

HIGH COURT OF GUJARAT**Bench : Divyesh A. Joshi, J.****Date of Decision: 1st March 2024**

R/Criminal Misapplication (For Regular Bail - After Chargesheet) No. 20310 of 2023

SULTAN HABIB LODHDA ...APPELLANT(S)**VERSUS****STATE OF GUJARAT ...RESPONDENT(S)****Legislation:**

Sections 8(c), 21(c), 23(c), 25, 29 of the Narcotics Drugs & Psychotropic Substances Act, 1985 (NDPS Act), Section 439 of the Code of Criminal Procedure, 1973

Subject: Regular bail application in a case involving large-scale narcotics trafficking, specifically the smuggling of heroin from Pakistan to India.

Headnotes:

Narcotic Trafficking and Heroin Seizure - FIR lodged for smuggling heroin from Pakistan to India - 56 kg of heroin recovered in an operation involving ATS and coastguard - Accused implicated based on past involvement in similar activities and CDR evidence - Sultan Habib Lodha, accused, associated with a major international drug syndicate - Involved in earlier transaction of 15 kg heroin in 2021 - Bail application under Section 439 CrPC. [Paras 2, 2.3, 2.4, 19]

Bail Rejected by Sessions Court and High Court - Consideration of serious nature of offence involving commercial quantity of narcotics - Past involvement of accused in similar offences - Strong evidence suggesting the accused's link to international drug trafficking - CDR indicating communication with Pakistani drug dealer and co-accused - Judicial consideration of NDPS Act's strict provisions against bail in drug trafficking cases involving commercial quantities. [Paras 4, 5, 6, 9, 19, 20, 21]

Application of Section 37 of NDPS Act - Requires satisfaction of court that accused is not guilty and will not commit similar offence while on bail - Burden on accused to demonstrate non-involvement in offence - Rigorous criteria for bail in commercial quantity drug cases underlined by the judiciary. [Paras 10-18]

Judgement Reference - Reliance on precedents like Union of India v. Ram Samujh, Union of India v. Shiv Shanker Kesari, and Union of India v. Md. Nawaz Khan in interpreting Section 37 of NDPS Act and its implications on bail. [Paras 13, 16, 17]

Decision – Bail application of Sultan Habib Lodha rejected due to seriousness of offence, his significant role in drug trafficking syndicate, and compliance with stringent bail provisions under the NDPS Act. [Para 21]

Referred Cases:

- Union of India v. Ram Samujh, (1999) 9 SCC 429
- Durand Didier v. Chief Secy., Union Territory of Goa, (1990) 1 SCC 95
- Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798
- Union of India v. Md. Nawaz Khan, (2021) 10 SCC 100
- Radhe Sham S/o. Ashok Kumar vs. UT of Jammu & Kashmir, Bail App No. 331/2022

Representing Advocates:

Mr. Nasir Saiyed for the appellant

Mr. Ronak Raval, Assistant Public Prosecutor, for the respondent State.

CAV JUDGMENT

Divyesh A. Joshi, J. - The present application is filed under Section 439 of the Code of Criminal Procedure, 1973, for regular bail in connection with the FIR being C.R. No.III-02 of 2022 registered with the Anti-Terrorist Squad Police Station, Ahmedabad of the offence punishable under Sections 8(c), 21(c), 23(c), 25 and 29 of the Narcotics Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act").

BRIEF BACKGROUND

2. The complaint was filed on 26.04.2022 through J.M. Patel, Police Inspector, Anti-Terrorist Squad, Ahmedabad stating that on 23.04.2022 Shri Bhavesh P. Rojiya, Deputy Superintendent of Police, received a secret information at 20:00 hours that one Mustufa Aiyub Miyana of Karachi Pakistan has supplied a huge cache of narcotic substance heroin in a rowboat called Al-Haj to be delivered to one person named Kali on 24.04.2022 between 22:00 and 24:00 hours in the night at Channel No.88 of VHF Radio which comes within the coastal territory of Jakhau Port, India, which narcotic substance would then be delivered to one Avtarsingh and Raj hailing from Okhla Vihar, South Delhi. The information was reduced into writing and forwarded to Shri Sunil Joshi, Superintendent of Police, A.T.S., Gujarat.

