



CrI.OP.No.25394 of 2023

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C.V.KARTHIKEYAN, J.

The petitioner/A5 in C.C.No.116 of 2019 now pending before the learned Principal Special Judge for NDPS Act cases, Chennai, seeks bail.

2.Charges have been framed under Sections 8(c) r/w 20(b)(ii)(C), 27A, 28 and 29 of NDPS Act.

3.It had been stated that the prosecution would be examining totally 6 witnesses from P.W.1 to P.W.6. The prosecution had taken chief examination of all the 6 witnesses. Since trial is in progress, it will be extremely inappropriate on my part to enter into a discussion on the facts of the case or on the analysis of the evidence already adduced.That is the prerogative for the learned trial Judge.

4.It is stated by the learned counsel for the petitioner/A5 that he had filed an application under Section 311 Cr.P.C., to recall P.W.1 for cross examination. It is stated that the learned counsel for A1 to A3 has also filed an application under Section 311 Cr.P.C to cross examine P.W.1. It is also stated that P.W.2 will also have to be cross examined on behalf of the petitioner herein. The learned counsel further stated that A2 had been granted bail.

5The learned counsel also draws the parallel with yet another case which was decided earlier in the morning today, wherein, in a case where there were two accused, the Hon'ble Supreme Court had granted bail to one of the accused on the ground that the petitioner therein /A2 had been under incarceration for a considerable number of years. In that



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application, this Court owing to the observations of the Hon'ble Supreme Court had granted bail, but had also fixed the manner in which the trial should proceed.

6.The learned Special Public Prosecutor however questioned drawing of parallel of this case with the case in which the bail was granted earlier in the morning and stated that from A2, in that case, there was no recovery, but from the petitioner herein, there has been recovery of contraband.

7.The learned counsel for the petitioner placed reliance on the judgment of the Hon'ble Supreme Court reported in 2023 *Live Law* (SC) 533 in the case of *Rabi Prakash Vs. The State of Odisha* wherein the Hon'ble Supreme Court had examined the fundamental right guaranteed under Article 21 of the Constitution and in such a situation, had held that the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of NDPS Act.

8.The learned counsel also relied on the observations of the Hon'ble Supreme Court reported in (2023) *SCC Online SC* 918 in the case of *Dheeraj Kumar Shukla Vs. State of Uttar Pradesh*, which reads as follows:

“It is true that the quantity recovered from the petitioner is commercial in nature and the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the



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petitioner is in custody for the last two and a half years, we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed.”

9. The learned counsel also placed reliance on the judgment of the Hon'ble Supreme Court reported in 2023 *Live Law (SC)* 260 in the case of *Mohd Muslim @ Hussain vs. State (NCT of Delhi)*, wherein, it had been observed as follows:

“20. The standard to be considered therefore, is one, where the Court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India Vs. Rattan Malik). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the



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opinion that in the facts of this case, the appellant deserves to be enlarged on bail.”

10. However, it is also to be stated that this judgment was delivered on 28.03.2023 and in the judgment reported in 2023 SCC Online (SC) 346 also delivered on 28.03.2023, *Union of India Vs. Ajay Kumar Singh @ Pappu*, the Hon'ble Supreme Court while examining the bail granted by the Alahabad High Court had observed as follows:

“14. This apart, it is noticed that the High Court, in passing the impugned order of bail, had lost sight of Section 37 of the NDPS Act, which, inter alia, provides that no person accused of an offence involving commercial quantity shall be released on bail unless the twin conditions laid down therein are satisfied, namely, (i) the public prosecutor has been given an opportunity to oppose the bail application; and (ii) the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any such offence while on bail.

15. For the sake of convenience Section 37(1) is reproduced hereinbelow:-

“37. Offences to be cognizable and non- bailable:-

(1) Notwithstanding anything contained in the Code of



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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 2[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.”

16. In view of the above provisions, it is implicit that no person accused of an offence involving trade in commercial quantity of narcotics is liable to be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail.

17. The quantity of “ganja” recovered is admittedly of commercial quantity. The High Court has not recorded any finding that the respondent-accused is not prima facie guilty of the offence alleged and that he is not likely to commit the



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same offence when enlarged on bail rather his antecedents are indicative that he is a regular offender. In the absence of recording of such satisfaction by the court, we are of the opinion that the High Court manifestly erred in enlarging the respondent-accused on bail.

18. In view of the aforesaid facts and circumstances and considering the role assigned to the respondent-accused and the illegality committed in releasing him on bail, we set aside the impugned final order dated 17.10.2022 passed by the High Court of judicature at Allahabad and allow the appeal.”

11.It is thus seen that the dictum of the Hon'ble Supreme court is to balance the flow of trial with the seizure of the contraband and if it is commercial in nature, the court will have to examine whether there is smooth flow of trial and at the same time examine whether there is impediment caused for the trial and the cause for the said impediment, whether it is on the side of the prosecution or on the side of the accused and balance it with the rigor of Section 37 of the NDPS Act. It is seen in this particular case that the complainant, P.W.1 had been examined over a period of three years, but for two years, it was during period of Covid-19. Thereafter the prosecution has examined all the witnesses and now, it is the stage of the accused to cross examine the witnesses.



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12. In the judgment in *2023 SCC Online 346* (referred supra), it has also been very specifically stated that the accused in an offence involving trade of commercial quantity of Narcotics can be released on bail only when the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence. At this stage, the Court can never analyse the evidence since the chief examination alone had been taken and three witnesses will have to be cross examined.

13. It is seen that the prosecution has examined all the witnesses and the defence will have to further cross examine of P.W.1 and P.W.2 and also cross examine P.W.6. If the applications under Section 311 Cr.P.C have been filed, the learned trial Judge may consider it to the advantage of the accused and direct the presence of the witnesses.

14. The learned trial Judge may endeavour to post the matter atleast twice every week for the cross examination of P.W.1, P.W.2 and P.W.6 and the learned counsel for the accused should also co-operate and cross examine the witnesses whenever they appear. Only three witnesses will have to be cross examined. As a matter of fact, P.W.1 will have to be only further cross examined on behalf of A1 – A3 and cross examined afresh by A5 and P.W.2 will also have to be cross examined and P.W.6 will also have to be cross examined. If the matter is posted twice every week, then the flow of the case could be controlled by the learned trial Judge and if the learned counsel for the accused co-operate, then there is every possibility of the trial itself being completed by 31.01.2024. It all lies in the hands of the learned counsel for the accused to take up the



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opportunity of cross examining the witnesses, as and when the witnesses appear on the dates for which the cross examination is posted.

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15.In view of all these facts, this Court is not inclined to grant bail to the petitioner.

16.Hence, this Criminal Original Petition stands dismissed.

07.11.2023

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