THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.2901 OF 2018

ORDER:

This petition is filed under Sections 437 and 439 of Code of Criminal Procedure (for short "Cr.P.C.") to enlarge the petitioner/accused No.3 on bail in S.C.No.57 of 2017 in F.No.DRI/HZU/48D/ENQ-15 (INT-31)/2016 of DRI, Hyderabad Zonal Unit pending on the file of I Additional District and Sessions Judge – cum – Special Judge, Medak at Sanga Reddy District, registered for the offence punishable under Sections 22, 28 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "N.D.P.S.Act").

The petitioner is in judicial custody since 13.02.2017.

The case of the prosecution, in brief, is that on 21.12.2016 on receipt of specific intelligence, the Investigating Agency conducted raid on the premises of M/s. Venkata Raghava Labs Pvt. Limited at Anantharam Village, Medak District, along with witnesses. On search of the premises the Investigating Agency alleged to have found 132 kgs of Alprazolam packed in six black coloured polythene bags. The officers of D.R.I. seized the material under the cover of a panchanama and issued notice under Section 67 of the N.D.P.S.Act to accused No.1 directing him to appear before the Officers. On recording the statement of accused No.1, the Investigating Agency issued summons under Section 67 of the N.D.P.S. Act to accused No.2. On recording the statements, the Investigating Agency arrested them. On the strength of the statements of accused Nos.1 and 2, the Investigating Agency recorded the statement of petitioner herein, arrested him and remanded him to judicial custody on 13.02.2017.

The main contention of the petitioner is that the search and seizure is not strictly in accordance with Section 41 (2) and Section 42 of the N.D.P.S. Act. When the search and seizure of contraband are illegal, the same cannot be the basis for conviction of the accused.

When the search and seizure are illegal, the Court can record that there is reasonable ground to conclude that the petitioner is not guilty of any offence and that he will not commit any offence while on bail, as required under Section 37 (1) (b) of N.D.P.S.Act, on this ground alone the petitioner is entitled to be enlarged on bail.

The petitioner is not in possession of any contraband even by the date of detection of crime as the petitioner was in judicial custody at Visakhapatnam in a case in which the petitioner was implicated and on release from judicial custody on 21.12.2016, the officers of D.R.I. arrested the petitioner and produced him in the present case without resorting to the established legal procedure. Therefore, *prima facie* there is no material to enrope the petitioner with the offence punishable under Sections 22, 28 and 29 of N.D.P.S.Act.

On 13.02.2017 the officers of D.R.I recorded the statement of petitioner under coercion and threat and made the petitioner to accept the dictation of the officers and made the petitioner to sign on computer printouts. On the basis of such statement, the petitioner is enroped with the offence punishable under Section 22, 28 and 29 of N.D.P.S.Act. When the statement is not voluntary, the same cannot be considered. If the statement of the petitioner is excluded, absolutely there is no evidence *prima facie* to conclude that the petitioner committed the alleged offence. In view of the apparent illegalities in the search and seizure and based on retracted confession, the result after the trial will be acquittal and the petitioner cannot be compelled to undergo imprisonment, in such case the petitioner is liable to be enlarged on bail.

Finally, it is contended that the entire investigation is completed and other two accused are already enlarged on bail, therefore, the petitioner is also liable to be enlarged on bail.

The respondent filed counter alleging that a *prima facie* case has been made out against the petitioner herein in terms of the provisions of the N.D.P.S.Act, 1985 and that he is a habitual offender. The statement given by the petitioner before the Senior Intelligence Officer under Section 67 of the N.D.P.S.Act is admissible in evidence. The petitioner, in his statement, admitted his role in the illicit manufacture and dealing of Alprazolam. He was part of the criminal conspiracy and was the prime person to set up the deal in establishing the manufacturing facility to manufacture Alprazolam clandestinely. The same is corroborated by the main accused i.e. accused No.1. It is settled law that the statement of the co-accused can be used as evidence. The involvement of the petitioner herein in illicit dealing of Alprazolam is established beyond doubt. The petitioner herein was arrested by the officers of D.R.I, Regional Unit, Visakhapatnam in the case of illicit dealing of Alprazolam under the provisions of N.D.P.S.Act, 1985. The petitioner has a history of illicit dealing in Alprazolam and prayed to dismiss the petition.