2.1 Acting upon such tip-off, a combined team of A.T.S. officers and the coastguard police of Jakhau Port was formed.

2.2 Then, the members of the raiding party, after following due procedure of raid, decided to conduct a joint operation and reached at the pointed place in the mid-sea in a rowboat and kept a watch of the hinted boat coming from Pakistan by shutting down the lights of the boat. While in surveillance, on 25.04.2022 at around 00:15 hours, upon hearing some conversation in Hindi language on Channel No.88, the navigation light of the boat got on and when seen towards the radar area, one boat carrying a Pakistani flag boarded with about eight to ten persons was found near to the boat of the coastguard in a suspicious condition. Therefore, it was announced on a loudspeaker to the onboard persons in the Pakistani boat not to move, however, they did not pay any heed to such an announcement and sailed the boat towards the coastal territory of Pakistan in an excessive speed. They were chased by the members of the A.T.S and though several rounds were fired, they did not stop. However, due to an excessive speed, the engine of the Pakistani boat got ablaze and, therefore, all the onboard persons in the Pakistani boat stopped the boat, raised their hands and surrendered to the police.

2.3 Thereafter, some members of the raiding party went to the Pakistani boat where total nine Pakistani nationals named in the FIR were found in the boat. A search was conducted in the presence of a gazetted officer in view of the provisions of Section 50 of the NDPS Act but nothing objectionable was recovered in the course of the personal search. However, upon searching the boat, total 56 small packets in three polythene bags were found. Thereafter, when the accused persons were asked about the narcotic substance found from the packets in Hindi language, they admitted it to be heroin. Then, samples were taken and upon testing with the drug detection kit, the samples tested positive for heroin. Hence, the present FIR.

2.4 The application for bail moved by the applicant-accused was rejected by the 6th Additional Sessions Judge & Special Judge (NDPS), Bhuj-Kachchh on 21.07.2023, observing that a huge commercial quantity of heroin was recovered and that having regard to the seriousness and gravity of the crime, no case for the grant of bail was established. The applicant is, thus, before this Court.

Submissions on behalf of the applicant-accused:-

3. Learned advocate Mr. Nasir Saiyed representing the applicant-accused has submitted that the applicant-accused was arrested on 13.10.2022 and since then he is in jail. Learned advocate Mr. Saiyed has also submitted that in the present case, investigation has already been completed and charge-sheet has also been filed. It is moreso submitted that initially the first information report came to be lodged against in all total thirteen persons including four fugitives wherein the name of the present applicant-accused is not mentioned anywhere. However, subsequently, during the course of investigation, on the basis of the statement of the co-accused, the present applicant-accused has been implicated in the present offence by filing supplementary charge-sheet. Learned advocate Mr. Saiyed has further submitted that the present applicant-accused has been booked in the present case solely on the ground that earlier somewhere in the Month of November, 2021, he obtained the delivery of 15 kg heroin supplied from Pakistan by the very same person, namely, Mustufa Aiyub Miyana. It is also submitted that except that, no otehr specific role has been attributed to the present applicant-accused in the present offence. It is further submitted that the present applicant-accused was neither found in conscious possession with the contraband substance nor was caught by the police on the spot. Even the name of the applicant-accused is not there in the list of fugitive accused persons. It is moreso submitted that the only allegation against the present applicant-accused is that earlier in the yeare 2021, he obtained a delivery of 15 kg heroin from same person. Learned advocate Mr. Saiyed has further submitted that except the same, no other incriminating material is found agaisnt the applicant-accused connecting him with the present offence. The contraband substance was neither found from the conscious possession of the applicant-accused nor he was caught red-handed by the police along with the narcotic substance. Lastly, learned advocate Mr. Saiyed argued that the statement of other co-accused and the accused recorded under Section 67 of the NDPS Act is inadmissible and cannot be relied upon to implicate the applicant. To buttress this argument, he placed reliance on the judgement of **Tofan Singh v. State of Tamil Nadu, AIR 2020 SC 5592**;

4. In such circumstances, referred to above, learned advocate Mr. Saiyed prays that there being merit in his application, the same be allowed and the applicant-accused be released on bail.

