

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

+ BAIL APPLN. 1087/2009

SURESH KUMAR SHARMA Petitioner
Through: Mr.K.T.S. Tulsi, Sr. Advocate with
Mr.S.Das and Mr.Ravinder Singh,
Advocates

Versus

DIRECTORATE OF REVENUE INTELLIGENCE Respondent
Through: Mr.Satish Aggarwal, Advocate for the
respondent - DRI

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

% **ORDER**
07.07.2009

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

G.S.SISTANI, J (ORAL)

1. By virtue of the present petition, petitioner seeks regular bail in the case for an offence under sections 21, 23 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act"), *primarily* on the ground that no recovery has been effected from him.
2. Learned senior counsel for the petitioner submits that 6 kilograms, 200 grams of heroin was recovered and seized by the officers of Directorate of Revenue Intelligence (hereinafter referred to as the "DRI"), from the exclusive possession of accused No.1 (Danon Armand Erick @ Peter). It is submitted by the learned senior counsel that the petitioner has not been named as an associate/accomplice in the commission of the

offence and no case is made out against him. He also submits that the statement made by the petitioner herein on 25.9.2008 was not voluntary and was retracted on 5.2.2009. The petitioner has been in custody since 25.9.2008.

3. As per the complaint, on 23.9.2008 the officers of DRI, on the basis of specific intelligence received, called two witnesses at about 13:30 hours at the office of DRI. These witnesses were briefed by the officers of DRI that they had specific intelligence that one person of African origin would be coming to M/s.Suman Business Centre, situated at A-162, Near Post Office, Hari Nagar, Clock Tower, New Delhi for booking of parcels and those parcels would be containing narcotic drugs. Around 15:20 hrs. one person of African origin alighted from an auto rikshaw at about twenty meters before the office premises of M/s.Suman Business Centre and took out three yellow coloured printed polythene bags from the said auto rikshaw and released the said auto. At that point of time, accused No.1 (Danon Armand Erick @ Peter) was apprehended and he was served a notice under section 50 of the NDPS Act, 1985. His personal search was conducted and thereafter he was taken to the office of DRI, as it was not possible to interrogate him in a crowded market place. On examination of three printed polythene bags, it was found that two of those polythene bags had been doubled by way of putting one bag into another, while the third bag was single. On further examination of those polythene bags, the two double polythene bags were found to contain three yellow coloured card board box each where as the single polythene bag contained one yellow

coloured card board box. All those seven card board boxes further contained one piece of silver coloured metal gear and a product catalogue of gears. The said silver coloured metal gear was also opened from one side by using a chisel and a hammer and on opening the same, the said gear was found to contain a cavity which was covered with black solid material. The said cavity was broken open with the help of a screw driver. Further examination of the cavity revealed that the same was found covered with black adhesive tapes and on removing the black adhesive tapes, an off white coloured plastic sheet was found, which on further opening was found to contain some off-white powder. Accused no.1- Peter, confirmed that the said powder was in fact heroin. In these circumstances, the statement of the accused no.1 (Danon Armand Erick @ Peter), was recorded on 23.9.2008, 24.9.2008 and 25.9.2008. Copy of these statements have been placed on record and have been referred to by learned senior counsel for the petitioner. A bare reading of these statements would show that accused no.1 (Danon Armand Erick @ Peter) has nowhere named the petitioner herein as his accomplice or stated that the petitioner was in any manner involved or connected either with the supply, possession or transportation of heroin. In his statement accused No.1- Peter has given his brief background and has stated that he had come to India on a tourist visa in June, 2008. Initially he stayed at a hotel in Mumbai. Thereafter he met one Emmanuel, a person of African origin. Mr. Emmanuel asked him as to why had he come to India. Accused no.1- Peter informed him that he was a good

football player and was looking for some work. Mr.Emmanuel informed him that he was working in a company that produces industrial gear and then he gave an offer to work for him. It was decided that accused no.1- Peter would collect industrial gear from Mr.Emmanuel and send the same from Delhi to South Africa through a courier company named M/s.Suman Business Centre and that he would be paid a sum of 300 US \$ per trip. He was informed by Mr.Emmanuel that gears were special gears which contained concealed drugs and he had to deliver the same to the courier agent. According to accused no.1 (Danon Armand Erick @ Peter), he was to deliver the parcels to the courier company. In the statement recorded on 25.9.2008, accused no.1- Peter has given out the procedure which had been followed. He stated that he booked two consignments of Iron Gears with concealed heroin for South Africa on 22.9.2008 through a courier agent of M/s.Suman Business Centre. He also stated that M/s.Suman Business Centre was paid @ Rs.1000/- per kilogram of the gross payments of the packages so handed over by him for export. He also identified the two commercial invoices.

