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R.NARAYANA PISHARADI, J

Crl.M.C.No.2707 of 2020

Dated this the 4th day of August, 2020

ORDER

This application is filed under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") by the State assailing the order dated 29.04.2020 passed by the Court of Session in Crl.M.C.No.655/2020 which was filed by the respondent in Crime No. 64/2020 of Elamakkara police station.

2. The respondent is the fourth accused in the aforesaid case registered under Sections 22(c), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act").

3. The prosecution case is that, on 02.03.2020, at about 18.00 hours, the Sub Inspector of Elamakkara police station reached Room No.303 of 'OYO HOMES' and conducted search of the body of the first and the second accused who were found in the room and seized fifteen grams of Methylenedioxy Methamphetamine (MDMA) from the possession of the first accused and three grams of MDMA from the

possession of the second accused. It is alleged that the money for purchasing the MDMA was transferred from the bank account of the third accused and it is the fourth accused who acted as the middle man in the transaction and who brought the substance from a person who is a citizen of Nigeria.

4. The respondent filed the application Cr1.M.C.No.655/2020 in the Court of Session for anticipatory bail. In spite of the opposition made by the Public Prosecutor, the application was allowed and bail was granted by the learned Additional Sessions Judge as per Annexure-A order, holding as follows:

"Considering the fact that nothing was recovered from the petitioner and no prima facie material are available to indicate his active participation in the crime. That apart, no antecedent is reported by the prosecution as against the petitioner".

5. The State has now filed this application for quashing Annexure-A order.

6. Heard learned Public Prosecutor and the learned counsel for the respondent.

7. Learned Public Prosecutor contended that the learned Additional Sessions Judge has passed the impugned order by completely ignoring the provisions under Section 37 of the Act and the seriousness of the offence alleged against the respondent. It is

contended that the impugned order is unsustainable in law because the mandatory requirements of Section 37 of the Act have not been followed by the court. It is also contended that the fact that no contraband substance was seized from the possession of the respondent cannot be a sufficient ground to come to the conclusion that he had not actively participated in the commission of the crime. Learned Public Prosecutor submitted that custodial interrogation of the respondent is required to find out the whereabouts of the Nigerian citizen who was involved in the transaction and to unearth the details of the transaction.

8. Learned counsel for the respondent pointed out that no contraband substance was seized from the possession of the respondent and that there was no material produced by the prosecution before the learned Additional Sessions Judge to show the involvement of the respondent in the transaction in any other manner and therefore, the court was perfectly justified in granting the privilege of pre-arrest bail to him.

9. An application under Section 438 of the Code for granting anticipatory bail by a person who is accused of an offence under the Act, involving commercial quantity, is not barred under any of the provisions under the Act. But, the restrictions provided in Section

37(1)(b) of the Act in granting bail to a person accused of the offences specified therein would apply to an application for granting anticipatory bail also (See **Shaji v. State of Kerala : 2018 (3) KHC 429 : 2018 (3) KLT 164**).

10. Section 37 of the Act contains special provisions with regard to grant of bail in respect of the offences enumerated under the said Section and offences involving commercial quantity. As per Section 37(1)(b) of the Act, it is mandatory that the Public Prosecutor shall be given an opportunity to oppose the application for bail filed by a person accused of any such offence. As per Section 37(1)(b)(ii) of the Act, if the Public Prosecutor opposes the application, two conditions have to be satisfied for enlarging the accused on bail. The first one is that the Court shall be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence alleged against him. The second one is that the Court shall be satisfied that there are reasonable grounds for believing that the accused is not likely to commit any offence while on bail. Only on satisfaction of these twin conditions, the Court has the power to enlarge the accused on bail.

11. Apart from giving an opportunity to the Public Prosecutor to oppose the application, satisfaction of the court with regard to two matters is mandatory before granting bail to a person who is accused

of the offences specified under clause (b) of sub-section (1) Section 37 of the Act. They are (i) reasonable grounds for believing that the accused is not guilty of the alleged offence and (ii) he is not likely to commit any offence while on bail. These two conditions are cumulative and not alternative. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

12. 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 connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. Thus, recording of satisfaction on both aspects, as noted above, is sine qua non for granting bail to a person who is accused of the offences specified under clause (b) of sub-section (1) of Section 37 of the Act.

