

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.3436 OF 2018

ORDER:

This criminal petition, under Sections 437 and 439 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), is filed to enlarge the petitioner/A.1 on bail in NSC. No.437/2017 (CR.No.34/2017 of Makavarapalem Police Station) Metropolitan Sessions Judge at Visakhapatnam A.P., for the offences punishable under Sections 20(b)(ii)(c), 25 read with 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act'), as he is in judicial custody since 18.05.2017.

The case of the prosecution in brief is that on 18.05.2017 on receipt of credible information the SI of police Makavarapalem Police Station, ASI and other staff members along with two mediators visited the scene of offence, and inspected the vehicle i.e. Winger van bearing No.TS 12 AU 6025, on seeing the police party, two persons including driver got down the van and tried to abscond there, but the staff chased A.1/ the petitioner herein and A.2 and seized 35 packets of dry ganja, on being opened the bags, found ganja leaves, flowers, buds and stems and got it weighed the bags and each packet weighing about 2 kg., total 35 each bag 5 packets totally 70 kgs. Immediately, A.1/the petitioner herein and A.2 were arrested and seized the contra band in the presence of mediators under the cover of panchanama, lifted the samples and sent them for analysis and the crime was registered and issued FIR. Thus, the petitioner along with A.2 allegedly committed the offence under sections 20(b)(ii)(c), 25 read with 8(c) of the NDPS Act.

The present petition is filed to enlarge the petitioner on bail on the ground that the entire investigation is completed and charge sheet is filed before the Metropolitan Sessions Court at Visakhapatnam and there is any amount of discrepancy with regard to quantum of ganja at two paragraphs and pointed out the penultimate paragraph of the at page 3 and so also at page 5 of the charge sheet regarding quantum of compensation seized from the vehicle and thus, when there is any amount of such inconsistency with regard to quantum, the petitioner is entitled to be enlarged on bail.

During hearing, learned counsel for the petitioner pointed out the discrepancy in the allegations made in the charge sheet at two paragraphs referred above and that too, A.2 was already enlarged on bail who was similarly placed and by applying the principle of parity, the petitioner is entitled to be enlarged on bail. It is further contended that the entire investigation is completed and filed charge sheet before the Sessions Judge, therefore, there is nothing to be investigated, and question of interference of the petitioner with the further investigation in the event of his release on bail would not arise and prayed to release the petitioner on bail.

The public prosecutor for the State of Andhra Pradesh opposed the petition on the ground that this Court has to record its satisfaction under Section 37 of the NDPS Act to enlarge the petitioner on bail and prayed to dismiss the petition.

The petitioner is A.1 in the Sessions Case pending before the Sessions court and he is in judicial custody since 18.05.2017. The total ganja seized from the vehicle which was in the custody of the petitioner and others is the commercial quantity i.e. 70 kgs. Therefore, it is an obligation of the court to record its satisfaction

under Section 37(1)(b) of the NDPS Act and unless such satisfaction is recorded, the Court cannot release the petitioner on bail, when commercial quantity is involved. Here in this case the petitioner was apprehended at the scene of offence while he was fleeing, therefore, he was the person traveling along with the ganja in the winger van and it is difficult to conclude that the petitioner did commit no offence.

Time and again, the Apex Court reminded all the courts that for grant of bail, the court shall satisfy that there is a reasonable ground to conclude that the petitioner did commit no offence and that the petitioner will not commit identical offences while on bail, without recording such conclusion, the court cannot grant bail in view of Section 37(1) (b) of the Act. Here the total quantum involved in the crime is a commercial quantity and unless the court records its satisfaction regarding the above two requirements, the petitioner cannot be enlarged on bail.

In **STATE OF MADHYA PRADESH v. KAJAD**¹ the Apex Court specifically 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 sub clause (ii) of clause (b) of Section 37(1) of the NDPS Act. 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

¹ AIR 2001 SC 3317

any offence while on bail. It is further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section 37 of the NDPS Act 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. Thus, in view of the principle laid down by the Apex Court in the Judgment referred to supra, the court is bound to record its satisfaction that the petitioner did not commit any offence, *prima facie*, to grant bail under Sections 437 and 439 of Cr.P.C. Thus, recording the satisfaction is *sine qua non* to grant bail in view of interdict under Section 37 of the NDPS Act.

In view of the law declared by the Apex Court in **Kajad** case referred supra, it is obligatory in the part of the Court to comply the requirement under Section 37(1)(b) of NDPS Act and if the court found that there is material against the petitioner, the Court cannot enlarge the petitioner on bail.

In the present facts of the case, there is substantial material to conclude that the petitioner found transporting ganja in Winger van, *prima facie*. When the first requirement the Court did not satisfy about the requirement under Section 37(1)(b) of the NDPS Act, the other requirement need not be considered.

It is contended that this petitioner never involved in any offence earlier, but it is not a ground to enlarge the petitioner since there are twin requirements for enlarging the petitioner on bail, who committed the offence under the provisions of NDPS act involving commercial quantity.

Therefore, it is not a ground to enlarge the petitioner on bail.

One of the contentions before this Court is that when the other accused i.e. A.2 was enlarged on bail by this Court in CrI.P.N.1619 of 2018 by order dated 21.02.2018, the petitioner who is similarly placed, is also to be enlarged on bail, based on principle of parity. In the order passed by this Court, the Court did not advert to Section 37 of the NDPS Act and did not record its satisfaction as to requirement under Section 37 of NDPS Act.

But in recent judgment of the Apex Court in **SATPAL SINGH V. THE STATE OF PUNJAB**² 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.

Therefore, in view of the law declared by the Full Bench of the Apex Court, this Court is not inclined to enlarge the petitioner on bail based on the principle of parity and in view of enlargement of A.2 on bail. Hence, I find no ground to enlarge the petitioner/A.1 on bail.

The other contention of the counsel for the petitioners is that the petitioner is in jail since 18.05.2017.

In **CHENNA BOYANNA KRISHNA YADAV -VS- STATE OF MAHARASHTRA AND ANOTHER**³ the Apex Court made it clear that when gravity of the offence alleged is severe, mere period of incarceration or the fact that the trial is not likely to be concluded in the near future either by itself or conjointly may not entitle the accused to be enlarged on bail. Nevertheless, both these factors may also be taken into consideration while deciding the question of grant of bail. The same principle is reiterated in **RAJESH RANJAN YADAV @ PAPPU YADAV VS CBI THROUGH ITS DIRECTOR**⁴ while deciding

² CrI.A.No.463 of 2018

³ (2007) 1 SCC 242

⁴ (2007) 1 SCC 70

the case it was held that it is one of the considerations in deciding whether to grant bail to an accused or not is, whether he has been in jail for a long time, the Court has also to take into consideration other facts and circumstances, and at the same time a balance has to be struck between the right to personal liberty guaranteed under Article 21 of the constitution of India and the interest of society, as no right can be absolute.

Therefore, languishing in jail for a longer period is not a ground to grant bail. Hence, I find no ground to enlarge the petitioner on bail.

In the result, the criminal petition is dismissed.

11.04.2018
BV

M.SATYANARAYANA MURTHY, J

