

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF APRIL, 2023

BEFORE

THE HON'BLE MRS.JUSTICE M.G. JMA

CRIMINAL PETITION No.1469/2023

BETWEEN:

EMMANUEL MICHAEL

... PETITIONER

(BY SRI: HASHMATH PASHA, SENIOR ADVOCATE FOR
SRI: MAHAMMADALI, HP-UNQIUE & CO.,)

AND:

UNION OF INDIA
NARCOTIC CONTROL BUREAU
BANGALORE ZONAL UNIT
BANGALORE.

(REPRESENTED BY LEARNED
STATE PUBLIC PROSECUTOR
HIGH COURT OF KARNATAKA
BANGALORE - 560 001.)

... RESPONDENT

(BY SRI: MADHUKAR DESHPANDE, SENIOR CGSC)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 439 OF CR.P.C. PRAYING TO ENLARGE THE PETITIONER ON BAIL IN NCB CR.NO.48/1/20/2020/BZU ON THE FILE OF THE RESPONDENT NCB, BENGALURU FOR THE OFFENCE PUNISHABLE UNDER SECTION 8(C) READ WITH SECTIONS 21(C), 22(C), 23(C), 27A, 28, 29 AND 32(A)(B) OF NDPS ACT WHICH IS PENDING ON THE FILE OF THE HONBLE XXXIII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE AND SPECIAL JUDGE (NDPS), BENGALURU IN SPL.C.C.NO.768/2021.

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 13.04.2023 COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT PASSED THE FOLLOWING:

ORDER

The petitioner-accused No.2 is before this Court seeking grant of bail under Section 439 of Cr.P.C. in NCB Crime No.48/1/20/2020/BZU on the file of respondent-NCB, Bengaluru, pending in Spl.C.C.No.768 of 2021 on the file of the learned XXXIII Additional City Civil and Sessions Judge and Special Court for NDPS Cases, Bengaluru, registered for the offences punishable under Section 8(c) read with Sections 21(c), 22(c), 23(c), 27, 27A, 28, 29 and 32B(a)(d) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act').

2. Heard Sri Hashmath Pasha, learned senior advocate for Sri Mahammadali, learned counsel for the petitioner and Sri Madhukar Deshpande, learned senior Central Government Standing Counsel for the respondent - State. Perused the materials on record.

3. Learned senior advocate for the petitioner submitted that the petitioner is arrayed as accused No.2. He

is innocent and has not committed any offences as alleged. He has been falsely implicated in the matter without any basis. He was apprehended on 23.12.2020 and since then he is in judicial custody. The petitioner had filed similar petition seeking grant of bail in Criminal Petition No.3406 of 2021 and the same came to be dismissed vide order dated 08.10.2021. The petitioner had filed Writ Petition No.16663 of 2022 (GM-RES) before this Court under Articles 226 and 227 of the Constitution of India seeking direction to the Trial Court for speedy trial of Spl.C.C.No.768 of 2021. The said writ petition was allowed by the co-ordinate Bench of this Court vide order dated 07.11.2022, directing the Trial Court to dispose of the special case within a period of three months from the date of receipt of copy of the order. The said period would expire on 06.02.2023. However, learned senior advocate would contend that the Trial Court sought for extension of period for disposal of the case and considering the prayer, the time was further extended by three months. But the trial before the Trial Court has not yet been completed. Even though, PWs.1 to 4 were examined before the Trial Court, only PW2 was tendered for cross examination. Other witnesses are not

being tendered to enable the counsel to cross examine them. Still there are four more witnesses to be examined on behalf of the prosecution. Under such circumstances, the right of the accused for life and liberty guaranteed under Article 21 of the Constitution of India is being violated. The direction passed by the co-ordinate Bench of this Court in the writ petition is also violated. The accused is in judicial custody since about 28 months. There is no possibility of completion of trial in near future. Under such circumstances, the petitioner is entitled to be enlarged on bail!