Sri D.Suryanarayana, learned counsel for the petitioner, mainly contended that when search and seizure is illegal and invalid, the Court can record that there is reasonable ground to conclude that the petitioner is not guilty of such offence, and placed reliance on the judgment of Supreme Court rendered in "***Roy V.D. v State of Kerala***[1]", on the strength of the principle laid down in the said judgment, it is contended that when the seizure and search is illegal, the result after trial will be acquittal, thereby the petitioner is entitled to be enlarged on bail.

He also further contended that the statement recorded under Section 67 of N.D.P.S.Act. itself can not from the basis for conviction for the grave offence, unless the statement recorded under Section 67 of N.D.P.S.Act is corroborated by any other evidence and in support of his contention he placed reliance on the judgment of Apex Court rendered in "***Union of India v. Bal Mukund***[2]".

Finally, learned counsel for the petitioner contended that when the case of the prosecution is based on confessional statement of co-accused, it is difficult to convict such person other than the person who gave confessional statement, since it is not substantive piece of evidence and placed reliance on the judgment of Apex Court rendered in "***Haricharan Kurmi v. State of Bihar***[3]" and contended that if the statement recorded under Section 67 of the N.D.P.S.Act and the confessional statement of accused under Section 67 of N.D.P.S.Act would not form the basis for recording conviction as the material collected under Section 67

---

[1] AIR 2001 SC 137
[2] (2009) 12 SCC 161
[3] AIR 1964 SC 1184

of the N.D.P.S.Act is not a substantive piece of evidence, it is only for the limited purpose of investigation and prayed to enlarge the petitioner on bail.

Sri Anil P Tiwari, learned Special Public Prosecutor, contended that the petitioner is Post Graduate in M.Sc., Bio-Chemistry and he is the person, who entered into agreement with the laboratory and took permission to manufacture Dotheipin medicine, but in the guise of production or manufacturing of Dotheipin medicine, the petitioner along with other accused started manufacturing of Alprazolam. Therefore, the petitioner is the king-pin and the prime accused in the offence, who arranged everything for production of Alprazolam, which is a Psychotropic substance prohibited under the provisions of Act. He also contended that the statements recorded under Section 67 of the N.D.P.S.Act is also a evidence to substantiate the contention of the prosecution and the same can be relied upon in view of the law laid down by the Apex Court in "***Francis Stanly @ Stalin v. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram***[4]" and that the petitioner is already in jail by the date of alleged offence in connection with the other crime i.e. similar offence, thus, the petitioner is having criminal background indulging in production of Psychotropic substance, which is prohibited under law and if for any reason, he is enlarged on bail, there is every chance of repeating identical offence and he cannot be enlarged on bail at this stage. Finally, it is contended that the Sessions Court framed charges and the petitioner pleaded not guilty and claimed to be tried, and the Sessions Case is posted

---

[4] (2006) 13 SCC 210

to 20.04.2018 for fixing trial schedule and requested this Court to issue a direction to Sessions Judge to complete the trial as expeditiously as possible. In case the petitioner is enlarged on bail, it is difficult to proceed with the trial by the Sessions Court as there is every possibility of committing similar offence and prayed to dismiss the petition.

