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Crl.O.P.No.16312 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.07.2024

PRONOUNCED ON : 26.07.2024

CORAM

THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

Crl.O.P.No. 16312 of 2024

Joby Joseph

... Petitioner/Accused No.2

Vs.

State represented by
The Inspector of Police
NIBCID, Coimbatore
Crime No. 22 of 2022
Coimbatore District.

... Complainant /Respondent

PRAYER: Criminal Original Petitions filed under Section 439 of Cr.P.C.,
pleaded to enlarge the petitioner on bail pending trial in C.C.No. 60 of 2022
on the file of Special Court for Essential Commodities Act Cases,
Coimbatore.

For Petitioner : Mr.A.M.Rahamath Ali

For Respondent : Mr.V.J. Priyadarsana
Government Advocate (Crl.Side)

ORDER



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The petitioner/A2, an accused in C.C.No.60 of 2022 pending before the Special Court for Essential Commodities Act Cases, Coimbatore seeks bail. Originally, Crime No.22 of 2022 had been registered for the offences under Sections 8(c), 20(b)(ii)(C), 25 and 29(1) NDPS Act.

2.Heard the learned counsel for the petitioner and the learned Government Advocate (Criminal side).

3.The case of the prosecution is that, on 04.02.2022, an Ashok Leyland mini lorry was intercepted at Valayar check-post, within the police limits of Velampalayam Police station. It is stated that the lorry tried to evade from the respondent. While searching the lorry, 88 packets, each containing 2 kgs of ganja, totally weighing 176 kgs had been seized. The 1st accused was the driver of the lorry and the present petitioner/the 2nd accused was the sole occupant of the lorry.

4.The learned counsel for the petitioner states that the contraband



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had not been seized from the present petitioner.

5. The learned counsel for the petitioner further stated that the petitioner had been in custody from 04.02.2022 and only charges have been framed, though nearly 22 months have passed by and stated that evidence had not even commenced.

6. The learned counsel for the petitioner placed reliance on the order of the Hon'ble Supreme Court in ***Special Leave to Appeal (Crl.) No. 6690 of 2022 [Dheeraj Kumar Shukla Vs. The State of Uttar Pradesh]*** wherein the Hon'ble Supreme Court had held as follows:-

“It appears that some of the occupants of the Honda City Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. 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 petitioner is in custody for the last two and a half



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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.”

7. The learned counsel for the petitioner also placed reliance on the Judgment of the Hon'ble Supreme Court in ***Crl.A.No. 2787 of 2024 [Javed Gulam Nabi Shaikh Vs. State of Maharashtra & Another]***, wherein the Hon'ble Supreme Court had held as follows:-

*“16. A three-Judge Bench of this Court in **Union of India v. K.A. Najeed reported in (2021) 3 SCC 713** had an occasion to consider the Section 43-D(5) of the UAP Act and observed as the same time the effect of incarceration and at under r: (SCC p. 722, para 17)*

"17. It is thus clear to us that the presence of statutory restrictions like Section 43- D(5) of the UAPA per se does not oust the grounds of violation grant bail on statute of Part III of the Constitution, Indeed, both the restrictions under a he ability of the constitutional courts to jurisdiction can be well harmonised. as well as the powers exercisable under



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legislaas at commencement of proceder arte expected to appreciate the constitutional Ingislative policy against grant of ballbuldings, burs of such provisions will melt dowend of there is no likelihood of trial being completingowithin a reasonable time and the period of Incarceration already undergone has exceeded withbstantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."

*17. In the recent decision, **Satender Kumar Antil v. Central Bureau of Investigation** reported in (2022) 10 SCC 51, prolonged incarceration and inordinate delay engaged the attention of the court, which considered the correct approach towards bail, with respect to several enactments, including Section 37 NDPS Act. The court expressed the opinion that Section 436A (which requires inter alia the accused to be enlarged on bail if the trial is not concluded within specified periods) of the Criminal Procedure Code, 1973 would apply:*



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"We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigour imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436- A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigour as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigour, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code."

18. Criminals are not born out but made. The human potential in everyone is good and so, never write off any criminal as beyond redemption. This humanist fundamental is often missed when dealing with delinquents, juvenile and adult. Indeed, every saint has a past and every sinner a future.



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When a crime is committed, a variety of factors is responsible for making the offender commit the crime. Those factors may be social and economic, may be, the result of value erosion or parental neglect, may be, betatise of the stress of circumstances, or the manifestation of temptations in a milieu of affluence contrasted with indigence or other privations.

19. If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime.”

8. Along with the petition the learned counsel had also produced the status of C.C.No. 60 of 2022 pending before the Special Court for Essential Commodities Cases at Coimbatore and pointed out that though a direction had been given when the earlier application seeking bail was



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dismissed that the trial should be completed on or before 30.06.2024, the trial had not yet commenced. It had been stated that the matter had been regularly listed before the Court and regularly adjourned on the ground of evidence.

9. A counter affidavit had been filed on behalf of the respondent wherein the reasons why the trial could not be completed had been given. It had been stated that the Presiding Officer was on leave for more than 60 days. The In charge Judge did not examine any witness. It had been stated that a new Judge had now assumed charge on 03.06.2024. On perusal of the records it was found that one of the accused was absent and therefore, had issued NBW to the third accused. The matter had next been listed on 23.07.2024 for framing of charges. It had been stated that the delay in concluding the trial was not caused by the prosecution. It had been stated that there is every possibility of the petitioner absconding.

