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Sonu @ Kane Vs. the State

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Court : Delhi

Decided On : Apr-21-2007

Reported in : 138(2007)DLT0; 2007(96)DRJ509; [2007]292ITR0(Delhi)

Judge : Reva Khetrapal, J.

Acts : Narcotics Drugs Psychotropic Substances Act - Sections 2, 19, 20A, 20B, 24, 27, 27A, 37 and 50; Code of Criminal Procedure (CrPC) , 1973; Narcotics Drugs Psychotropic Substances (Amendment) Act, 2001

Appeal No. : Bail Appln. No. 58/2007

Appellant : Sonu @ Kane

Respondent : The State

Advocate for Def. : Sunil K. Kapoor, Addl. Public Prosecutor

Advocate for Pet/Ap. : R.P. Luthra and; Sunita Arora, Advs

Judgement :

Reva Khetrapal, J.

1. The petitioner who is in judicial custody since 19th August, 2006 seeks bail. The facts as alleged by the prosecution are that on the said day, Head Constable Majkush, while on patrolling duty in 17 Block, Kalyanpuri, received secret

information that a young man would be coming from the side of L.B.S. Hospital and would be going to Block No. 13, Kalyanpuri via Jalebi Chowk, who may be carrying some ganja. Allegedly, this information was transmitted by the Head Constable to the Duty Officer, Police Station Kalyanpuri where it was recorded as DD No. 46B. Allegedly also, the Head Constable requested seven or eight passers-by to join the raiding party, but they did not agree and left the place without disclosing their names and addresses. Accordingly, the Head Constable formed a raiding party and cordoned the area. At about 1.35 p.m., on the pointing out of the secret informer, the petitioner was apprehended and on interrogation, he disclosed his name as Sonu @ Kane. According to the prosecution, a notice under Section 50 of the NDPS Act was served on him and on his refusal to be searched before a Magistrate/Gazetted Officer, the Investigating Officer offered his search before taking the search of the petitioner. On the search of the bag of the petitioner, 1700 gms of ganja was recovered. Two packets were prepared comprising of the sample of 100 gms. and the balance of 1600 gms, which were wrapped in two separate newspaper sheets and bundled in white cloth into pulandas. Both the pulandas were sealed with the seal of SMY. The SHO, Police Station Kalyanpuri also reached there and fixed his seal of RKJ on both the pulandas and the petitioner was arrested. The sample parcel was thereafter sent to the Forensic Science Laboratory. The Forensic Science Laboratory by its report dated 29th November, 2006 described the sample sent to it (Exhibit '1') as greenish brown coloured vegetative material stated to be ganja, being approximately 105 gms with the newspaper. On thin layer chromatography examination, Exhibit '1' was found to contain 'tetrahydrocannabinol', which is the main constituent of cannabis plant.

2. Learned Counsel for the petitioner submitted that the recovery of 1700 gms of ganja, as per entry No. 55 of Notification dated 09.10.2001, falls in the non-commercial quantity and, thereforee, the embargo of Section 37 of the NDPS Act is not attracted. A perusal of entry No. 55 of the aforesaid Notification shows that in Column No. 5, 1000 gms is specified by the Central Government as 'small quantity' in relation to ganja while in Column No. 6, 20 kilograms is specified as 'commercial quantity' in relation to the aforesaid cannabis. Accordingly, counsel for the petitioner submitted that the alleged recovery of ganja made from the petitioner

is a little more than the quantity specified as 'small quantity' and about 1/12th of the quantity specified as 'commercial quantity' and, thereforee, the rigors of Section 37 of the NDPS Act would not apply. As such, he urged that the petitioner, who has been in custody for more than 8 months ought to be released on bail, particularly as he has no criminal antecedents and has been falsely implicated in the present case at the instance of a sole police official viz., the Head Constable who apprehended him. It is pointed out by counsel that no public person was joined in the raiding party despite the secret information having been allegedly transmitted to the concerned Police Station. The entire case of the prosecution, it was pointed out, hinged upon the testimony of the Head Constable, who allegedly searched the bag of the petitioner and made the recovery and the evidence against the petitioner is, thereforee, of an extremely tenuous nature. Further, from the FSL Report, it is not clear whether the entire quantity alleged to have been recovered falls in the definition of ganga or not and, thereforee, the quantity alleged to have been recovered, if classified by its contents, may fall even less than the intermediate quantity and on this score also, the petitioner deserves to be released on bail. Heavy reliance, in this context, has been placed upon the judgments of this Court in Mahesh Pal Singh v. State : 130(2006)DLT463 and Ansar Ahmed and Ors. v. State (2005) Delhi LT123.

