

Syed vs State on 13 October, 2008

Author: H.K.Rathod

Bench: H.K.Rathod

Gujarat High Court Case Information System

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CR.MA/2556/2008 9/ 34 JUDGMENT

IN
THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL
MISC.APPLICATION No. 2556 of 2008

For
Approval and Signature:

HONOURABLE
MR.JUSTICE H.K.RATHOD

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1

Whether

Reporters of Local Papers may be allowed to see the judgment ?

2

To

be referred to the Reporter or not ?

3

Whether

their Lordships wish to see the fair copy of the judgment ?

4

Whether

this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5

Whether

it is to be circulated to the civil judge ?

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SYED
BABAR CHISTY SON OF SHRI HAMID CHISTY - Applicant(s)

Versus

STATE
OF GUJARAT - Respondent(s)

=====

Appearance
:
MR
JAGDISH M CHAUHAN for
Applicant(s) : 1,
PUBLIC PROSECUTOR for Respondent(s) :
1,
=====

CORAM

:

HONOURABLE

MR.JUSTICE H.K.RATHOD

Date
: 13/10/2008

ORAL
JUDGMENT

Heard learned advocate Mr. Sodhi on behalf of applicant Syed Babar Chisty son of Shri Hamid Chisty, learned APP Mr. Dave appearing for State of Gujarat.

The present application is filed u/s 37 of NDPS Act read with Section 439 of Criminal Procedure Code.

Learned advocate Mr. Sodhi raised contention before this Court that allegation made against accused applicant that two persons namely Salim and Jallaluddin show me for putting bag in Car, except that according to him no evidence available with prosecution to establish charge against applicant.

He submitted that witness Jallaluddin died during pendency of proceeding and Salim who turned hostile in support of case of applicant. Except this two witnesses, there was no evidence against applicant for establishing charge levelled against applicant. Therefore, applicant shall have to release on bail, who is in jail for more than six years.

He also relied upon decision of Co-ordinate bench (Co: Honourable Mr. Justice A. L. Dave) in Cri. M. Application No. 6476/2008 dated 8/8/2008 and submitted that in case of Brijpal Singh @ Birju s/o Purana Singh Jat Vs. State of Gujarat, who is one of accused, against whom only role attributed that he asked PW. 7 ? Amar Singh to prepare a compartment in vehicle in question stating that if he will prepare said compartment, he will be paid thereof. Learned advocate Mr. Sodhi submitted that said witness does not supported the case of prosecution before trial Court. There are about 70 witnesses, out of whom, 31 have been examined and 39 are yet to be examined and on that ground, also present, application for releasing on bail filed by applicant - accused.

He relied upon said order and submitted that on the ground of parity, when one witness Amar Singh has not supported the case of prosecution, this Co-ordinate Bench has granted bail in favour of Brijpal Singh on the ground that for more than six years, he is in jail and case of Brijpal Singh can not be said that his case would be governed by Section 37 of NDPS Act. Therefore, he submitted that to consider this order of Co-ordinate bench and release present applicant on bail.

Learned APP Mr. Dave appearing on behalf of respondent raising serious objections and opposing

application filed by applicant. Learned APP submitted that before Co-ordinate bench almost facts have been admitted by APP, but in this case, he is not admitting a single fact in favour of applicant. He submitted that one witness namely Salim, he was examined and turned hostile that does not mean that other evidence can not be considered against applicant by Trial Court.

He also submitted that decision of Co-ordinate bench is not applied to fact of this case because in this case this Court has decided bail application by detailed order and rejecting it. Thereafter, applicant has approached Apex Court and Apex Court has also rejected application filed by present applicant while confirming order of this Court.

However, at this stage, learned advocate Mr. Sodhi submitted that in case of Brijpal Singh, bail application was also rejected by Apex Court on merits, even though, Co-ordinate bench as referred above has granted bail in favour of Brijpal Singh. Therefore, according to learned advocate Mr. Sodhi it is necessary to consider order passed by Co-ordinate bench.

The relevant observations made in para 1 to 4 in case of Brijpal Singh passed in Cri. Misc. Application No. 6478/2008 dated 8/8/2008 delivered by (Coram: Honourable Mr. Justice A. L. Dave) is quoted as under:

?S1. Heard learned advocate Mr.Sodhi for the applicant, and learned A.P.P. Ms. Archana Raval for the State.

