

Mohammad Imran vs Narcotics Control Bureau Lucknow on 16 January, 2024

Author: Pankaj Bhatia

Bench: Pankaj Bhatia

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

?Neutral Citation No. - 2024:AHC-LK0:4374

Court No. - 12

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 11506 of 2021

Applicant :- Mohammad Imran

Opposite Party :- Narcotics Control Bureau Lucknow

Counsel for Applicant :- Mukesh Kumar Tewari, Anil Kumar Pandey, Suresh Kumar Yadav

Counsel for Opposite Party :- Akhilesh Kumar Awasthi

Hon'ble Pankaj Bhatia, J.

1. Heard Shri Anil Kumar Pandey, learned counsel for the applicant and Shri Akhilesh Kumar Awasthi, learned counsel for the and perused the record.
2. The accused-applicant seeks bail in Case Crime No.29 of 2021 under section 8/21/25/29 N.D.P.S. Act, P.S. - N.C.B. Lucknow, District-Lucknow.
3. From the documents on record, it appears that on 12.07.2021, a search was carried out based upon the information received from the informers that huge quantity of drug is being transported. On the basis of a search allegedly carried out, Morphine was recovered which was kept in a White Bag weighed at 2.250 Kg along with currency notes of an amount of Rs. 2,00,000/- which were kept in a Car bearing vehicle no.UP 32 LC 5503. The car was owned by the applicant Mohammad Imran

(the applicant) and the car was being driven by co accused Wahid Ali.

4. Submission of learned counsel for the applicant is that the possession was shown at the pointing out of both the persons including the applicant and Wahid Ali. This Court by means of a detailed order dated 12.7.2023, granted bail to the co accused Wahid Ali. It is admitted that the said order remains intact and has not been challenged.

5. It is argued that all the shortcomings as were argued while arguing the bail applicant of Wahid Ali are present in the present case also as the recovery were shown from the two persons and from the same car. In addition to the said, it is argued that there is clear non compliance of the mandate of Section 52-A of the N.D.P.S. Act as in the sample drawn allegedly in the presence of the magistrate do not demonstrate the compliance of mandate of Section 52-A of the N.D.P.S. Act as the court concerned has merely recorded that "Seen" whereas there is no approval or certification of the court concerned as is required in terms of the mandate of Section 52-A.

6. Reliance is also placed upon the judgement and order dated 13.10.2023 passed by Hon'ble Supreme Court in the case of Yusuf @ Asif Vs. State : Criminal Appeal No.3191 of 2023 arising out of S.L.P.(Crl.) No.3010 of 2023, which are as under (paragraphs 11 and 12) :-

"11. For the sake of convenience, relevant sub-sections of Section 52-A of the NDPS Act are reproduced hereinbelow :

"52A. Disposal of seized narcotic drugs and psychotropic substances.

(1).....

(2). Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of -

(a). certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances or conveyances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3). Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (10 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate as primary evidence in respect of such offence."

12. A simple reading of the aforesaid provisions, as also stated earlier, reveals that when any contraband/ narcotic substance is seized and forwarded to the police or to the officer so mentioned under Section 53, the officer so referred to in sub-section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn."

7. It is further argued that as the sampling process was not duly certified by the magistrate, the effect of such search was concluded by the Hon'ble Supreme Court in paragraph 16 of the said judgement, which reads as under :-

"16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated."

8. It is further argued by learned counsel for the applicant that the applicant was apprehended on 13.7.2021 and till date P.W.-1 has not yet completed his evidence, as is clear from the questionnaire handed over by learned counsel for the applicant across the bar, which is taken on record.

9. He further argued that the Hon'ble Supreme Court had granted the bail to an accused who had continued in custody for over 2 and half years and his bail application was rejected by the Calcutta High Court. The said bail order by which the bail was granted to the accused in S.L.P.(Criminal) No.5623 of 2023 : Subrata Biswas @ Pradip Vs. The State of West Bengal, is handed over across the bar demonstrating that on 3.8.2023, the bail was granted by the Hon'ble Supreme Court. It is thus, argued that the applicant who has no other criminal antecedents, should be enlarged on bail.

10. Shri Akhilesh Kumar Awasthi appearing on behalf of the respondent on the other hand, strongly opposed the application for bail. He argues that the argument raised by the counsel for the applicant deserved to be rejected. It is the applicant who is the mastermind of the entire operations who was apprehended by the respondents. He draws my attention to the statement under Section 67 of the NDPS Act wherein the applicant had accepted that he was the owner of the car as well as the goods and the money. Shri Awasthi had also admitted that it was the applicant who was transporting the apprehended goods with the help of Wahid Ali, co accused. In the light of the said submission, it is argued that the applicant has admitted his guilt and was the main person running the drugs racket and was being held by the NCB alongwith other co accused.

11. He also draws my attention to the statement of Wahid Ali wherein he had stated that earlier he was not aware of the applicant indulging in these offences, however for the last 3 to 4 months, he became aware of the said business and was helping the applicant. A similar averment is contained in paragraphs 7 and 12 of the complaint filed by the N.C.B. against the applicant.

