

Bail Application No.230/2008

Date of Decision : July 24, 2008

Sanjeev Kumar Saxena Petitioner

Through : Mr. R. P. Luthra, Advocate

VERSUS

State Government of Delhi Respondent

Through : Mr. Sanjay Lao, Advocate

CORAM:
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

SUDERSHAN KUMAR MISRA, J: *(Oral)*

1. In this case, the petitioner was apprehended carrying Heroin. He has been charged with a recovery of net quantity of 107 grams of Diacetylmorphine under Section 21(b) of the NDPS Act. Admittedly, in this case, Section 37 of the NDPS Act is not attracted. The accused has been in judicial custody since 13.8.2007. All the witnesses that have been named by the prosecution are police officials; two of them have already been examined. As per the status report, the accused is found to have no previous criminal involvement. The chargesheet has been filed in the Court.
2. Mr. Sanjay Lao, appearing for the State, has opposed this petition on only one ground. For this, he has relied on the decision of a Single

Judge of this Court in ***Mahesh Pal Singh Vs. State 2006(2) JCC 108*** to contend that in such matters, while considering the question of bail, what must be seen is whether the time spent by the accused in custody while under trial, bears the same proportion to the maximum imprisonment awardable to him on conviction as the quantity of substance recovered bears to the maximum quantity prescribed under the nomenclature, "intermediate quantity". He points to the fact that in ***Mahesh Pal Singh's*** case, while the quantity of the substance recovered fell within the classification, "intermediate quantity", the recovery was about 1/10th of the maximum quantity prescribed thereunder. Since the maximum punishment that could be meted out to the petitioner in that case for possession of the "intermediate" quantity under Section 21(b) of the NDPS Act would be imprisonment for 10 years with fine of Rs.1.00 lakh, consequently, looking at the proportionality, the Court felt that even if it is assumed that the accused is to be convicted, he is not likely to be imprisoned for a period longer than what he has already spent in custody. Therefore he is entitled to bail. From this Mr. Lao has invited this Court to conclude that since in this case, 107 gms. of diacetyl morphine has been recovered, which corresponds to 42.8% of the maximum quantity of diacetyl morphine which can be classified as an, "intermediate quantity" under the statute, therefore, the petitioner should not be released on bail until he has remained in judicial custody for at least the same proportion, i.e., 42.8% of the maximum imprisonment that could have been awarded for the offence under Section 21(c) of the NDPS Act, if he were to be convicted.

3. I do not agree with this proposition. In fact, I do not think that this is what ***Mahesh Pal Singh's*** case decides. In my view, ***Mahesh Pal Singh's*** case lays down no such proposition. A reading of that case

would show that the exercise of proportionality was carried out because, in that case, the petitioner was being tried for possession of an intermediate quantity of diacetyl morphine and had already remained in judicial custody for over four years, while the quantity recovered from him was alleged to be 25.5 gms. It was in these circumstances that the Court was persuaded to the view that even if the petitioner in that case was ultimately convicted, then, looking to the quantity allegedly recovered, his likely punishment may be less than the time already spent in jail by the accused. This aspect of the matter along with other factors persuaded the court to grant bail in that case. But this cannot give rise to the proposition that till the accused persons are found to have undergone the likely imprisonment that they would receive in case of conviction, they should never be released on bail. That was a decision on its own set of facts where the time already spent by the petitioner as an undertrial was also taken into consideration keeping in view the quantity recovered and the likely sentence that may be awarded in the event of conviction. On examining these facts, the court concluded that the actual time spent by the petitioner as an undertrial, was clearly much more than, or equal to, the punishment that might be awarded even in case of conviction.

4. To take Mr. Lao's proposition to its logical conclusion would mean that in case an accused is apprehended with, say, 99% of the maximum quantity prescribed as, "intermediate" under the statute, then until he spends 99% of the maximum sentence awardable on conviction under the Act, while in custody as an undertrial, he cannot be enlarged on bail. To my mind, this is not a sound proposition. It cannot be the sole, inflexible criteria, as contended by learned counsel for the State. The NDPS Act does not prescribe such an approach.

5. Even under Section 37 of that Act, such an approach has not been prescribed, despite the fact that it has been specially enacted to make the grant of bail more stringent in cases where the recovery is of “commercial” quantities. ***Mahesh Pal Singh***’s case (supra) also does not lay down any such criteria. Furthermore, if the courts were to approach all such cases in this manner, as is being suggested by Mr. Lao, it would amount to sanctioning detention without conviction since courts would then be obliged to refuse bail until the accused has already completed the likely sentence to be awarded to him if he is eventually convicted. No doubt the actual quantity recovered must always be one of the considerations for grant of bail, but other factors must also be kept in mind and, undeniably, every case turns on its own facts.

6. The petitioner is found to have no previous criminal involvement; all the witnesses are official witnesses; Section 37 of the NDPS Act does not apply, and since no other ground is urged in opposition, I consider it appropriate that the petitioner be released on bail on his furnishing a personal bond of Rs.50,000/- with two sureties in the like amount, of which one surety, shall be a local surety to the satisfaction of trial court.

7. Dasti.

Sudershan Kumar Misra, J.

July 24, 2008
lb/OPN