Submissions on behalf of the Respondent-State:-

5. The learned APP Mr. Ronak Raval appearing on behalf of the respondent-State has opposed grant of regular bail looking to the nature and gravity of the offence. Learned APP Mr. Raval has submitted that the case on hand is very serious in nature. More than a huge quantity of heroin is tried to be brought into India via sea route from the neighbouring country. Learned APP Mr. Raval has also submitted that earlier in the year 2021, similar kind of offence had been committed by the accused persons where 15 kg of heroin was supplied by the very same Pakistani dealer to the present applicant-accused which was successfully collected by the applicant along with the other accused persons from the mid-sea. At that time, the present applicant along with the other co-accused even went within the coastal territory of Pakistan. In the earlier transaction, the narcotic substance was successfully brought into India which was then sold out by the accused in the different areas of Ahmedabad city. It is also submitted that in the earlier transaction, the present applicant-accused had received a huge amount of Rs. 7,00,000/- through one Angadiya firm which is evident from the statements of witness Asif Abdullah Alimohammed and the statement of the partner of Ganpati Angaidya firm Shri Ganeshbhai Vinaji as well as from the statements of certain other witnesses. Learned APP Mr. Raval has further submitted that the present applicant-accused is the key accused at whose instance, the entire conspiracy was hatched by all the accused persons. The present applicant-accused is the kingpin of the entire episode. Learned APP Mr. Raval submits that the evidence in the form of Call Data Record further clamped down on the applicant-accused strongly indicating his nexus with the commission of the present offence which reveals the voice conversation between the applicant-accused and the Pakistani dealer Mustufa Aiyub Miyana as well as with the other fellow accused persons.

6. Mr Raval, the learned APP lastly submitted that apart from the ratio enunciated by the Honble Supreme Court in **Tofan Singh** (supra) as regards the confessional statement of the accused before the police, there are three crucial circumstances which cannot be lost sight of by the Court while deciding the bail application, namely:

(i) A huge contraband of heroin weighing 56 kg has been recovered by the police and, therefore, rigors of Section 37 of the NDPS Act would also come into play.

(ii) Earlier, in the similar kind of activity, the applicant-accused was admittedly involved and went all the way from Jakhau port from India to the coastal

territory of Pakistan along with the other co-accused and collected the narcotic substance;

(iii) The Investigating Officer collected the call data records of the cell phones used by the accused persons. The applicant-accused persons was found to have been in touch with each other;

7. In such circumstances, referred to above, learned APP prays that there being no merit in the present application, the same be rejected.

ANALYSIS

8. Having heard the learned counsel appearing for the parties and having gone through the materials available on record, the only question that falls for my consideration is whether discretion should be exercised in favour of the applicant-accused indicted for the offence under the NDPS Act?

9. My answer to the aforesaid question is in the negative for the following findings;

Object of the Act

10. Let me first analyze the provisions and objective of the NDPS Act. Section 37 of the Act reads as under:

"37. Offences to be cognizable and non-bailable. -

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless--

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

11. In view of the gravity of the consequences of drug trafficking, the offences under the NDPS Act have been made cognizable and non-bailable. The Section does not allow granting bail for offences punishable under Section 19 or Section 24 or Section 27A and for offences involving commercial quantity unless the two-fold conditions prescribed under the Section have been met. The conditions include:

a) hearing the Public Prosecutor; and

b) Satisfaction of the court based on reasonable grounds that the accused is not guilty of the offence and that he is likely to not commit an offence of a similar nature.

