

**A.F.R.**

Reserved on 25.06.2021

Delivered on 06.07.2021

Court No. - 64**Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 42092 of 2020**Applicant :-** Dheeraj Kumar Shukla**Opposite Party :-** State of U.P.**Counsel for Applicant :-** Rajiv Lochan Shukla, Arya Suman Pandey**Counsel for Opposite Party :-** G.A.**Hon'ble Sanjay Kumar Singh, J.**

1. Keeping in view the Pandemic (COVID-19), the case is taken up through video conferencing.

2. Heard Mr. Rajiv Lochan Shukla, learned counsel for the applicant and Mr. Virendra Kumar Maurya, learned Additional Government Advocate assisted by Mr. Prashant Kumar Singh, learned Brief holder appearing on behalf of State of U.P. through video conferencing and perused the material placed on record.

3. By means of this application, the applicant, who is involved in Case Crime No. 0532 of 2020, under sections 8/20 of Narcotic Drugs & Psychotropic Substances Act, police station Jhunsi, district Prayagraj, is seeking enlargement on bail during the pendency of trial.

Facts

4. In nutshell, the facts which led to the prosecution of accused are that on 23.6.2020 informant (Sub Inspector Ranendra Kumar Singh, UP S.T.F. field Unit Prayagraj) lodged First Information Report at police station Jhuni, District Prayagraj against four accused persons, namely, Dhiraj Kumar Shukla (applicant), Praveen Maurya alias Punit Maurya, Dhiraj Maurya and Rishabh Kumar alleging *inter alia* that on 23.6.2020, he along with other police personnel were busy in the city area for collecting information regarding illicit trafficking of narcotics substance

and criminals declared as wanted, where he received information through informer that some persons are about to come at Jhunsi near Trivenipuram gate on vehicle with illegal and suspicious goods, if quick action be taken, they can be caught. On such information, he after giving information to higher officers proceeded for the place of occurrence along with informer and other police personnel and reached at Trivenipuram gate, Jhunsi through Nyay Nager Crossing. Effort was made to persuade the local persons to become witness, but due to fear no body became ready. Thereafter, they walked towards railway crossing and reached on the bridge and started waiting there. After some time, they saw that two vehicles white coloured Swift Dzire car and grey coloured Honda City car were coming. On the indication of informer, said vehicles were caught by the police team using necessary force and persons sitting in the vehicles were pulled out. On questioning, they disclosed about transportation of illegal Ganja in the said vehicles. On interrogation, the apprehended accused persons, who were sitting in Honda City car, disclosed their names as Praveen Maurya alias Punit Maurya (owner), Rishabh Kumar (Driver) and Dhiraj Maurya, whereas person, who was driving Swift Dzire car disclosed his name as Dheeraj Kumar Shukla (applicant). The accused were enlightened about their legal rights to be searched before a Gazetted Officer, to which they declined and gave their consent saying that informant may take their search. Accordingly, they were searched, but no contraband was recovered from their personal search, except mobile phones and some cash amount etc. as mentioned in the recovery memo. On taking search of aforesaid vehicles, total 92.410 Kgs. of Ganja were recovered from the dicky of Honda City car bearing No. MH 04 AF 0076 and 65.160 Kgs. of Ganja were recovered from the dicky of Swift Dzire car bearing No. UP 70 EW 0246. As such, total 157.570 Kgs of illegal Ganja have been recovered in this case. Accused persons could not show the authorization for keeping and transporting the same. Separate samples of about 100-100 grams each of Ganja were taken

out from each packets, thereafter samples and remaining Ganja as well as other recovered materials were separately sealed in white cloths. Specimens of seal were prepared. Accused persons disclosed that they have been engaged in the trafficking of Ganja since last several years. They also disclosed that they purchased the Ganja from one Hari, resident of Kodpad, Odisha and sell the same on higher price in Prayagraj. Both the aforesaid vehicles were also seized. Contents of recovery memo were explained to the accused persons and after taking their signature, copy of recovery memo was handed over to them. On the basis of aforesaid recovery, a case was registered against the accused persons at Case Crime No. 0532 of 2020, under section 8/20 of N.D.P.S. Act, police station Jhunsi, district Prayagraj.