12. He further argued that the sampling process by which the samples were drawn, were duly brought to the knowledge of the court concerned, which is reflected in the order which demonstrates as "Seen". He thus, argues that sampling process was done in the presence of the court, which was due compliance of Section 52-A of the NDPS Act, the bail application of the applicant deserves to be rejected.

13. He further argues that although P.W.-1 has started his deposition, generally in practice, not more than 4 to 5 witnesses are adduced, although in the complaint, it is stated that 8 witnesses would be putting their depositions as stated in the complaint. He further argued that no parity can be claimed by the applicant with Wahid Ali in view of the specific statement as referred to above.

14. He further argued that there is a presumption of culpable mental state as prescribed under Section 54 of the NDPS Act. Thus, the bail application should be rejected. He, however, does not disputes that the applicant has no criminal antecedents. It is further argued that in view of the bar created under Section 37 of the NDPS Act, the bail application deserves to be rejected.

15. Learned counsel for the respondent has placed reliance on the judgement of the Hon'ble Supreme Court in the case of State of Kerala and others Vs. Rajesh and others reported in Manu/SC/0084/2020, wherein the Hon'ble Supreme Court has observed as under (paragraphs 18, 19,20 and 21) :-

"18. The jurisdiction of the Court to grant bail is circumscribed by the provisions of Section 37 of the NDPS Act. It can be granted in case there are reasonable grounds for believing that accused is not guilty of such offence, and that he is not likely to commit any 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 Act is apposite. That provision makes the offences under the Act cognizable and non bailable. It reads thus: "37. Offences to be cognizable and nonbailable.?(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 subsection (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)

19. This Court has laid down broad parameters 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 Ors.* 1999(9) SCC 429, it has been elaborated 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* [(1990) 1 SCC 95] as under:

24. 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.

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions 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. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent- Accused on bail. Instead of attempting to take a holistic view of the harmful socioeconomic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended."

20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, 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.

21. The 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 on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."

16. In rejoinder affidavit, learned counsel for the applicant argued that presumption of culpable mental state would arise only when firstly the recovery from accused is established by the prosecution after compliance of the provisions prescribed under the NDPS Act which according to the applicant, are not established in the present case.

17. Considering the submissions made at the bar, what transpires is that the offending goods were recovered from the joint possession of Wahid Ali as well as the applicant from a car in which both the persons were travelling. Separate statements under Section 67 of the NDPS Act were recorded.

The certification as is required in terms of Section 52-A, prima facie does not satisfy the test of Section 52-A as there is no certification of the court concerned.

18. Considering the inconsistencies as observed by this court while deciding the bail application of co accused Wahid Ali, the same would squarely apply to the present case also as the search in case of applicant is same to that of Wahid Ali. The discrepancies as highlighted in the bail order dated 12.7.2023 in the case of Wahid Ali, the co accused would also be applicable to the present case. As regards the statement under Section 67 which is heavily relied upon by the learned counsel for the respondent, it is well settled that the statement under Section 67 is not admissible piece of evidence in view of the law laid down by Hon'ble Supreme Court in the case of Tofan Singh Vs. State of Tamilnadu : AIR 2020 SC 5592.

19. Coming to non-compliance of Section 52-A of the NDPS Act, prima facie on the basis of the document which is on record and contained at page 63 of the counter affidavit filed by the respondent State, there appears to be no certification by the court concerned except the remark "Seen" which prima facie does not satisfy the mandate of Section 52-A.

20. In view of the effect that non-compliance of Section 52-A in its true spirit, would result in trial getting vitiated, as observed by the Hon'ble Supreme Court in its judgement in the case of Yusuf @ Asif (supra) on all the three grounds, a case for bail is made out.

21. The true intent and interpretation of Section 37 of the Act was considered by Hon'ble Supreme Court in the case of Mohd Muslim @ Hussain vs. State (NCT of Delhi) reported in 2023 Live Law (SC) 260, to the following effect (paragraphs 18, 19 and 20) :-

"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 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 vs. Ratan Malik*¹⁹). 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 19 (2009) 2 SCC 624 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."

22. In the present case, there is a prima facie non compliance of mandatory provisions of Section 52-A, thus I am reasonably satisfied that the accused may not be held guilty, the said view is prima facie view only for the purpose of deciding this application.

23. Thus, all the reasons recorded above, the applicant is entitled to be enlarged on bail particularly when the second of twin tests prescribed under Section 37 of the NDPS Act is also satisfied as the applicant has no criminal history of an offence under the provisions of N.D.P.S.Act.

24. Thus, the bail application is allowed.

25. Let the applicant Mohammad Imran be released on bail in aforesaid first information report number subject to his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court below concerned with the following conditions: -

(a) The applicant shall execute a bond to undertake to attend the hearings;

(b) The applicant shall not commit any offence similar to the offence of which he is accused or suspected of the commission; and

(c) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

Order Date :- 16.1.2024 Shukla