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Court : Kerala

Decided On : Aug-01-2012

Reported in : 2012(3)KLT817; 2012(3)KLJ698; 2012(3)ILR(Ker)936

Judge : N.K. Balakrishnan

Appeal No. : BAIL APPL. NO. 5030 OF 2012

Appellant : Karuthan Ponnaiya and Another

Respondent : Senior Intelligence Officer State of Kerala, Rep. by the Special Public Prosecutor

Judgement :

ORDER

1. Petitioners are A1 and A3 in O.R. No. DRI/TVM/2/NDPS/2012 of Directorate of Revenue Intelligence, Sub Unit, Thiruvananthapuram. The offences alleged against the accused are under sections 9A r/w 25A, 27A, 28 and 29 of N.D.P.S. Act. Petitioners have been in custody from 05.04.2012 and hence this petition for bail. The final report was already filed in this case and it is pending as S.C. No:681/2012.

2. The learned Special Prosecutor submits that section 27A of the Act is not pressed into service now. It is further submitted that the main section of offence attracted in this case is section 25A of N.D.P.S. Act.

3. It is alleged that the officials of the respondent received reliable information that the petitioners were carrying Ephedrine, a controlled substance as defined under the N.D.P.S. Act, by concealing that substance in their baggages and were trying to board a flight to Singapore. Hence, the officials of the Directorate of Revenue Intelligence (D.R.I.), after complying with the procedure prescribed, checked the baggages of the accused persons. The baggages contained Ephedrine, a controlled substance. It was found to have been ingeniously concealed. The total weight of Ephedrine recovered from the baggages of the petitioners herein, were 4.501 Kg, 4.580 Kg and 3.020 Kg respectively. Statements of these petitioners were recorded by the officials. It could be discerned that these two petitioners and the third accused were carriers employed by one Shanmugham of Chennai. Baggages containing the aforesaid controlled substance were handed over by Shanmugham mentioned above to the petitioners; it is alleged by the Prosecution. It could also be found that the accused persons carried the Ephedrine knowing fully well that carrying the same is an offence punishable under the N.D.P.S. Act.

4. The learned counsel for the petitioners submits that section 37(1)(b) is not applicable to the facts of this case, since carrying Ephedrine, a controlled substance, does not attract the offences punishable under sections 19, 24 or 27A of the Act nor can it be said that the concept of commercial quantity is applicable to Ephedrine, the controlled substance seized in this case. 'Controlled substances' is defined in Section 2(viid) as:

"In this Act, unless the context otherwise requires,- 'Controlled Substance' means any substance which the Central Government may, having regard to the available information as to its possible use in the production or manufacture of narcotic drugs or psychotropic substances or to the provisions of any International Convention, by notification in the Official Gazette, declare to be a controlled substance;"

5. It is not disputed that Ephedrine is a controlled substance. There is no categorization of small quantity or commercial quantity so far as it relates to controlled substances. As can be seen from the definition of commercial quantity in Section 2 (viia) of the Act it is clear that it applies only to narcotic drugs or psychotropic substances. Section 9A deals with the power to control and regulate controlled substances, which reads:

"(1) If the Central Government is of the opinion that, having regard to the use of any controlled substance in the production or manufacture of any narcotic drug or psychotropic substance, it is necessary or expedient so to do in the public interest, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the power conferred by sub-section(1), an order made thereunder may provide for regulating by licenses, permits or otherwise, the production, manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption, use, storage, distribution, disposal or acquisition of any controlled substance."

The contravention of orders made under section 9A is made punishable under section 25A. The punishment prescribed is rigorous imprisonment for a term which may extend to ten years and fine which may extend to one lakh rupees.

6. The learned Special Prosecutor has relied upon the decision of the Delhi High Court in Rizwan Ahmed V. Directorate of Revenue Intelligence an unreported decision dated 29.03.2012. It is argued that in that case also Ephedrine, a controlled substance, was seized from the possession of the accused. It is not disputed that in view of the notification No. S.O. 1296 (E) dated 28.12.1999, Ephedrine is notified as a 'controlled substance'. Therefore, it may attract the offence punishable under section 25A. There is no case for the accused that possession of Ephedrine, a controlled substance, was under a valid licence or permit. The aforesaid decision has been mainly relied upon by the learned Special Prosecutor in support of his submission that punishment prescribed for the offence is imprisonment up to ten years and fine of Rs.1 lakh and so section 37(1)(b) of N.D.P.S. Act is applicable, and if that be so, the rigour mentioned in that provision

should be satisfied in order to enable the accused person to obtain bail. This submission is strongly resisted by the learned counsel for the petitioner. Though the punishment prescribed under section 25A is imprisonment up to ten years and fine of Rs.1 lakh, section 25 A is not an offence which has been made mention of in section 37(1)(b) of the Act.

7. Section 37(1)(b) only deals with offences under sections 19, 24 or 27A and also offences involving 'commercial quantity'. As said earlier, so far it relates to controlled substance, the categorization as small quantity or commercial quantity has no application. Section 25A is not included in section 37(1)(b). Therefore, the rigour of section 37(1)(b) cannot be projected as a ground to deny bail, the petitioner contends. In support of that submission the learned counsel for the petitioner has relied upon the decision of the Bombay High Court in Rafael Palafox Garcia V. Union of India and Another 2009 KHC 5335. In that case 290 Kg of Pseudo Ephedrine, which is a controlled substance was seized. It was held that the concept of 'commercial quantity' does not apply to 'controlled substances' as per section 37(1)(b) of the Act. As has been said earlier, section 37(1)(b) itself is clear that it applies only to offences under sections 19, 24, 27A and offences involving 'commercial quantity'. The concept of commercial quantity is alien to 'controlled substances' Therefore, there can be no doubt that section 37(1)(b) is not applicable to the facts of this case.

8. The fact that the rigour mentioned in section 37 (1)(b) of the Act is not applicable to the facts of the case, does not automatically lead to any conclusion that the petitioner is entitled to get bail. Section 37(2) makes it clear that 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 or any other law for the time being in force, for the granting of bail. Therefore, it is manifest that even if the rigour under section 37(1)(b) is not applicable, the Court can refuse bail, if the Court is of the view that the accused persons are likely to flee or will become unavailable to put them to trial or if there are other circumstances justifying negation of bail. It is pointed out that the final report in this case was filed on 22.06.2012 and it is now pending before the Sessions Court as S.C. No: 681/2012. It is also pointed out that the petitioners are actually carriers or peddlers

of the controlled substance and that, it was not carried by them innocuously without knowing the gravity of the offence. It is also pointed out that the petitioners are from Tamil Nadu and are persons having international connections and so once they are released on bail it would be practically impossible to secure their presence to put them to trial.

9. The prosecution contends that the accused are powerful persons who would indulge in similar criminal activity and that they would tamper with evidence and threaten or terrorize the witnesses. It is further contended that the accused are having international connections and so there is likelihood of the accused fleeing to another country or making themselves scarce by going underground or becoming unavailable to the investigating agency.

10. I have carefully examined the entire available records and particularly the allegations levelled against the accused. The nature and gravity of the offence, possibility of the accused to flee from justice and the likelihood of their indulging in commission of similar offences as alleged by the prosecution are also taken note of. Considering all these aspects, I am not inclined to grant bail to the accused, and hence this application is dismissed. The learned trial Judge is directed to try and dispose of the case at the earliest.

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