

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 28.04.2016

Pronounced on : 29-04-2016

Coram

THE HONOURABLE MR. JUSTICE R. SUBBIAH

Crl.O.P. No. 8070 of 2016

Sadiq Basha

.. Petitioner/Accused 2

Versus

State represented by
The Intelligence Officer
Narcotics Control Bureau
Chennai Zonal Unit
Chennai - 600 090

.. Respondent/Complainant

Petition filed under Section 439 of Cr.P.C. read with Section 37 of The Narcotic Drugs and Psychotropic Substances Act, 1985 praying to enlarge the petitioner on bail in C.C. No. 45 of 2015 in NCB F.No.48/1/3/2015-NCB/MDS on the file of the Principal Special Judge, NDPS Court, Chennai subject to such terms and conditions as this Honourable Court may deem fit and proper.

For Petitioner : Mr. S. Veeraraghavan, Senior Advocate
for Ms. Vanajakumari

For Respondent: Mr. N.P. Kumar
Special Public Prosecutor for NDPS Cases

ORDER

The petitioner is arrayed as second accused in this case. This is the second petition filed by the petitioner seeking to release him on bail. Earlier, the petitioner has filed Crl.OP No. 11025 of 2015 before this Court praying for grant of bail and the same was dismissed by this Court by passing a detailed order on 22.06.2015.

2. In the earlier order dated 22.06.2015, this Court has elaborately dealt with the facts leading to the registration of the case against the petitioner. Therefore, it is not necessary to deal with the facts of the case in detail. However, succinctly, the case of the prosecution can be stated as under for the purpose of this petition seeking bail.

3. On the basis of specific information received by the officials attached to the respondent/NCB, they proceeded to Central Railway Station, Chennai along with two independent witnesses. The tip-off received by the officials matched the description of one passenger (Javeed Basha-A-1) who alighted from Mumbai-Chennai Mail which reached platform No.3 of Chennai Central Railway Station. Upon alighting from the train, the said Javeed Basha-A-1 reached the waiting hall where he met the petitioner/A-2 and gave to him a black backpack bag. At that time, the officers approached and enquired them. While they were interrogated and when their personal belongings were checked, the officials have found three identical sized packets and all the three packets answered positive for the presence of Methamphetamine, a psychotropic substance covered under the The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called as The Act). After complying with the formalities and recording the voluntary statement of the accused on 21.02.2015, a case in R.R. No.48/1/3/2015-NCB/MDS for the offences punishable under Section 8 (c) read with Section 22 (c) and Sections 28 and 29 of The Act was registered. Upon registration of the case, both the accused were arrested and remanded to judicial custody on 21.02.2015.

4. Mr. Veeraraghavan, learned Senior counsel appearing for the petitioner/A-2 would vehemently contend that after dismissal of the earlier Petition filed by the petitioner in CrI.OP No. 11025 of 2015 for bail on 22.06.2015, the prosecution has filed the charge sheet and trial in the criminal case commenced. During the course of trial, the prosecution has examined three witnesses namely Mr. Sanjay Kumar Acharya (Seizing Officer) as PW1, Tmt. Mercy Stella (Assistant Chemical Examiner) as PW2 and Mr. C. Shanmugam, Investigation Officer as PW3. The learned Senior counsel for the petitioner invited my attention to the chief-examination of PW\2 wherein she has deposed that the sample sent for chemical analysis has been tested and it contains the presence of Methaphitamine Hydrochloride and therefore it is covered under the NDPS Act. In this context, the learned senior counsel for the petitioner drawn my attention to the Chemical Analysis Report wherein it is stated as under:-

"The sample marked as SI was analysed for the presence of Methamphetamine as per the procedure given in "Recommended methods for issuing Amphetamine and Methamphetamine" a manual for use by National Narcotics Laboratories published by United Nations and the test report is given below:-
Report : Lab No.755 dated 24.02.2015 (marked as 'SI')

The sample is in the form of white crystals. It answers the tests for the presence of Methamphetamine Hydrochloride and is covered under NDPS Act, 1985.