2.This bail application is pressed into service by the applicant on the ground that he is in jail for nearly six years. The trial has commenced. The only role attributed to the applicant is that he asked P.W.7- Amar Singh to prepare a compartment in the vehicle in question stating that if he will prepare said compartment, he will be paid therefor. The said witness does not involve the applicant in his deposition before the trial Court. There are about 70 witnesses, out of whom, 31 have been examined and 39 are yet to be examined and, therefore, the applicant may be released on bail.

3. On the other hand, learned A.P.P., on the basis of the report received by her from the investigating agency and instructions from the Investigating Officer, who is present in the Court, states that the deposition of eye witness is in process of being recorded and thereafter the Investigating Officer will be examined. She is, however, not able to state firmly that the prosecution is not going to examine other witnesses. That apart, she conceded to a situation that the role attributed to the applicant is of asking P.W.7 ?

Amar Singh to prepare a compartment in the vehicle in question and that Amar Singh would be paid therefor. There is also no dispute on the aspect that Amar Singh has not supported the prosecution against the applicant and he has been declared hostile. It is also conceded by the learned A.P.P. that other witnesses who are yet to be examined, would have nothing to say against the applicant, except what may be stated by the I.O. In this regard, the I.O. at the most would depose that Amar Singh had stated that the applicant had come and asked him to prepare the compartment.

4. In light of the above situation, this Court is of the view that there is hardly any material to deny liberty to the applicant. Besides this, it cannot be said that his case would be governed by Section 37 of the N.D.P.S. Act. It may also be recorded that considering the accusation and considering the fact that he is in jail for nearly six years, the case of the applicant for bail becomes stronger. This Court is, therefore, inclined to entertain this application, but, on certain stringent conditions.??

I have considered submissions made by both learned advocates. It is necessary to note important facts that in Cri. Misc. Application no. 7862/2003, this Court by order dated 12/11/2003 after considering mandatory provisions of Section 37 of NDPS Act rejected bail application. The decision given by this Court is running about 37 pages and also considered that what would be effect in considering bail application under provisions of NDPS Act.

The relevant observation made by this Court on page 26 to 29 is quoted as under:

?SLooking to the charge sheet filed against the petitioner, the prima facie involvement as well as the active participation of the petitioner in a transaction has been established which is having international racket. At the time when the narcotic drugs were adjusted in both the cars at the relevant time, the presence of the petitioner has also been established, of course, prima facie, in view of the statements of two independent persons namely Jalaluddin Chita and Salim Chita. The presence of the said two independent persons at the site was natural because both of them were preparing the food as per the requirement of accused. Therefore, naturally, both the independent persons rightly identified the presence of the petitioner on the site at the relevant time for doing the work of adjustment of the narcotic drugs in a secret place and/or box of the cars. Therefore, when the activity of the petitioner, his active participation with narcotic drugs has been prima facie established and proved on the basis of the statements of two independent witnesses, that itself is enough to say that prima facie, it cannot be said that the petitioner is falsely implicated in the said offence. Not only that, but accused no.5 Mohammad Rais initially gave statement before the police authority wherein also, involvement of the present petitioner in the said offence was pointed out by him which alone was establishing his prima facie involvement and active participation in the offence. Thereafter, accused no.5 Mohammad Rais gave his statement before the Magistrate under Section 164 of the Code of Criminal Procedure and now, naturally, this is an additional piece of evidence against the petitioner which established clear involvement of the petitioner in the alleged offence. In view of such clear and apparent evidence on record, at this juncture, it cannot be said that there are reasonable grounds for believing that the petitioner is not guilty of such offence. In view of that, the submission made by the learned advocate Mr. Yagnik that the petitioner has falsely been implicated in such a serious offence cannot be accepted and, therefore, same is rejected. The submission made by the learned advocate Mr. Yagnik about the young age, education and the religious back ground of the petitioner has to be considered in light of the draconian effect of the narcotic drugs and psychotropic substance on the young generation of our country which is the wealth of the nation. If we see to the effect of such drugs in

