

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NOS. 5
AND 6 OF 2017****CRIMINAL WRIT PETITION NO. 5/2017**

UNION OF INDIA, REP. BY MR. HARESH
S. GANGAN AND ANR., ... Petitioners

Versus

MR. OMKAR KESHAV PALYEKAR., ... Respondent

CRIMINAL WRIT PETITION NO. 6/2017

UNION OF INDIA, REP. BY MR. HARESH
S. GANGAN AND ANR., ... Petitioners

Versus

MR. RUNAL PALYEKAR., ... Respondent

Shri Joaquim Godinho, Special Public Prosecutor for the
Petitioners in both the petitions.

Shri Jos Peter D'Souza with Ms. Caroline Collasso, Advocates
for the Respondent in both the petitions.

CORAM:- C. V. BHADANG, J.

DATE:- 21st MARCH, 2017

ORAL ORDER:

Both these petitions arise out of the same Special
Case and involve common questions and they can be
conveniently disposed off by this common order.

2. The respondent, Runal Palyekar (WPCR No. 6/2017) is accused no. 1, while the respondent, Omkar Palyekar (WPCR No. 5/2017) is accused no. 2, before the learned Special Judge, facing prosecution for the offence punishable under Section 20(b)(ii)(C) and Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act, for short), for having found in possession of commercial quantity of charas, totally weighing 1.086 kgs. The commercial quantity in relation to charas is 1 kg. and above.

3. It appears that on behalf of the prosecution, one Nilima Mishal, a Senior Scientist Officer (Drugs) was examined as PW-1.

4. According to the prosecution, the contraband substance was contained in nine bags and each of the bags contained separate pieces. The substance from bag no. 9 tested negative for charas. The weight of the said bag was 11.4 grams. Insofar as bag no. 4 is concerned, the net content of the bag weighed 69.8 grams. It is evident from the evidence of PW-1 that there were 32 pieces inside bag no. 4 and PW-1 had taken 4 grams of substance from the 32 pieces for the purpose of analysis, which tested positive for charas.

During the cross examination of PW-1, a specific question was put as to from which of the 32 pieces, she had taken the sample for analysis, when the witness could not identify the said piece. On the basis of the cross examination of PW-1, the respondent sought their release on bail.

5. The learned Special Judge has found that the weight of the contraband from bag no. 4 can be said to be only 4 grams and the balance 64 grams was not contraband substance charas. If this is considered alongwith 11.4 grams from bag no. 9 (which tested negative), the total substance which cannot be said to have been charas would be 75.4 grams and if, the said amount is deducted, the quantity which is allegedly recovered from the respondent would come to 981 grams, which is lesser than the commercial quantity. This is primarily, the reason for the learned Special Judge to hold that the rigour of Section 37 of the NDPS Act, would not be applicable in this case.

6. I have heard Shri Godinho, the learned Special Public Prosecutor for the petitioners and Shri D'Souza, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the evidence of PW-1 and the impugned order passed.

7. It is submitted by Shri Godinho, the learned Special Public Prosecutor that rigour of Section 37 of the NDPS Act would apply in this case. It is submitted that unless and until the learned Special Judge is satisfied with the compliance of Section 37 of the NDPS Act, bail could not have been granted. The learned Counsel has specifically referred to Section 37(1) (b)(ii) of the NDPS Act, in order to submit that the Court has to be satisfied that there are reasonable grounds for believing that the accused is not guilty of 'such offence' and he is not likely to commit such offence while on bail. It is submitted that in the absence of the said satisfaction, bail could not have been granted.

Strong reliance is placed on the decision of the Hon'ble Supreme Court in the case of **State of M.P. Vs. Kajad, (2001) 7 SCC 673; Ratan Kumar Vishwas Vs. State of Uttar Pradesh & Another, (2009) 1 SCC 482; Union of India Vs. Rattan Mallik, (2009) 2 SCC 624** and **Narcotics Control Bureau Vs. Dilip Pralhad Namade, (2004) 3 SCC 619** and a decision of this Court in the case of **Mr. Floyd Lopes Vs. Union of India, 2007 ALL MR(Cri) 177**.

It is submitted that the impugned orders in such circumstances, need to be set aside.

8. On the contrary, the learned Counsel for the respondent submitted that the rigour of Section 37 of the NDPS Act would apply only where, the quantity of contraband recovered is a commercial quantity in relation to the particular substance. It is submitted that nothing prevented the learned Special Judge, from considering *prima facie*, on the basis of the evidence of PW-1 that the quantity in the present case would be lesser than the commercial quantity and as such, the learned Special Judge has rightly come to the conclusion that the rigour of Section 37 of the NDPS Act, would not be applicable.

