

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Bail Appl. No.689/2007**

% **Date of decision : 07.08.2008**

Sayeed Abu Ala

..... Petitioner

Through: Mr. Mr.Sandeep Sethi and
Mr.Harjinder Singh, Sr. Advocates
with Mr.Yogesh K. Saxena,
Advocate for the petitioner.

Versus

Narcotic Control Bureau

..... Respondent

Through : Mr.Rajesh Manchanda, Special
Public Prosecutor for Narcotic
Control Bureau.

CORAM :-

* **HON'BLE MR. JUSTICE ANIL KUMAR**

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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This is a petition under Section 439 of the Code of Criminal Procedure by the petitioner, Shri Sayeed Abu Ala, seeking bail.

On the basis of secret information, the office of Narcotic Control Bureau had conducted a raid at the residential premises of the petitioner at A-263, New Friends Colony, New Delhi. From the said

residential premises nothing was recovered and thereafter raid was conducted at the office premises of the petitioner M/s Zenith Pharma, a Pharmaceuticals and Chemical firm. At the time of conducting the raid, the son of the petitioner, Abu Sualeh, had disclosed about another premises in Old Delhi at Mohalla Kishanganj, Teliwara. From the raid on the said premises, approximately 32 kilograms of heroin was recovered along with equipment required for the manufacture of heroin. Mohd. Altaf, an employee of the petitioner, was found in the said premises.

Petitioner was also caught with 18 kilograms of heroin at Bangalore for which he was under custody at Chennai. Later on after the recovery of about 32 kilograms of heroin from the house at Kishan Ganj, where the employee of the petitioner was present and from where equipments for making heroin was also confiscated, the statement of petitioner was recorded under Section 67, which was later on retracted by him. Along with 32.205 Kgs. of heroin 28 bottles of Acetic Anhydride and 79 bags of suspected Sodium Carbonate having a total weight 400 Kgs was recovered from the house of the petitioner at Mohalla Kishanganj, Teliwara.

Mohd Altaf was issued notice under section 67 of NDPS Act and he gave a voluntary statement under section 67 of the Act admitting that the premises belonged to the petitioner and he was working with

him and assisting him in the manufacture of heroin. The statements of the petitioner's wife and other persons were also recorded.

Since the petitioner was in prison in connection with another seizure of 18 Kgs. of heroin in Bangalore, an application was filed for his examination which was granted and he was examined in jail from 9A.M to 6 P.M on 12.01.2001. In his statement he admitted that the properties owned by him at Delhi and Bangalore were purchased from the income received from the illegal trade of narcotics. He also stated about the manufacture of heroin from his house at Teliwara.

The petitioner has contended that from his residential house at New Friends Colony nothing incriminating was recovered and that the house at Kishan Ganj, Teliwara, from where 32 kilograms of heroin along with the equipments to manufacture heroin was confiscated is on rent to Mr.Asghar Khan. Learned counsel for the petitioner however admitted that the entire house is not on rent and the ground floor of the house at Kishan Ganj, Teliwara, was in the occupation of Mohd. Altaf, who has also not been granted bail.

Learned counsel for the petitioner contended that a power of attorney was executed in favour of the petitioner by his wife and a rent agreement was executed in favour of Mr.Asghar Khan, who is stated to be in occupation of the first floor. These documents, the power of

attorney and the rent agreement, were sought to be produced on behalf of petitioner, however, the trial Court had rejected the application of the petitioner to take those documents and the order of the trial Court has not been challenged by the petitioner.

When the statement of the wife of the petitioner was recorded, certain documents were produced by her, which reflected that the house is owned by her. This is also admitted that she had executed a power of attorney in favor of the petitioner, which is still valid.

Learned counsel for the petitioner has also contended that at the time of seizure on 29th November, 1999, the petitioner was in Jail in Chennai in a case pertaining to recovery of 18 Kilograms of the heroin at Bangalore.

The learned counsel has also contended that the son of the petitioner and his wife have been granted bail. The charge framed against the son and the wife is under Section 25 of the NDPS Act whereas the charges against the petitioner has been framed under Section 29 read with section 21/22 and section 25-A read with section 9-A of the said Act. In the circumstances, it is contended that since the co-accused have been granted bail, the petitioner is also entitled to be released on bail especially because the petitioner is incarcerated for the last eight years.