Submissions on behalf of the applicant

5. Learned counsel for the applicant argued that as per the prosecution case, total 157.570 Kgs illegal Ganja are said to have been recovered in this case, out of which 92.410 Kgs Ganja were recovered from the dicky of Honda City car, which was driven by the co-accused Rishabh Kumar and 65.160 Kgs Ganja were recovered from the dicky of Swift Dzire car, which was driven by Dheeraj Kumar Shukla (applicant). The co-accused Rishabh Kumar, who was the driver of the Honda City car, has already been granted bail by co-ordinate Bench of this Court vide order dated 31.05.2021 in Criminal Misc. Bail Application No.17226 of 2021, therefore the applicant is also entitled to be released on bail on the ground of parity. It is next submitted by the learned counsel for the applicant that Investigating Officer has not followed the procedure of N.D.P.S. Act. The applicant is Diploma holder in Electrical Engineering and has been falsely implicated. Charge sheet has been filed in this case on 16.8.2021. Applicant has no criminal antecedent and is in jail since 24.6.2020. Lastly, it is prayed to release the applicant on bail on the ground of parity of bail order dated 31.05.2021 of co-accused Rishabh Kumar.

Submissions on behalf of the State of U.P.

6. Per contra, learned Additional Government Advocate appearing on behalf of State of UP/opposite party, vehemently opposed the aforesaid submissions of learned counsel for applicant by contending that recovered 157.570 Kgs Ganja in this case, is much more than commercial quantity, out of which 65.160 Kgs Ganja were recovered from the dicky of Swift Dzire car occupied by the applicant. The accused applicant was driver of Swift Dzire car and was having conscious possession of aforesaid recovery as well as constructive possession over recovered 65.160 Kgs Ganja from his car. There is no enmity between the applicant and police team, therefore, allegation of false implication of the applicant is without any basis and against the evidence on record. The huge quantity of 157.570 Kgs Ganja cannot be planted. The mandatory requirements as provided under the Narcotics Drugs & Psychotropic Substances Act have been followed by the officer concerned. Samples were sent to laboratory for chemical analysis. Applicant is also involved in a case being case crime no.598 of 2020, under Section 2/3 U.P. Gangsters and Anti Social Activities (Prevention) Act. Sonu Shukla (brother of applicant) is owner of the vehicle Swift Dzire car in question, who has also made an accused in this case and has been arrested on 03.04.2021. Swift Dzire car bearing no. U.P.70 EW 0246 has been seized by the police, thereafter a letter has been sent to the District Magistrate for initiating confiscation proceedings. So far as bail order dated 31.05.2021 of co-accused Rishabh Shukla is concerned, it is submitted by learned A.G.A. that argument advanced on behalf of State of UP has neither been considered nor noted in the order dated 31.05.2021 and the same has been passed without considering the provisions of section 37 of Narcotics Drugs & Psychotropic Substances Act accepting wrong submission on behalf of co-accused that recovered Ganja is less than commercial quantity and the same was not sent for chemical examination, therefore no case of parity is made out and bail application of the applicant is liable to be rejected.

Now rival submissions fall for analysis.

Issue

7. After having heard the learned counsel for the parties, I find that one of the issue that arises for consideration before this Court is “as to whether applicant is entitled to be released on bail only on the ground of parity of bail order dated 31.05.2021 of co-accused Rishabh Kumar”.

8. Before delving into the matter it would be relevant to quote the relevant extract of bail order dated 31.05.2021 of co-accused Rishabh Kumar passed in Criminal Misc. Bail Application No.17226 of 2021, which is being reproduced herein-below:

“This matter is listed for hearing through video conferencing. Link has been sent to the respective learned counsels. Learned Counsel for the applicant and learned A.G.A. for the State are connected through the link.

Heard learned counsel for the applicant as well as learned A.G.A for the State and perused the record.

By means of this application, the applicant who is involved in Case Crime No.325 of 2020, under Section 8/20 N.D.P.S. Act, Police Station Jhunsi, District Prayagrj, is seeking enlargement on bail during the trial.

Submission made by learned counsel for the applicant is that the applicant has been falsely implicated in the present case. Learned counsel for the applicant submits that nothing incriminating materials have been recovered from the possession of the applicant at the time of recovery. He further submits that the police has falsely shown the recovery of Ganja from the possession of the applicant and the alleged recovery of Ganja was also not sent for chemical examination. The applicant has no criminal history. He further submits that the alleged recovery of Ganja is less than the commercial quantity. The applicant is nothing to do with the aforesaid offence. The applicant is languishing in jail since 23.06.2020.