9. It is submitted by the learned Counsel for the respondent that the application, which is filed under Section 439 read with Section 482 of Cr.P.C., would not be maintainable. It is submitted that under Section 439(2), a bail can be cancelled only if, the prosecution claims and demonstrates that the accused has misused the bail, which is not the case herein.

10. I have carefully considered the rival circumstances and the submissions made and I do not find that any case for interference is made out.

11. At the outset, it is necessary to mention that for cancellation of bail under Section 439(2) of Cr.P.C., the conduct of the accused subsequent to the release on bail and the supervening circumstances are alone relevant (see the case of **State, through C.B.I. Vs. Amarmani Tripathi, AIR 2005 SC 3490**). In other words, the prosecution has to show that there are circumstances indicating that the accused has misused the bail, which is not the case made out in these petitions.

Insofar as the challenge based on Section 482 of Cr.P.C. is concerned, it has to be shown that intervention of this Court is necessary to prevent abuse of the process of the Court or otherwise to secure the ends of justice. It is well settled that the jurisdiction under Section 482 of Cr.P.C. has to be exercised sparingly and with caution and only when such exercise is justified (see the case of **Monica Kumar Vs. State of Uttar Pradesh, (2008) 8 SCC 781**). Normally, this Court would be slow in interfering with the discretion exercised by the Courts below, while granting bail, unless and until the exercise of discretion is found to be tainted with perversity.

12. Coming back to the present case, it is apparent that at this stage, the rigours of Section 37 of the NDPS Act, would apply only if, it is shown that the contraband, allegedly

recovered from the accused, confirms to commercial quantity and not otherwise. Undisputedly, the commercial quantity in relation to charas is 1 kg. and above. The prosecution came with a case that the amount of quantity which is recovered is 1.086 grams. Nothing prevented the learned Special Judge from considering the application for grant of bail on a *prima facie* consideration of the evidence of PW-1. It is clear from the evidence of PW-1 that the substance recovered from bag no. 9 tested negative, while out of 32 pieces from bag no. 4, PW-1 was unable to state as to from which of the pieces the samples were taken for analysis. It can thus be seen that *prima facie*, at this stage, it is difficult to hold that all the 32 pieces from bag no. 4 were that of the contraband substance charas. After considering this aspect, the quantity which is said to be recovered would be less than the commercial quantity.

13. There cannot be any manner of dispute with the proposition that wherever Section 37 of the NDPS Act applies, negation of bail is a rule and its grant an exception. For granting of bail, the Court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not

likely to commit any offence while on bail (see the case of **Kajad** (supra)).

In the case of **Dilip Pralhad Namade** (supra), the Hon'ble Apex Court has held that 'reasonable grounds' mean something more than *prima facie* grounds and it contemplates substantial probable cause for believing that the accused is not guilty of the alleged offence and he is not likely to commit any offence while on bail.

14. The case of **Ratan Kumar Vishwas** (supra) involved the issue of suspension of sentence and grant of bail. Thus in that case, there was a conviction, which was subject matter of challenge before the High Court. The High Court concluded that the parameters of Section 37 of the NDPS Act were not fulfilled and thus, granted an order for suspension of sentence, which was not interfered with.

15. In the case of **Rattan Mallik** (supra), the accused was charged with financing and trading in 14.900 kilograms of heroin and was sentenced to 10 years rigorous imprisonment and a fine of Rs.1 Lakh. The High Court allowed the bail application saying that nothing was found from the possession of the accused and the accused had been in jail since 3 years

and there was no chance of the appeal being heard within 7 years period. The Supreme Court held that these were not the grounds to satisfy the mandatory requirements of Section 37(1) (b) of the NDPS Act and the matter was remitted back to the High Court.

16. It can thus be seen that the decisions cited by the learned Special Public Prosecutor turned on their own facts. It is evident that the question, whether the quantity recovered from the accused is a commercial quantity or not and whether, the rigours of Section 37 of the NDPS would apply, would depend upon facts and circumstances of each case. As noticed earlier, the learned Special Judge has *prima facie* come to the conclusion, on the basis of the evidence of PW-1, that the quantity which is said to be recovered, falls short of the commercial quantity. If that be so, in my considered view, no exception can be taken to the impugned order and I do not find that it suffers from any infirmity, so as to require interference.

In the result, the petitions are dismissed. Needless to mention that the observations made herein are of *prima facie* nature and the learned Special Judge shall not be influenced by the same, at the trial.

C. V. BHADANG, J.