

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

+ Crl.M.A.4057/2009 in Bail Application No. 184/2009

% Date of reserve : 22.04.2009
Date of decision: 28.04.2009

Arinze Bernard Emenike ...PETITIONER
Through: Mr.Manish Khanna, Advocate

Versus

Akhilesh K.Mishra ...RESPONDENT
Through: Mr.Narender Singh, Special PP/NCB

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG, J.

1. This is application under Section 445 read with Section 482 Cr.P.C. for conversion of the condition of surety to cash surety in bail order dated 18th March, 2009, vide which the applicant/petitioner was directed to be released on bail on furnishing bail bond in the sum of Rs.50,000/- with one surety in the like amount to the satisfaction of the concerned court.
2. It is submitted on behalf of the applicant that the applicant/accused was arrested for the offence of having 344 gram

of heroin on 29.08.2007 and he was granted bail by this Court vide order 18th March, 2009. However, the petitioner could not avail of the bail order as he is a foreigner and has been unable to procure a suitable surety. It is prayed on his behalf that the condition of surety be altered to cash surety. It is also submitted that the applicant has already been behind bars for more than 15 months. It is also submitted that the applicant should not be punished because he cannot procure a personal surety in a foreign land. The personal surety cannot provide any additional safety to the argument that the applicant may abscond. It is further submitted that the even if the applicant is to abscond, the personal surety is only liable for the amount of money being put. The personal surety cannot be made liable under any law for any punishment. The arguments that the personal surety shall be able to tell the address of the applicant can only be an argument because the passport of the applicant is already with the prosecution as well as on the file of the trial court and the same has the address of the applicant. It is further prayed that in such situations cash sureties be allowed because otherwise it can have the disastrous affect of people bringing in false sureties.

3. Counsel for the applicant in support of his case has relied upon the following judgments:-

- (1) *Babu Singh & Ors. Vs. State of Uttar Pradesh, AIR 1978 SC 527.*
- (2) *Crl.M.A. No. 4387/2008 in Bail Application No. 320/2008 titled as Obinkons Emma Vs. NCB, decided on 8.4.2008.*
- (3) *Mr. Agali E. Samki Vs. The State (NCT of Delhi), 2006 (3) JCC 1292.*
- (4) *Shokhista Vs. State, 2005 (3) JCC 1612.*

4. Counsel for the NCB has strongly opposed the present

application and has relied upon the judgment of this Court in *Charles Sobhraj Vs. State*, 63 (1996) Delhi Law Times 91.

5. In the aforesaid case the petitioner was arrested for the offences of having 344 gm of heroine on 29.08.2007. Even if the petitioner is held to have committed an offence which involves intermediary quantity as has been pleaded on behalf of the petitioner and which is the basis of granting him bail he can still be sentenced to undergo R.I. for 10 years. He is a foreign national. In the case of *Charles Shobhraj Vs. State* 63 (1996) DLT 91 this Court while examining the question of releasing an accused on cash surety for the purpose of releasing him on bail has been pleased to observe:

(6) But then, all said and done, a few things need to be noticed. The object of requiring an accused to give security for his appearance in Court is not to secure the payment of money to the State, for that is a secondary consideration, but to secure the presence of a person facing trial. Thus the primary consideration is the personal element of the surety or sureties concerned as the Court expects the surety to see that the accused appears on the date fixed and also that the surety will take steps for getting the accused arrested in case of any attempt on the part of the accused to abscond or to avoid attendance in Court. As observed by Alvorstone, Lord Chief Justice of England in *King v. Porter*, (1910) 1 Kb 369, it is to the interest of the public that criminals should be brought to justice, and therefore that it should be made as difficult as possible for a criminal to abscond. Responsibility is fixed on the sureties to see that such a person does not escape. A duty is thus cast on the Court, in accepting or rejecting a surety, to see the sureties are solvent and persons of sufficient vigilance to secure the appearance and prevent the absconding of the accused.

(7) The principal purpose of bail being to secure that the accused person will return for trial if he is released after arrest, this consideration is not lost sight of in the provisions of section [445](#) of the

Code. It is only an enabling section, and provides that a Court or officer may permit a person to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix in lieu of executing a bond except in cases where the bond is for good behaviour. Surely, we cannot and must not lose sight of the word "may" which indicates that accepting the deposit of money in lieu of surety is left to the discretion of the Court and that consequently the acceptance of deposit of money is not obligatory and the relief is to be granted only where the Court thinks fit to substitute a cash security. While considering the question of fitness, principal purpose of bail as underlined above, would always remain a paramount consideration. In short thus besides the question as to whether the accused can find sureties or not, the Court shall have to keep in mind the question as to whether the prisoner is likely to abscond or not and while meditating on the last question the Court may take into account various factors concerning him like the nature and circumstances of the offence charged, the weight of the evidence against him, length of his residence in the community, his family ties, employment, financial resources, character and mental condition, his record of convictions, reputation, character and his records of appearance at Court proceedings or flight to avoid prosecution or failure to appear at Court proceedings.

6. Insofar as the judgment in Babu Singh & Ors. Vs. State of Uttar Pradesh, AIR 1978 SC 527 is concerned, it has no application on the facts of this case as it was given in the peculiar facts of that particular case. In any event, the law has to be laid down in consonance with the facts of each and every case.

7. I have also gone into the judgment cited on behalf of the petitioner. Insofar as the judgment delivered in the case of Obinkons Emma Vs. NCB, Bail Appn. No.320/2008 decided on 12.03.2008. The concerned order in that case to accept the cash security was granted by the learned Single Judge of this Court because the respondents gave no objection to the said proposal.

8. In the case of Mr. Agali E. Samki Vs. The State (NCT of Delhi) 2006 (3) JCC 1992, the case was not involving a drug addict and in fact was with respect to offence committed of cheating. There also the petitioner was directed to deposit the double the amount of the surety.

9. In the present case, in fact, even the penalty which can be imposed in such cases may go up to Rs.1,00,000/- and therefore this is not a fit case where the relief prayed for by the petitioner to release him by accepting cash surety in lieu of surety bond can be accepted because not only that he is a foreign national but is involved in serious offence of drug trafficking.

10. Accordingly the application for modification of the order dated 18.03.2009 is dismissed.

APRIL 28, 2009

MOOL CHAND GARG, J.