the society, then, lacs of the young people are becoming addicted of such drugs which is ultimately ruining the young generation and thereby destroying the wealth of the nation. After the boys of a young are being made addicted of such narcotic drugs, the operators of such racket are compelling them to indulge into anti social and anti national activities and the victims of such drugs are having no option but to surrender at the whims and caprice of such operators because if they would not surrender to them, then, they would not get the quantity for their consumption. By adopting such means, the operators of such international racket are also exploiting the young generation which is nothing but the wealth and hopes of our nation. Narcotic Drugs is concealed cancer in the society. Nobody is realizing the real effect of the said drugs in the society. It is like a slow poison which is ultimately resulting in death of such a person. Accused wants certain financial benefits by selling the commercial quantity in the society but the accused persons are not worried and are having no concern about the interest of the society. They are concerned and interested only in money and not in the society. Ultimately, by consuming such drugs and substances, society as a whole is becoming weak because the young generation is becoming addicted of such drugs and substances but nobody is looking from that angle because ultimately, young person, with the help of 8 to 10 persons, destroying settled society by selling the narcotic drugs. In view of that, considering the effect of such drugs and substances on the young generation of our country, the submission of Mr. Yagnik that the young age of the petitioner, his religious family back ground should be considered while considering this application cannot be accepted and the same is, therefore, rejected since the offence in question is not the offence against an individual but it is an offence against the society as a whole and the nation because when there is a conflict between an individual and the society at large, then, the law has given prima place to the society, State and the Nation. Means, the Society, State and the Nation are supreme in comparison to the fundamental right of any individual. Therefore, when it was found in two car about 24 kg. narcotic drugs in Gujarat, then, no leniency can be shown in favour of such a person and in view of that, his age, his religious family back ground etc. cannot be taken into consideration while considering his bail application under the NDPS Act.??

It is made clear that this Court has rejected bail application after receiving charge sheet by accused but before evidence commenced in trial Court. Normally, once bail application rejected on merits by the Court, then successive bail application can not be entertained by this Court unless circumstances are changed.

Looking to fact of this case, present circumstance changed as pointed by learned advocate Mr. Sodhi that one witness Jallaludin died and Salim become hostile, except that there is no changed in circumstance, which was prevailed at relevant time when this Court has rejected bail application of applicant. Now what would be effect of this change which alleged by applicant before this Court in present application is to be considered by this Court. Before Trial Court almost 32 witnesses are examined and according to learned APP now one witness is remained to be examined on

15/10/2008 and one witness, who is to be cross examined by other side and except that evidence part will be over within a week.

Now at this stage which is considered to be crucial, how this Court will appreciate evidence which are lying before Trial Court and appreciation of evidence is within jurisdiction of Trial Court, this Court can not appreciate evidence of witness while considering bail application filed by applicant, only on the ground of changed circumstance. The charge can be proved before Trial Court on the basis of materials, which are on record available with Trial Court and it can not presume that except this two witness no other witness made allegation against present applicant. The Mohmad Rais made statement before Magistrate involved present applicant. The Trial Court has to consider entire evidence and circumstance and chain and link of offence that how offence has been committed and how many persons are linked with this offence and how this entire work has been completed by several person, can not be put in pieces by way of separate evidence for separate accused. If that theory has been applied, then it is very difficult to establish charge against any accused. The present applicant is a accused committed offence under the provisions of NDPS Act. The offence is not committed by one person, but it is a continuous chain connected each accused with offence for completing network. Now that connection is to be established by prosecution by leading proper evidence before Trial Court. That exercise likely to be over within a week as per statement made by learned APP Mr. Dave before this Court. Now, learned advocate Mr. Sodhi submitted that out of entire chain only one evidence of Salim is to be considered against accused and except that nothing is to be considered against applicant. Such submission can not be accepted by this Court simply on the ground that it is offence being serious one committed by applicant, for that, 32 witnesses have been examined and this is the function of Trial Court to appreciate evidence lead by prosecution against each accused whether they are involved in offence or not and whether offence has been established against them or not, for that, offence, merely evidence of witness no. 1 or 2 is not enough but entire chain is to be considered by Trial Court and surrounding circumstance where involvement of accused is to be established then also Court can pass order against applicant for convicting in any offence of NDPS act as mentioned in charge sheet.

Therefore, mandatory provision u/s 37 is strictly applied to this case also which were applied in first order dated 12/11/2003. According to my opinion, there is no slightest change in circumstance from date of first order till date of this order, so long Section 37 applied having statutory mandate that this Court has to satisfy that there are reasonable ground for believing that he is not guilty of such offence and not likely commit any offence while on bail. Then and then only this Court can consider successive bail Application under NDPS Act otherwise not.

This Court at this stage, having 32 witnesses, examined by Trial Court can not ignored the mandate of Section 37 which has not satisfy in fact of this case. The present applicant is one hook or link of entire chain where offence has been

committed by covering all accused alleged by prosecution in charge sheet.

