

(1991) 03 KAR CK 0012
In the Karnataka High Court
Case No : C.P. No. 184 of 1991

Smt. Kamalabai and others

APPELLANT

Vs

The State of Karnataka

RESPONDENT

Date of Decision : 01-03-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437, 439

Evidence Act, 1872 — Section 25

Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 37, 8

Citation : (1992) CriLJ 561

Hon'ble Judges : M.M. Mirdhe, J

Bench : Single Bench

Advocate : Mr. A.B. Patil, for the Appellant; Mr. C.H. Jadhav, Govt. Pleader, for the Respondent

Judgement

1. This petition is filed by the petitioners u/S. 439, Cr.P.C. praying for grant of bail to them in Crime No. 18 of 1991 of Hubli Suburban Police Station registered for offences punishable u/Ss. 8 and 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act" for short). The petitioners filed a similar petition in the Court of the Special Judge, Dharwar, for their releasing on bail u/S. 439, Cr.P.C. The learned Special Judge, by his order dated 20-1-1991, rejected the prayer of the petitioners for grant of bail. Thereafter this petition is filed by them.

2. I have heard the learned counsel for the petitioners and the learned Government Pleader fully and perused the records of the case.

3. The case of the prosecution is that the complainant visited a house and they found the three petitioners in that house and after searching the house, ganja worth Rs. 1,100/- i.e. 1 Kg 100 grams was found in that house. As the petitioners did not give a satisfactory answer about the ganja, they were arrested and the case came to be registered against them.

4. Section 8 of the Act prohibits a person from possessing any Narcotic Drugs or Psychotropic Substances except for medical or scientific purpose and in the

manner provided therein. The case of the prosecution is that these petitioners were in possession of ganja in contravention of S. 8 of the Act and, therefore, they are liable to be prosecuted and convicted under the Act. S. 20 of the Act lays down that where the contravention of the provisions of the Act is in relation to ganja, the offence is punishable with rigorous imprisonment for a term which may extend to five years and shall also liable to fine which may extend to fifty thousand rupees. There is a special provision regarding bail laid down in S. 37 of the Act. It says that no person accused of an offence punishable for a term of imprisonment to five years or more under the Act shall be released on bail or on his own bond unless the Public Prosecutor had been given an opportunity to oppose the application for such release and when 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 word "Court" referred to in S. 37 of the Act came to be interpreted by Bombay High Court in a case reported in Ashak Hussain Allah Detha Alias Siddique and another Vs. Assistant Collector of Customs (P.), Bombay and another, His Lordship of the Bombay High Court has held as follows (at page 2212) :-

"(E) Narcotic Drugs and Psychotropic Substances Act (61 of 1985), S. 37 - Criminal P.C. (2 of 1974), S. 439 - Offence under the Act - Power of High Court to grant bail u/S. 439 of the Code is not limited by S. 37 of the Act.

The "Court" referred to in S. 37 of the N.D.P.S. Act, being a legislative substitute for the "Magistrate of the First Class" occurring in the repealed S. 36 is not intended to include the High Court. Secondly, the Parliament has identified the Special Court with the Court of the Magistrate whose power to grant bail is restricted u/S. 437 of the Code of Criminal Procedure. The restriction of the power of release on bail created by S. 37 of the N.D.P.S. Act, being similar to that u/S. 437 of the Code of Criminal Procedure, the Parliament did not intended to include High Court within the words "Special Court". Thirdly, S. 37(2) of the N.D.P.S. Act has conceived the limitation on granting bail specified in S. 37(1)(b), as "in addition to the limitations under the Code of Criminal Procedure". Therefore, in the Parliament's conception, "the Court" is the Court whose power to grant bail is limited by the Code of Criminal Procedure. The High Court, not being a Court of such restricted power to grant bail, is not "the Court" conceived by S. 37 of the N.D.P.S. Act. Fourthly, the construction of the words, "the Court" used in S. 37 of the N.D.P.S. Act deprives the High Court of its established jurisdiction. There are no words in the N.D.P.S. Act which bring out the intention to take away the jurisdiction of the High Court u/S. 439 of the Code of Criminal Procedure."

5. The learned Government Pleader brought to my notice the averments in the seizure mahazar of the ganja which are to the effect that all the three petitioners were sitting in the house of petitioner-1 and ganja leaves were lying spread before them and they were granting them. On the basis of these averments in

the mahazar, the learned Government Pleader contended that there is material to show that the petitioners were in conscious possession of the ganja leaves seized under that mahazar. It is not disputed in this case that petitioners 2 and 3 are not the owners of that house or in possession of that house or the residents of that house. It is also not disputed in this case that the house stands in the name of the husband of petitioner-1. Therefore, the house in which the ganja is alleged to have been found is not of the ownership of any of the petitioners and petitioners-2 and 3 cannot be said to be in possession of the said house. So far as petitioner-1 is concerned, it is alleged by the defence that petitioner-1 does not reside alone in that house. She is residing along with her husband and children in that house. In view of these factors, the question will be whether it can be held that petitioner-1 who was residing along with her husband and children in that house can be said to be in exclusive possession of the ganja that was found in that house. The learned Government Pleader contended that all the three petitioners have given voluntary statements before the police admitting their guilt. But the statement of the accused before the police admitting the guilt will be hit by S. 25 of the Indian Evidence Act and not admissible in evidence. Those statements are excluded from consideration. The only material left is the mahazar of seizure of ganja and in view of the fact that the petitioners cannot be said to be either the owners or persons in exclusive possession of that house, that material will also be not sufficient to raise a presumption against any of the petitioners that they were the persons in exclusive possession of the ganja found in that house. Petitioner-1 is a woman and petitioners-2 and 3 are not the persons residing in that house and the offence alleged against the petitioners is not punishable with death or imprisonment for life. No doubt, the offences under the Act are the serious menace to the society at large. But while considering the bail application, the Court has to take into consideration the liberty of the individual, interest of the State, interest of the society at large. Taking into consideration all these factors, I am of the considered view that it will not be just and proper to deny bail to the petitioners. But, it will have to be granted subject to certain conditions to safeguard the interest of the Investigating Agency in this case.

6. Hence, I make the following order :-

The petition is allowed. The petitioners are granted bail on each of them executing a bond for a sum of Rs. 10,000/- with one solvent surety for the like sum to the satisfaction of the Special Judge, Dharwar. This bail is granted subject to the following conditions :-

- (1) That the petitioners shall make themselves available to the Investigating Agency as and when their presence is required for the purpose of investigation;
- (2) They shall mark their attendance in Hubli Suburban Police Station once in a week on every Sunday between 8-00 a.m. and 5-00 p.m.; and
- (3) The petitioners shall not tamper with the prosecution witnesses in any

manner.

7. Petition allowed.