

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (BA) NO. 213/2023

Sau Gulshan w/o Sharif v/s The State of Maharashtra

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mr Nitesh Samundre, counsel for the applicant.
Mr M.J.Khan, APP for the State.

CORAM : URMILA JOSHI-PHALKE, J.
DATE OF RESERVE : 07/07/2023.
DATE OF DECISION : 18/07/2023

1. Heard.
2. The present application is preferred by the applicant for grant of bail under Section 439 of the Code of Criminal Procedure, 1973 in connection with Crime No. 385/2022 registered under Section 20(b), (ii), (C), 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act'). The applicant is arrested on 09/06/2022, since then he is in jail.
3. The crime is registered on the basis of a report lodged by Subhash Madawi, on an allegation that on 08/06/2022 at about 14.45 hours when the Police of Crime Detention Squad and Railway Protection Force Officers were checking Train No. 20805 VSKP-NDLS Express, they had a strong odour of Ganja from coach No.

ECO-204243S5 and Coach Seven and found that 7 persons were found suspects of carrying the Ganja, out of which two were Women. A total 106.807 Kg of Ganja was found in the bags possessed by the said accused person. One child in conflict with law was also along with them. All the accused person were arrested and the child in conflict with law was referred before the Juvenile Justice Board. It is alleged that five white bundles, on which two rose flowers were kept in the cross, were found in the red colour bag of the present applicant. Those five bundles contained 13.117 kg of Ganja. The entire Ganja was seized by the Investigating Officer. The present applicant along with other accused persons were arrested.

4. As per the contention of the present applicant that the bag which was seized by the Police was not belongings to him. She is arrested merely on suspicion. She is in jail for the last nine months. Now, the investigation is completed and charge-sheet is filed. There is no material against her to connect him with the alleged offence and hence she be released on bail.

5. The said application is strongly opposed on behalf of the State on the ground that the RPF Police were carrying out checking New Delhi - Andra Pradesh Express, they had witnessed one bag from which there was a smell. When they asked the other co-accused

Sonam, she has not given a satisfactory answer and they found that the bags were kept under berth Nos. 01 to 12 and the present applicant was travelling by keeping the said Ganja in their bags. The eight bags of the accused were checked in the presence of panchas and Gazetted officer i.e. Tahsildar and a total of 106.807 Kg Ganja was found. The Panchanama was prepared. At the relevant time, co-accused Sonu Thakur run away, who was subsequently arrested. As per the contention of the State, mandatory provisions are followed by the investigating agency. During a search of the suspected accused person, a statutory notice under Section 50 was issued. The present applicant along with other co-accused persons were also apprised about their rights to get searched in the presence of Gazetted Officer and therefore, the statutory requirement was complied.

As per the contention of the State that there is prima facie material against the present applicant to connect her with the alleged offence. If the applicant accused is released on bail, there is apprehension that she would be involved in a similar type of offence and prays for rejection of the application.

6. Heard Mr. Samudre learned counsel for the applicant. He submitted that the applicant is a lady. The bag which was seized not belongs to her. Now, the

investigation has been completed and charge-sheet is filed further custody of the present applicant is not required. Hence, she be released on bail.

7. Per contra, learned APP submitted that the huge quantity of 106.807 kg Ganja was found, the panchanama was prepared and photographs were taken. The railway tickets were also seized. During the investigation, the notice was issued under Section 50 of the NDPS Act to the present applicant. The present applicant and other accused persons were apprised about their right to get searched in the presence of Gazetted Officers and after following the mandatory provisions, the raid was carried out wherein 13.117 kg Ganja was seized from the bag of the present applicant.

8. From the other co-accused persons namely Sarif Ali Ashraf Ali 12.645 Kg. was seized. Thus, there is prima-facie material against the present applicant, it further reveals from the investigation that the present applicants have procured the said Ganja from Visakhapatnam and were carrying the said Ganja to New Delhi. The investigating officer also obtained the CCTV Footage of the lodge, where the applicant and another co-accused have stayed, during their visit at Visakhapatnam. The Investigating Officer has already forwarded the extract of CCTV footage for further expert

examination and the report of the same is still awaited. The inventory was also conducted and the certificate under Section 52-A of the NDPS Act was obtained. Thus, there is prima-facie material against the present applicant with the alleged offence

