

HON'BLE SMT. JUSTICE LALITHA KANNEGANTI
CRIMINAL PETITIONS No. 8531 AND 8532 of 2021

COMMON ORDER:

Both these Criminal Petitions under Sections 437 and 439 Cr.P.C. are filed by petitioners – Accused Nos. 2 and 1 respectively in Crime No. 232 of 2021 on the file of P.S. Bhadrachalam Town registered for the offence punishable under Section 8(c) read with Section 20(b) of Narcotic Drugs and Psychotropic Substances Act, 1985, seeking bail.

2. Prosecution alleges that on 06.06.2021, at about 04.00 PM, on credible information, Sub-Inspector of Police, Bhadrachalam conducted vehicle check at Konavaram Road, Bhadrachalam and found Accused Nos. 1 and 2 in vehicle bearing Registration No. AP 28 AX 2229 and seized 200 kgs. of dry ganja from their possession.

3. Learned counsel for petitioners Sri J.P. Srikanth submits that it is alleged that contraband of 200 kgs. is seized in this crime and petitioners were arrayed as Accused Nos. 1 and 2. He submits that petitioners were arrested and remanded to judicial custody on 06.06.2021 and from the last 186 days, they have been languishing in jail. He also submits that so far, police have not filed charge-sheet, nor an Application under Section 36 of the NDPS Act seeking extension of time, as such, petitioners are entitled for default bail.

4. On the other hand, learned Public Prosecutor submits that investigation is still in progress as police could not arrest Accused Nos. 4 to 8 who have supplied ganja to these petitioners.

He submits that Accused Nos. 4 to 8 belong to Odisha State and as huge contraband of 200 kgs. is involved in this crime, petitioners are not entitled for bail, in view of the bar under Section 37 of the NDPS Act.

5. Section 36(A) of the NDPS Act reads thus:

36A. Offences triable by Special Courts.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate: Provided that in cases which are triable by the Special Court where such Magistrate considers—

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him, that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorized in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under section 36.

[\(4\)](#) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days": Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

[\(5\)](#) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.]

6. Section 167 (2) Cr.P.C reads thus:

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

[\(a\)](#) ¹ the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding,-

[\(i\)](#) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

[\(ii\)](#) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

[\(b\)](#) no Magistrate shall authorize detention in any custody under this section unless the accused is produced before him;

[\(c\)](#) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorize detention in the custody of the police. ¹ Explanation I.- For the avoidance of doubts, it is hereby declared

that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail;].²

Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorizing detention.

7. The Hon'ble Apex Court in case of ***Uday Mohanlal Acharya v. State of Maharashtra***¹ has observed that personal liberty is one of the cherished objects of the Indian Constitution and deprivation of the same can only be in accordance with law and in conformity with the provisions thereof, as stipulated under Article 21 of the Constitution. When the law provides that the Magistrate could authorize the detention of the accused in custody upto a maximum period as indicated in the proviso to sub Section (2) of Section 167 of Cr.P.C, any further detention beyond the period without filing of a challan by the investigating agency would be a subterfuge and would not be in accordance with law and inconformity with the provisions of the Criminal Procedure Code, and as such, could be violative of Article 21 of the Constitution of India and the Hon'ble Apex Court in recent judgment in ***S.Kasi v. State***² wherein it was observed that the indefeasible right to default bail under Section 167(2) is an integral part of the right to personal liberty under Article 21, and the said right to bail cannot be suspended even during a pandemic situation as is prevailing currently. It was emphasized that the right of the accused to be set at liberty takes precedence over the right of the State to carry on the investigation and submit a charge sheet. Additionally, it is well settled that in case of any ambiguity in the construction of a penal

¹ (2001)5 SCC 453

² 2020 SCC OnLine SC 529

statute, the Courts must favour the interpretation which leans towards protecting the rights of the accused, given the ubiquitous power disparity between the individual accused and the State machinery. This is applicable not only in the case of substantive penal statutes but also in the case of procedure providing for the curtailment of the liberty of the accused.

8. In view of the foregoing reasons, as charge-sheet is not filed within the statutory period of 180 days nor any Application seeking extension of time, petitioners are entitled for grant of statutory bail, which is an indefeasible right of the accused as laid down by the Hon'ble Apex Court in catena of cases.

9. The Criminal Petitions are therefore, allowed. Petitioners - Accused Nos. 2 and 1 shall be enlarged on bail in connection with Crime No. 232 of 2021 on the file of Bhadrachalam Police Station, on each of them executing a personal bond for a sum of Rs.2,00,000/- (Rupees two lacs only) with two sureties for a like sum each to the satisfaction of the Judicial Magistrate of I Class, Bhadrachalam. Petitioners - Accused Nos. 2 and 1 shall appear before the police till completion of trial on every Sunday between 10.00 a.m. and 1.00 p.m.

10. This is high time to place on record that in number of cases, because of the failure on the part of the prosecution in filing charge-sheet or an Application under Section 36 of the NDPS Act seeking extension of time, and where accused are languishing in jail for more than 180 days, this Court is granting default bails to the accused, which is an indefeasible right of accused. Wherever investigation is not completed, if police fail to file Application

under Section 36 of the NDPS Act, the purport of the said proviso itself is defeated. This Court has observed that in cases of huge contraband running into hundreds of kgs. also police are not diligent in taking appropriate and timely action.

11. The Director General of Police shall therefore, take appropriate steps to set in place a mechanism in the NDPS cases to monitor whether investigation is completed or not and if not, whether an Application under Section 36 of the NDPS Act seeking extension of time is filed or not. If Investigation Officer fails to file such an Application, departmental action shall be initiated on the erring officer. Steps taken in this regard shall be intimated to this Court in the form a Report to be filed before the Registrar (Judicial) within four weeks from today.

12. Registrar (Judicial) shall communicate a copy of this order to the Director General of Police.

LALITHA KANNEGANTI, J

08th December 2021

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