By order dated 24th April, 2002, the person who had supplied acetic anhydride to one Jagbir Singh without permission/license and who was 25 years of age was released on bail as nothing was recovered at his instance or from his possession.

By order dated 6th April, 2004 the son of the petitioner was granted bail by this court on his furnishing a personal bond of Rs. 2.0 lakhs. By order dated 11th April, 2005, three bail applications of Jagbir Singh, Sanjay Kakkar and Mrs.Tahira Sayed were allowed and they were released on bail on furnishing personal bonds in the sum of Rs.2.00 lakh each with two sureties of the like amount. While granting bail it was noticed that raw material/chemicals for the manufacture of heroin which included acetic anhydride, were supplied to the petitioner, his wife, his son and his employee, Mohd. Altaf, by one Rajinder who had in turn brought those supplies from co-accused Sanjay Kakkar who in turn got the same from co-accused Jagbir Singh who ultimately got the supplies from one Mr.Ghanshyam. The learned single Judge divided the matter into two sets of allegations one regarding the main accused and his family members with regard to manufacture and storage of heroin, and the other regarding employees, i.e. Rajinder, Sanjay Kakkar, Jagbir Singh and Ghanshyam, for having made supplies of raw materials and chemicals. Since they were alleged to be middle links in the supply chain of which accused Ghanshyam and

accused Rajinder formed the beginning and end of the chain and since they had been enlarged on bail by order dated 25th September, 2001 (Rajinder) and 24th April, 2002 (Ghanshyam), Jagbir Singh was also granted bail.

Apparently, the case of the petitioner is distinct and the role of the petitioner is also different. The petitioner has also been running a chemical/pharmaceuticals business and from the house of his wife, for which a power of attorney was given by her to the petitioner, about 32.0 kilograms of heroin and the equipment used for manufacture of heroin was recovered where the co-accused Mohd. Altaf, his employee was present and who has not been granted bail.

In the circumstances, it cannot be held that there is no other evidence against the petitioner other than the confession of the co-accused. In his statement, he stated that he started manufacturing heroin at the agricultural farm of Bhiwani Singh and that the petitioner was transporting the heroin to Bangalore for sale. He also admitted that manufacturing of heroin started at his house at Kishan Ganj, Teliwara, on top floor and he was assisted by Bhiwani Singh and another man, his employee, Altaf. Though the statement recorded by NCB are subject to closer scrutiny, however, considering the entire statement and other circumstances, the petitioner cannot contend that

his case is similar to that of his wife and his son who have already been granted bail.

The petitioner who was arrested on 29th January, 1999 and is in custody since then was granted interim bail on the ground that he was not well and suffering from High Blood Pressure with coronary artery disease. The petitioner was admitted at DDU Hospital from 11th June, 2007 to 13th June, 2007. After his discharge from DDU Hospital he was admitted to Jail Hospital till 21st June, 2007. Pursuant to the order dated 31st August, 2007 a Medical Board was constituted which opined that treatment and investigation can continue at G.B.Pant Hospital where treatment is already going on and he was granted interim bail on medical grounds on furnishing personal bond of Rs.1,00,000/- with two sureties of the like amount. The interim bail granted to the petitioner by the Trial Court was extended on the same terms and conditions by order dated 11th January, 2008 and thereafter it has been extended till 7th August, 2008.

Another Medical Board was constituted by order dated 30th May, 2008. The said Board had opined by its report dated 26th June, 2008 that he needs an upper GI endoscopy and sigmoidoscopy which can be done electively on **an outpatient basis**. The relevant portion of the report is as under:

“ Based on above, the medical board is of the opinion that currently the accused Syed Abu Ala has HTN, CAD, TAD with normal LV function, class II dyspnoea of exertion, Gd.-I piles without active bleed, and erosive gastritis with h/o small volume haematemesis. He was advised CABG surgery in 2004 which as per history the patient declined for personal reasons. There has been significant improvement in the patient's cardiac symptoms since the previous evaluation performed on 31st August, 2007. Based on these findings, the Board opines that the accused Syed Abu Ala needs (admission for) CABG surgery, which can be done on an elective basis. Prior to CABG, he needs an upper GI endoscopy and sigmoidoscopy which can be done electively on an outpatient basis. He may be followed up at G.B.Pant Hospital where he has already been investigated for these diseases.

