

A.F.R.
RESERVED

IN CHAMBER

Case :- CRIMINAL MISC. BAIL APPLICATION No.-12805 of 2021

Applicant :- Shankar Varik @ Vikram

Opposite Party :- Union of India

Counsel for Applicant :- Bhavya Sahai, Brijesh Sahai (Senior Adv.)

Counsel for Opposite Party :- Ashish Pandey, Pranay Krishna

Hon'ble Shekhar Kumar Yadav,J.

1. Heard Mr. Brijesh Sahai, learned Senior Counsel assisted by Mr. Bhavya Sahai, learned counsel for the applicant, Mr. Ashish Pandey, learned counsel for Narcotics Control Bureau.

2. This bail application under Section 439 of Code of Criminal Procedure has been filed by the applicant seeking enlargement on bail in Case Crime No.12 of 2020, under Section 8/20/29 of Narcotic Drugs and Psychotropic Substances Act at Police Station Challani-NCB Lucknow, District Jhansi.

3. The factual matrix of the present case is that on 27.05.2020 at about 07.00 AM, upon information that four persons, namely, Sanjay Kumar Singh, Vinod Singh, Shankar Varik (applicant-accused) and Chhote Lal in two Trucks bearing Registration No.CG-04 HZ-4685 and Dumper bearing Registration No.CG-04 JA-9801 are about to come from Teekamgarh towards Mauranipur at Khadiyan Crossing and they are carrying huge quantity of illegal Ganja, the informant of NCB with his team alongwith necessary items (proper kits) for further action in accordance with provisions of NDPS Act, reached the spot at about 09.00 AM and started patrolling at Khandiyan Crossing. It is alleged that in evening at about 18.30 hrs., the officers of NCB saw both trucks, which were coming towards Khandiyan Crossing of Teekamgarh. The officers

of NCB intercepted the Dumper CG-04 JA-9808 and from the Cavity of Dumper, huge amount of Ganja weighing 1025 kg has been recovered, which was kept in 25 plastic gunny bags and upon testing by DD Kit, the samples tested positive for Ganja. The said Dumper was driven by co-accused Vinod Singh and the applicant was sitting on the truck. The aforesaid search was conducted in presence of two independent witnesses, namely, Chandra Shekhar and Kuldeep and also in presence of gazetted officer, namely, Dr. Pradeep Kumar Singh, C.O. Mauranipur, Jhansi. The aforesaid Dumper was also seized under Section 60 of NDPS Act. A notice under section 67 of NDPS Act was served upon the accused persons and their statements were also recorded.

4. Mr. Sahai, learned Senior Counsel appearing for the applicant has submitted that the applicant has been falsely implicated in the present case. During lock-down, the applicant went to Jhansi for his personal work and he did not get any vehicle to return back to his village at Chhattisgarh. The applicant was neither owner of the Dumper nor driver of the Dumper. The applicant was merely a passenger in the vehicle in question. He has further submitted that the applicant has no knowledge about recovered contraband. The alleged Dumper, from which the contraband has been recovered, does not belong to the applicant. He has further submitted that neither any recovery has been made nor any recovery memo has been prepared on the spot. At the time of arrest, mandatory provision of Sections 42, 50, 52, 53, 57 of NDPS Act have not been complied with. He has further submitted that nothing has been recovered from the possession of the applicant and the alleged recovery is false and fabricated. There is no independent eye witness of the alleged recovery, which has

been shown. He has further submitted that there is no evidence on record which shows that applicant was in conscious possession or constructive possession of the recovered contraband. The applicant is having no criminal history. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the applicant have also been touched upon at length. The applicant is in jail since 29.05.2020.

5. Learned AGA for the State as well as Mr. Ashish Pandey, learned counsel for NCB have opposed the prayer for bail and have submitted that the applicant was arrested on spot. The applicant and other co-accused persons were very much involved in inter-state trafficking as they themselves have admitted in their voluntary statement under Section 67 of NDPS Act, which belie all statements. He has further submitted that so far as compliance of Section 50 of NDPS Act is concerned, the accused persons were searched in the presence of Dr. Pradeep Kumar Singh, C.O. Mauranipur, Jhansi, who is a gazetted officer, hence, Section 50 of NDPS Act has fully complied with. Recovery has also been made in presence of two independent witnesses, namely, Chandra Shekhar and Kuldeep. He has further submitted that it is an admitted fact that the recovery of 1025 kg. Ganja, which is more than the commercial quantity, has been recovered from the Dumper in question, hence, Section 37 of NDPS Act is attracted in the present case, therefore, the bail application is liable to be rejected.