10. A contention had been raised on behalf of the petitioner that the contraband was not seized from the petitioner but only from the first accused.

11. As stated, the lorry bearing registration No. TN 45 BP7825 had



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been intercepted at Valayar Check-post in Tamil Nadu and Kerala Border and apart from the lorry driver, the petitioner was also physically present in the lorry. A search revealed the presence of 88 packets of Ganja each weighing 2 kgs. They had been brought from Andhra Pradesh. The seizure was effected on receiving specific information. The total quantity of ganja seized was 176 kgs.

12. In view of the stipulations under Section 37 of the NDPS Act, before granting bail for an offence under NDPS Act, twin conditions as provided under Section 37(1)(b) (i) and (ii) have to be satisfied. Section 37 of the N.D.P.S. Act is quoted herein below:

"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]



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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."

13. The Hon'ble Supreme Court had examined the expression 'reasonable grounds' as found in Section 37(1)(b)(ii) of NDPS, Act.

14. In ***Union of India Vs. Rattan Mallik @ Habul, 2009 (1) SCC (Crl) 831***, the Hon'ble Supreme Court has settled the expression "reasonable grounds". The relevant paragraphs Nos.12, 13 and 14 are extracted below:



"12. It is plain from a bare reading of the nonobstante clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub- section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

13. The expression 'reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify



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satisfaction that the accused is not guilty of the alleged offence. [Vide Union of India Vs. Shiv Shanker Kesari, 2007(7) SCC 798] Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail."

15. The Hon'ble Supreme Court while dealing with the question of possession and application of Section 50 in the case of **Megh Singh Vs. State of Punjab, 2003 CRI. L.J. 4329**, held that word 'possession' includes



conscious possession. Relevant paragraph nos. 9 to 13 are extracted below:

"9. The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

10. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

*11. As noted in **Gunwantlal v. The State of M.P. (AIR 1972 SC 1756)** possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.*

*12. The word 'possession' means the legal right to possession (See **Health v. Drown (1972) (2) All ER 561***



(HL). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness (1976 (1) All ER 844 (QBD)).

13. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. This position was highlighted in Madan Lal and Anr. v. State of Himachal Pradesh (2003 (6) SCALE 483)."

16. The Hon'ble Supreme Court in the case of **Dehal Singh vs. State of Himanchal Pradesh, 2011 (72) ACC 661**, has again considered the concept of "conscious possession". In the said case, two accused persons were travelling in a car and they knew each other. From the windows/door of the said car, recovery of 27 Kgs. 800 gms. of charas was made, which were found concealed between the shields and doors of the car. The Hon'ble Supreme Court in the said case, taking into consideration the provisions of Sections 35 and 54 of the N.D.P.S. Act, had held that the accused was not



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only in possession, but conscious possession of the recovered contraband also.

17. It is thus seen that the Hon'ble Supreme Court had expanded the term possession to also include not just physical possession and constructive possession but also conscious possession.

18. A perusal of the records show that the reasons for the delay in completing the trial was beyond the control of either the Court or the prosecution. The Judge was on leave for 60 days and there, could not be any effective progress. When a new Judge assumed charge, the third accused had absconded from the judicial process. These are circumstances which will have taken into consideration.

19. The dictum of the Hon'ble Supreme Court is binding, but the circumstances in each cases will also have to be examined. Now, the third accused has absconded and Non-Bailable Warrant had been issued against the third accused. There could thus be no possibility of the trial commencing unless the case is split up as against the third accused.

20. In *Union of India Vs. Ajaykumar Singh alias Pappu, 2023 SCC OnLine SC 346*, the Hon'ble Supreme Court had held as follows:

“13. In light of the above, the grant of bail to the



above two accused persons - the driver of the vehicle and the helper, does not seem to be a good and sufficient reason for granting bail to the respondent-accused. The above two accused are not the main accused, but the vicarious agents of the respondent-accused, who is the main person in drug trafficking and was involved in the above illegal transactions. The role of the respondent-accused is clearly different from that of the driver and the helper, the other two co-accused. The co-accused Om Prakash Yadav in his affidavit filed in support of his bail application before the High Court admitted the involvement of the respondent-accused and his role as the mastermind of the illegal trade, as is evident from the order of his release on bail. Therefore, the High Court was not justified in releasing him on bail in the same manner as the above two accused persons.

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 nonbailable.-

(1) Notwithstanding anything contained in the [Criminal Procedure Code, 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 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.

21. In view of these facts, I would once again reiterate a direction to the trial Court to commence trial and complete the same by conducting the trial, if not on a day to-day basis, atleast by listing the matter definitely twice every week and showing progress in the recording of evidence. This would also require the co-operation of the counsels for the accused, who must cross examine the witness immediately when their chief examination is recorded. If there is no progress from the counsel for the accused, the time line issued by the Court can never be kept up by the trial Judge. A direction is given that the trial should be completed on or before 31.12.2024.

22. Observing as above, this Criminal Original Petition stands



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dismissed.

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26.07.2024

vsg

To

1. The Inspector of Police
NIBCID, Coimbatore
Coimbatore District.
2. The Central Prison, Coimbatore.
3. The Public Prosecutor,
High Court of Madras.



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C.V.KARTHIKEYAN, J.

vsg



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Pre Delivery Order made in
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