4. Learned senior advocate further contended that the Hon'ble Apex Court in its recent decision rendered on 28.03.2023 in ***Mohd Muslim @ Hussain Vs State (NCB of Delhi)***¹ categorically held that the twin conditions mentioned under Section 37 of NDPS Act cannot have a general application to deny bail once the case is registered for commission of such offence. Finding the accused not guilty and that he would not commit any offence while on bail, at the initial stage when there are no materials available on record would amount to punitive detention. The Hon'ble Apex

¹ 2023 Live Law (SC) 260

Court also held that grant of bail on the ground of undue delay in trial cannot be said to be fettered by Section 37 of NDPS Act, given the imperative of section 436A which is applicable to the offences under NDPS Act too. By making such observations, the Hon'ble Apex Court granted bail in favour of the accused in similar offence. Therefore, learned senior advocate would contend that the approach of the Hon'ble Apex Court in considering Section 37 of NDPS Act and the twin conditions mentioned therein has drastically changed. Therefore, the petitioner in the present case against whom there is absolutely no material to invoke any of the provisions of law cannot be made to languish in the prison without any basis that too when there are absolutely no material to connect the accused to the offence in question. Detention of the petitioner in custody would amount to pre-trial punishment. The petitioner is the permanent resident of the address mentioned in the cause title to the petition and is ready and willing to abide by any of the conditions that would be imposed by this Court. Hence, he prays to allow the petition, in the interest of justice.

5. *Per contra*, learned senior Central Government Standing Counsel opposing the petition submitted that the contention of the petitioner that there are no materials to connect him to the offence in question and that he is entitled to be enlarged on bail were considered by this Court in the earlier petition filed by him in Criminal Petition No.3406 of 2021, which came to be dismissed vide order dated 08.10.2021. A categorical finding is recorded regarding *prima facie* satisfaction about the materials against the petitioner for having committed the offences. Under such circumstances, it cannot be contended once again regarding requirement under Section 37 of NDPS Act.

6. Learned counsel further submitted that there is an extension of time granted by the writ court, but the order is not produced before the Court. Even before extension of period by the writ court, the present petition came to be filed. The prosecution examined PWs.1 to 4. PW2 alone is cross examined fully. Even though, PWs.1, 3 and 4 were present before the Trial Court, the counsel representing the accused sought for time and therefore, the matter was adjourned.

Under such circumstances, the petitioner cannot take advantage of the situation to seek bail on such grounds.

7. Learned counsel further submitted that the petitioner is an Kenyan citizen over staying in India without any passport or visa. He is indulged in drug peddling. The *modus operandi* adopted in procuring the contraband through postal service and collecting the same after ensuring their anonymity and making an effort to run away from the scene of occurrence on seeing the NCB officers, *prima facie* discloses the conduct of the accused. When the petition filed by the petitioner was rejected on merits and when there are no changed circumstances, the petitioner is not entitled for grant of bail.

8. Learned counsel further submitted that the petitioner is also booked for the offence under the provisions of Foreigners Act. Admittedly, he being Kenyan citizen is not having valid passport and visa to remain in India. Under such circumstances, he is not entitled to be released from prison. Even if he is enlarged on bail, he is required to be shifted to the Detention Centre.

9. Learned counsel also submitted that the petitioner was apprehended and investigation was conducted. Immediately, the charge sheet was filed. The matter is now pending before the Trial Court, where four of the witnesses are examined. The remaining four witnesses will be examined within a short period of time. Under such circumstances, it cannot be said that there is undue delay in the trial and the petitioner is unnecessarily detained in custody. Therefore, no grounds are made out to entertain the petition. Hence, he prays for dismissal of the petition.

10. In view of the rival contentions urged by the learned counsel for both the parties, the point that would arise for my consideration is:

"Whether the petitioner is entitled for grant of bail under Section 439 of Cr.P.C.?"

