

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No. 3288 OF 2018

ORDER:

This petition is filed, under Sections 437 and 439 of the Code of Criminal Procedure, 1973, for grant of bail to the petitioner-accused No. 5 in S.C.No. 97 of 2017 on the file of the Court of Metropolitan Sessions Judge, Cyberabad, - cum - I Additional District and Sessions Judge, Ranga Reddy District at L.B. Nagar (for short, 'the Court below'), registered for the offences punishable under Section 8 (c) read with Sections 22 (c), 28, 29 and 31 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the Act').

2. The case of the prosecution is that the petitioner engaged accused No. 2 as an employee and directed to collect Alprazolam of 22.106 kilograms from accused No. 1 and handover the same to accused No. 3; that on credible information, on 05-03-2017, the police seized Alprazolam, which is a psychotropic substance, from the possession of accused No. 1 when he was about to handover the same to accused No. 2, who is an alleged employee of the petitioner, under a cover of panchanama and lifted samples as per the procedure; that on interrogation of accused Nos. 1 and 2, accused Nos. 3 and 4 were added as accused; that on the strength of statement of accused Nos. 1 and 2 recorded under Section 67 of the Act, the petitioner was also arraigned as accused on the ground that he was the main person who engaged accused No. 2 to collect Alprazolam from accused No. 1 on payment of Rs.5,000/- per each consignment

and that after completion of investigation, charge sheet was filed before the Court below and it is numbered as S.C.No. 97 of 2017 and pending for trial.

3. At the hearing, Smt. T.V.Sridevi, learned counsel for the petitioner, has contended that nothing was seized from the petitioner but he has been falsely implicated based on the statement of accused Nos. 1 and 2 and in the absence of any recovery from the possession of the petitioner, he cannot be detained in prison as a pre-trial detenu and prayed for enlargement of the petitioner.

4. Sri V.Gopalakrishna Gokhale, learned Special Public Prosecutor for NCB, has contended that the petitioner, who was arraigned as accused No. 5, is the person who engaged accused No. 2 and conducting the business of sale of psychotropic substances since long time and that nothing need be seized from the possession of the petitioner in view of Section 29 of the Act and therefore failure to seize anything from the possession of the petitioner is not a ground to enlarge the petitioner on bail and that too the quantity of Alprazolam involved in this case is 22.106 kilograms which is commercial quantity and prayed for dismissal of the petition.

5. As seen from the charge sheet, the petitioner was added as accused No. 5 at a later stage based on the statement of accused Nos. 1 and 2 recorded by the authorities under the Act. Accused No. 2 is allegedly an employee engaged by the petitioner for collection of Alprazolam from accused No. 1 and handover the same to accused No. 3 and bring back accused No.

3 along with the contraband to Mahaboobnagar on payment of Rs.5,000/- per each consignment. The statement of accused Nos. 1 and 2 recorded under Section 67 of the Act is suffice to conclude *prima facie* that the petitioner committed an offence punishable under the provisions of the Act.

6. The main endeavour of learned counsel for the petitioner is that when nothing is seized from the possession of the petitioner, the petitioner is bound to be enlarged on bail and has placed reliance on order dated 10-11-2017 in Criminal Petition No. 7836 of 2017 passed by this Court, whereby accused No. 4 was enlarged on bail, to contend that when accused No. 4, from whom no contraband was seized, was enlarged on bail, the principle of parity would normally apply to the petitioner who also stands on the same footing as that of accused No. 4. A perusal of the order dated 10-11-2017 shows that this Court while deciding the petition did not advert to Section 29 of the Act so also Section 37 of the Act. Therefore, the order dated 10-11-2017 is not binding on this Court.