The learned counsel for the respondent has pointed out that though the CABG surgery was recommended in 2004 it was declined by the accused and even now it is recommended only on an elective basis. It was also pointed out that the other treatments, which have been recommended prior to CABG surgery, can also be done electively on an outpatient basis. The learned counsel for the respondent has also pointed out the outpatient test results of the petitioner and has contended that in his haematology report only Eosinophils are not within the normal range. He has also pointed out that the petitioner has been advised rest and for that purpose he cannot be released on interim bail.

This is no more *res integra* that the jurisdiction of the court to grant bail is circumscribed by the provision of Section 37 of the NDPS Act. It can be granted in a case where there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed. At this juncture a reference to Section 37 of the Act will be appropriate which is as under:

“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 a term of imprisonment of five years or more under this Act 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.”

The aforesaid section was incorporated to achieve the object as mentioned in the Statement of Objects and Reasons for introducing Bill No. 125 of 1988 thus:

“Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, *drug offenders were being released on bail*. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt.” (emphasis supplied)

This legislative mandate is required to be adhered to and has to be followed. It would be relevant to consider the object behind this mandate. In a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. The reason may be large stakes and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier v. Chief Secy., Union Territory of Goa* (1990) 1 SCC 95 as under: (SCC p.104, para 24)

“24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances

have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.”

Therefore the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

- (i) there are reasonable grounds for believing that the accused is not guilty of such offence; and
- (ii) that he is not likely to commit any offence while on bail

are satisfied. In the case of the petitioner about 32 Kgs of heroin along with equipment and other chemicals used for manufacture of the heroin were recovered from his house. The petitioner has business of pharmaceuticals and chemicals. Though the house from which the above-said heroin and equipments were recovered was in the name of the petitioner's wife, she had executed a power of attorney in favour of the petitioner. The employee of the petitioner was present when the recovery was made. Statements have been made under section 67 by Mohd. Atlaf, the employee of the petitioner, his wife, his son and he

himself which shows his complicity, though the statements made were retracted later on.

The learned counsel for the petitioner has relied on 116(205) DLT 354 (SC), Jayendra Saraswathi Swamigal v. State of Tamil Nadu to contend that Section 10 of the Evidence Act cannot be pressed into service and the confessions cannot be relied on. Perusal of the said judgment, however, reveals that it is quite distinguishable from the case at hand. In Jayendra's case the confessions were recorded long after the murder when the conspiracy had culminated and therefore it was held that Section 10 of the Evidence Act could not be pressed into service as there was no other independent evidence. Even then the Apex Court had held that no concluded opinion on this question could be given in the facts and circumstances of that case. The Apex Court had observed as under:-

“10.....Here, the confessions of A-2 and A-4 were recorded long after the murder when the conspiracy had culminated and, therefore, Section 10 of the Evidence Act cannot be pressed into service. However, we do not feel the necessity of expressing a concluded opinion on this question in the present case as the matter relates to grant of bail only and the question may be examined more deeply at the appropriate stage.”

This cannot be disputed that if prima facie evidence of the existence of a conspiracy is available, the statements made by any one

of the conspirators in furtherance of the common object is admissible against all. For such admissibility, there must be first a prima facie evidence that the person was a party to the conspiracy, before his acts or statements can be used against his co-conspirators. In Jayendra Saraswati Swamigal (Supra) in para 12 of the judgment the Supreme Court had held that no worthwhile prima facie evidence apart from the alleged confessions had been brought to the notice of the Court and, therefore, the confessions of the accused were not relied upon.

In Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra & Anr, JT 2005 (4) SC 123 it was held that the Court does not have to reach a positive finding that the accused has not committed the offence accused of before granting bail. This is no more res integra that for purpose of considering an application for grant of bail no detailed reasons are necessary, however, granting or refusing to grant bail must demonstrate application of mind, at least in serious cases, as to why the accused has either being granted or denied the privilege of bail. The duty of the Court at the stage of granting bail is not to weigh the evidence meticulously but arrive at a finding on the basis of broad probabilities. While dealing with the case of MCOCA in Ranjitsing Brahmajeetsing Sharma (Supra) the Apex Court also held that dealing with such Statutes the Court may have to probe into matter deeply so as to enable it to arrive at a finding that the materials collected against

the accused during the investigation must justify a judgment of conviction. In para 57 at page 145 the Apex Court had held as under:-

“56. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in subsection (4) of Section 21 of the Act, the Court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial without in any manner being prejudiced thereby.”

The other precedent relied on by the petitioner, 121 (2007) DLT 166, Ram Narayan v. State is also clearly distinguishable, as on the basis of material brought on record it was held that there was every likelihood that the accused may not be convicted as there was difference in the test results of the samples taken from the same packet, which had cast doubts on whether case property was the same as alleged to be recovered from the accused. The accused in the said case also had no criminal antecedents or propensity to commit any offence under the NDPS Act entitling him to bail and in the circumstances it was held that the mandatory conditions for grant of bail were satisfied.

The learned counsel for the respondent has relied on 2002(2) JCC 949, Atul B.Kohly v. N.C.B; AIR 2000 SC 2245; Hardev Singh v. State; 1996 SCC (Cri) 820; State of Maharashtra v. Som Nath Thapa & Ors; AIR 2007 SC 451 and Rajesh Ranjan Yadav v. CBI and 2003 SCC (Crl) 1690, State Through Secretary, Central Narcotics Deptt, Lucknow v. Syed Amir Hasnain to contend that the petitioner is not entitled for bail in the present facts and circumstances. The learned counsel for the respondent has also placed reliance on AIR 1992 SC 1795, Poolpandi v. Superintendent, Central Excise to contend that there was no compulsion against the petitioner to give the statement. It was contended that the compulsion can be inferred only where the statement has been taken after starvation or beating or where by deceitful means an accused has been induced to believe something which is not true. The learned counsel also contended that merely because a person is in police custody at the time the statement is made will not mean that there was compulsion against him. In Atul B. Kohly (Supra) the accused was earlier convicted in Italy for sending heroin to England and Holland and later heroin weighing 1.810 kg was recovered from a co-accused and statement was recorded under Section 67 of NDPS Act of the co-accused, showing involvement of other accused and of another person in possessing heroin from India and transporting it to Italy. The main accused had also confessed his involvement in his statement under Section 67, which statement was later retracted by

him. The bail application of such a person who had been in custody for 3½ years was declined. In Hardeo Singh (Supra) the Apex Court had held that some general evidence pertaining to the conspiracy would be sufficient to form part of the charge of conspiracy in the charge sheet. The Apex Court had clarified that some connecting link or connecting factor somewhere would be good enough for framing of charge. It was held that for the charge of conspiracy there should be cogent evidence of meeting of two minds in the matter of commission of an offence.

In Som Nath Thapa & Ors. (Supra) the Apex Court had held that to establish a charge of conspiracy, knowledge about the indulgence in either an illegal act or a legal act by illegal means is necessary. It was held by the Apex Court that the prosecution is not to establish that a particular unlawful use was intended so long as the goods or service in question could not be put to any lawful use. As the ultimate evidence consists of chain of action, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use.

In (2008) 4 SCC 668, Kanhiya Lal v. Union of India, it was held by the Supreme Court that a statement made under section 67 of the NDPS Act is not the same, as a statement made under section 161 of the Code unless made under threat or coercion and therefore the statement thus made can be used as confession against the person making it and excludes from the operations of section 24 to 27 of the Evidence Act. The ratio of the said case was that conviction can be maintained solely on the basis of a confession made under section 67 of the NDPS Act.

