

(2019) 09 MAN CK 0009

In the Manipur High Court

Case No : Bail Application No. 8 Of 2019

Muminur Rahaman Barbhuya

APPELLANT

Vs

State Of Manipur And Others

RESPONDENT

Date of Decision : 18-09-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 167, 167(2), 167(2A)(2), 437, 439
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 21(C), 25, 27, 29A,
36, 36(A)(4), 37, 68Y

Citation : (2019) 09 MAN CK 0009

Hon'ble Judges : M.V. Muralidaran, J

Bench : Single Bench

Advocate : M. Hemchandra, Juno Rahman, Y. Ashang

Final Decision : Allowed

Judgement

M.V. Muralidaran, J

BRIEF CASE OF THE PETITIONER:

[1] The Petitioner/accused was arrested in the formal arrest under FIR No.37(5) 2018 NAB-PS U/s 21(C)/25/27 A/29/68Y ND & PS Act (as amended on 15.09.2018 and has been under Judicial custody for the last 7/8 months i.e., 240 days in jail.

[2] That brief fact of the case is that on 5th May, 2018 at about 9.10 am, reported to OC-NAB-PS stating that during the course of the investigation of case FIR No.30(04) 2018 NAB PS, it has been revealed that, one Mrs. Chalmawii Dhulian from Moreh supplied the seized drugs through her daughter Mrs. Lalrozami Dhulian of Moreh and son-in-law Mr. Sougaijam Robindro Singh of Kakching Singh of Kakching Wairi Thongam Leikai A/P Moreh. Accordingly they were arrested in c/w the case on 04.05.2018 at 0735 hrs. 0805 hrs and 0815 hrs respectively from their residence. Investigation also revealed that, they are doing illicit drug trafficking cross border from Myanmar to India. Further, as per

statement for UBI account No.0791010161817 of Moreh Branch. Of accused Mrs. Chalmawii Dhulian for the period of 29.03.2012 to 04.05.2018 it is found that during the period altogether Rs.85,22,41275/- were deposited on her account from different source and total withdrawals was Rs.81,85,755.25/-. The total balance in her account is Rs.3.36,657.50/-. Then, as per statement of UBI account No. 0791010164351 of Moreh Branch, of accused Mrs. Lalroami Dhulian for the period of 25.08.2012 to 04.05.2018, it is found that, during the period altogether Rs.4,10,79,679,00/- were deposited on her account from different source and total withdrawal was Rs.4,10,56,460.25/-. The total balance in her account is Rs.23,218,75/-. Further, as per statement of another UBI Account No. 0791010164351 of Moreh Branch in respect of accused Mrs. Lalrozami Dhulian for the period of 16.05.2015 to 04.05.2018 it is found that, during the period altogether Rs.13,13,39,700.00/-. Where deposited on her account from different source and total withdrawals was Rs.12,97,42,933.50/-. The total balance in her account is Rs.15,96,766.50/-. Most of the transactions were related to illicit trafficking of illegal drugs which involved different persons, hence the case.

[3] The petitioner/accused is quite innocent of the charges leveled against him and he has been falsely implicated in this case and nothing from his possession any illegal drugs at the time of arrest and moreover no related the above said transaction of the money.

[4] The statutory mandatory period of detention of 180 days as per Section 167(2) of the Code of Criminal procedure, 1973 as amended is violated since the petitioner/accused had been in custody for 300 days till date. Release on bail the Petitioner/accused in view of the mandatory provision of Section 167(2) of the Code of Criminal Procedure, 1973 as amended. The Petitioner/accused on bail in connection with the FIR No.37(5) 2018 NAB-PS U/s 21(C)25/27 A/29/68Y ND&PS Act as amended.

[5] The respondent in their objections stated that the investigation was completed and subsequently charge sheet was filed against the accused persons and sent up for trial before the Learned Special Court (ND & PS) Manipur, Imphal at Lamphelpat on 03/11/2018 vide C/S.No.72/NAB PS/2018 dated 03/11/2018. For supporting his case, the petitioner counsel has produced the following citations:

1. (2011) 10 SCC 445 Para 53 to 58
2. 1995 Supp (3) SCC 211 Pra 4
3. (1954) 5 SCC 410 Para 53 (2)(b).

[6] The learned counsel for the respondent cited the following decisions.

1. (1995) 4 SCC 190 Para 11,14
2. (2018) 3 SCC 22 Para 5
3. (2018) 11 SCC 1.

[7] I have given my careful consideration to the respective submission made by the learned counsel for both parties and perused entire available records and the citations produced by both the counsels.

[8] The provisions of Section 36(A) (4) and Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short) reads thus:

Section 36A. Offences triable by Special Courts

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

(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorize the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate: Provided that in cases which are triable by the Special Court where such Magistrate considers:-

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorized by him, that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction

(c) The Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section:

(d) A Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorized in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal

Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under section 36.

(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.]"

Section 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.]"

