel for Opposite Party :- G.A.

Hon'ble Pankaj Bhatia, J.

1. Heard learned counsel for the applicant, learned AGA and perused the record.
2. The accused-applicant seeks bail in Case Crime No.76 of 2023 under section 8/20 NDPS Act, P.S. Munshiganj, District Amethi.
3. In terms of the FIR, it was alleged that on the basis of a search being carried out from the vehicle no.UP33/BM-5277, three persons were allegedly sitting in the vehicle, on the driver seat, one Anuj Kumar Maurya was driving the vehicle whereas the applicant was sitting with the said person. Subsequently, third person ran away from the spot. On the basis of the search carried out from the vehicle, allegedly 10 packets total containing forty kilogram of Ganja were kept in the said vehicle, out of which sample was drawn from each packet and fifty grams of sample was prepared and was sent for verification and the applicant was apprehended based upon the said recovery. The FIR itself records that there were no independent witness to the search.
4. In terms of the said allegations, the counsel for the applicant argues that there were no independent witnesses to the search. He further argues that the sample was not drawn from each of the alleged ten packets found in the car and a common sample without indicating from which packet the sample was drawn was prepared and was sent for verification. He further argues that the sample was not drawn in the presence of the Magistrate which is required in terms of the mandate of Section 52-A of the NDPS Act. In support of the said, he places reliance on the judgment of the Supreme Court in the case of ***Yusuf @ Asif v. State; Criminal Appeal No.3191 of 2023*** decided on **13.10.2023**. He further argues that the applicant has been wrongly linked with the offence in question and he has no criminal history, as such, the applicant who is in custody since 05.05.2023 may be enlarged on bail.
5. Learned AGA opposes the bail application by arguing that the

commercial quantity of ganja was allegedly recovered from the joint possession of three persons including the applicant and in terms of the FSL Report which has been filed as CA-I, the report corroborates that the recovered article was Ganja, as such, the bail application deserves to be rejected more so in view of the mandate of Section 37 of the NDPS Act.

6. The counsel for the applicant in rejoinder states that even as per the counter affidavit relied upon by the learned AGA, the sample was received on 15.05.2023 whereas the same was allegedly recovered on 05.05.2023 without there being any explanation of delay. He further argues that the sample size in the FIR shown as 50 grams whereas the sample size as indicated in the counter affidavit is 48.3 gram which is not in accordance with the compliance prescribed for recovery.

7. Considering the fact that the recovery is more than the commercial quantity, the test of section 37 is to be satisfied. Section 37 of the Act came up before consideration before the Supreme Court in the case of **Mohd. Muslim @ Hussain vs. State (NCT of Delhi) 2023 Live Law (SC) 260**, which is interpreted in the following effect :

"18. The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is "not guilty of such offence" and that he is not likely to commit any offence while on bail. What is meant by "not guilty" when all the evidence is not before the court? It can only be a prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the

likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws – be balanced against the public interest.

19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India vs. Ratan Malik). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having 19 (2009) 2 SCC 624 regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.
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8. In the present case, prima-facie the non-presence of independent witnesses, the not drawing of samples in the presence of the magistrate, prima-facie pointed the infirmities which led to the in violation specially of section 52-A of the NDPS Act, the affect of which has been dealt with in the case of **Yusuf @ Asif v. State; Criminal Appeal No.3191 of 2023** decided on **13.10.2023** in the following effect:

"16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent

that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated."

9. Thus, on these infirmities and the fact that not following the mandate of section 52-A of the Act, prima-facie a view can be formed that the prosecution may not be able to establish the offence against the applicant, as such, the first test of Section 37 is satisfied in favour of the applicant. As the applicant has no criminal history of an offence under the NDPS Act, the second test is also satisfied in view of the law as explained in the case of ***Ranjitsingh Brahmajeetsing Sharma vs. State of Maharashtra, (2005) 5 SCC 294.***

10. Thus, for all the reasons recorded above, the applicant is entitled for the bail. The bail application is allowed.

11. Let the applicant ***Shoeb*** be released on bail in aforesaid first information report number subject to his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court concerned with the following conditions:

- (a) The applicant shall execute a bond to undertake to attend the hearings;
- (b) The applicant shall not commit any offence similar to the offence of which he is accused or suspected of the commission; and
- (c) The applicant 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.

Order Date :- 25.4.2024

VNP/-