Considering rival contentions and perusing the material on record, the point that arises for consideration is:

> "***Whether non-compliance of Section 41(2) and Section 42 of NDPS Act is a ground to conclude that there is reasonable ground that this petitioner did commit no offence under the provisions of the Act to record satisfaction under Section 37(1)(b) of the Act. If so, whether the petitioner is liable to be enlarged on bail under Section 437 & 439 Cr.P.C?***

P O I N T:

Section 41 of NDPS Act deals with Power to issue warrant and authorization. Section 41(2) permits any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including the paramilitary forces or the armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under this Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy or a constable to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest such person or search a building, conveyance or place. Thus, a Gazetted Officer of the rank referred above who is superior in rank of peon, sepoy or constable is authorized by the State or Central Government may search, seize and arrest on receipt of any information regarding commission of offence under the Act. Thus, clause 19 seeks to substitute sections 41 to 43 of the principal Act to extend powers of the Central Government and State Governments to authorize subordinate officers for search, seizure, etc., and to simplify the procedure for seizure, detention and search of persons. On strict construction of Sub-section (2) of Section 41, any Gazetted Officer of the department referred therein, who is authorized by the State Government is empowered in this behalf by general or special order by the Central Government, upon his personal knowledge or on information given by any person and taken in writing, conduct search, seizure etc. Here, the contention of the learned counsel for the petitioners in all the criminal petitions is that the DRI Officer did not take the information they received in writing. But, question of taking the information in writing would arise only when the Gazetted Officer is in the station or in the office concerned, from any third party either by telephone or personally and make necessary entry in the General Diary. Thus, safeguard is provided only to avoid unnecessary implication of various persons as accused for the serious offences punishable under the provisions of NDPS Act. It is only a check on the power of the police to ensure free and fair search, seizure and arrest under the provisions of the Act, in view of the heavy penalities prescribed for the offences punishable under this Act.

Therefore, any person who is authorized under Section 41(2) of the N.D.P.S. Act alone is competent to enter and conduct search, seize and arrest the suspected person who committed an offence in contravention of the provisions of NDPS Act, without warrant or authorization.

Similarly, Section 42(2) of N.D.P.S.Act deals with power of entry, search, seizure and arrest without warrant or authorization. Section 42(2) is in the nature of exception to Section 41 and Section 42(2) mandates that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior. Section 42(1) permits any officer who is superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including paramilitary forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe or from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of NDPS Act is kept or concealed in any building, conveyance or enclosed place may between sunrise and sunset,

a) enter into and search any such building, conveyance or place;

b) in case of resistance, break open any door and remove any obstacle to such entry;

c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

But, proviso to Subsection (1) of Section 42 thereon spelt out that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. Thus, provisio to Section 41 enables the officer referred in Section 41(1) to conduct search, seizure and arrest on his belief. The requirement of compliance under Section 42 is also in the nature of a safeguard to avoid concealment of evidence or facilitating for escape of the offender, who committed an offence under the provisions of the Act and at the same time, it is a check against the power of police officials to conduct such search only to avoid false implications of any person in the serious crimes.