Wt. of the sample received along with the plastic pouch = 12.5 gms

Wt. of the sample returned along with plastic pouch = 8.6 gms

The test report is given under the hand of Govt. Scientific expert mentioned in Section 283 Cr.P.C. - 73 read with notification dt.17.07.1976 and 02.02.1977 issued by the Government of India, Ministry of Finance (Department of Revenue and Banking) published in the Govt. of India Gazzette part-1, Section 2 on 21.08.1976 and 02.03.1977 respectively"

5. By relying on the above chemical analysis report, the learned Senior counsel for the petitioner submits that what was seized from the accused is not a narcotic drug or a psychotropic substance as defined under the Act. In this context, the learned Senior counsel for the petitioner invited my attention to the definition given in the Act under Section 2 (xxiii) to the 'psychotropic substance'. As per Section 2 (xxiii), psychotropic substance means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic. Therefore, according to the learned senior counsel for the petitioner, unless the alleged psychotropic substance seized from the petitioner is covered in the List of psychotropic substances annexed along with Section 2 (xxiii) it shall not be construed that what was seized from the petitioner is a psychotropic substance. In this regard, the learned Senior counsel for the petitioner invited my attention to The Schedule for Section 2 (xxiii) of the Act containing the List of Psychotropic substance and referred to Serial 90 wherein Metamfetamine Racemate is mentioned. According to the learned Senior counsel for the petitioner, what was seized from the petitioner is Methamphetamine Hydrochloride even as per the Chemical Analysis report and it does not find place in the list mentioned above. Had it been a psychotropic substance, it ought to have been included in the scheduled list.

6. It is the further submission of the learned Senior counsel for the petitioner that the chemical analysis report relied on by PW2 does not contain the quantitative analysis and it speaks only about the qualitative content of the substance

sent for analysis. In the absence of quantitative analysis, it is not known as to what was the proportion or exact quantity of narcotic or psychotropic content contained in the substance which would lead to an inference that it was a psychotropic substance. In other words, it is not sure as to what is the quantity and exact percentage of psychotropic substance contained in the contraband allegedly seized from the petitioner. In the absence of quantitative analysis, the chemical analysis report cannot be relied on by the prosecution. In this regard, the learned Senior counsel for the petitioner drawn my attention to specification of quantity mentioned in columns 5 and 6 of the Table appended to Section 2 (xxiia) of the Act wherein the quantity contained in a substance has been given to conclude whether such quantity is referable to small or commercial quantity. By reading the note given below the table, the learned Senior counsel for the petitioner submitted that in the absence of indication of quantitative analysis in the chemical analysis report, it cannot be construed that what was allegedly seized from the petitioner is a psychotropic or narcotic substance. In the note below the Table relating to column Nos. 5 and 6, it is mentioned as follows:-

"(4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture of any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

7. By drawing my attention to the above note, the learned Senior counsel for the petitioner would contend that it could be inferred that only if quantitative analysis is made, it would reveal the percentage of neutral material which alone will be a determinative factor to conclude whether the substance is a narcotic or psychotropic substance covered under the Act. However, in this case, the chemical analysis report is silent in this aspect. In this connection, the learned Senior counsel for the petitioner relied on the decision of the Andhra Pradesh High Court in the case of (Shahid Khan vs. Director of Revenue Intelligence) reported in 2001 CrL.J. 3183 wherein it was held that unless the substance, which is seized, tallies with the Schedule given to the Act, it has to be called as a psychotropic substance and not otherwise, as this Act is very much technical. Further, PW19, Senior Scientific Officer, CFSL, Agra was examined by the prosecution as an Expert witness and in the cross-examination, the deposition given by him does not tally with the chemical composition given in the Schedule.

8. Relying on the decision of the Judgment of the Andhra Pradesh High Court mentioned supra, the learned Senior counsel for the petitioner would contend that what was seized from the petitioner is not a psychotropic substance and on that ground the petitioner is entitled for bail.