My answer to the above point is in 'Negative' for the following:

REASONS

11. The petitioner is charged for the offences punishable under Section 8(c) read with Sections 21(c),

22(c), 23(c), 27, 27A, 28, 29 and 32B(a)(d) of the NDPS Act. It is the contention of the prosecution that on receipt of secret information regarding a parcel lying in the Foreign Post Office, Chamrajpet suspected to contain MDMA pills, the same was opened in the presence of parchas where they found 314 grams of pale yellow colored round shaped pills and 296 grams of grey colored pills in polythene pouches. Those pills are tested positive for MDMA. It is stated that accused Nos.1 and 2 were intercepted when they came near the post office at Sahakarnagar, obviously to collect the parcel in question. Accused No.1 was apprehended when he came and enquired about the parcel and revealed about the presence of accused No.2 who was his friend. Accordingly, accused No.2 was found waiting outside the post office and made an attempt to run away when NCB team introduced themselves to him. Accused Nos.1 and 2 were apprehended and investigation was conducted.

12. The petitioner had filed similar petition seeking grant of bail in Criminal Petition No.3406 of 2021. The contention taken by the petitioner was considered at length and an opinion was formed that looking to the seriousness of

the offence and *prima facie* materials that are placed before the Court, he is not entitled for grant of bail. While dismissing the petition, this Court had also taken into consideration the contention taken by the prosecution that the passport found during the search of the house where the petitioner was staying was fake one and one more criminal case under the provision of Foreigners Act was registered against him at DJ Halli Police Station. It is also stated that the bank account in the name of Mugmami Esther Awsi is suspected to be a fictitious person and account was handled by the present petitioner where an amount of Rs.1.14 crores was transferred by accused No.3 for having purchased the drugs from the petitioner and his statement was recorded during investigation. It is also observed that the prosecution is relying on small and tiny circumstances to connect the petitioner to the offence in question. But when all the dots are joined together, it will lead to a reasonable and *prima facie* conclusion regarding involvement of the petitioner in the commission of offence. By assigning elaborate reasons, the petition filed by the petitioner came to be dismissed vide

order dated 08.10.2021. Admittedly, the said order is not challenged by the accused.

13. Learned senior counsel relies on the decision of **Mohd Muslim @ Hussain** (*supra*), to contend that the rigor under Section 37 of NDPS Act has no general application and that the twin conditions contained therein cannot be made applicable to all the cases in general. While disposing of the earlier petition regarding application of Section 37 of NDPS Act and satisfaction with regard to twin conditions contained in Section 37(1)(b)(ii) of NDPS Act, this Court has referred to the decisions of the Hon'ble Apex Court in **Union of India Vs Mohanlal**² and another and **Supdt., Narcotics Control Bureau, Chennai Vs R Paulswamy**³ and formed an opinion that there are *prima facie* materials to connect the petitioner to the offence in question and it cannot be said that he is not guilty of the offence and he may not commit any offence while on bail.

14. The Hon'ble Apex Court in **Mohd Muslim @ Hussain** (*supra*), on facts, noticed that on the basis of secret

² (2016) 3 SCC 379

³ (2000) 9 SCC 549

information, a raid was held by the police on 28.09.2015 to seize 180 kilo grams of ganja. The accused was arrested on the intervening night of 3/4.10.2015 and his bail applications were rejected. The investigation was completed and charge sheet was filed and since then the accused in the said case was in custody. Under such circumstances, learned counsel representing the accused contended that there is long incarceration suffered by the accused and he is entitled for grant of bail since more than 34 witnesses are yet to be examined and there is no progress in the trial. It was also urged that the main accused and the co-accused are already enlarged on bail and under such circumstances, the accused before the Hon'ble Apex Court is also entitled for grant of bail. On the facts of the said case, the Hon'ble Apex Court considered Section 37 of NDPS Act and held in paras 18 to 23 as under:

"18. The conditions which courts have to be cognizant of are 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. What is meant by "not guilty" when all the evidence is not before

the court? It can only be a prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice: even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not

committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws - be balanced against the public interest.