4. According to the petitioner, his father was working in the Ministry of Agriculture and he retired in September, 1988; his mother is a house-wife; and his wife-Suman Sharma expired in the year 2002 and besides that he also had a son and a married daughter. It is stated that the petitioner had joined as an apprentice in the National Fertilizers Limited, Delhi in October, 1979 and later on he took VRS in the year 2001 from the National Fertilizers Limited. He had thereafter started his own business in the name

and style of M/s.Suman Business Centre, providing service for typing/STD/PCO/FAX etc. In the year 2003 he had started courier service as well. In his statement he has stated that he was booking the consignment of iron gears for accused no.1- Mr.Peter from time to time. As for booking an international parcel, commercial invoices were required, hence at the request of accused no.1- Peter he generated two commercial invoices. In his statement he further stated that invoices were generated on his computer as he was to be provided some extra charges. No doubt the petitioner has in his statement stated that he was aware that the consignment contained concealed drugs and he was informed that narcotic drugs will be concealed in the iron gears, however on 5.2.2009, the petitioner retracted from his statement.

5. Learned counsel for the respondent- DRI has strongly opposed this application for grant of bail on the ground that there is a direct nexus between accused no.1 and the petitioner herein. He also submits that the invoices would show direct involvement of the petitioner. Learned counsel further submits that there is an embargo of Section 37 of the NDPS Act and while granting bail, this Court must take into consideration the parameters laid in Section 37 of the NDPS Act. It is submitted that unless and until the conditions therein are satisfied, bail ought not to be granted. It is also submitted that the trial court while declining the bail to the petitioner has rightly observed that the contraband used to be sent by concealing the same in metal gears from time to time through Shri S.K. Sharma (petitioner), who was running a

courier company and for which he was also paid excess amount.

6. I have heard learned counsel for the parties and given my thoughtful consideration to the matter. Learned counsel for the petitioner has submitted before me that this is a fit case for grant of bail in view of the fact that admittedly as per the complaint, heroin was not seized from the possession of the petitioner. Accused no.1 in his statement recorded has also not named the petitioner as an accomplice or as in any manner being involved or connected with the supply, possession or transportation of heroin. Further, the petitioner had charged extra amount only for the purpose of generating an invoice, as commercial invoice was required for booking international parcels and which was done on the instructions of accused no.1. Thus it cannot be said that petitioner was in any way conscious or aware of heroin which was concealed in the iron gear. Further, no reliance can be placed on the statement made under section 67 of the NDPS Act as the same was not voluntary and the petitioner on 5.2.2009 had retracted from his statement made on 25.9.2008.
7. Section 37 of the NDPS Act reads 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 (12 of 1974), or any other law for the time being in force on granting of bail.]”

8. In the case of ***Union of India Vs. Shiv Shanker Kesari*** reported at **(2007) 7 SCC 798**, the Apex Court while elaborating upon section 37 of the NDPS Act, held as under:

“6. As the provision itself provides that no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

7. The expression used in Section 37(1)(b)(ii) is “reasonable grounds”. The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

8. The word “reasonable” has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word “reasonable”.

“7. ... In *Stroud’s Judicial Dictionary*, 4th Edn., p. 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."

(See *Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumar*¹ (SCC p. 504, para 7) and *Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd.*²

9. "9. ... It is often said that 'an attempt to give a specific meaning to the word "reasonable" is trying to count what is not number and measure what is not space'. The author of *Words and Phrases* (Permanent Edn.) has quoted from *Nice & Schreiber, In re*³ to give a plausible meaning for the said word. He says

'the expression "reasonable" is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined'.

It is not meant to be expedient or convenient but certainly something more than that."⁴

10. The word "reasonable" signifies "in accordance with reason". In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. (See *Municipal Corpn. of Greater Mumbai v. Kamla Mills Ltd.*⁵)

11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

12. Additionally, the court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion."

9. Applying the principles laid down to the facts of this case, sub-section (1) of section 37, NDPS Act envisages that the Public Prosecutor should have an opportunity to oppose the bail application. In this case notice was issued and I have heard

¹ (1987) 4 SCC 497

² (1989) 1 SCC 532

³ 123 F 987 at p. 988

⁴ Ed.: As observed in *Rena Drego v. Lalchand Soni*, (1998) 3 SCC 341, p. 346, para 9.

Mr.Satish Aggarwal, learned counsel for the DRI at length. Learned counsel has opposed the application for grant of bail *primarily* on the ground that as per the statement of the accused no.1 as well as the statement made by the petitioner herein, extra payment had been charged to book the consignment. Secondly, the consignment was booked in the name of the petitioner. Thirdly, the confessional statement made by the petitioner is admissible in evidence, wherein he had admitted that he was aware of the nature of goods which were to be sent in the consignment and for which he had charged extra money and which fact has been duly mentioned by the trial court while declining bail. Besides that, the embargo of section 37 of the NDPS Act comes in the way of the petitioner for grant of regular bail. In view of the submissions made, requirement of sub-section (1) of section 37, NDPS Act has been met.