9. The learned Senior counsel for the petitioner also relied on the decision of the Honourable Supreme Court in the case of Tofan Singh vs. State of Tamil Nadu reported in (2013) 16 Supreme Court Cases 31 to contend that the decision of the Andhra Pradesh High Court mentioned above has also been referred to and discussed by the Honourable Supreme Court. Ultimately the Honourable Supreme Court, while referring the matter for consideration of a larger bench, granted bail to the petitioner therein.

10. The learned Senior counsel for the petitioner would contend that the petitioner has been arrested on 21.02.2015 and he is undergoing incarceration for more than a year. That apart, the learned Senior counsel for the petitioner submits the petitioner is arrayed as A-2 and he was not in possession of the alleged contraband at the time of his arrest. In this context, by referring to Section 37 of the Act, the learned Senior counsel for the petitioner submits that when it was not established by the prosecution that what was seized from the petitioner is not a banned contraband or prohibited substance covered under the Act, the bar under Section 37 of the Act cannot be pressed into service against the petitioner. There is no material record made available by the prosecution to satisfy this Court that there are reasonable grounds for believing that the petitioner is guilty of the offence complained of and that he is likely to commit any similar offence while on bail. Therefore, the learned Senior counsel for the petitioner prays for granting bail in favour of the petitioner.

11. Opposing the Petition for bail, Mr. N.P. Kumar, learned Special Public Prosecutor appearing for NDPS Cases would contend that even as admitted by the petitioner, trial in the criminal case has commenced in which three witnesses have been examined. While so, it is just and proper for the petitioner to await the conclusion of the trial and he ought not to have filed this petition seeking bail especially when his earlier petition for bail was dismissed by this Court. There is no change of circumstances pointed out by the petitioner for filing this second petition for bail. Furthermore, PW2, Assistant Chemical Examiner has been only examined in chief and the petitioner has not cross-examined her so far.

12. The learned Special Public Prosecutor invited my attention to the Table appended to Section 2 (xxiii) relating to Serial No.239 wherein it is stated that "Any mixture or

preparation that of with or without a neutral material, of any of the above drugs" meaning thereby any content or substance added to a mixture would form a psychotropic or narcotic substance. Further, Methamphetamine Hydrochloride is nothing but Methamphetamine mixed with salt and it comes under NDPS Act. Merely mixing the salt with main drug could not be said that it is not in the list and it does not come under the purview of the Act. In any event, the fact whether the mixture or content would be categorised as a narcotic or psychotropic substance can be tested only at the time of trial and at this stage, the same need not be gone into by this Court.

13. As regards the submission of the learned Senior counsel for the petitioner that the chemical analysis report does not reveal any quantitative assessment, the learned Special Public Prosecutor would contend that the contraband seized from the accused in this case is 3 kilograms and in such circumstances, it is not necessary to subject the entire quantity of contraband seized or to indicate the proportionate neutral content. In this regard, the learned Special Public Prosecutor placed reliance on the decision of the Division Bench of this Court in the case of (M. Veladurai and others vs. The Superintendent of Customs, Special Narcotic Cell, Nagercoil and another) reported in 2012 1 Law Weekly (Cr1) 70 wherein it was held that in case of a mixture or preparation with or without a neutral substance, the entire quantity of mixture/preparation shall be decisive as to whether the Narcotic Drug/Psychotropic substance is of a small quantity or if it is of commercial quantity. In view of the notification dated 18.11.2009 of the Central Government in respect of the offences committed on or before 18.11.2009, Purity test need not be conducted and that the ratio laid down in Michael Raj's case is not applicable to such cases. The ratio in Michael Raj's case is applicable only to the offence committed on or before 17.11.2009." Therefore, it is submitted by the learned Special Public Prosecutor that the quantitative analysis is not a governing factor for determination of the fact whether the substance seized is a psychotropic or narcotic substance. In any event, it is a matter for trial and at this stage, this Court need not go into the same.