13. However, while considering an application for bail with reference to Section 37 of the Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the materials meticulously to arrive at a positive

finding as to whether or not the accused has committed the offence alleged against him. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence he is charged with and further that he is not likely to commit an offence under the Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

14. The principles mentioned above have been reiterated by the Supreme Court in umpteen decisions (See Superintendent, Narcotics Central Bureau v. R. Paulsamy : AIR 2000 SC 3661, Customs, New Delhi v. Ahmadalieva Nodira : AIR 2004 SC 3022, Union of India v. Abdulla : (2004) 13 SCC 504, Union of India v. Shiv Shanker Kesari: (2007) 7 SCC 798, N.R. Mon v. Md. Nasimuddin: (2008) 6 SCC 721, Union of India v. Rattan Mallik: (2009) 2 SCC 624, Union of India v. Niyazuddin: AIR 2017 SC 3932 and State of Kerala v. Rajesh : AIR 2020 SC 721).

15. In the instant case, there is no dispute raised with regard to the fact that the quantity of MDMA seized from the possession of the first accused amounts to commercial quantity. The fact that no substance was seized from the possession of the respondent is immaterial. In the first place, in order to attract Section 22(c) of the

Act, it is not always necessary that the contraband substance was in the actual possession of the accused. Manufacture, sale, purchase, import, export and use of the psychotropic substance without authority would also attract that offence. In the second place, commission of the offence under Section 29 of the Act, involving abetment and conspiracy, is also alleged in the case.

16. The impugned order does not refer to Section 37 of the Act. A bare perusal of the impugned order shows that the learned Additional Sessions Judge has not adverted to the twin conditions mentioned under Section 37(1)(b) of the Act and that he has not recorded any satisfaction with regard to those conditions. It is also not possible to infer from the impugned order that the court was satisfied with regard to those conditions. As stated by the Apex Court in **Rattan Mallik** (supra), the observation in the impugned order that "nothing was recovered" from the accused is not sufficient to infer that the learned Additional Sessions Judge had applied his mind to the provisions contained in Section 37(1)(b) of the Act.

17. In **Satpal Singh v. State of Punjab: AIR 2018 SC 2011**, the Apex Court has held as follows:

"Be that as it may, the order dated 21/09/2017 passed by the High Court does not show that there is any reference to Section 37 of the NDPS Act. The quantity is

reportedly commercial. In the facts and circumstances of the case, the High Court could not have and should not have passed the order under Section 438 or 439 Cr.P.C without reference to Section 37 of the NDPS Act and without entering a finding on the required level of satisfaction in case the Court was otherwise inclined to grant the bail. Such a satisfaction having not being entered, the order dated 21/09/2017 is only to be set aside and we do so."

(emphasis supplied)

18. In the aforesaid circumstances, the impugned order is liable to be set aside. The Court of Session has to consider afresh the application for anticipatory bail filed by the respondent.

19. Consequently, the petition is allowed and the impugned order granting anticipatory bail to the respondent is set aside. The application for anticipatory bail filed by the respondent shall stand restored to the file of the Court of Session, Ernakulam. The Principal Sessions Judge, Ernakulam shall dispose of that application within a period of two weeks from the date of production of a certified copy of this order either by the Public Prosecutor or the respondent.

Sd/-**R.NARAYANA PISHARADI, JUDGE**

APPENDIX

PETITIONER'S/S EXHIBITS:

ANNEXURE A THE TRUE COPY OF THE ORDER DATED 29-04-2020
IN CRL M.C NO. 655/2020 IN THE COURT OF
SESSIONS, ERNAKULAM

RESPONDENTS EXHIBITS: NIL

TRUE COPY

P.S TO JUDGE

JSR