Learned counsel for the informant as well as learned A.G.A opposed the prayer for bail but could not dispute the aforesaid facts and the legal submissions as argued

by the learned counsel for the applicant.

Keeping in view the nature of the offence, evidence, complicity of the accused and submissions of learned counsel for the parties, I am of the view that the applicant has made out a case for bail.

Let the applicant Rishabh Kumar, who is involved in Case Crime No.325 of 2020, under Section 8/20 N.D.P.S. Act, Police Station - Jhunsi, District Prayagraj, be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions. Further, before issuing the release order, the sureties be verified.....”

Section 37 of N.D.P.S. Act

9. There is no dispute that commercial quantity of Ganja is 20 Kgs. Recovered and seized total 157.570 Kgs. of Ganja (recovery of 92.410 Kgs. of Ganja from Honda City car and 65.160 Kgs. of Ganja from Swift Dzire car) in this case are much more than the commercial quantity, therefore, provisions of section 37 of Narcotics Drugs & Psychotropic Substances Act are attracted in this case, which is in addition to section 439 of Cr.P.C. and mandatory in nature.

10. In view of Section 37 of the N.D.P.S. Act, before granting bail for the offence under N.D.P.S. Act twin conditions as provided under Section 37(1)(b) (i) and (ii) have to be satisfied. Section 37 of the N.D.P.S. Act is quoted herein below:

"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. On several occasions, the Apex Court has considered the issue relating to provisions of Section 37 of the N.D.P.S. Act and after wholesome treatment laid down guidelines in this regards, which would be useful to quote herein-below:

- i. The expression 'reasonable grounds' has not been defined in the N.D.P.S. Act, but the Apex Court in the case of **Union of India Vs. Rattan Mallik @ Habul, 2009 (1) SCC (Crl) 831**, has settled the expression "reasonable grounds". Relevant paragraphs no. 12, 13 and 14 are quoted herein below:

"12.It is plain from a bare reading of the non-obstante clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from

giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

13. The expression 'reasonable grounds' has not been defined in the said Act but 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. [Vide Union of India Vs. Shiv Shanker Kesari, 2007(7) SCC 798] Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS 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 evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said 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."

ii. In case of **Union of India Vs. Ram Samujh 1999 (9) SCC 429**, Apex Court has made following observations in paragraph 7 of the said judgment, which are reproduced herein below:-

"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered and followed. It should be borne in mind that in murder case, accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death blow to number of innocent young victims, who are vulnerable: it causes deleterious effects and 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 NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didien v. Chief Secretary. 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 proportion 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, the Parliament in the wisdom has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine."

iii. In **Union of India Vs. Shiv Shankar Kesari, (2007) 7 SCC 798**, Apex Court elaborated and explained the conditions for granting of bail as provided under Section 37 of the Act. Relevant paragraph Nos. 6 and 7 are extracted here in below :

"6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If

either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

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."

iv. In recent decision of Apex Court in **State of Kerala Etc. Vs. Rajesh Etc. AIR 2020 Supreme Court 721**, Apex Court again considered the scope of Section 37 of N.D.P.S. Act and relying upon earlier decision in Ram Samujh (Supra) held as under:

"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."

v. The Apex Court in **Union of India vs Prateek Shukla, AIR, 2021 SC 1509** has held that merely recording the submissions of the parties does not amount to an indication of a judicial or, for that matter, a judicious application of mind. The provisions of Section 37 of the N.D.P.S. Act provide the legal norms which have to be applied in determining whether a case for grant of bail has been made out. The relevant paragraph nos. 11,12 and 13 of the said judgment are reproduced herein under :

"11. Ex facie, there has been no application of mind by the High Court to the rival submissions and, particularly, to the seriousness of the allegations involving an offence punishable under the provisions of the NDPS Act. Merely recording the submissions of the parties does not amount to an indication of a judicial or, for that matter, a judicious application of mind by the Single Judge of the High Court to the basic question as to whether bail should be granted. The provisions of Section 37 of the NDPS Act provide the legal norms which have to be applied in determining whether a case for grant of bail has been made out. There has been a serious infraction by the High Court of its duty to apply the law. The order granting bail is innocent of an awareness of the legal principles involved in determining whether bail should be granted to a person accused of an offence under the NDPS Act. The contention of the respondent that he had resigned from the Company, Altruist Chemicals Private Limited, must be assessed with reference to the allegations in the criminal complaint which has been filed in the Court of the District and Sessions Judge, Gautam Budh Nagar (Annexure P-6).

