

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL PETITION No.8532 of 2017

ORDER:

The criminal petition is filed under Section 438 of Cr.P.C., by the petitioner-accused No.6 to grant pre arrest bail in Crime No.126 of 2017 on the file of the Station House Officer, Patamata Police Station, Vijayawada City, for the offence under Section 8(c) read with Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act (the NDPS Act).

2. The case of the prosecution is that on 23.2.2017, accused Nos.1 to 4 loaded Ganja in two lorries bearing Nos.AP 16 TB 4878 and AP 03 TD 9402 at Paderu Forest Area in order to transport the same to Tirupathi. When the two lorries reached Patamata, Vijayawada, the Inspector of Police, Patamata Circle, intercepted the said lorries and found Ganja. Immediately he secured the presence of the Tahsildar-cum-Executive Magistrate, Vijayawada Rural Mandal, and seized Ganja weighing 2,686.900 Kgs. The Inspector of Police drew the samples by following the procedure as contemplated under the NDPS Act. After completion of necessary formalities, the Inspector of Police registered the above case and produced accused Nos.1 to 4 before the concerned Court for judicial custody. The further case of the prosecution is that during the course of interrogation by the Inspector of Police, accused No.1 confessed that the petitioner provided escort with a reporter for safe transportation of Ganja in the lorries from Paderu go Tirupathi. He also confessed that the petitioner had taken Rs.4,50,000/- from them for providing escort to the Ganja lorries.

3. The learned counsel for the petitioner submitted that there is no material much less legally admissible material to connect the petitioner with the offence, except the confession of accused Nos.1 to 4, which is not at all admissible. He further submitted that the petitioner worked as Prohibition and Excise Inspector, Paderu and registered number of NDPS cases against several persons; therefore, the petitioner was falsely implicated in this case. *Per contra*, learned Additional Public Prosecutor representing the State submitted that the petitioner, by accepting an amount of Rs.4,50,000/- provided escort to the lorries for safe transportation of the Ganja. He further submitted that the petitioner being a Police Officer ought not to have helped the other accused to transport the Ganja. He further submitted that the petitioner is not entitled for pre arrest bail in view of Section 37 of the NDPS Act.

4. To substantiate the argument, learned counsel for the petitioner has drawn the attention of this Court to the following cases:

(i) **Chepuri Nageswara Rao v SHO, Rollugunta P.S., Visakhapatnam**¹ wherein this Court held at paragraph Nos.11 and 12 as follows:

11. It is settled principle of law that an application for pre-arrest bail could be considered without detailed description of evidence and elaborate documentation of merits was to be avoided. Thus, no party had impression that his case was prejudged. Existence of *prima facie* case alone shall be considered rather than elaborate analysis or exhaustive exploration of merits. Hence, question of grant of bail in offences of serious nature could be decided keeping in view the nature and seriousness of such offence, character of evidence and larger public interest.

12. Courts shall exercise their power judiciously and reliefs granted by them shall be logical and tenable within framework of law, as held by the Apex Court in *Vaman Naraiah Ghiya v State of Rajasthan*, AIR 2009 SC 1362.

¹ 2014 (2) ALT (CrI.) 256 (A.P.)

(ii) **Kishan Singh v State of Rajasthan**² wherein Rajasthan

High Court held at paragraph No.4 as follows:

“... the confessional statement u/S.67 of the (Evidence) Act can be admissible in evidence only as against the person, who has made such confession but the same cannot be made the sole basis even for framing charge against other accused person in absence of any independent affirmative evidence.”

5. Let me consider the facts of the case on hand in the light of the above legal principles. The petitioner worked as Prohibition and Excise Inspector, Paderu, from October, 2015 to December, 2016. During that period, he registered some cases under the NDPS Act. Basing on the confession made by one of the accused in Crime No.185 of 2016, on 20.10.2016, the petitioner was transferred from Paderu to Visakhapatnam vide proceedings dated 17.12.2016. In the said confession, it was mentioned that the petitioner had taken an amount of Rs.30,000/- in order to manage the Forest officials not to book case under the NDPS Act. Thus, the record *prima facie* reveals that prior to registration of this case, there was allegation against the petitioner as to his helping hand to the persons involved in the cases under the NDPS Act. The petitioner himself mentioned about the said allegations in paragraph No.4 of the petition.