12. The fetters on the power to grant bail does not end here, they are over and above the consideration of relevant factors that must be borne in mind while considering the question of granting bail. The court also needs to be satisfied before grant of bail about the scheme of Section 439 of the Code. Thus, it is evident that the present section limits the discretion of the court in matters of bail by placing certain additional factors over and above, what has been prescribed under the Code.

Tenets of law on the subject

13. The contours of Section 37 of the Act have been analysed by the Hon^{ble} Supreme Court in the case of **Union of India v. Ram Samujh, reported in (1999) 9 SCC 429**. In this case, the Apex Court evaluated the validity of the order on bail granted by the High Court in a case registered under the Act. The Honble Court reckoned the Statement of Objects and Reasons for the introduction of amended Section 37 of the Act through Bill No.125 of 1988. It is relevant to extract those for the present analysis, which reads as:

"6. The aforesaid section is incorporated to achieve the object as mentioned in the Statement of Objects and Reasons for introducing Bill No. 125 of 1988 thus:

"Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic

Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt."(emphasis supplied)

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 death-blow 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 : 1990 SCC (Cri) 65]** as under: (SCC p. 104, para 2

"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."

14. Thus, what is evident from the above is that the offences prescribed under the Act are not only a menace to a particular individual but to the entire society especially, the youth of the country. Such offences have a cascading effect and are in vogue these days, thus destroying the capabilities and lives of a substantial chunk of the population and trend has been growing over the years. Thus, to prevent the devastating impact on the people of the nation, Parliament in its wisdom deemed it fit to introduce stringent conditions for grant of bail under the Act. The Court must stay mindful of the legislative intent and mandate of the Act while considering the question bail in such matters.

15. As far as condition under Section 37(b)(i) is concerned, there is no ambiguity in its interpretation. It gives effect to the doctrine of *audi alteram partem*. Since the crime is an act against the society, the legislature has contemplated that the Public Prosecutor must be given an opportunity to oppose a bail application under the Act. Additionally, under Section 37(b) (ii) of the NDPS Act, the court is not required to be merely satisfied about the dual conditions i.e., prima facie opinion of the innocence of the accused and that the accused will not commit a similar offence while on bail, but the court must have "reasonable grounds" for such satisfaction.

16. The term "reasonable grounds" under Section 37(b)(ii) has been interpreted by the Hon"ble Supreme Court in the case of **Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798**. It was a case where an appeal was preferred against the order granting bail under the NDPS Act by the High Court. The prosecution alleged that the raiding party seized nearly 400 kgs of poppy straw from the possession of the accused therein. The special court rejected the bail while the High Court granted the bail on the ground that the recovery was not from the exclusive possession of the accused, but other family members were also involved. The Supreme Court set aside the order granting bail. In this context, it interpreted "reasonable grounds" under Section 37 of the Act, as under:

"7. The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word "reasonable".

17. The Honble Supreme Court in a recent past in a decision in the case of **Union of India v. Md. Nawaz Khan (2021) 10 SCC 100**, penned by then Justice Dr. Dhananjaya Y. Chandrachud, now the Chief Justice of India, has reiterated the position of law with respect to Section 37 of the Act. After analysing the previous decisions of the Hon"ble Supreme Court, the court prescribed the following test for granting bail under Section 37 of the NDPS Act:

"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."

18. Thus, the court must be conscious about the mischief that is sought to be curbed by the Act and the consequences that might ensue if the person accused of the offence under the Act is released on bail. The court ought to be satisfied on the basis of reasonable grounds discernible from the facts and circumstances that the applicant is not guilty of offences he is indicted with. Additionally, the court also needs to be satisfied that the person so released will not commit the offence while being on bail. Both the conditions are interconnected because the legislature intends that in cases where there is a likelihood of commission of this grave offence under the Act, exercising discretion in favour of the applicant-accused would render the provisions of the Act otiose. It is so because if the person is released, he is most likely to repeat the felony, thus impacting the society at large. Thus, to not give any leeway to the accused, the court has to be satisfied about the dual conditions on reasonable grounds.