14. The learned Special Public Prosecutor also relied on the decision of this Court in the case of (T. Senthil Kumar vs. The Superintendent of Customs, Prosecution Unit (AIR) reported in (2014) 1 MLJ (Cr1) 564. In that case, it was contended on behalf of the petitioner that at the time of seizure of the contraband, the investigation officer has tested the same by using the test kit and concluded that the seized contraband is a drug by name 'Ephedrine Hydrochloride' whereas in the chemical analysis report it came to light that the contraband seized is a drug by name 'Methamphetamine Hydrochloride'. In such circumstances, it was held that both are narcotic drugs and

possession of these two drugs itself is punishable under the Act. Relying on this decision, the learned Special Public Prosecutor contended that even assuming that if quantitative analysis is done and it revealed the percentage or proportionate content of the mixture, still possession of narcotic and psychotropic substance itself is an offence punishable under the Act.

15. The learned Special Public Prosecutor relied on the order passed by me in (Intelligence Officer, NCB vs. Selvi) reported in (2013) 2 MLJ (Cr1) 754 to contend that unless and until the contrary is proved, the presumption defined under Section 54 of the Act would be indicative of the fact that it is the accused who has committed the offence under the Act. Therefore, the learned Special Public Prosecutor would contend that it is too early to presume that the accused has not committed the offence contained in the Act and it is for them to disprove the case of the prosecution at the time of trial in the case by raising all probable defence. The learned Special Public Prosecutor therefore contends that when trial has commenced and witnesses have been examined, it is just and necessary that the petitioner has to face the trial and this petition for bail has to be dismissed.

16. I heard the learned Senior counsel appearing for the petitioner and the learned Special Public Prosecutor appearing for the respondent. I had gone through the material records.

17. The submission of the learned Senior counsel for the petitioner is three fold namely (i) the contraband allegedly seized from the petitioner viz., Methamphetamine Hydrochloride is not included in the schedule to Section 2 (xxiii) of the Act (ii) the chemical analysis report is silent about the quantitative assessment made with reference to the neutral material contained in the drug allegedly seized from the petitioner and (iii) the petitioner is arrayed as A-2, he was not in possession of the contraband at the time of seizure and that he is undergoing incarceration for a period of more than a year.

18. The main contention of the learned Senior counsel for the petitioner is that the list of psychotropic substances appended in the Schedule to Section 2 (xxiii) of the Act does not contain the name of the drug allegedly seized from the petitioner and what is indicated in serial No.90 thereof is only Metamphetamine Racemate and it is not indicated in the chemical analysis report in this case. In order to repudiate this submission, the learned Special Public Prosecutor has taken me to the table appended to Section 2 (xxiii) of the Act, in serial No.239 it is stated that "Any mixture or preparation that of with or without a neutral material, of any of the above drugs".

By relying on this note in Serial No.239, it is submitted that any content or substance added to a mixture would form a psychotropic or narcotic substance. The above submissions made by the learned Senior counsel for the petitioner and the learned Special Public Prosecutor are matters to be decided in the course of trial and in this petition, which is filed by the petitioner for bail, it has no significance. For granting or rejecting bail, this Court is required to arrive at a conclusion that there is no material made available by the prosecution to show that there are reasonable grounds exist for believing that the accused is guilty of such offence and that he is not likely to commit any offence while on bail. In this case, there are materials made available on record by the prosecution in the form of confession statement of the petitioner, recovery mahazar, chemical analysis report etc., but they are disputed by the petitioner. While so, it is for the trial court to decide the correctness or otherwise of the material evidence produced by the petitioner and it is not for this Court to consider those evidence for grant of bail.