10. As far as sub-section 2 of section 37, NDPS Act is concerned, the Court has to record its satisfaction that there are reasonable grounds for believing that the petitioner is not guilty of the offence, nor is he likely to commit any offence while on bail. Dealing with second portion of sub-section 2 first, I am of the considered opinion that there is nothing on record to suggest that the petitioner herein has had any past record or history of dealing with drugs. In fact Mr. K.T.S. Tulsi, learned senior counsel on instructions has submitted that there is no case of any nature, which is pending against this petitioner and that the petitioner is not a recidivist or a habitual offender. Moreover, nothing has

⁵ (2003) 6 SCC 315

been placed on record by the respondent to show that there is any past history of this petitioner which would lead to a conclusion that the petitioner is likely to commit any offence if he is granted bail. A specific question was put by this Court to the learned standing counsel for the DRI- whether there is any record in their possession and/or other material in their possession to show that the petitioner is likely to commit any offence if bail is granted to him. However, the answer has been given in negative. In the absence of anything brought on record to suggest that the petitioner would commit any offence while on bail, there is no reason for this Court to draw any negative inference against the petitioner herein.

11. Coming next to the first portion of sub-section (2) of section 37, NDPS Act, admittedly, no contraband drug was seized from the possession of the petitioner. The petitioner was examined by the DRI on 25.09.2008 and in the statement, the petitioner had admitted that the consignments were booked by him as per the instructions of Mr. Peter. As commercial invoices were required for booking international parcels, petitioner had generated the commercial invoices through the computer for sending the same to the South Africa as per the instructions of Mr. Peter. The prime accused (Peter) from whose possession the contraband drug was seized, has made three statements and in none of the statements he has named the petitioner as his partner/assistant, accomplice and/or nowhere has he stated that the petitioner herein had knowledge of what was concealed in the gears. It has nowhere been mentioned in the statement of Mr. Peter that at

any point of time, he disclosed to the petitioner herein the contents concealed in the gears. Further, it is seen that at the time the goods were seized they were fully packed and in fact had to be opened with a chisel and a hammer and on opening the same, the said gear was found to contain a cavity which was covered with black solid material. The said cavity was broken open with the help of a screw driver. Further examination of the cavity revealed that the same was found covered with black adhesive tapes and on removing the black adhesive tapes, an off white coloured plastic sheet was found which on further opening was found to contain the contraband drug. Thus it would *prima facie* show that the petitioner had no role in concealing the drug and his role was limited only to dispatching the same. The prime accused (Peter) was caught holding the consignment in a sealed condition, and the courier company had no role to play except to dispatch the said consignment. In the statements made by the petitioner, although he has stated about some extra payment which was made to him for sending the consignment, however, this extra payment was accepted due to the invoice which was generated from his computer. The relevant portion of the statement made reads as under:

“.....On being asked I state that the above stated two Commercial Invoices dated 22-9-08 has been generated from my computer, Mr.Peter who booked the two consignments of Iron Gears did not provide my Commercial Invoice. However since commercial Invoice for booking International Parcel is required. But the time of booking above said two consignments, Mr.Peter did not provide the commercial Invoices along with two consignments. In this regard, I asked Mr.Peter then Peter told me that you please generate two commercial Invoices for the above said two consignments on your

computer for which he will give some extra charge to me. Mr.Peter also provided to the details of the consignee's at South Africa.”

12. In view of the fact that admittedly, heroin was not seized from the possession of the petitioner herein; he was not named as an accomplice by accused no.1; in none of the statements made by prime accused- Mr.Peter, he has stated that the petitioner was aware about the contents of the silver gears or that he was involved with him; the petitioner was only a proprietor of the courier company and goods were recovered duly packed; the petitioner had agreed for some extra payment only, to generate an invoice; the respondent has been unable to show that the petitioner may commit any offence, if bail is granted to him, I consider this to be a fit case for grant of bail inasmuch as, the parameters of section 37 of the NDPS Act are fully met. The petitioner shall be released on bail on his furnishing a personal bond in the sum of Rs.50,000/- with one surety of the like amount to the satisfaction of the trial court, subject to the condition that (i) petitioner will not tamper with the evidence or contact or influence any witness; (ii) the petitioner shall surrender his pass-port (if any), before the concerned court; and (iii) the petitioner shall not leave this country without prior permission of the concerned court.
13. Application stands disposed of. DASTI.

July 07, 2009
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G.S. SISTANI, J.