As narrated in the earlier paragraphs and from the contents of charge sheet filed before the Court, it is clear that on receipt of information received by M.Satyanarayana Rao, Senior Intelligence Officer, DRI, Hyderabad, he reported the gist of information to the Superior Official A.Dhileeban, Deputy Director, DRI, Hyderabad vide note dated 21.12.2016 in compliance with Section 42 of the Act. The Deputy Director, DRI, Hyderabad on receipt of gist of information on 21.12.2016 endorsed the same and gave instructions to T.Padmaja, Intelligence Officer, DRI, Hyderabad to take necessary action. On 21.12.2016 she acknowledged receipt of the intelligence note and approached A.Rangadham, Senior Intelligence Officer, DRI, Hyderabad and explained about the intelligence. A search authorisation dated 21.12.2016 was issued by Senior Intelligence Officer authorising T.Padmaja to search the premises of M/s.Venkata Raghava Labs Pvt. Ltd. Sy.No.172, Kanukunta Road, Anantharam Village, Jinnaram Mandal, Medak District. Accordingly, on 22.12.2016 the said T.Padmaja along with team of offices and two independent witnesses K.Srinivasa Rao and A.Pandu Ranga proceeded to the premises of M/s. Venkata Raghava Labs Pvt. Ltd., Sy.No.172, Kanukunta Raod, Anantharam Village, Jinnaram Mandalam, Medak to cause necessary search and found one person by name B.Hanumanth Reddy, accused No.1 in the factory premises. During the search in the presence of two independent mediators, accused No.1 informed that he has entered into an agreement with Sri K.Sri Ram, General Manager of M/s. Venkata Raghava Labs Pvt. Ltd. to manufacture a drug by name "Dothiepin" in the factory premises and noticed that the said accused No.1 was perturbed, thereafter on interrogation he admitted about the manufacturing of 'Alprazolam' and 'Alprazolam' is available in the Drier available in a room adjacent to the production Block. Accused No.1 further informed that the material being dried inside the drying machine is 'Alprazolam'. When the Officers proceeded to the Drier available in the room adjacent to the Production Block along with accused No.1, they found Drier which was marked as TDR-003 consisting 48 trays inside and informed the officers that 'Alprazolam' is being dried in the drier TDR-003. The officers then turned off the drier in the presence of accused No.1 and opened the door of the Drier and found 48 trays inside the drying machine and in each of the trays, the officers found certain material which was slightly brownish in colour and was in the form of lumps/flakes. The officers then questioned accused No.1, whether he was having any permission/authorisation from the authorities concerned to manufacture Alprazolam, for which accused No.1 replied that he does not have any permission from any Government authorities concerned and that he was manufacturing Alprazolam illicitly by informing the Management of M/s.VRL Private Limited that he was manufacturing a product by name Dothiepin. Thereafter, investigating officer issued notice under Section 67 of N.D.P.S.Act to the accused. The accused disclosed the details as to how they entered into the agreement for production of drug with the M.D. of M/s. VRL Private Limited and the petitioner is the person, who made the arrangement and abetted accused Nos.1 and 2 to manufacture 'Alprazolam', which is a prohibited drug. Later, after following necessary procedure seized the entire contraband under the cover of panchanama in the presence of mediators and lifted samples and sealed them with labels containing the signatures of mediators and the officers including accused No.1.

The petitioner was in jail as under trial prisoner on the date of search and seizure. Immediately after his release from the jail, he was arrested by DRI officials, later recorded his statement in terms of Section 67 of N.D.P.S.Act, wherein he allegedly made a confession about the role played by him in the process of manufacturing of Alprazolam. Thus, the petitioner is the prime accused, who made every arrangement for production of

Alprazolam and on the strength of information collected under Section 67 of the N.D.P.S.Act, the petitioner is also arrayed as accused and it is the basis for prosecution.

The main contention urged by the learned counsel for the petitioner is that the search and seizure is not in accordance with Section 41 (2) and Section 42 of the N.D.P.S.Act. It is contended that Section 41 (2) of the N.D.P.S.Act is not complied with and the person, who conducted search and seizure has no authorisation to conduct search and seizure. Therefore, the seizure itself is illegal and in such case, he is liable to be acquitted even at the end of trial. In the circumstances, the petitioner cannot be allowed to languish in jail till completion of entire trial as it is infringement of fundamental right guaranteed under the Constitution of India.

The basis for such argument is the principle laid down in "***Roy V.D. v. State of Kerala***" (referred above). In the said judgment, the Apex Court while deciding the application filed under Section 482 of Cr.P.C. held that where search and seizure are illegal and vitiates the trial, power under Section 482 of Cr.P.C. should be exercised. In the facts of the above judgment, there was non-compliance of Section 42 (2) of the N.D.P.S.Act, therefore, the Apex Court quashed the proceedings. But in the facts of the present case, as per the allegations made in the charge sheet, Section 42 of N.D.P.S. Act strictly adhered to and whether the Section 41 (2) of N.D.P.S.Act is complied with or not is a question to be decided during the trial.