6. In support of his submission, Mr. Ashish Pandey, learned counsel for NCB has relied upon the judgment of Hon'ble Apex Court in the case of *Union of India through Narcotics Control*

Bureau, Lucknow vs. Md. Nawaz Khan passed in Criminal Appeal No.1043 of 2021 arising out of SLP (Crl.) No.1771 of 2021 dated 22.09.2021.

7. I have considered the rival submissions advanced by learned counsel for the parties and perused the material available on record.

8. It is evident that on 27.05.2020 during the checking, the vehicle mentioned above, Ganja weighing 1025 kilograms was recovered from the vehicle, which admittedly is more than the commercial quantity, as such, rigors of Section 37 of the NDPS Act are applicable in the instant case.

9. This court has considered the recent case of ***Union of India Vs Md. Nawaz Khan, reported in, AIR 2021 SC 447***, which is a case where contraband was concealed under the bonnet near the wipers of the car and it was held by Supreme Court that factum of absence of possession of contraband by the accused in itself cannot be sole ground for grant of bail. In paragraph nos. 20 & 29, it has been said as under:-

"20. Based on the above precedent, the test which the High Court and this Court are required to apply while granting bail is whether there are reasonable grounds to believe that the accused has not committed an offence and whether he is likely to commit any offence while on bail. Given the seriousness of offences punishable under the NDPS Act and in order to curb the menace of drug-trafficking in the country, stringent parameters for the grant of bail under the NDPS Act have been prescribed.

29. In the complaint that was filed on 16 October 2019 it is alleged that at about 1400 hours on 26 March 2019, information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. The complaint states that the information was immediately reduced to writing. Therefore, the contention that Section 42 of the NDPS Act

was not complied with is prima facie misplaced. The question is one that should be raised in the course of the trial."

10. The Hon'ble Apex Court further in the case of ***Md. Nawaz Khan (supra)*** in paragraph nos. 24 & 25 has also stated as under:

"24. As regards the finding of the High Court regarding absence of recovery of the contraband from the possession of the respondent, we note that in Union of India vs. Rattan Mallik, a two-judge Bench of this Court cancelled the bail of an accused and reversed the finding of the High Court, which had held that as the contraband (heroin) was recovered from a specially made cavity above the cabin of a truck, no contraband was found in the 'possession' of the accused. The Court observed that merely making a finding on the possession of the contraband did not fulfil the parameters of Section 37 (1)(b) and there was non-application of mind by the High Court.

25. In line with the decision of this Court in Rattan Mallik (supra), we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act."

11. It is further asserted by the Hon'ble Supreme Court vide para 25, referred to above, that finding of the absence of possession of the contraband on the person of the accused does not absolve him of the level of scrutiny required under Section 37 (1)(b)(ii) of the NDPS Act.

12. Further from the record it is evident that the prosecution has cited two independent witnesses, so at this stage merely on the ground that the accused has been in custody for more than one and half years, bail cannot be granted, particularly when there are serious allegations of recovery of 1025 kilograms of Ganja, which is above the commercial quantity as per the schedule.

13. Learned counsel for the accused has not been able to point out anything to this Court so as to come to conclusion that the

accused is not guilty of the offence. The fact that accused was not in physical possession of contraband would not be enough to conclude that accused is not guilty. The contention that recovery was not from conscious possession of the accused is noted to be rejected in view of recent decision of Supreme Court in ***Md. Nawaz Khan's case (supra)***.

14. So far as the contention of learned counsel for the applicant that the arresting officials did not comply with the mandatory provisions of search and seizure of narcotics substance as per the provisions of the NDPS Act is concerned is also a question of fact which requires to be decided at the time of trial. It is also a question of fact as to whether the recovery was made on the spot or any substantial delay in taking inventory, photograph and samples of seized articles as contemplated in Section 52-A of the said Act would vitiate the trial or not, can only be decided during trial on the basis of evidence on record.