Facts on record

19. In the case at hand, the role of the present applicant accused in the entire chain of events is not as simple as has been projected by the learned advocate for the applicant. He is arrested mainly on two counts; firstly for the commercial quantity of contraband weighing 56 kg and secondly he has been implicated for his role as being part of a larger drug syndicate. It is pertinent to note that the present applicant is charged for commercial quantity or rather it can be said that more than commercial quantity and, as such, his bail application needs to be decided as per Section 37 of the Act. The present one is a case of huge drug haul. Some of the perpetrators in the present case are the Pakistani nationals who came all the way from Pakistan to India through sea route with a huge cache of heroin for being delivered to the accused persons in India. It appears from the record that previously, very same accused persons from Pakistan sent 15 kg of heroin which was successfully collected by the applicant-accused along with the other co-accused persons from the mid-sea in the boat of the other co-accused. The

present applicant-accused is the key person at whose instance the entire plan was designed. The applicant-accused himself went in the midsea for getting the delivery of narcotic substance coming from Pakistan. For the said purpose, he hired a boat from accused Jakubhai Daudbhai Buchda for which the applicant-accused paid him Rs.3,00,000/- which fact is evident from statement of one Farid Siddiq Nangiya who was one of the companions in the boat with the applicant and the other accused when they all went near the coastal region of Pakistan for collecting the parcels coming from Pakistan to be delivered to the applicant-accused. The said deal was successful and the heroin was then supplied to the various individuals in the city of Ahmedabad. In the said deal, the applicant-accused got a huge amount of Rs.7,00,000/-. In short, the present applicant-accused is the mastermind behind the entire conspiracy. Apart from that, there are call data records collected by the Investigating Officer indicating not only the connection of the present applicant-accused with the fellow accused from India but also establish his connection with the perpetrators hail from Pakistan. The case on hand and the incident took place in the past seems to be interconnected and indicates the organized criminal networks indulged in illegal drugs trafficking which has caused immense instability in the country. Thus, I am of the prima facie opinion, that the role of the present applicant-accused in the commission of the crime is clearly established from the entire material available on record. Therefore, I am not inclined to entertain the present application.

Conclusion

20. Before concluding, I would like to quote with profit some very important observations on the subject made by the High Court of Jammu & Kashmir and Ladakh in the case of Radhe Sham S/o. Ashok Kumar vs. UT of Jammu & Kashmir, Bail App No. 331/2022, decided on 17.04.2023, which read thus;

"Courts cannot lose sight of the fact that the menace of the crime of smuggling of contraband drugs is on increase and therefore, the perpetrators of the crime who are destroying the society and younger generations rendering them incapacitated by falling prey to drug abuse must be dealt with iron hands. The crime alleged against petitioner/accused is against the society and by his criminal activities, he is spoiling the young generation of the country. Such types of offences are to be dealt with severity and with heavy hands. Showing leniency in such matters would be really a case of misplaced sympathy. The criminal act of petitioner/accused operating in a manner as the smuggler of commercial quantity of contraband poppy straw, is

destructive, and is aimed to destroy the social fiber of the country, therefore, curtailment of his liberty is reasonable. The act of petitioner/accused is not only shocking but outrageous in contours. The granting of bail to petitioner/accused would lead to the danger of the course of justice being thwarted. I, therefore, hold that this is a fittest case where, "Jail" and not "Bail", is the appropriate remedy at this stage. The case law relied upon by learned counsel for petitioner/accused is distinguishable and inapplicable to the facts of the case in hand. The bail application being misconceived under law, is disallowed, rejected and dismissed."

21. In view of what has been observed herein above, the present application fails and is hereby rejected. Rule is discharge.

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