In "***Karnail Singh v. State of Haryana***[5]" the Constitutional Bench of Supreme Court considered the scope of Sections 41(2) & 42(2) and specifically held that, Legislature has made some of its provision obligatory for the prosecution to comply with, which the Courts have interpreted to be mandatory. This is an order to balance stringency for an accused by casting an obligation on prosecution for its strict compliance, balance must be struck between need of law and enforcement of such law on one hand and protection of citizens from oppression and injustice on other. Court while constructing such provisions strictly should not interpret them literally so as to render their compliance impossible. Section 42 of NDPS Act deals with search, seizure and arrest without warrant. Search and seizure are essential steps in armory of an investigator in investigation of a criminal case. Non-compliance of Section 42 may not vitiate trial if it does not cause any prejudice to accused. In view of changed circumstances in technology, if statutory provisions under Sections 42(1) & 42(2) of writing down information is interpreted as a mandatory provision, it will disable haste of an emergency situation and may turn out to be in vain with regard to criminal wrongdoers/drug offenders as a major ground for acquittal. These provisions should be taken as discretionary measure which should check the misuse of Act rather than providing an escape to hardened drug-peddles.

In view of the constitutional bench judgment referred supra, the principle laid down in "***Roy V.D. v. State of Kerala***" (referred above) cannot be applied to the present facts of the case at this stage to release the petitioner on bail.

---

[5] 2009 3 SCC (Cri) 887

The other contention raised by the learned counsel for the petitioner is that statement recorded under Section 67 of the N.D.P.S.Act. can be used for limited purpose of information and conviction should not be based merely on the basis of a statement without any independent corroboration as per the principle laid down in "***Union of India v. Bal Mukund***" (referred supra).

Learned Special Public Prosecutor contended that even if the principle enunciated in "***Union of India v. Bal Mukund***" (referred supra) applied to the present facts of the case, independent corroboration is required to record conviction and on the basis of information collected under Section 67 of the N.D.P.S. Act alone, conviction cannot be recorded. In such case, question of corroboration would arise only during trial, therefore, at this stage the petitioner cannot be enlarged on bail.

One of the contentions raised by the learned counsel for the petitioner is that, based on the statement recorded under Section 67(b) of the Act, the petitioner cannot be convicted for the offence after trial and this view is supported by the judgment of the Apex Court in "***Union of India v. Bal Mukund***" (referred supra). In the said judgment, the Trial and High Court recorded conviction of the accused for the offences punishable under the provisions of NDPS Act and when the matter reached the Supreme Court, the Supreme Court held that where the statute confers such drastic powers and seeks to deprive a citizen of its liberty for not less than ten years, and making stringent provisions for grant of bail, scrupulous, compliance with the statutory provisions must be insisted upon. While considering a case of the present nature where two persons may barely read and write Hindi, are said to have been used as carrier containing material of only 1.68% of narcotics, a conviction, should not be based merely on the basis of a statement made under Section 67 of the Act without any independent corroboration particularly in view of the fact that such statements have been retracted.

No doubt, as per the law declared by the Apex Court in the judgment referred supra, statement recorded under Section 67 of the Act cannot alone form the basis for conviction, if it is corroborated by any evidence, the Court can record conviction, if any statement is recorded under Section 67 of the Act, it is only an additional circumstances to substantiate the prosecution case. But, the question of corroboration would arise only when the Trial is completed and at this stage, the same principle cannot be applied to the present facts of the case.

Finally, learned counsel for the petitioner contended that the conviction cannot be recorded on the basis of confession of co-accused. No doubt, confession of co-accused is a weak piece of evidence, but that cannot be ignored if it is corroborated by any other independent evidence, in support of his contention, learned counsel for the petitioner relied on "***Haricharan Kurmi v. State of Bihar***" (referred supra). In the said judgment, the Apex Court considered the scope of confession and held as follows:

> "The question about the part which a confession made by a co-accused person can play in a criminal trial, has to be determined in the light of the provisions of s. 30 of the Act. Section 30 provides that when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is

proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. The basis on which this provision is found is that if a person makes a confession implicating himself, that may suggest that the maker of the confession is speaking the truth.