15. In the case of ***State vs. Syed Amir Hasnain, (2002) 10 SCC 88***, the Hon'ble Apex Court has held in view of the two judgments of this Court in ***Union of India Vs Ram Samujh, (1999) 9 SCC 382*** and ***Union of India Vs Aharwa Deen, (2000) 9 SCC 382***, even the High Court would be bound by the provisions of Section 37 of the NDPS Act and would not be entitled to release the accused under the provisions of the NDPS Act unless the provisions of Section 37 of the Act are satisfied.

16. In the case of ***Megh Singh Vs State of Punjab, 2004 (1) CCSC 337***, the Hon'ble Supreme Court held that a bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises.

17. The learned counsel appearing for the applicant submits that no public witness was taken by the police in the alleged recovery proceedings despite the alleged recovery was made on the Highway, therefore, this recovery cannot be presumed to be an impartial recovery. According to the recovery memo, it is evident that the recovery was made at night and due to pandemic prevalent at that time and seclusion no public witness could be secured. Apart from this, the law is well settled that the evidence of a public officer cannot be thrown only on the ground that he is a police officer.

18. The accusation in the present case is with regard to the commercial quantity. Once the bail is opposed to a person accused of the enumerated offences, in case, the Court proposes to grant bail to such a person, two conditions are to be mandatorily satisfied in addition to the normal requirements under the provisions of the Code of Criminal Procedure, 1973 or any other enactment, (i) the Court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence.

19. In ***Criminal Appeal No(s) 154-157 of 2020 State of Kerala Vs. Rajesh and others***, the Hon'ble Supreme Court has held on 24.01.2020 that the expression "reasonable grounds" means something more than prima facie grounds, and (ii) that person is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed. The non-obstante clause with which this Section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. To check the menace of dangers drugs and psychotropic substances flooding the market, the Parliament has provided that

the person accused of the offences under the Act should not be released on bail during the trial unless the mandatory conditions provided under Section 37 of the Act, 1985 are satisfied.

20. In *State of M.P. Vs. Kajad, (2001) 7 SCC 673*, the Hon'ble Supreme Court has held that negation of bail is the rule and its grants an exception under (ii) of clause (b) of Section 37(1) of the Act, 1985.

21. In Criminal Appeal No(s) 154-157 of 2020 (Supra) the Hon'ble Supreme Court has held that liberal approach in the matter of bail under the NDPS Act, is uncalled for. Therefore, it is quite clear that an order of bail cannot be granted in an arbitrary or fanciful manner. A ratio decidendi of the judgment of Hon'ble Apex Court in *Anil Kumar Yadav Vs. State (N.C.T.) of Delhi and another, 2018(1) CCSC 117* is that in serious crimes, the mere fact that the accused is in custody for more than one year, may not be a relevant consideration to release the accused on bail.

22. In the light of the facts and circumstances of the present case, it would be inappropriate to discuss the evidence in depth at this stage because it is likely to influence the trial of accused. But, from the perusal of the evidences, collected during investigation so far, prima facie, the involvement of the accused in the present case cannot be ruled out. No reason is found to falsely implicate the applicant/accused. Therefore, there is no good ground to release the applicant-accused on bail at this stage. All the contentions raised by the learned senior counsel for the accused pertain to the merits of the case and the same cannot be considered while considering application for grant of bail. This court is unable to form an opinion at this stage that the accused has not committed an offence.

23. In the ultimate conclusion, considering the facts and circumstances of the case, gravity of the offence, severity of punishment, in my opinion, no case for bail is made out. Accordingly, the bail application is hereby **rejected**.

24. It is clarified that the observations made regarding the bail application is limited to the decision of the bail application and any observations made herein shall not effect the trial of the case.

25. However, it is expected that the trial court shall make all sincere endeavours to expedite the proceedings of the trial and conclude the same as expeditiously as possible, in accordance with law, within a period of six months.

Order Date :- 17.01.2022

Ajeet

(Shekhar Kumar Yadav,J.)