The learned counsel for the petitioner has also contended that the statement of the petitioner recorded under Section 67 of the NDPS Act was in violation of Article 20 (3) of the Constitution of India. In Kanhaiyalal Vs Union of India, the Supreme Court had considered the question as to whether a statement made under section 67 of the NDPS Act would attract the bar both of section 24 to 27 of the Indian Evidence Act as also Article 20 (3) of the Constitution of India. The Court held that as long as the statement was made by the accused at a time prior to his being formally charged with the offence, the bar under section 24 to 27 would not operate nor would the provisions of Article 20 (3) of the Constitution be attracted. In para 36 the Supreme Court observed:-“ A parallel may be drawn between the provisions of section 67 of the NDPS Act and section 107 and 108 of the Customs Act and to

a large extent section 32 of the Prevention of Terrorism Act, 2002 and section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. These are all special Acts meant to deal with special situations and circumstances. While the provisions of the Prevention of Terrorism Act, 2002, and TADA Act, 1987, are much more stringent and excludes from its purview the provision of Section 24 to 27 of the Evidence Act with regard to confession made before a police officer, the provisions relating to statements made during inquiry under the Customs Act and under the NDPS Act are less stringent and continues to attract the provisions of the Evidence Act. In both the enactments, initially an inquiry is contemplated during which a person may be called upon to provide any information relevant to the inquiry as to whether there has been any contravention of the provisions of the Act or any Rule or order made there under. At that stage the person concerned is not an accused although he may be said to be in custody. But on the basis of the statements made by him he could be made an accused subsequently. What is important is whether the statement made by the person concerned is made during inquiry prior to his arrest or after he had been formally charged with the offense and made an accused in respect thereof. As long as such statement was made by the accused at a time when he was not under arrest, the bar under section 24 to 27 of the Evidence Act would not operate nor would the provisions of Article 20 (3) of the Constitution be attracted. It is only after a person is placed in

position of an accused that the bar imposed under the aforesaid provision shall come into play.” Therefore the bar under Article 20 (3) would have operated only if the petitioner had made the statement after he had been placed in the position of an accused in the case. In the present case though it is true that the statement of the petitioner under section 67 of the NDPS Act was recorded while he was in Central Jail, Chennai, however, he was incarcerated in relation to another case. At the time his statement was recorded, the petitioner was not an accused in present case. In *Pon Adithan v. Dy. Director, Narcotics Bureau*, (1999) 6 SCC 1, it was held that even if a person is placed under arrest and thereafter makes a statement which seeks to incriminate him, the bar under Article 20 (3) of the Constitution would not operate against him if such statement was given voluntarily and without any threat or compulsion and if supported by corroborating evidence.

In *State of Bombay v. Kathi Kalu Oghad and Ors.*, AIR 1961 SC 1808, the issue before an eleven Judge Bench of the Supreme Court was the interpretation of Article 20 (3) of the Constitution. The Supreme Court had held in para 18 as under:

“1. An accused person cannot be said to have been compelled to be a witnesses against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to

make the statement, though the fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

2. The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'.....

Consequently it cannot be held that the statement given by the petitioner while he was in custody in another case will attract the bar of Article 20 (3) of the Constitution of India. The statement was made by the petitioner before he was formally charged in the present case. For the foregoing reasons it cannot be inferred that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit offense again if released on bail. For granting or refusing bail the Court has to consider the broad probabilities and in the circumstances, it will not be appropriate to grant bail to the petitioner.

The petitioner required CABG surgery on elective basis which has been declined or avoided by him since 2004 and he is continuing without surgery. Even now the petitioner has not opted for CABG surgery. According to medical report if he requires treatment for his other problems prior to CABG surgery, the same can be availed by him as an outpatient electively which does not require admission to the

Hospital. For the treatment on an outpatient basis, the petitioner cannot be granted interim bail any further in the present facts and circumstances. According to the Medical report if he can be treated without requiring admission to the Hospital, he can be sent to the hospital even in judicial custody as and when required. Therefore the bail granted to the petitioner on medical ground is also not extended any further.

Therefore for the foregoing reasons, the petitioner is not entitled for bail and the application of the petitioner to be released on bail is dismissed. The interim bail on the medical grounds which is till 7th August, 2008 is also not extended. The petitioner, therefore, should surrender to the concerned authorities forthwith.

August 7th, 2008.

ANIL KUMAR J.

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