Normally, if a statement made by an accused person is found to be voluntary and it amounts to a confession in the sense that it implicates the maker, it is not likely that the maker would implicate himself untruly, and so, s. 30 provides that such a confession may be taken into consideration even against a co-accused who is being tried along with the maker of the confession. There is no doubt that a confession made voluntarily by an accused person can be used against the maker of the confession, though as a matter of prudence criminal courts generally require some corroboration to the said confession particularly if it has been retracted. With that aspect of the problem, however, we are not concerned in the present appeals. When s. 30 provides that the confession of a co-accused may be taken into consideration, what exactly is the scope and effect of such taking into consideration, is precisely the problem which has been raised in the present appeals.

It is clear that the confession mentioned in s. 30 is not evidence under s. 3 of the Act. Section 3 defines "evidence" as meaning and including -

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents produced for the inspection of the Court; Such documents are called documentary evidence.

Technically constructed, this definition will not apply to a confession. Part (1) of the definition refers to oral statements which the court permits or requires to be made before it; and clearly, a confession made by an accused person is not such a statement; it is not made or permitted to be made before the court that tries the criminal case. Part (2) of the definition refers to documents produced for the inspection of the court; and a confession cannot be said to fall even under this part. Even so, s. 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused person; that is to say, though such a confession may not be evidence as strictly defined by s. 3 of the Act, it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a non-technical way. But it is significant take like other evidence which is produced before the Court, it is not obligatory on the court to take the confession into account. When evidence as defined by the Act is produced before the Court, it is the duty of the Court to consider that evidence. What weight should be attached to such evidence, is a matter in the discretion of the Court. But a Court cannot say in respect of such evidence that it will just not take that evidence into account. Such an approach can, however, be adopted by the Court in dealing with a confession, because s. 30 merely enables the Court to take the confession into account.

As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. As was observed by Sir Lawrence Jenkins in Emperor v. Lalit Mohan Chuckerbutty (1911) I.L.R. 38 Cal. 559 a confession can only be used to "lend assurance to other evidence against a co-accused". In In re. Peryaswami Noopan, (1913) I.L.R. 54 Mad. 75 Reilly J. observed that the provision of s. 30 goes not further than this : "where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in s. 30 may be thrown into the scale as an additional reason for believing that evidence." In Bhuboni Sahu v. King (1949) 76 I.A. 147 the Privy Council has expressed the same view. Sir John Beaumont who spoke for the Board observed that a confession of a co-accused is obviously evidence of a very week type. It does not indeed come within the definition of "evidence" contained in s. 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighted with the other evidence." It would be noticed that as a result of the provisions contained in s. 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the court is evidence; circumstances which are considered by the court as well as probabilities do amount to evidence in that generic sense."

Special Public Prosecutor relied on "***Francis Stanly @ Stalin v. Intelligence Officer, Narcotic Control Bureau, Thiruvananthapuram***" (referred supra), wherein Apex Court held as follows:

"We are of the opinion that while it is true that a confession made before an officer of the Department of Revenue Intelligence under the NDPS Act may not be hit by Section 25 in view of the aforesaid decisions, yet such a confession must be subject to closer scrutiny than a confession made to private citizens or officials who do not have investigating powers under Act. Hence the alleged confession made by the same appellant must be subjected to closer scrutiny than would otherwise be required."

Accepting the principles laid down in the above judgments, the confession of co-accused can be taken into consideration while deciding the complicity of other accused if it is corroborated by independent evidence. It is not the law laid down by the Apex Court the confession of co-accused can be thrown overhead on the ground that it is inadmissible in evidence. Therefore, the question of corroboration arises only during trial, but at this stage of consideration of bail application, the Court cannot insist for corroboration to the confession of co-accused. It is also difficult to decide whether the information furnished under Section 67 (1) (b) of N.D.P.S. Act is voluntary or obtained such information by using coercion etc. to vitiate such statement and it has to be decided only during trial and not at this stage. Therefore, the contention of the learned counsel for the petitioner with regard to Section 67 of N.D.P.S. Act and confession of co-accused, cannot be accepted since the scope of enquiry in a petition under Section 437 and 439 of Cr.P.C. is limited and on the strength of those confessions, it is difficult to record satisfaction as required under Section 37 (1) (b) of N.D.P.S. Act.