Therefore, in light of this back ground, first part that there is no sufficient evidence on record produced by applicant to establish that circumstance has been changed, which entitled him to file such application before this Court. Whatever circumstance mentioned by learned advocate Mr. Sodhi in respect to above referred two witnesses, according to my opinion, it can not consider to be changed in circumstance of accused from date of original order dated 12/11/2003 till today. There are no materials produced by Applicant before this Court about evidence of Salim and other facts relied by Applicant.

Recently, the Apex Court has examined question while considering bail application under provisions of NDPS Act read with section 37, which controlled such bail application filed by accused in case of N. R. Mon Vs. MD Nasimuddin reported in 2008 (9) SCALE 334. The relevant portion as discussed by apex Court after considering case of Union of India Vs. Gurucharan Singh reported in 2003 (11) SCC 764 in para 6,7,8 and 9 are quoted as under:

?S6. In Union of India Vs. Gurucharan Singh (2003 (11) SCC 764), it was noted as follows:

?S5. On a bare perusal of the impugned order of the High Court, we are satisfied that the High Court has not borne in mind the provisions of Section 37 of the Act before releasing the accused ? respondent on bail. We, therefore, set aside the order and allow this appeal. We direct that the trial be concluded expeditiously.??

In Collector of Customs, New Delhi Vs. Ahmadalieva Nodira (2004 (3) SCC 549) it was noted at page 552 as follows:

?S6. As observed by this Court in Union of India Vs. Thamisharasi clause

(b) of sub section (1) of Section 37 imposes limitations on granting of bail in addition to those provided under the Code.

The two limitations are : (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court 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.

7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused ? respondent is concerned, are : the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not

guilty has to be based on reasonable grounds. 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 provisions 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 at hand the High Court seems to have completely overlooked the underlying object of Section 37. It did not take note of the confessional statement recorded under Section 67 of the Act. Description of drug at Serial No. 43 of the Schedule which reads as follows has not been kept in view:

SL. International non- Chemical No. Proprietary names name 43 DIAZEPAM 7.

Chloro- 1, 3- dihydro, methyl- 5 phenyl-2H2, 4-

benzondiaspein 2-

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In addition, the

report of the Central Revenue Control Laboratory was brought to the notice of the High Court. The same was lightly brushed aside without any justifiable reason.

In Union of India Vs. Abdulla (2004 (13) SCC 504) it was noted as follows:

"5. The respondent herein was charged of the offences punishable under sections 8/21/29/60 of the Narcotic Drugs and Psychotropic Substances Act, 1985 before the Court of Special Judge, Lucknow. His application for grant of bail was rejected by the Special Judge by assigning reasons therefor. Further application being made to the High Court of Judicature at Allahabad, the High Court without considering the mandatory requirement of Section 37 of the Act and without coming to the prima facie conclusion that there was no material against the respondent to convict him for the charges alleged against him mechanically proceeded to grant the bail. This Court in the case of Supdt., Narcotics (Control Bureau vs. R. Paulsamy (200) 9 SCC 549, has held that in matter arising out of the Narcotic Drugs and Psychotropic Substances Act grant of bail is controlled by Section 37 of the Act and it is mandatory for the Court to hear the Public Prosecutor and come to the prima facie conclusion that there is no material to come to the conclusion that the accused could be held guilty of the charges levelled against him. Since such a conclusion is not recorded by the High Court and is not supported by reasons we think the impugned order cannot be sustained."

In *Narcotics Control, Bureau Vs. Karma Phuntsok and Ors.* (2005 (12) SCC 480) it was noted as follow:

?S4 The respondents were convicted under section 29 read with Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, (the NDPS Act) and sentenced to rigorous imprisonment for 10 years and a fine of Rs. 1000. On appeals being filed, the learned Judge suspended the sentence and the respondents were enlarged on bail on executing a personal bond for a sum of Rs. 50,000/- with one surety for the like amount, to the satisfaction of the trial court. We have perused the order passed by the Learned Judge and we find that there is not even a whisper about the conditions contained in Section 37 of the NDPS Act with regard to enlarging of the accused on bail. Mr. Jaspal Singh, learned Senior Counsel appearing for the respondents contended that the learned Public Prosecutor did not oppose the bail as continued in Section 37(1)(b)(ii) of the NDPS Act. According to him, unless the Public Prosecutor oppose the bail application, Section 37 will not apply. Mr. Singh seriously contended that inasmuch as the appellant have not put on record that the Public Prosecutor had opposed the granting of bail it must be presumed that this is an order covered under sections 37(3) read with section 439 Cr.P.C. To say the least, the argument appears to be baseless. We can not accept the contention that in a matter involving seizure of commercial quantity of a substance prohibited by the NDPS Act when the Public Prosecutor appears on notice of the bail application he would be standing there as a mute spectator not opposing the beck of the accused. We find no substance in this argument. In our view, the very fact that the Public Prosecutor appeared would suggest that the appears to oppose the bail application. In any event, the order of the High Court does not suggest that the Public Prosecutor had agreed for bail being granted. In the aforesaid circumstance, we find no substance whatsoever in the contention raised by Mr. Singh.??

