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ENLARGEMENT ON BAIL UNDER NDPS THROUGH THE LENS OF ARYAN KHAN'S CASE

- Kanchumarthi Vineetha, student, Damodaram Sanjivayya National Law University

The Drugs-on-Cruise case has created ripples in B-Town as well as political circles for it involved the NCB's arrest of Shah Rukh Khan's son, Aryan Khan along with the other accused Arbaaz Merchant and Munmun Dhamecha. The bail application had found its way to the Bombay High Court after the Special NDPS Court rejected their bail application. The undeniable public image of Aryan's father, the actor Shah Rukh Khan, and the sensationalist media attention have grabbed the country's eyeballs. It is pertinent to note the reasons for which bail was denied initially and granted subsequently by the higher court. Before delving deep into the reasons, one has to fathom the application of Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985.

A crime under the NDPS Act is a crime against society and not just an individual or a group of individuals.¹ The NDPS Act makes cultivation, consumption, abating consumption, sale or transaction of narcotic drugs and psychotropic substances listed under the act as crime and the quantum of punishment is determined primarily by the quantity of the substances i.e., for 'small' and 'commercial' quantities the punishment differs. Under Section 27 of the Act consumption of a narcotic drug or a psychotropic substance attracts the smallest quantum of punishment, which is rigorous imprisonment extending up to one year or fine up to Rs. 20,000 or both.

Conscious Possession:

Despite there being no recovery of possession from Aryan, the agency argued that the recovery of six grams of charas from his friend Arbaaz Merchant points to "conscious possession" by Aryan Khan as well. WhatsApp chats of Aryan Khan were relied upon, which they claimed pointed towards procurement of bulk quantities of drugs.

In this factual backdrop, one has to zero in on the Section 35 of the NDPS Act which lays out the principle of "presumption of culpable mental state". The term "possession" is a polymorphous term which assumes different colours in different contexts and may carry different meanings in contextually different backgrounds as held in *Madan Lal and Another*

¹ Banerjee J dissenting judgement in Tofan Singh v. State of Tamil Nadu, 2020 SCC OnLine SC 882

*v. State of Himachal.*² Section 20(b) makes possession of contraband articles an offence. It will be illicit possession only if it's coupled with mental element and not mere custody without knowledge.

Section 35 says, "In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution." In simpler words, an accused arrested under the NDPS Act is presumed to have intention, motive and knowledge of the drugs-related crime he or she is charged with. After the prima face case is put forth, there lies reverse burden of proof on the accused to prove that he or she does not have a "culpable mental state" before the court to secure bail.³

The knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case.⁴ The standard of conscious possession differs in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. In *Mohan Lal v. State of Rajasthan*, Supreme Court also observed that the term "possession" could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge.

Like the case of Aryan Khan in which the defence counsel has argued that no drug was recovered from his possession, the accused in the Uttar Pradesh case had contended that no contraband was found on his body. The Supreme Court bench of Justices DY Chandrachud and BV Nagarathna said, "we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act."

Bail under NDPS:

The grant of bail is a rule and its rejection is an exception as long as the mandate of the legislature as required by the provisions of the NDPS Act is followed. Section 37 of the *Narcotic Drugs and Psychotropic Substances Act, 1985* is embedded with the principles for grant of bail. For enlarging the accused on bail, essentially two conditions need to be met.

² Madan Lal and Another v. State of Himachal, 2018 SCC OnLine HP 495

³ Noor Aga vs. the State of Punjab, (2008) 16 SCC 417

⁴ Dharampal Singh v. State of Punjab, AIR 2010 INSC 721

- a. First being that the prosecution must be given an opportunity to oppose the application; and
- b. Secondly, while considering bail application court is required to see if reasonable grounds exist for believing in the guilt of the accused and the likelihood of the accused to commit crime while on bail.

Reasonable Grounds Though the term ‘reasonable’ is vague,⁵ the Supreme Court in *State of Kerala v. Rajesh*⁶ held that the expression “reasonable grounds” means something more than *prima facie* grounds. The substantial probable causes for believing in the guilt of the accused is contemplated by the term. In *Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar*,⁷ the judgment reads,

"Stroud's Judicial Dictionary, Fourth Edition, page 2258 states that it would be unreasonable to expect an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy."

Further, it was noted that in the ultimate analysis, whether a particular act is reasonable or not depends on the circumstances in a given situation.

Admissibility of WhatsApp Chats:

NCB relied on WhatsApp chats to prove their case. WhatsApp chats are considered voluntary statements under Section 67 of the NDPS Act. SC in *Tofan Singh vs. State of Tamil Nadu*⁸ held that a conviction under the NDPS Act cannot solely rely upon the voluntary statements made by an accused under section 67. Such evidence shall be entirely inadmissible. If a conviction is solely based upon Section 67, it shall be a direct infringement of Articles 14, 20(3), and 21 of the Constitution of India.

The Bombay High Court enlarged on bail by making an observation that *"An accused is refused bail only when the Court has reasonable ground to believe that they might hinder the investigation process or tamper with the evidence. In Khan's case, where the NCB did not recover any drugs specifically from him or conduct appropriate medical tests to prove*

⁵ *Shiv Shanker Kesari v. Union of India*, (2007) 7 SCC 798

⁶ *State of Kerala v. Rajesh* C.A 154-157 of 2020

⁷ *Municipal Corporation of Delhi v. M/s Jagan Nath Ashok Kumar*, 1987 (4) SCC 497

⁸ *Supra* note 1

consumption, and relied only upon WhatsApp chats as evidence that cannot be tampered with, there was no reasonable ground for the court to deny him bail.”