19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

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

21. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the

country. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

22. *The danger of unjust imprisonment, is that inmates are at risk of "prisonisation" a term described by the Kerala High Court in A Convict Prisoner v. State as "a radical transformation" whereby the prisoner:*

"loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes."

23. *There is a further danger of the prisoner turning to crime, "as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal". Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata: immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable),*

and ensure that trials – especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily."

(Emphasis supplied)

15. Analyzed the reasoning given by the Hon'ble Apex Court and compared with the facts of the present case. In the present case, the accused was apprehended on 23.12.2020. The investigation was completed and the charge sheet was filed citing 8 witnesses. The trial in the matter has already begun and four witnesses are already examined. However, only one witnesses is cross examined. The order sheet of the Trial Court dated 07.02.2023 discloses that the counsel for accused No.1 submitted as under:

"Learned counsel for accused No.1 submits that he has to cross examine the witness in length, it may take hours. Senior counsel for Sri SB is absent. He submits his senior is on the way from Hon'ble High Court and he may reach shortly. But now he is not present before the Court today. The chief examination of witness is completed. Documents and properties were marked. Now, it is 1.50 p.m. the cross examination if is taken today also, it won't be completed. He has submitted that, he is going to

cross examine the witness in the afternoon session.

In the afternoon session, case is called. Learned counsel for accused prays time for cross. Hence, call on for cross of PW.1 and PW.2."

16. On the next date of hearing on 21.02.2023, even though PW1 was present, the Trial Court noted that the trial in the Spl.C.C.No.1106 of 2019 was in progress where PW10 was being examined. Accused Nos.1 and 3 are in judicial custody from 22.03.2019. The NCB official has come from Hyderabad and is examined as PW11 and under such circumstances, the evidence in the present case could not be taken and hence, the matter was adjourned.

17. It is to be noted that the Trial Court, which is a Special Court to try the cases registered under NDPS Act is having the pendency of 1308 cases as on 01.04.2023 and in majority of cases, accused are in judicial custody. The oldest case which is pending before the Trial Court is of the year 2004. In the light of these facts and circumstances the contention raised by the learned senior advocate that the right of the accused to the life and liberty guaranteed under

Article 21 of Constitution of India is being violated is to be appreciated.

18. In a similar situation, while disposing of the similar matter in Criminal Petition No.1521 of 2022 dated 21.04.2022, this Court had taken note of the fact that the total pendency before the Special Court was 1550. Out of which, 1345 were the special cases under NDPS Act and the oldest matter being the year 2004. It was observed that it is high time to take appropriate measures to lessen the burden of the Trial Court to enable speedy trial and disposal of the matters in a time bound manner. Accordingly, the learned Registrar (Judicial) of this Court was directed to take appropriate measures to lessen the burden of the Trial Court after taking necessary orders from the concerned to enable the Trial Court to dispose of the matter within a reasonable time.

19. It is stated that as a result of such direction, now there are two more designated Courts, apart from the existing dedicated Court in Bengaluru City to try the cases under NDPS Act and the jurisdiction of the Trial Court to try such cases

pertaining to Bengaluru Rural District is now withdrawn, which has eased the burden on the Trial Court to some extent. But in spite of that, the pendency before the Trial Court as on 01.04.2023 is 1308. It is humanly impossible to dispose of all those matters in a time bound manner, since invariably in all these cases there will be lengthy evidence that is being led by the prosecution and equally lengthy cross examination on behalf of each of the accused. There will be again lengthy arguments even on bail applications and on merits. Under such circumstances, the practicability of disposing of the matter expeditiously within few months would be a herculean task. If in the meantime, considering the right of the accused guaranteed under Article 21 of the Constitution of India, they are to be enlarged on bail, almost all the accused who are in judicial custody in those 1308 cases pending before the Trial Court may have to be released on bail, which is definitely not in the best interest of the civilized society as a whole.

