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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **BAIL APPLN. 2675/2022**

MOHD MUSLIM @ HUSSAIN Petitioners

Through: **Mr. Satya Bhushan, Advocate.**

versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through: **Mr. Manoj Pant, APP for the State.**

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant application under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973 has been filed on behalf of the petitioner Mohd. Muslim seeking regular bail in FIR bearing No. 148/2015, registered at Police Station Crime Branch, for offences punishable under Sections 20/25/29 Narcotic Drugs and Psychotropic Substances Act, 1985 Act (hereinafter 'NDPS').

2. The facts in brief, leading to the filing of the present bail applications are as follows: -

- a. On 28.09.2015, at about 6:15 pm secret information was received in police station that today at about 7:30 pm a person named Nitesh, a resident of Chhattisgarh who supplies in Delhi and NCR, would come along with his accomplices in vehicle



having Chhattisgarh registration XUV white colour, to supply ganja under Barapula Flyover, Ring Road near Gurudwara Bala Sahib from Ashram Chowk side. If raid is conducted, they could be arrested with illegal ganja. A Raiding Party was constituted, raid was conducted, four accused persons namely Nitesh Ekka, Sanjay Chauhan, Sharif Khan, and Virender Shakiyavar @ Deepak were allegedly apprehended with illegal ganja of 180 kg, and thereafter were arrested in the case.

- b. During the course of investigation, 7 (seven) days police custody remand of co-accused Nitesh Ekka was obtained and he was taken to Chhattisgarh for identification of co-accused persons. At the instance of co-accused Nitesh Ekka, applicant/accused Mohd. Muslim was arrested from his village in the intervening night of 03/04.10.2014 and his two days police custody remand was obtained. On the basis of the disclosure statement of co-accused Nitesh Ekka, petitioner herein was arrested. The FIR bearing no. 0148/2015 was registered on 28.09.2015, under Sections 20/25/29 of the NDPS Act.
- c. On 29.02.2016, chargesheet was filed under Sections 20/25/29 of the NDPS Act, and thereafter on 05.07.2016 charges were framed qua the petitioner under Sections 25/29 NDPS Act, and under Section 120-B of IPC.
- d. The petitioner filed bail application under Section 439 CrPC for grant of regular bail, before the learned ASJ, South East District, Saket Court, New Delhi. The bail application was rejected vide the impugned order dated 08.06.2022. The



learned Judge observed that considering the gravity of offence, the severity of the punishment entailing the offence, and the role of the Petitioner/accused, he cannot be released on bail.

The observations of the impugned order read as under: -

“9. A perusal of the record reveals that the accused herein was in regular contact with other co-accused for the commission of the crime. Material witnesses are yet to be examined.

10. Under these circumstances, taking into the account the gravity of the offence, severity of the punishment that the offence entails, the role attributed to the accused herein, this Court is of the opinion that bail ought not to be granted to the accused at this juncture. Accordingly, the present bail application is hereby dismissed.

11. Needless to say, the abovementioned observations are predicated solely on the facts as alleged, and brought forth at this juncture, and are not findings on merits, and would also have no bearing on the merits of the case. With these conditions, and observations, the bail application stands disposed of.”

3. Learned counsel for applicant submits that the accused has been in judicial custody since 03.10.2015. He also states that no recovery was effected from him. Learned counsel further argues that the period of detention itself entitles him to grant of bail as trial will take some time to conclude.

4. Learned APP for State submits that the quantity of 180 kgs recovered in the present case is commercial in nature, hence bar of Section 37 will operate.

5. I have heard learned counsels for the parties and have perused the relevant documents.



6. The grant or rejection of a bail application in case of commercial quantity of 180 kgs would attract bar of Section 37 of NDPS Act. The relevant section is reproduced as under: -

“Section 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 [offences under section 19 or section 24 or section 27A 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.]”

7. Since the quantity of ganja recovered in this case is commercial quantity, it will attract bar under Section 37 of NDPS Act.

8. Section 37 is a negation rule of bail, which has an exception laid down under Section 37(1)(b)(i) and Section 37(1)(b)(ii). The rule of negation and exception within Section 37 has been reaffirmed in ***Madhya Pradesh v. Kajad, (2001) 7 SCC 673***, wherein the Hon’ble Supreme Court observed as follows: -



“The purpose for which the 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 subclause (ii) of clause (b) of Section 37(1). 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 any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of 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 the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for.”

9. Further, the criterion and broad parameters under Section 37 of NDPS Act have been discussed in ***Collector of Customs v. Ahmadaliev Nodira***, (2004) 3 SCC 549, the observations of the Hon’ble Supreme Court read as follows: -

"6. As observed by this Court in Union of India v. Thamisharasi [(1995) 4 SCC 190 : 1995 SCC (Cri) 665 : JT (1995) 4 SC 253] clause (b) of sub-section (1) of Section 37 imposes limitations on granting of bail in addition to those provided under the Code. The two limitations are: (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of



such offence and that he is not likely to commit any offence while on bail.

7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused- respondent is concerned, are: 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 based on reasonable grounds. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence....."

10. The Hon'ble Supreme Court in ***Union of India v. Rattan Malik, (2009) 2 SCC 624***, further laid down a criterion for Section 37 of NDPS Act, the relevant portion of the case reads as under: -

"The aforesaid Section is incorporated to achieve the object as mentioned in the Statements of Objects and Reasons for introducing the Bill No. 125/ 1988 thus:

"Even though the major offences are non-bailable by virtue of the level of punishment, on technical grounds, drug offenders were being released on bail In the light of certain difficulties faced in the enforcement of NDPS Act, 1985 the need to amend the law to further strengthen it has been felt."