19. The next submission of the learned Senior counsel for the petitioner is that in the chemical analysis report, there is no quantitative assessment with respect to proportionate content of neutral substance in the contraband seized from the petitioner. A fitting answer to this submission of the learned Senior counsel for the petitioner has been given by the Division Bench of this Court in the case of M. Veladurai and others vs. The Superintendent of Customs, Special Narcotic Cell, Nagercoil and another) reported in 2012 1 Law Weekly (Cr1) 70 wherein in par No.25, it was held as follows:-

"25. We are conscious of the fact that the Central Government has issued yet another notification dated 18.11.2009 wherein the Central Government has declared that in case of a mixture or preparation with or without a neutral substance, the entire quantity of mixture/preparation shall be decisive as to whether the Narcotic Drug/Psychotropic substance is a small quantity or commercial quantity. As held in Harjit Singh's case, cited supra, the said notification is only prospective in its operation. Therefore, in view of the said notification, in respect of the offences committed on or before 18.11.2009, purity test need not be conducted and that the ratio laid down in Michael Raj's case is not applicable to such cases. The ratio of Michael Raj's case is applicable only to the offences committed on or before 17.11.2009.

26. In the result, we answer the question, referred to us, as follows:-

(i) If the contraband seized is either a mixture or a preparation with or without a neutral material, of any Narcotic Drug or Psychotropic substance falling within the scope of entry No.239 of the notification dated 19.10.2001 issued in S.O.No.1055 (E) of the Central Government, it is absolutely necessary to conduct Purity Test to ascertain the exact quantity of the Narcotic Drug/Psychotropic Substance contained in the said mixture or preparation. In the absence of Purity Test, as indicated, the contraband seized shall be construed only as a small quantity and accordingly, the accused shall be liable for punishment.

(ii) In case of a contraband, which is neither a mixture nor a preparation falling within the sweep of entry No.239 and if the contraband is a Narcotic Drug/Psychotropic substance simplicitor, there is no need for Purity test and in such cases, the entire quantity of Narcotic Drug/Psychotropic substance shall be taken into consideration for deciding as to whether the same is a small quantity or a commercial quantity or an intermediate quantity for the purpose of conviction....."

20. In the light of the above conclusion arrived at by the Division Bench of this Court, the submissions of the learned Senior counsel for the petitioner relating to quantitative analysis has to be rejected.

21. The last limb of argument advanced by the learned Senior counsel for the petitioner is that the petitioner is arrayed as A-2 and he was not in possession of the alleged contraband at the time of seizure. Further, the petitioner is undergoing incarceration for more than a year and the prosecution has also filed charge sheet in this case. While so, there is no embargo for releasing the petitioner on bail. This submission of the learned Senior counsel for the petitioner cannot be accepted. First of all, long incarceration of the petitioner is not a ground for granting bail in his favour especially when there is a bar contained under Section 37 of the Act for granting bail. As mentioned above, there are material evidences made available in this case and they have to be tested only at the time of trial. Even as admitted by the petitioner in this case, trial in the criminal case has commenced and it is just and proper that the petitioner has to extend his cooperation for completion of the trial in this case.

22. As regards the decisions relied on by the learned Senior counsel for the petitioner, it is seen that in those cases, the accused was convicted and his conviction and sentence

was challenged by the accused. In those circumstances, the Andhra Pradesh High Court in the case of (Shahid Khan vs. Director of Revenue Intelligence) reported in 2001 CrI.L.J. 3183 held that unless the substance, which is seized, tallies with the Schedule given to the Act, it has to be called as a psychotropic substance and not otherwise, as this Act is very much technical. In this case, PW2, Assistant Chemical Examiner was only examined in chief and she has not been cross-examined by the petitioner. It is for the petitioner to bring forth a favourable answer from the mouth of the PW2 during the course of her chief-examination to disprove the offences complained against him. At any rate, when there are enough material evidences made available by the prosecution and the correctness or otherwise is being tested in the trial, this Court is of the view that Section 37 of the Act is a bar for the petitioner to seek the relief of bail. Accordingly, the Criminal Original Petition is dismissed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

- 1.The Intelligence Officer,
Narcotics Control Bureau
Chennai Zonal Unit
Chennai-600 090.
- 2.The Principal Subordinate Judge,
EC & NDPS Court, Chennai.
- 3.The Superintendent,
Central Prison-2,
Puzhal, Chennai.
- 4.The Public Prosecutor,
High Court, Madras.

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