The relevant part of the complaint reads as follows:

"18. That during investigation of the case, letter dated 27.11.2018 was sent to the Registrar of Companies for providing details of the Directors etc of the company in question i.e. U/s Altruist Chemicals Pvt Ltd

and vide its report dated 03.12.2018 Registrar of Companies provided the said information and from the perusal of said information/documents, it reveals that accused Prateek Shukla and Bismillah Khan are the Directors.

Accused Himanshu Rana was also Director but he has resigned from the directorship. From the perusal of the documents, it also reveals that they had registered the company, i.e., Altruist Chemical Pvt. Ltd. At 001, Block Ab-Sector-45, Noida, which is a residential area and accused persons also obtained Unique Registration No. from the NCB on the above said premises.”

12. We may also note at this stage the contention of the respondent in the application for bail which was filed before the High Court (Annexure P-8) that he had transferred 99% of his shareholding in the Company to Bismilla Khan Ahmadzai. Bismilla Khan Ahmadzai, as the prosecution alleges at this stage, is an Afghan national. The application for bail which had been filed before the High Court as well as the counter affidavit which has been filed in the present proceedings suppress more than what they disclose. Be that as it may, we are of the view that the High Court was clearly not justified in granting bail and the reasons provided by the High Court, as we have already indicated above, do not reflect application of mind to the seriousness of the offence which is involved. Indicating that the respondent as an educated person with a Bachelor of Technology “may not commit any offence” is an extraneous circumstances which ought not to have weighed with the High Court in the grant of bail for an offence under the NDPS Act.

13. For the above reasons, we are of the view that the High Court has mis-applied the law to the facts in arriving at a decision for the grant of bail to the respondent. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court dated 7 May 2019. As a consequence, the bail which has been granted by the High Court to the respondent shall stand cancelled. The respondent shall

surrender forthwith as a result of the cancellation of bail by the present order of this Court.”

vi. **Narcotics Control Bureau vs Laxman Prasad Soni, Etc**, (Criminal Appeal No. 438-440 of 2021 decided by the Apex Court on 19.04.2021).

In the said case, there was recovery of 229 Kgs. of Ganja from the possession of accused persons. Out of which 25 Kgs. of Ganja was recovered from one vehicle occupied by the accused. There was another vehicle namely truck in which rest of the contraband material was found. The accused persons, who were arrested along with 25 Kgs. Ganja have been granted bail by the co-ordinate Bench of this Court vide order dated 23.09.2019 in Criminal Misc. Bail Application Nos. 38036 of 2019, 38066 of 2019 and 38048 of 2019 without considering provisions of Section 37 of the N.D.P.S. Act.

The aforesaid order dated 23.09.2019 has been set-aside by the Apex Court on account of the reason that the applications for bail were allowed by the High Court without considering the import and effect of Section 37 of the N.D.P.S. Act.

Possession

12. Possession is the core ingredient to be established before the accused are made criminally liable. The expression 'possession' is a polymorphous term, which assumes different colour in different context as settled by the Apex Court. There are three kind of possession, namely, Physical Possession, Constructive Possession and Conscious Possession. The words 'conscious possession' connotes a particular state of mind which is deliberate and intended.

i. Supreme Court while dealing with the question of possession and application of Section 50 in the case of **Megh Singh Vs. State of Punjab, 2003 CRI. L.J. 4329**, held that word 'possession' includes conscious

possession. Further Section 50 applies in case of personal search of a person and it does not extend to search of a vehicle or container or a bag or premises. Relevant paragraph nos. 9 to 13 and 16 are extracted here as under:

"9. The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

10. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

*11. As noted in **Gunwantal v. The State of M.P. (AIR 1972 SC 1756)** possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.*

*12. The word 'possession' means the legal right to possession (See **Health v. Drown (1972) (2) All ER 561 (HL)**). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See **Sullivan v. Earl of Caithness (1976 (1) All ER 844 (QBD)**).*

*13. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. This position was highlighted in **Madan Lal and Anr. v. State of Himachal Pradesh (2003 (6) SCALE 483)**.*

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16. A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. (See Kalema Tumba v. State of Maharashtra and Anr. (JT1999 (8) SC 293), The State of Punjab v. Baldev Singh (JT1999 (4) SC 595), Gurbax Singh v. State of Haryana(2001(3) SCC 28). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh's case (supra). Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance."

ii. The Apex Court in the case of **Dehal Singh v. State of Himanchal Pradesh, 2011 (72) ACC 661**, has again consider the issue of “conscious possession”.