7. According to Section 67 of the Act, any officer referred to in Section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provision of this Act, call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder; require any person to produce or deliver any document or thing useful or relevant to the enquiry and examine

any person acquainted with the fact and circumstances of the case. In the process of making an enquiry, the authorities called for information from accused Nos. 1 and 2, who are acquainted with the facts of the case, and it was elicited that the petitioner is the prime accused who was transacting the business of sale of Alprazolam in different modes. Therefore, the information collected under Section 67 of the Act is relevant. Section 29 of the Act deals with punishment for abetment and criminal conspiracy and according to it, whoever abets, or is a party to a criminal conspiracy to commit an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in Section 116 of the Indian Penal Code, be punishable with the punishment provided for the offence. Therefore, failure to recover any contraband from the possession of the petitioner cannot be appreciated. When the petitioner is the prime accused who was transacting the business of sale of Alprazolam by engaging accused No. 1, he cannot be exonerated from the liability *prima facie*. Even otherwise, when the quantity of Alprazolam involved in the case is 22.106 kilograms, which is commercial quantity, Section 37 of the Act would come into operation. According to Section 37 (1) (b) of the Act, no person accused of offences punishable 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 the Public Prosecutor has been given an opportunity to oppose the

application for such release and 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. Thus, recording of satisfaction that there are reasonable grounds to believe that the petitioner is not guilty of the offence and that he is not likely to commit any offence while on bail is the prime requirement to grant bail to the petitioner in terms of Section 37 of the Act but this Court, while enlarging accused No. 4 in Criminal Petition No. 7836 of 2017, did not record any such satisfaction as required under Section 37 of the Act.

8. In State of Madhya Pradesh Vs. Kajad¹, the Apex Court categorically held that

"The purpose for which the NDPS Act was enacted and the menace of drug trafficking which 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 and exception under Section 37 (1) (b) (ii). For granting 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 is further to be noticed that the conditions for granting bail, specified under 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 grant of bail. Liberal approach in the matter of bail under the Act is uncalled for."

¹ AIR 2001 SC 3317

Thus, in view of the principle laid down by the Apex Court in the above judgment, the Court is bound to record its satisfaction that the petitioner is not guilty of such offence and that he is not likely to commit any offence while on bail, which is *sine qua non*, to grant bail under Sections 437 and 439 of Cr.P.C. in view of the interdict contained under Section 37 of the Act and the same principle is reiterated in *State of Uttaranchal Vs. Rajesh Kumar Gupta*² and *Union of India Vs. Rattan Mallik @ Habul*³. In the case on hand, according to the statement of accused Nos. 1 and 2 recorded under Section 67 of the Act, the petitioner is the prime person who was prosecuting the business of sale of Alprazolam by engaging accused No. 2 and 22.106 kilograms of Alprazolam was allegedly seized from the possession of accused No. 1 when he was about to handover the same to accused No. 2. In such case, onus of proof is on the petitioner, to prove that he is not concerned with the contraband allegedly seized from the possession of accused No. 1, in view of Sections 35 and 54 of the Act which imposes reverse burden on the petitioner. Sections 35 and 54 of the Act give rise to culpable mental state on the part of the accused as also placed burden of proof in this behalf on the accused (*vide Noor Aga Vs. State of Punjab*⁴).

9. Turning to the facts of the case on hand, the case of the prosecution is that the petitioner is the prime accused who engaged accused No. 2 to collect Alprazolam from accused No. 1

² 2007 (1) Crimes 6 (SC)

³ (2009) 2 SCC 624

⁴ (2008) 16 SCC 417

and 22.106 kilograms of Alprazolam was allegedly seized from the possession of accused No. 1 which is commercial quantity and therefore it is difficult for this Court to exercise jurisdiction in view of the bar under Section 37 of the Act.

10. For the foregoing reasons, I find no ground to enlarge the petitioner on bail and the petition deserves to be dismissed.

11. The criminal petition is accordingly dismissed. Pending miscellaneous petitions if any shall stand dismissed in consequence.

23-03-2018.
JSK

M. SATYANARAYANA MURTHY, J.