6. The learned Additional Public Prosecutor submitted that the petitioner filed a Criminal Petition under Section 482 of Cr.P.C., to quash the proceedings against him in this crime and the same is pending before this Court. He further submitted that the petitioner also filed Criminal Petition No.1997 of 2017 under Section 438 of Cr.P.C., to grant pre arrest bail in the present case and the same was dismissed as withdrawn on 15.3.2017. As rightly pointed out

² LAWS (RAJ)-1995-1-58

by the learned counsel for the petitioner, mere filing of criminal petition under Section 482 Cr.P.C., will not debar the petitioner to file a petition under Section 438 of Cr.P.C.

7. This Court carefully perused the petition filed by the petitioner. As rightly pointed out by the learned Additional Public Prosecutor, the petitioner did not disclose about the pendency of quash petition and withdrawal of CrI.P.No.1997 of 2017 filed by him under Section 438 of Cr.P.C. However, the petitioner, in the petition, disclosed about filing of CrI.M.P.No.482 of 2017 on the file of the Sessions Court at Vijayawada, under Section 438 of Cr.P.C., and dismissal of the same on 20.4.2017. However, this Court is inclined to decide the present criminal petition on merits.

8. The contention of learned counsel for the petitioner is two fold: (1) the petitioner was falsely implicated in this case; and (2) while deciding bail petitions, the Court has to exclude the confession of a co-accused.

9. It is not in dispute that the petitioner worked as Prohibition and Excise Inspector, Paderu from October, 2015 to December, 2016. During that period, one of the accused in Crime No.185 of 2016 made an allegation that the petitioner received money from the persons, who are indulged in illegal transportation of Ganja assuring that he would manage the Forest officials. In the instant case, accused Nos.1 to 4 loaded Ganja in the two lorries in Paderu Forest area to take the same to Tirupathi and reached Vijayawada, without any hindrance. It is a matter of common knowledge that no one can transport such a huge quantity of Ganja on the National High-way from Paderu to Vijayawada without checking.

This itself indicates that there may be some influential persons behind illegal transportation of Ganja. During the course of interrogation in the present case, accused No.1 confessed that the petitioner provided necessary protection for safe transportation of Ganja in the lorries from Paderu to Tirupathi by taking Rs.4,50,000/-. It is not the case of the petitioner that from October, 2015 to December, 2016, he registered case under the NDPS Act against any one of accused Nos.1 to 4 or anybody connected to them, and bearing the same in mind, they falsely implicated the petitioner in this case. When there is no animosity between the petitioner and accused Nos.1 to 4, what made them to rope the petitioner in this case? This Court is not supposed to express any opinion on this aspect at this point of time.

10. As per the principle enunciated in the case 1st cited supra, the Court has to consider seriousness of the offence alleged to have been committed by the petitioner, while considering the bail applications. In the case 2nd cited supra, framing of the charge against accused by the trial court was challenged under Section 482 of Cr.P.C. Framing of charges cannot be equated with deciding of the bail applications more particularly anticipatory bail applications. While deciding the bail applications, the Court has to consider whether there is any *prima facie* material against the petitioner or not as well as the stage of investigation. If the Court satisfies that there is no *prima facie* case against the petitioner, the Court can grant relief of pre arrest bail to the petitioner. On the other hand, if the material disclose *prima facie* case, then the petitioner is not entitled for pre arrest bail. Prior to this incident, the petitioner was transferred from Paderu to Visakhapatnam

basing on certain allegations made against him by one of the accused in Crime No.185 of 2016 registered under the NDPS Act.