In the said case, two accused persons were travelling in a car and they knew to each other. From the windows/door of the said car, recovery of 27 Kgs. 800 gms. of charas was made, which were found concealed between the shields and doors of the car. The Apex Court in the said case taking into consideration the provisions of Sections 35 and 54 of the N.D.P.S. Act has held that accused was not only in possession, but conscious possession of recovered contraband also.

Presumption under Section 54 of the N.D.P.S. Act

13. In this case, total 157.570 Kgs. Ganja has been recovered from two vehicles, out of which 92.410 Kgs. Ganja has been recovered from Honda City car, in which three persons, namely, Rishabh Kumar (driver), Dhiraj Maurya and Praveen Maurya alias Punit Maurya (owner of vehicle) were travelling. Similarly, 65.160 Kgs. Ganja has been recovered from Swift Dzire car, which was driven by the applicant, which is in the name of his brother Sonu Shukla, who also made accused during investigation. Both the aforesaid vehicles were apprehended together by police personnel. The applicant was the only person, who was in actual control of Swift Dzire car containing 65.160 Kgs. of Ganja. As such,

conscious and constructive possession of the accused applicant over the recovered Ganja is apparent on record.

There is specific statutory presumption in relation to contraband that comes within the ambit of N.D.P.S. Act. In view of Section 54 of the N.D.P.S. Act presumption shall be drawn against the accused unless and until the contrary is proved. The expression "*unless and until the contrary is proved*", clearly imposes the burden of proving that possession of prohibited substance is legal on the accused himself.

Enmity and False Implication

14. No material has been brought on record by the applicant to show that there was any prior ill-will or enmity of the applicant with the police personnel concerned. Illicit trafficking is an organized crime and are done adopting different *modus operandi* by a group of persons with their different role. So far as plea of false implication is concerned, in my view, it is a stereo typed defence raised in every case, where accused are found in possession of contraband. Experience shows that such statements are made in almost every case, therefore, such kind of plea of false implication without any basis is not liable to be accepted at this stage.

Independent Witness

15. Nowadays, totally unconcerned people do not dare to become witness against criminals, as they have a lot of financial and political patronage available to them as well as muscle power. Public witnesses against the criminals and drug traffickers are always under the threat, therefore police personnel cannot be seen within eye of suspicion particularly when there is a huge recovery of contraband and there is no prior ill-will of police personnel with the accused and they are discharging their official duty. Huge quantity of recovered 157.570 Kgs. Ganja cannot be planted.

Detention Period

16. So far as argument of learned counsel for the applicant that applicant is in jail since 24.06.2020 is concerned, it is relevant to mention that in the case of **Union of India v. Rattan Mallik** (supra), the accused was in jail for last three years, but the Apex Court has made an observation that the stated circumstances may be relevant for grant of bail in matters arising out of conviction under Penal Code etc., but are not sufficient to satisfy the mandatory requirements as stipulated in clause (b) of sub-section (1) of Section 37 of the N.D.P.S. Act.

Parity

17. From perusal of bail order dated 31.05.2021 of co-accused Rishabh Kumar passed in Criminal Misc. Bail Application No. 17226 of 2021, I find that co-accused Rishabh Kumar has been granted bail without considering the provisions of Section 37 of N.D.P.S. Act. It is well settled that recording of finding in terms of Section 37 of N.D.P.S. Act is a *sine qua non* for granting bail under N.D.P.S. Act. Though, there was a huge recovery of 92.410 Kgs Ganja from the Honda City car, which was driven by co-accused and the same is much more than commercial quantity, but on behalf of co-accused it has been wrongly argued before the co-ordinate bench that alleged recovery of Ganja is less than commercial quantity. Apart from above, no reason has been recorded while granting bail to co-accused Rishabh Kumar. In such circumstances, this Court is of the considered view that if co-accused obtained bail by misrepresentation of facts, other accused on same footing are not entitled to bail on the ground of parity, ergo order dated 31.05.2020 is not helpful to the applicant.