At this stage, it is relevant to note Section 37of NDPS Act which reads as follows:

> **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 2[offences under section 19 or section 24 or section 27 A 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.

The Supreme Court in "***Union of India v. Ram Samujh***[6]", "***Durand Didier v. Chief Secretary, Union Territory of Goa***[7]", wherein, the Apex Court discussed scope of Section 37 of NDPS Act. In "***State of Uttaranchal v. Rajesh Kumar Gupta***[8]" and

[6] 1999 Supp (2) SCR 76
[7] 1989 AIR 1966
[8] (2007) 1 Supreme Court Cases 355

"***Union of India v. Rattan Mallik alias Habul***[9]", the Supreme Court extensively discussed about scope and consequences failing to adhere Section 37 of NDPS Act and concluded that Section 37 of NDPS Act created an interdict to grant bail for an offence punishable under various provisions of the Act, where a commercial quantity of contraband is involved. According to Section 37(1)(b) of NDPS Act, unless the Court records its satisfaction that the petitioner did commit no offence and that he will not commit similar offence again while on bail under Section 439 Cr.P.C in serious offences like the offence punishable under the Act.

In "***Maktool Singh v. State of Punjab***[10]" Supreme Court held that for all the offences punishable more than five years, the Courts power to release the accused on bail during the period before conviction has been, thus, drastically curtailed by providing that if the Public Prosecutor opposes the bail application, no accused shall be released on bail, unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty for such offences.

In "***Customs, New Delhi v. Ahmadalieva Nodira***[11]" the Apex Court held that the Court has to keep in mind two conditions i.e, 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

---

[9] (2009) 2 Supreme Court Cases 624
[10] (1999) 3 SCC 321
[11] 2004 (1) JCC 662

based on reasonable grounds and the expression reasonable grounds means something more than prima facie grounds and it contemplates substantial probable causes for believing that the accused is not guilty of the alleged offences.

In view of the law declared by the Apex Court in the judgments referred supra, Section 37 of NDPS Act, unless the Court concludes that the accused is not guilty based on reasonable ground and that there is no possibility of committing similar offences while on bail, where the offences are punishable for more than five years, he shall be enlarged on bail.

Even according to Section 37 of NDPS Act, the general provisions regarding grant of bail under Section 437, 438 & 439 are applicable. Besides the application of general provisions of Cr.P.C, certain safeguards are provided in the Act to grant bail, while placing reversal burden in view of Section 35 & 54 of NDPS Act. Therefore, the general principles governing bails under Section 437, 438 & 439 are equally applicable to the bail applications filed by accused of the offences punishable under Sections 8(C) read with Section 20(b)(ii)(C) of NDPS Act for enlarging the accused in the above crimes under NDPS Act, where commercial quantity is involved.

In the recent judgment in **Satpal Singh V. The State Of Punjab**[12] the Supreme Court held that while considering the application for grant of pre-arrest bail for the offence punishable under the provisions of NDPS Act, declined to apply the principle of parity.

---

[12] Crl.A.Nos.462 & 463 of 2018 dated 27.03.2018

In view of the law declared by the Apex Court in the judgments referred supra, Section 37 of NDPS Act, unless the Court concludes that the accused is not guilty based on reasonable ground and that there is no possibility of committing similar offences while on bail, where the offences are punishable for more than five years, he/she shall be enlarged on bail.

In view of my foregoing discussion, I am not inclined to grant bail to the petitioner herein.

In the result, the criminal petition is dismissed.

The miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

16.04.2018
Ksp