[9] The provisions of Section 36(A)(4) of the NDPS Act is analogous to the provisions of Section 167(2) of Cr.P.C. with a difference regarding the period of detention. Under Section 167(2) of Cr.P.C. the maximum period of detention for a case not triable by Sessions is 60 days and in case of Sessions trial 90 days, the investigation to be completed and Final Report to be filed. The Hon'ble Supreme Court in the case of Union of India vs. Thamisharasi and others in (1995) 4 SCC 190 while interpreting the provisions of Section 167(2) of Cr.P.C. has held that

the Court has no power to keep the accused in judicial custody beyond the period mentioned therein and if the investigation is not complete, the accused would get statutory right to seek bail without reference to the merits. The Provisions of Section 36 A(4) of the NDPS Act prescribes maximum period of detention of 180 days and that the investigation agency should file the Final Report or the complaint within the said period. If not done, what is the effect is the question involved.

[10] The provision of Section 37 of the NDPS Act departs from the general principles of grant of bail under Section 437 of Cr.P.C. The prosecution should prima facie prove the guilt of the accused under Section 437 of Cr.P.C. to resist the bail application, but under Section 37 of the NDPS Act, the situation is converse, the accused has to prove prima facie his innocence to take bail. Therefore onus could be on the accused to prove his innocence. The question now arises is as to whether Section 37 of the NDPS Act should be read in conjunction with Section 36 A(4) of the NDPS Act while granting bail or the Section 36 A(4) of the NDPS Act should be read independently.

[11] The Hon'ble Supreme Court in the case of Rajwinder Singh vs. State of Punjab in Cril.Misc.No.M-35502/2011 has made the following observations:

"I have considered the orders dated October 12, 2011. It is a settled principle of law as laid down by the Hon'ble Apex Court in Uday Mohanlal Acharya Vs. State of Maharashtra, AIR 2001 SC 1910 laying down that if the challan is not presented within the period stipulated in Section 167 (2) Cr.P.C. accused gets an indefeasible right to get bail and that subsequent Cril.Misc.No.M-35502 of 2011 [3] filing of challan during the pendency of the bail application will not extinguish an indefeasible right of an accused to get bail. In the present case in the light of provisions of Section 167 (2) Cr.P.C. read with Section 36 A (4) of the NDPS Act, challan was required to be filed within 180 days by the prosecution agency as it was not filed, the petitioner had exercised his right under Section 167(2) Cr.P.C. on October 4, 2011. Section 36 A (4) of the NDPS Act reads as follows:- "Section 36 A (4) : In respect of persons accused of an offence punishable under Section 19 or Section 27 A or for offences involving commercial quantity the references in sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days";

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period upto one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days." No doubt, on the basis of the powers conferred in the Court under Section 36 A (4) of the NDPS Act as mentioned above, the Special Court can extend the period of presentation of challan beyond 180 days on Cril.Misc.No.M-35502 of 2011 [4] an application of Public Prosecutor indicating the progress of the investigation and

the specific reason for detention of the accused beyond a period of 180 days. The Hon'ble Apex Court in Sanjay Kumar Kedia @ Sanjay Kedia Vs. Intelligence Officer, Narcotic Control Bureau, 2009 (17) SCC 631 has observed that in application for extension of time under Section 36 A (4) of the NDPS Act, the investigating officer is required to specifically mention the progress of the investigation and the compelling reasons which are required for extension of custody beyond 180 days. A notice is also required to be issued to the accused before allowing such application for extension of custody."

[12] It is not disputed that the provisions of Section 167 (2) Cr.P.C. are applicable to the offence under the NDPS Act. If further extension is needed it could be possible only on compliance of the mandatory provision under Section 36(A)(4) of the Act. The report prepared by the Police was submitted by the Special Public Prosecutor, which cannot be construed as report filed by the Public Prosecutor, as contemplated under Section 36(A)(4) of the NDPS Act. Further the report should indicate the progress of investigation which is also missing in the report. In the instant case the progress of investigation is also not specifically stated with the compelling reasons, for seeking detention of accused beyond a period of 180 days. In the aforesaid report filed by the respondent, the compelling reasons for seeking the detention of accused beyond a period of 180 days is not available, though there was notice to the accused. As the mandatory provision under Section 36(A)(4) of NDPS Act are not complied with, I am of the view that the objection raised by the respondent after 180 days without filing final report would not be justifiable. Even as per the prosecution case no contraband was seized from the petitioner. Apart from this, the petitioner is in Judicial custody from 04.05.2018 i.e. almost 16 months. On the aforesaid facts and circumstances of the case, I am of the view that the petitioner is entitled to statutory bail.

[13] In view of the above circumstances, the petitioner deserves to be released on bail as indefeasible right has been accrued to him to be released on bail as challan had not been filed within the statutory period. Petition is allowed. Petitioner is ordered to be released on bail under Section 167(2) Cr.P.C. on his furnishing bail bonds/ surety bonds to the satisfaction of the Ld. Special Judge.

[14] In the result,

(a) bail application is allowed.

(b) the petitioner is released on bail on condition that the petitioner should execute two sureties for a like sum of Rs.1,00,000/- each to the satisfaction of the Ld. Special Judge, ND&PS Manipur, Imphal at Lamphelpat.

(c) the petition is directed to report before the Learned Special Judge, NDPS, Manipur, Imphal at Lamphelpat daily at 10.00 a.m., until further orders.

(d) the petitioner is directed to appear in all hearings without absenting himself before the Learned Special Judge at Lamphelpat, Manipur, Imphal.

(e) the Learned Special Judge, NDPS, Manipur, Imphal at Lamphelpat is directed to dispose the case within 6(six) months from the date of receipt of this order.