11. The next question that falls for consideration is whether the Court can consider the confession of co-accused at the time of granting pre arrest bail or not. In order to resolve the issue, this Court is placing reliance on the judgment in **State of U.P. v Amarmani Tripathi**³, wherein the Hon'ble apex Court held at paragraph Nos.18 and 22 as follows:

18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see **Prahlad Singh Bhati v. NCT, Delhi**, (2001) 4 SCC 280, and **Gurcharan Singh v. State (Delhi Admn.)**, (1978) 1 SCC 118]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in **Kalyan Chandra Sarkar v. Rajesh Ranjan**, (2004) 7 SCC 528: (SCC pp. 535-36, para 11)

“11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See **Ram Govind Upadhyay v. Sudarshan Singh**, (2002) 3 SCC 598 and **Puran v. Rambilas**, (2001) 6 SCC 338.)”

³ (2005) 8 SCC 21

22. While a detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no prejudging and no prejudice, a brief examination to be satisfied about the existence or otherwise of a *prima facie* case is necessary. An examination of the material in this case, set out above, keeping in view the aforesaid principles, disclose *prima facie*, the existence of a conspiracy to which Amarmani and Madhumani were parties. The contentions of the respondents that the confessional statement of Rohit Chaturvedi is inadmissible in evidence and that that should be excluded from consideration, for the purpose of bail is untenable. This Court had negated a somewhat similar contention in ***Kalyan Chandra Sarkar*** thus: (SCC p. 538, para 19)

“19. The next argument of learned counsel for the respondent is that *prima facie* the prosecution has failed to produce any material to implicate the respondent in the crime of conspiracy. In this regard he submitted that most of the witnesses have already turned hostile. The only other evidence available to the prosecution to connect the respondent with the crime is an alleged confession of the co-accused which according to the learned counsel was inadmissible in evidence. Therefore, he contends that the High Court was justified in granting bail since the prosecution has failed to establish even a *prima facie* case against the respondent. From the High Court order we do not find this as a ground for granting bail. Be that as it may, we think that this argument is too premature for us to accept. The admissibility or otherwise of the confessional statement and the effect of the evidence already adduced by the prosecution and the merit of the evidence that may be adduced hereinafter including that of the witnesses sought to be recalled are all matters to be considered at the stage of the trial.”

As per the principle enunciated therein, admissibility, legality or otherwise of the confession of co-accused has to be considered at the time of trial only but, the Court can take note of its contents, while deciding the bail applications. In view of the said principle, the judgments relied upon by the learned counsel for the petitioner are no way helpful to the petitioner. A perusal of the record *prima facie* reveals the role played by the petitioner in the commission of the offence.

12. The contention of learned Additional Public Prosecutor is that the petitioner is not entitled for pre arrest bail in view of Section 37 of the NDPS Act.

(i) In **State of M.P. v. Kajad**⁴, the Hon'ble apex Court held at paragraph No.5 as follows:

5. ... The purpose for which the Act was enacted and the menace of drug trafficking which it intends to curtail is evident from its scheme. A perusal of Section 37 of the Act leaves no doubt in the mind of the court that a person accused of an offence, punishable for a term of imprisonment of five years or more, shall generally be not released on bail. Negation of bail is the rule and its grant an exception under sub-clause (ii) of clause (b) of Section 37(1). For granting the 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. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for.

(ii) In **Collector of Customs v. Ahmadalieva Nodira**⁵, the Hon'ble apex Court at paragraph No.7 as follows:

7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. ...

(iii) The Hon'ble apex Court reiterated the same principle in **Union of India v Sanjeev V. Deshpande**⁶.

13. As per the principle enunciated in the cases cited supra, the court can grant bail to the persons involved in the cases under the NDPS Act, if it satisfies that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and even if the accused is released on bail, he will not involve in similar

⁴ (2001) 7 SCC 673

⁵ (2004) 3 SCC 549

⁶ (2014) 13 SCC 1

type of offences. In the instant case, Ganja seized is weighing 2,686.900 Kgs, which is a commercial quantity. A perusal of the record reveals that the petitioner was transferred from Paderu to Visakhapatnam on the ground of his alleged involvement in commission of the offence under the NDPS Act. The record *prima facie* reveals the role played by the petitioner in the commission of the offence.

14. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases 3 to 6 cited supra, I am of the considered view that it is not a fit case to grant pre arrest bail to the petitioner.

15. Accordingly, the criminal petition is dismissed.

12.10.2017

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T.SUNIL CHOWDARY, J

