

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No. 4425 OF 2018

ORDER:

This petition is filed, under Sections 437 and 439 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.'), for grant of bail to the petitioners-accused Nos. 8 and 9 in Crime No. 166 of 2017 of Gantyada Police Station, Vizianagaram District, registered for the offence punishable under Section 8 (c) read with Section 20 (b) (ii) (C) of NDPS Act (for short, 'the Act').

2. Heard learned counsel for the petitioners and learned Public Prosecutor (A.P.).

3. The case of the prosecution is brief is that on 06-10-2017 at 19.00 hours, the Sub Inspector of Police, Gantyada Police Station, Vizianagaram District, along with his staff while conducting vehicle check at Kotarubilli Junction, they found four vehicles coming from Boddavara side as a convoy; that on suspicion, they stopped the vehicles and in the meantime, accused Nos. 10 to 12 fled away; that on interrogation, the petitioners and accused Nos. 1 to 7 confessed that they were in possession of Ganja; that on verification of all the four vehicles, they found 20 myka bags containing 388 packets of Ganja and that after lifting samples, they arrested the petitioners and accused Nos. 1 to 7 under a cover of mediator report and seized all the 388 packets of Ganja weighing about 792.865 kilograms.

4. Learned counsel for the petitioners submits that the petitioners are only driver and coolie respectively and they have

nothing to do with the offence and that the petitioners have been languishing in jail since 06-10-2017.

5. Learned Public Prosecutor has opposed the petition on the ground that the material collected during investigation is suffice to conclude that the petitioners also played their role in transportation of Ganja in contravention of 8 (c) of the Act and they are also equally liable along with the owners of Ganja.

6. It is indeed even according to the allegations made by the prosecution that petitioner No. 1 is driver and petitioner No. 2 is labourer engaged for driving and loading and unloading of Ganja in the vehicles. When the petitioners are engaged for transportation and loading and unloading of Ganja from the vehicles, they are also equally liable for the offence along with the owners of Ganja. Section 8 (c) of the Act prohibits produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirements by way of licence, permit or authorisation also in accordance with the terms and conditions of such license, permit or authorisation. Turning to the case on hand, it is not the case of the petitioners that they obtained any permission or authorisation or license for transportation or possession of Ganja. Therefore, transportation of Ganja is *prima facie* in contravention of Section 8 (c) of the

Act which is an offence punishable under Section 20 (b) (ii) (C) of the Act as the total quantity of Ganja involved in the crime is commercial quantity. The Court, unless based on reasonable grounds concludes that the petitioners are not guilty of the offence and that they are not likely to commit similar offence while on bail, it cannot grant bail in view of the bar under Section 37 (1) (b) of the Act. Section 37 (1) (b) of the Act clearly states that 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, it is mandatory requirement for the Court to record reasons under Section 37 (1) (b) of the Act to grant bail where commercial quantity is involved.

7. It is the contention of learned counsel for the petitioners that the petitioners did not commit such offence earlier. The previous background of the petitioners is only one of the circumstances and what is required under Section 37 of the Act is only to conclude based on reasonable grounds that the petitioners are not guilty of such offence *prima facie* and the second requirement is to conclude that they will not commit an identical offence while on bail. Apart from that, there is presumption under Section 54 of the Act and according to it, in

trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of (a) any narcotic drug or psychotropic substance or controlled substance; (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated; (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily. Thus, the presumption is against the petitioners and negative burden is placed on the petitioners who allegedly committed the offence. When the negative onus of proof is placed on the petitioners to prove that they did commit no offence, it is difficult for this Court to conclude that there are reasonable grounds that the petitioners are not guilty and that they are not likely to commit similar offence while on bail.

8. The Apex Court time and again insisted the Courts below to record their satisfaction as required under Section 37 (1) (b) of the Act when commercial quantity is involved. In *State of Madhya Pradesh Vs. Kajad*¹, the Apex Court held that a person accused of an offence, punishable for a term of

¹ AIR 2001 SC 3317

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) of the Act. For granting bail, the Court must, on the basis of record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence 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 in Section 37 (1) (b) of the 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 above judgement, the Court is bound to record its satisfaction that the petitioners did not commit any offence prima facie to grant bail under Sections 437 and 439 of Cr.P.C. Thus, recording of satisfaction is *sine qua non* to grant bail in view of the interdict under Section 37 of the Act. In *State of Uttaranchal Vs. Rajesh Kumar Gupta*² and *Union of India Vs. Rattan Mallik @ Habul*³, the Apex Court held that recording of satisfaction that accused is not guilty of offence and that he is not likely to commit any offence while on bail is *sine qua non* for granting bail. In view of the facts and circumstances of the case, it is difficult for this Court to enlarge the petitioners on bail at this stage.

² 2007 (1) Crimes 6 (SC)

³ (2009) 2 SCC 624

9. Yet, learned counsel for the petitioners has submitted order dated 06-03-2018 in Criminal Petition No. 2469 of 2018, whereby a coordinate Bench of this Court granted bail to accused No. 7 in the above crime, to contend that the petitioners, who are similarly situated persons as that of accused No. 7, are also entitled to be enlarged on bail basing on the principle of parity. No doubt, in normal course, the principle of parity can be applied while granting bail. However, this Court while granting bail to accused No. 7 did not record any satisfaction as required under Section 37 (1) (b) (ii) of the Act and in the absence of recording such satisfaction while granting bail to accused No. 7, the same cannot be relied upon to apply the principle of parity. A similar question came up for consideration in *Satpal Singh Vs. The State of Punjab*⁴. In the facts of the above judgment, though a coordinate Bench of High Court of Punjab and Haryana at Chandigarh had granted anticipatory bail to the co-accused, another Bench of the same High Court was not inclined to grant bail to other accused of the same crime in view of the fact that the coordinate Bench had not taken note of the limitations under Section 37 of the Act. The view taken in the latter case was upheld by the Apex Court. If the principle laid down in the above case is applied to the present facts of the case, the petitioners are not entitled to claim bail basing on the principle of parity.

10. In view of my foregoing discussion, I find that it is not a fit case to grant bail to the petitioners in view of the gravity and

⁴ CRIMINAL APPEAL No. 462 OF 2018

seriousness of the offence and as I find no material to record my satisfaction as required under Section 37 (1) (b) (ii) of the Act and consequently, the criminal petition is liable to be dismissed.

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

M.SATYANARAYANA MURTHY, J.

23-04-2018.
JSK