3. At this juncture it may be mentioned that the Supreme Court in Basheer @ N.P. Basheer v. State of Kerala : 2004 CriLJ1418 noticed that as a consequence of the Amending Act coming into force on 2.10.2001, the sentencing structure has undergone a drastic change. The Act introduced the concept of 'commercial quantity' in relation to narcotic drugs or psychotropic substances by adding Clause (vii-a) in Section 2, which defines this term as any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette. Further, the expression 'small quantity' is defined in Section 2, Clause (xxiii-A), as any quantity lesser than the quantity specified in the Notification. Under the rationalised sentencing structure, the punishment would vary depending on whether the quantity of offending material was 'small quantity', 'commercial quantity' or something in between. This is the effect of the rationalisation of sentencing structure carried out by the Amending Act 9 of 2001, in Section 27. A notification was issued on 9.10.2001, specifying in respect of 239 narcotic drugs

and psychotropic substances, as to what would be 'small quantity' and 'commercial quantity'. The application of strict bail provisions was also restricted only to those offenders who indulged in serious offences. Thus, Section 37 was amended so as to limit its rigors to offences involving 'commercial quantity' and to those where a minimum term of imprisonment of 10 years or more was prescribed under the Act. Nithertobefore, Clause-b of Sub-section 1 of Section 37 provided as under:

37. Offences to be cognizable and non-bailable. - Nothwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -

(a)...

(b) no person accused of an offence punishable for 'a term of imprisonment of five years or more under this Act', 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.

The said clause w.e.f. 2.10.2001 was amended to read as follows:

37(b) Offences to be cognizable and non-bailable. - Nothwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -

(a)...

(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.

4. Thus, the legislature clearly indicated that in cases other than those involving 'commercial quantity' , bail may be granted to the accused persons in appropriate cases.

5. In the present case, the petitioner has already been in custody for over eight months. A little more than 'small quantity' was recovered from the petitioner and the punishment for 'small quantity' of ganja under Section 20(A) is rigorous imprisonment for a term which may extend to six months or with a fine which may extend up to Rs. 10,000/- or with both. The recovery is about 1/12th of the 'commercial quantity', the 'commercial quantity' being 20 kilograms and falls within the range of 'intermediate quantity'. Even assuming that the petitioner is convicted, the 'maximum punishment' which can be meted out to him under Section 20(B) may extend to 10 years with fine which may extend up to Rs. 1 lac. However, it has to be born in mind that the maximum punishment cannot be handed out to the petitioner in view of the fact that the quantity recovered from him was only a little more than 'small quantity' for which the petitioner may be let off with a fine of Rs. 10,000/- or sentenced to six months imprisonment. thereforee, looking at the proportionality of the sentence which the petitioner is likely to be awarded even if convicted, and the fact that the petitioner has already undergone 8 1/2 months of incarceration, in my considered opinion, the petitioner deserves to be released on bail.

6. There is one other factor which has to be born in mind. It is not the case of the prosecution that the petitioner has any criminal antecedents. This is the first prosecution being faced by the petitioner in a criminal offence under the NDPS Act and hence it cannot be said that the petitioner has any propensity for such offences.

7. Keeping in view all the aforesaid facts and circumstances, the petitioner is directed to be released on bail on his furnishing personal bond in the sum of Rs. 25,000/- with one surety in the like amount to the satisfaction of the concerned

court/Duty Magistrate.

8. Application stands disposed of accordingly.

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