It is to be borne in mind that the aforesaid legislative mandate is required to be adhered and followed. It should be borne in



mind that in murder case, accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death blow to number of innocent young victims, who are vulnerable: it causes deleterious effects and deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didien v. Chief Secretary, Union Territory of Gua. [1990] 1 SCC 95 as under:

"With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportion in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in the wisdom has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine,"

To check the menace of dangerous drugs flooding the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless mandatory conditions

provided in Section 37, namely,

- (i) there are reasonable grounds for believing that accused is not guilty of such offence; and*
- (ii) that he is not likely to commit while on are satisfied. The*



High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in the dangerous drugs, the Court should implement the law in the spirit with which the Parliament, after due deliberation, has amended."

11. The special statute would be given a preferential stature considering the commercial quantity of 180 kgs recovered, hence, Section 37 bar would be attracted. The standard laid down within Section 37(1)(b)(ii) would demand reasonable grounds to believe that the accused is not guilty of the offence. The term reasonable grounds have been explained by the Division Bench of the Hon'ble Supreme Court in ***Union of India vs. Shiv Shanker Kesari***(2007) 7 SCC 798, the observation reads as under: -

"The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word 'reasonable'. Stroud's Judicial Dictionary, Fourth Edition, page 2258 states that it would be unreasonable to expect an exact definition of the word "reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy. (See: Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar and another (1987) 4 SCC 497. and Gujarat Water Supplies and Sewerage Board v. Unique Erectors (Gujarat) Pvt. Ltd. and another [(1989) 1 SCC 532]. It is often said "an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space". The author of 'Words and



Phrases' (Permanent Edition) has quoted from in re Nice & Schreiber 123 F. 987, 988 to give a plausible meaning for the said word. He says, "the expression 'reasonable' is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined". It is not meant to be expedient or convenient but certainly something more than that. The word 'reasonable' signifies "in accordance with reason". In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See: Municipal Corporation of Greater Mumbai and another v. Kamla Mills Ltd. (2003) 6 SCC 315)."

12. In the present case, the total recovery is 180 kgs of ganja. It is vital to understand that the NDPS statute was brought about to curb the usage of such narcotic substances. The Hon'ble Supreme Court in ***Gurdev Singh v. State of Punjab, (2021) 6 SCC 558***, observed that the increase in addiction amongst youth has led to a negative impact on the coming generations, and to curb the same NDPS Act was introduced. Learned counsel for the accused repeatedly argued that the present accused/applicant has been falsely implicated and has no role to play in either the selling or any other activity connected with the alleged offence in question. I have gone through the record produced before me. The record as per the charge sheet filed reveals that the present accused was in regular contact with other co-accused persons and a total 250 calls on mobile of Mohd Muslim @ Hussain and 205 on mobile number of Mohd. Muslim @ Hussain were made and received by the present applicant to main accused Virender between 04.01.2015 to 28.09.2015. As per the report, the main



accused Virender had transferred money from his bank account to the bank account of petitioner several times. Since the trial is being conducted during the course of trial one of the witnesses who had received money from the account of accused Virender stated before the Court that a sum of Rs. 50,000/- was received from the present applicant. The statement of accounts and certified copy of CDRs have already been filed along with charge sheet and the account holders are being examined before the Trial Court. Above said clearly shows the active involvement of the present accused in the offence in question.

13. Learned Counsel of the Petitioner has stressed that the accused has been in custody for more than 6 (six) years. He argues that the period of custody itself is ground for grant of bail. However, the ***Hon'ble Supreme Court in Sheru versus Narcotics Control Bureau in Criminal Appeal Nos. 585-586/2020*** arising out of SLP (Criminal) Nos. 2249-2250/2020, opined as under:

“We have given a thought to the matter and there is no doubt that the rigors of Section 37 would have to be met before the sentence of a convict is suspended and bail granted and mere passage of time cannot be a reason for the same. However, we are faced with unusual times where the Covid situation permeates. We are also conscious that this Court has passed orders for release of persons on bail to de-congest the jail but that is applicable to cases of upto seven years sentence. In the given aforesaid facts and circumstances of the case, we consider it appropriate to enlarge the appellant on bail on terms and conditions to the satisfaction of the Trial Court. At the instance of the learned Additional Solicitor General, we clarify that the order has been passed in the given facts of the case and not to be treated as a precedent.”



14. The Apex Court in *Sheru versus Narcotics Control Bureau* (supra) had released the accused on bail after considering the period of custody of around 8 years. However, in that case, the Apex Court has clearly observed that rigors of Section 37 NDPS Act have to be met before grant of bail and mere passage of time or period of judicial custody cannot be reason for grant of bail. The Apex Court had granted bail in this case in only due to peculiar circumstances of Covid-19 pandemic, and it had also been clarified in this order itself that the said order is being passed in the given facts of the case and should not to be treated as a precedent. There is recovery of commercial quantity of opium in present case, thus there is definite embargo under Section 37 of NDPS Act.

15. As per the above contentions as well as relevant facts, that prima facie a case exists against the accused, and thus, there are no grounds to rely on the exceptions of Section 37. Resultantly, the application for grant of bail stands rejected. However, the court takes into account, that the accused/applicant has been in judicial custody for more than six years. It is directed that the learned Trial Court will make every endeavour to expedite the trial and conclude it in a period of six months, on the condition that no adjournments would be requested by either of the parties.

16. The bail application stands disposed of.

SWARANA KANTA SHARMA, J.

SEPTEMBER 8, 2022/kss