20. The Hon'ble Apex Court in **Mohd Muslim @ Hussain** (*supra*), considered a situation where the accused was languishing in prison for about 8 years and still the trial had not commenced. The prosecution has cited as many as 34

witnesses who are to be examined, but there was no progress in the trial. The main accused was also already enlarged on bail. With these facts, it was held that the accused therein is detained due to undue delay and prolonged trial. However, the Hon'ble Apex Court re-iterated that the Special Courts have to consider the materials, which are *prima facie* sufficient to prove the guilt of the accused and likelihood of he committing any offence upon release. The Court has also highlighted the responsibility of the Courts to balance the interest of the accused against the public interest. The Court rightly observed that the stringent conditions under Section 37 of NDPS Act cannot be made applicable casually or generally in all the cases, where even the *prima facie* material to prove the guilt is lacking.

21. When sufficient materials are placed before the Court which *prima facie* substantiates the contention of the prosecution at the initial stage of considering the bail application, I do not find any reason to accept the contention of the petitioner, that there is inordinate delay in concluding the trial and it is a ground to enlarge the accused on bail without reference to the bar under Section 37 of NDPS Act.

The decision of the Hon'ble Apex Court cannot be stretched to such an extent to state that in any case irrespective of the materials that are placed by the prosecution to prove the guilt of the accused, the accused is entitled to be enlarged on bail ignoring Section 37 of NDPS Act. If this yardstick is adopted by the Courts, by and large no person accused of committing the offence under the special enactment could be detained in prison after expiry of certain specified period, ignoring the *prima facie* materials that are relied on by the prosecution. One should keep in mind the object with which the NDPS Act was enacted. Each one of us know the menace that is being caused by Narcotics Drugs and Psychotropic Substances. This menace of drug may enter our house unknowingly, but its effect will be unimaginable. When the Courts recognize and respect the individual right to life and liberty as guaranteed under Article 21 of the Constitution of India, it is the duty of the Court to recognize and respect such rights of the citizens as a whole. The societal interest will always be paramount when compared to the individual right of a person.

22. When the petitioner admits that the writ court has extended the period of time for disposal of the case by the

Special Court, nothing prevented him from producing the order passed in the said case. Even according to the petitioner, the order in the writ petition was passed on 07.12.2022 granting three months time to dispose of the case. It is relevant to mention that even though there was extension of the period by three more months, the present petition was filed on 07.02.2023. Even if the contention of the learned senior advocate for the petitioner is to be accepted regarding extension of period by three more months, the said period is not yet lapsed till now.

23. If the seriousness of the offence with the peculiar facts and circumstances are taken into consideration, it cannot be said that the accused is languishing in prison due to undue delay in trial. The facts and circumstances disclose that the Trial Court has already taken up the matter for trial and the prosecution has examined PWs.1 to 4 and out of them, PW2 is cross examined fully. Only four more witnesses are required to be examined by the prosecution. When admittedly the petitioner is also booked for the offence under the Foreigners Act and it is stated that he is not having valid passport and visa to stay in India, definitely he is not entitled

to be released from prison. Even if he is to be granted bail, he is to be sent to Detention Centre.

24. In view of the discussions held above, I am of the opinion that, when the individual right of the accused guaranteed under Article 21 of the Constitution of India is considered in the light of the interest of society as a whole, which is to be protected by unscrupulous drug peddlers, the balance will tilt in favour of the society as a whole rather in favour of the accused. The societal interest is always paramount when compared to the individual right of the accused. Therefore, it is to be held that no grounds are made out to entertain the petition. Hence, I answer the above point in the Negative and proceed to pass the following:

ORDER

The petition is ***dismissed***.

**Sd/-
JUDGE**

*bgn/-