It is necessary to note that once this Court has rejected bail application after examining section 37 on merits after receiving charge sheet by applicant, now to reconsider entire matter because of fact that one witness Jallulddin expired and Salim has turned hostile, it is risky to consider bail application while keeping in mind this only factor where more than 32 witnesses have been examined by Trial Court and Trial Court has to examine where on the basis of evidence charge levelled against applicant is proved or not, for that, only two witnesses are not enough and sufficient where circumstance can be considered by Trial Court to establish entire chain of offence against applicant including other accused.

It is also necessary to note that at this stage, if this Court has considered submissions made by learned advocate Mr. Sodhi, then it amounts to cause some prejudice to case of prosecution and unnecessary interference by higher Court when trial is already continued day to day before Trial Court.

It is necessary to note that order of Co-ordinate bench as referred is unreasoned order based on implied consent of Learned APP. I failed to understand the order passed by Co-ordinate Bench how it applicable to facts of this case. In this case there is statement given by Mohmad Rais before Magistrate involving present applicant. The Salim hostile suggested something adverse to the applicant. There is no materials produced by applicant before this Court which satisfied this Court about mandatory requirement of Section 37 if NDPS Act. The view taken by Apex Court in N. R. Mon reported in 2008 (9) SCALE 334, para 7 is quoted again for repetition. As per 7 from aforesaid decision for satisfaction of this Court it required reasonable ground for believing that accused is not guilty and he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The expression Reasonable grounds means something more than prima facie grounds. It contemplates substantial probable causes for believing that accused is not guilty of the alleged offence. Therefore, according to my opinion, the applicant has not established his case which satisfied this Court to have reasonable ground to believe and for that no materials are placed on record and such power even can not be exercised by this Court at the stage when trial is now completing within a week being crucial stage. It is not interest of justice and it give wrong signal to trial court while appreciating evidence against applicant and cause prejudice to the case of prosecution against the applicant. The relevant para 7 of above referred decision of Apex Court is quoted as under:

?S7. In Collector of Customs, New Delhi Vs. Ahmadaliev Nodira (2004 (3) SCC 549) it was noted at page 552 as follows:

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(b) of sub section (1) of Section 37 imposes limitations on granting of bail in addition to those provided under the Code.

The two limitations are : (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court 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.

7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused ? respondent is concerned, are : the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression ?Sreasonable 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 provisions 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 at hand the High Court seems to have completely overlooked the underlying object of Section 37. It did not take note of the confessional statement recorded under Section 67 of the Act. Description of drug at Serial No. 43 of the Schedule which reads as follows has not been kept in view:

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addition, the report of the Central Revenue Control Laboratory was brought to the notice of the High Court. The same was lightly brushed aside without any justifiable reason.??

Therefore, according to my opinion, decision of Co-ordinate bench, which has been relied by learned advocate Mr. Sodhi is not helpful to applicant because there is no reasoned order passed by Co-ordinate bench. This Court is not able to get support from that order, therefore, present application can not be accepted. The Trial Court has rightly rejected application filed by applicant on 3/1/2008. The applicant has not established any changed circumstance which satisfied ingredients of Section 37, so he can able to get bail from this Court. On the contrary there is no material placed before this Court to satisfy section 37 of NDPS Act by applicant.

It is necessary to note that in present application charge is levelled against accused u/s 8(c), 22 and 29 of NDPS Act. Therefore, Trial Court has to consider all these relevant sections for establishing charge against present applicant. Accordingly, all and entire evidence is also necessary to be considered by Trial Court.

It is made clear that whatever observations made by this Court while considering this bail application may not come in way of accused and Trial Court may not influence by this order while deciding trial itself.

Accordingly, present application is dismissed. The Trial Court must have to decide case independently and in accordance with law based upon evidence on record.

(H.K.RATHOD, J) asma