9. After hearing both the sides. On perusal of the investigation papers, it reveals that when the present applicant along with other co-accused was travelling by Visakhapatnam New Delhi Express, the train arrived at Nagpur Station at 14.45 p.m., when the Railway Police were carrying out the inspection of the train, they suspected the present applicant along with other co-accused, who were carrying the Ganja in their bags. Accordingly, the letter was issued to the railway administration under 42(1)(2) for seeking their permission. The articles were called to weigh the Ganja. The notice under Section 50(1) of NDPS Act was issued to the present applicants and they were apprised regarding their rights whether they gone to search themselves in the presence of the Gazetted Officer. Thereafter, the raid was carried out. During the investigation, it was revealed to them that these persons were travelling by obtaining a ticket of slipper class. From the possession of the bag of the present applicant total of five bags having 13.117 kg. Ganja worth of Rs. 1,96,755/- was found in the said bags. At the relevant

time, the ticket of the present applicant was also seized as well as her mobile handset was also seized. It reveals from the investigation papers that notice was issued to the present applicant under Section 50 of the NDPS Act. She has consented to have a search in the presence of Gazetted Officer. Therefore, a search in the presence of Gazetted Officer- Tahsildar was carried out and the articles were seized in the presence of the said Gazetted Officer. The panchanama regarding the seizure of the mobile of the present applicant is also carried out. The inventory was carried out in the presence of the Judicial Magistrate First Class and the inventory certificate under Section 52-A of the NDPS Act was obtained. Accordingly, inventory panchanama was also drawn, from which it is reflected that total eight bags were found in possession of the present applicant and other co-accused, wherein they were carrying the Narcotic Substance Ganja. The Investigating Officer has also collected the CCTV Footage of one lodge at Visakhapatnam where the applicant was staying. During their halt at Vishakhapatnam, they procured the said Ganja from Vishakhapatnam.

10. As far as the entitlement of the present applicant to release her on bail is concerned, the power under Section 37 is subject to the limitation contained under Section 439 of the Code of Criminal Procedure. It is also subject to the limitation placed by Section 37. Section 37

commences with non obstinate clause. The jurisdiction of this Court to grant bail is in view of the provisions of Section 37 NDPS Act. It can be granted in case where there are reasonable grounds for believing that the accused is not guilty of such offence, and that he /she is not likely to commit offence while on bail. It is the mandate of the legislature which is required to be followed. At this juncture, a reference to Section 37 of the NDPS Act is required and therefore the provision is reproduced for reference. It reads thus:

“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.” (emphasis supplied).

11. The Hon’ble Apex Court has laid down broad parameters which are to be followed while considering the application for bail moved by the accused involved in offences under NDPS Act. In ***Union of India Vs Ram Samujh and others reported 1999 (9) SCC 429***. It reads as under

“7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting deathblow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a 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

*the NDPS Act, has succinctly observed about the adverse effect of such activities in **Durand Didier v. Chief Secy., Union Territory of Goa** reported in AIR (1989) SC 1966.*

12. In the case of Durand Didier referred (supra), the Hon'ble Apex Court held that "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 proportions 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, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.

13. In view of Section 37 of the NDPS Act, the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory condition provided in **Section 37**, namely, (i) there are reasonable grounds for believing that the accused is not guilty of such offence; and (ii) that he is not likely to

commit any offence while on bail are satisfied. Thus scheme of Section 37 shows that the exercise of power to grant bail is not only subject to the limitations contained under [Section 439](#) of the Code of Criminal Procedure, 1973, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

14. It is observed by the Hon'ble Apex Court in the case of ***State of Kerla Vs Rajesh reported in AIR 2020 SC 721*** that 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. In the case in hand, the

applicant is found with bags containing the Ganja with large quantity of 106.87 Kg.

15. The submission made by the learned counsel for the applicant is that now the investigation is complete and the charge-sheet is filed, further custody of the applicant is not required and hence the applicant be released on bail. Considering the limitations under Section 37, the applicant can be released on bail only when there is reasonable grounds for believing that the accused is not guilty of such offence and that he/ she is not likely to commit any offence while on bail are satisfied. Considering the facts of the present case, the applicants were found in possession of Ganja with large quantity. They procured the said Ganja from Visakhapatnam which is substantiated by the investigation officer by obtaining the CCTV footage which shows their presence in one lodge. I find that bail is to be granted by Court after taking cognizance of the principles laid down in Section 37 of the Act. Here in the present case, there is prima-facie case against the present applicant, and the material which is collected during the investigation which shows the possession of the contraband articles with the present applicant to the extent of 13.117 kg worth of Rs. 1,96,755/-. I am of the opinion that, there are no grounds to believe that the present applicant is not guilty of such offence. The applicant can be released on bail

only when there is reasonable ground for believing that the accused is not guilty of such crime. It contemplates substantial probable causes for believing that the present applicant is not guilty of the alleged offence.

Therefore, I am of the opinion that at this stage, it is difficult to accept that the present applicant is not guilty of such offence. In the result, the criminal application deserves to be rejected.

Accordingly, I proceed to pass the following in order:

Criminal Application is **rejected**.

JUDGE