In quite recent, the Apex Court in the case of **Sonu vs Sonu Yadav and another, AIR 2021 SC 201**; deprecated the practice of passing such kind of orders. The relevant paragraph nos. 11 and 12 of the said judgments are reproduced herein under :

“11. In the earlier part of this judgment, we have extracted the lone sentence in the order of the High Court which is intended to display some semblance of reasoning for justifying the grant of bail. The sentence which we have extracted earlier contains an omnibus amalgam of (i) “the entire facts and circumstances of the case”; (ii) “submissions of learned Counsel for the parties”; (iii) “the nature CrI.A.377/2021 of offence”; (iv) “evidence”; and (v) “complicity of accused”. This is followed by an observation that the “applicant has made out a case for bail”, “without expressing any opinion on the merits of the case”. This does not constitute the kind of reasoning which is expected of a judicial order. The High Court cannot be oblivious, in a case such as the present, of the seriousness of the alleged offence, where a woman has met an unnatural end within a year of marriage. The seriousness of the alleged offence has to be evaluated in the backdrop of the allegation that she was being harassed for dowry; and that a telephone call was received from the accused in close-proximity to the time of death, making a demand. There are specific allegations of harassment against the accused on the ground of dowry. An order without reasons is fundamentally contrary to the norms which guide the judicial process. The administration of criminal justice by the High Court cannot be reduced to a mantra containing a recitation of general observations. That there has been a judicious application of mind by the judge who is deciding an application under Section 439 of the CrPC must emerge from the quality of the reasoning which is embodied in the order granting bail. While the reasons may be brief, it is the quality of the reasons which matters the most. That is because the reasons in a judicial order unravel the thought process of a trained judicial mind. We are constrained to make these observations because the reasons indicated in the judgment of the High Court in this case are becoming increasingly familiar in matters which come to this Court. It is time that such a practice is discontinued and that the reasons in support of orders granting bail comport with a judicial process which brings credibility to the administration of criminal justice. CrI.A.377/2021.

12. For the above reasons, we are of the view that the order of the High Court granting bail without due

application of mind to the relevant facts and circumstances as well to the provisions of the law requires the interference of this Court.”

18. As such, in the light of dictum of aforesaid judgments of the Apex Court as well as the reasons mentioned in preceding paragraph no.17, this Court is of the view that the orders which have been passed ignoring the settled law laid down by the Apex Court regarding Section 37 of the N.D.P.S. Act have no persuasive value and the same is not binding upon this Court. Hence, the benefit of parity of order dated 31.05.2021 of co-accused Rishabh Kumar cannot be extended to present applicant. Accordingly, the submission of learned counsel for the applicant for granting bail to the applicant on the ground of parity of order dated 31.05.2021 is hereby rejected. The issue of parity as mentioned in paragraph no. 7 is decided against the applicant.

Discretion

19. At this juncture it would be relevant to note that discretion is required to be exercised judiciously and judicially. The devastating effects of narcotic drugs and psychotropic substance on any person who comes to its touch are well known. Normally, such person ceases to be a normal human being. It is also well settled that a proper administration of the criminal justice delivery system, requires balancing the rights of the accused and the prosecution. Undoubtedly rights of the accused are important, but equally important is the societal interest for bringing the offender to book and for the system to send right message to all in the society. Undue sympathy for offender would be more harm to justice system to undermine the public confidence in the efficacy of law.

Conclusion

20. In the light of analysis of the case as mentioned above and considering the recovery of huge quantity of Ganja as mentioned above,

coupled with the fact that applicant was apprehended at the spot and was having conscious and constructive possession over the recovered Ganja, I do not find any reasonable ground in terms of Section 37 of the N.D.P.S. Act to hold that applicant is not guilty of an offence and he is not likely to commit any offence while on bail.

It is made clear that this finding is for a limited purpose and is confined to the question of releasing the accused applicant on bail only. The trial court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything said in this order.

Result

21. In view of the facts and circumstances of the case and on account of the reasons mentioned above, I do not find any good ground for enlarging the applicant on bail at this stage. The bail application of the applicant is accordingly **rejected**.

Order Date :- 06.07.2021
Sunil Kr. Gupta