

N.R. MON

v.

MD. NASIMUDDIN

(Criminal Appeal No. 1167 of 2001)

MAY 16, 2008

[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985:

s. 37 r/w s. 437 Cr P C—Application for bail – Allowed by Special Judge – Order not interfered by High Court – Held: The effect of s. 37 of the Act has not been noticed by either the trial court or the High Court – The order granting bail is clearly unsustainable and is set aside – Code of Criminal Procedure, 1973 – s. 437.

A truck being driven by the respondent was intercepted and on its search 163 kg ‘ganja’ was recovered from it. The respondent was arrested. The report of the Chemical Analyst of the Forensic Science Laboratory confirmed the representative samples to be ‘ganja’. On application for bail filed by the respondent, he was released on bail by the Special Judge concerned. The High Court also allowed the respondent to remain on bail.

In the instant appeal it was contended that in view of the provisions of s. 37 of the Narcotic Drugs and Psychotropic Substances Act, the trial court as also the High Court erred in allowing the bail to the respondent.

Allowing the appeal, the Court

HELD: The effect of s. 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 in relation to grant of bail, as has been considered by this Court in several decisions*, has not been noticed by either the trial court or

A the High Court. Since the trial court and the High Court have not kept the relevant aspects in view, the order granting bail is clearly unsustainable and is set aside. (para 5 and 10) [1162-F-G; 1166-C]

B **Union of India v. Gurcharan Singh (2003) 11 SCC 764; Collector of Customs, New Delhi v. Ahmadaliev Nodira (2004) 13 SCC 549; Union of India v. Abdulla (2004) 13 SCC 504; and Narcotics Control Bureau v. Karma Phuntsok and Ors (2005) 12 SCC 480 – relied on.*

C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1167 of 2001

From the final Judgment and Order dated 12.4.2000 of the High Court of Guwahati Imphal Bench in Criminal Revision Petition No. 7 of 2000

D B.B. Singh, T.A. Khan and Sushma Suri for the Appellant.
Anjani Aiyagari for the Respondent.

The Judgment of the Court was delivered by

E **Dr. ARIJIT PASAYAT, J.** 1. Challenge in this appeal is to the judgment of the learned Single Judge of the Gauhati High Court, Imphal Bench, upholding the order passed by the Learned Special Judge, NDPS, Manipur, Imphal, in Crl. Complaint case no.32 of 2000, by which bail was granted to the respondent.

F 2. Background facts in a nutshell are as follows:

G On 17.1.2000 the appellant received information in writing from a casual source that a Tata truck bearing registration No.MN-5113 carrying ganga would be proceeding from Imphal area towards Guwahati in the early hours of 18.1.2000. It was immediately reported by the appellant to its superior officer i.e. Superintendent, NCB, RU, Imphal, who issued order to the appellant to take necessary action. The appellant along with other members of staff of the NCB led by the Superintendent kept vigil along the Imphal-Ukhrul road and started checking of vehicles.

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Around 7.00 a.m. on 18.1.2000 a Tata truck was seen approaching the road. The said vehicle was intercepted and stopped by the appellant. The vehicle was occupied by a driver (the respondent herein) and one Purna Bahadur handyman. The vehicle, the accused and the handyman were brought to the Revenue complex for a thorough checking. After following procedure laid down under Section 50 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (in short 'the Act'), the respondent and the driver were asked whether they would like to be taken before the Magistrate or the Gazetted Officer. During search 6 packets of ganja in pressed form, from a specially constructed chamber in the fuel tank were recovered. On weighing, the same was found to be 163 kgs. in total. The representative samples were taken and sent for analysis by the Chemical Examiner of the Government of Assam, at the State Forensic Science Laboratory in Guwahati. The voluntary statement of the respondent was recorded in the presence of the witnesses on 18.1.2000. The respondent was put on arrest under Section 43(a) of the Act and case was registered for offence in relation to possession punishable under Sections 20, 29 and 60 of the Act. The Forensic Science Laboratory report was to the effect that the sample was ganja. On 4.3.2000 an application for bail was filed before the learned Special Judge, NDPS, Manipur, Imphal, under Section 437 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') and Section 37(b)(ii) of the said Act. But without taking note of Section 37 of the Act, bail was granted. The same was challenged before the High Court. By the impugned order, the same was rejected. The High Court noted that attendance of the accused can be secured by means of bail bonds already signed. He may be allowed the respondent to remain on bail in order to enable him to have adequate consultation with the lawyer of his choice.

3. Learned counsel for the appellant submitted that the parameters of Section 37 have not been kept in view by the trial Court and High Court. Learned counsel for the respondent supported the order.

A 4. Section 37 of the Act reads as follows:

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

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

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

C (b) No person accused of an [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

D (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.

E (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.”

F 5. As rightly contended by learned counsel for the appellant, the effect of Section 37 has not been noticed by either the Trial Court or the High Court. The position relating to grant of bail in the background of Section 37 of the Act has been considered by this Court in several cases.

G 6. In *Union of India v. Gurcharan Singh* (2003(11) SCC 764), it was noted as follows:

H “5. 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.”

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

“6. As observed by this Court in *Union of India v. 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 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 at hand the High Court seems

A 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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"SL.No.	International non-proprietary names	Other non-proprietary names	Chemical name
43	DIAZEPAM		7-Chloro- 1, 3-dihydro - 1, methy 1-5-pheny 1-2 • H-1, 4- benzondiasepim- 2-one

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D 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.

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

E "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

F 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

G 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 v. R. Paulsamy* (2000) 9 SCC 549, has held that in matters arising out of the Narcotic Drugs and Psychotropic

H 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.”

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

“4. 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 condition 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 contained in Section 37(1)(b)(ii) of the NDPS Act. According to him, unless the Public Prosecutor opposes 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 Section 37(3) read with Section 439 CrPC. To say the least, the argument appears to be baseless. We cannot 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

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A mute spectator not opposing the bail application unless he was at 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 he appeared 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 circumstances, we find no substance whatsoever in the contention raised by Mr Singh.”

C 10. Since the Trial Court and the High Court have not kept these aspects in view, the order granting bail is clearly unsustainable and is set aside. The appeal is allowed.

R.P.

Appeal allowed.