

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

+ CRL.M.C.2970/2011 & CrI.M.A.10476/2011(stay)

% Judgment reserved on :13th September, 2011
Judgment delivered on:16th September, 2011

DIRECTORATE OF REVENUE
INTELLIGENCE

..... Petitioner

Through : Mr.Satish Aggarwala and
Mr.Sushil Kaushik, Advs.

versus

BITOREN DOLORES FERNANDEZ

..... Respondent

Through : Mr.Rahul Tyagi and Mr.V.V.P.
Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

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

SURESH KAIT, J.

1. Vide the instant petition, the petitioner – DRI has challenged the order dated 24.08.2011 passed by learned Trial Court, whereby, the respondent/ accused has been admitted on bail.

2. Mr.Satish Aggarwala, learned counsel for the petitioner submits that while granting the bail, learned Trial

Court has not recorded its opinion as required under Section 37 of the NDPS Act. Same is reproduced 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 [offence under section 19 or section 24 or section 27-A and also for offence involving commercial quantity] 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 are 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.]”

3. Learned counsel for the petitioner further submits that as per Section 1(b)(ii) of the Act, where the Public Prosecutor opposes the application, and if the Court is satisfied that there are reasonable grounds for believing that accused is not guilty of such offences, and that he is not likely to commit any offence while on bail.

4. Learned Trial Court has taken the fact into consideration, that the respondent is facing a trial for commission of offence punishable under Section 21(c) of the NDPS Act with regard to the possession of 1.987 kgs. of heroin and also for the offences punishable under Section 29 read with Section 23 of the Act i.e. being a party to a criminal conspiracy to export the above said contraband substance out of India. The quantity of 1.987 kgs. of heroin is a commercial quantity because in the table notified under the said Act quantity of 250 gms. only has been declared to be a commercial quantity of heroin.

5. It is admitted case of both the parties that the respondent/accused could not be released on bail in view of

the provisions as contained under Section 37 of the NDPS Act, unless there are reasonable grounds for believing that she is not guilty of such offence and that she is not likely to commit any such offence while on bail.

6. The bail application was filed by the respondent/accused on the ground that during investigation of the case, the samples taken from the above contraband substance and were sent to Central Revenues Control Laboratory (hereinafter referred as 'CRCL') for testing and vide report of the CRCL, which has been brought on record Ex.PW7/A, the percentage of diacetylmorphine (heroin) in the above sample has been opined to be 86%. During trial of the case one application was moved on behalf of accused for drawing a fresh sample out of the remaining case property and retesting thereof because of some changes observed in the colour and texture etc. of the contraband substance.

7. While moving the above stated application for bail, the respondent / accused relied upon the proposition of law as laid down by this Court in ***Nihal Khan Vs. State (Govt of NCT of Delhi) 2007 CrI LJ 2074; Customs Vs.***

Ahmad Urkapa Crl.M.C.No.1731/2007 & Crl.M.C. No.6050/2007 decided on 04.02.2009. Anil Kumar Vs. NCB, 2008(3) JCC (Narcotics) and Lily Lam Vs. DRI, Crl.MC. No.2604/2010, wherein the applications were allowed and released on bail.

8. On application a fresh sample from the remaining case property was also drawn in the trial Court on 23.02.2011. In CRCL report regarding examination thereof, the percentage of diacetylmorphine (heroin) has been stated to be 41.3%. In view of above, a major discrepancy was found in the percentage count of diacetylmorphine (heroin) in the above two samples.

9. Ld. counsel for the Respondent/accused has argued before trial court that, in view of the above two test reports that there are serious doubts regarding the substance which was allegedly recovered from the respondent / accused and the same was decided vide the said reports. Learned counsel for accused has relied upon in view of the proposition of law as laid down by this Court in **Ram Narayan Vs. State Manu/DE/0837/2005** decided on

29.08.2006 wherein it was held that in cases of vast difference, between the percentage of diacetylmorphine (heroin) in the two test reports it becomes doubtful that the samples were taken from the same bags which were recovered from the accused and hence, as submitted that accused could be released on bail, despite provisions of Section 37 of the Act as the conditions contained therein are satisfied.

10. Learned counsel for the petitioner has argued on behalf of the DRI before the Trial Court in context of Section 37 of the Act, which talks about the bars and rigors; hence the respondent / accused cannot be released on bail and the above differences in the purity of the percentage count of the diacetylmorphine (heroin) in the two test reports was not of much consequences.

11. Further argued that even if percentage of diacetylmorphine (heroin) in the second test report, taken into consideration, still the purity weight of contraband substance recovered from the respondent/accused, will still be a commercial quantity.

12. Further argued that being a foreigner, respondent/accused can always jump the bail and abscond from the proceedings.

13. In **Ram Narayan (supra)** recovery of 1.5 kgs of heroin was effected from the accused and the percentage of diacetylmorphine (heroin) in the report of FSL was opined to be 1.08%. While considering a plea of bail of the accused in the said case and in view of the bars and rigors contained in Section 37 of the Act, had made the following observations:-

"I have considered the arguments advanced by the learned counsel for the petitioner as well as the learned counsel for the State. In so far as the applicability of Section 37 of the NDPS Act is concerned, without going into the question of percentage of the Heroin found in the substance, it may be assumed that the same is applicable in this case. However, the fact that Section 37 of the NDPS Act applies to a particular case does not mean that the accused in such a case would not be entitled to bail per se. What is necessary for the court examining the question of grant of bail where Section 37 applies is that the court should be satisfied having regard to the material available on record that there are sufficient

grounds that the petitioner may not be convicted. If the probabilities are that the petitioner may not be convicted, the Court can grant bail subject to the further condition being satisfied that the petitioner is not likely to commit any offence while on bail. However, if the court is satisfied looking at the probabilities of the case that the petitioner is likely to be convicted, the question of grant of bail would not arise. This is what has been held by the Supreme Court in the case of **Ranjitsing Brahmajeetsingh Sharma V. State of Maharashtra And another: AIR 2005 SCW 2215** while considering the provisions of Section 21 of the Maharashtra Control of Organised Crime Act, 1999. The provision of Section 21 of the latter act are in pari material with the provisions of Section 37 of the NDPS Act.

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In the backdrop of the foregoing principles, I find that the differences in the test results of the samples taken from the very same packet case doubts on the issue as to whether the case property is the same as what is alleged to have been recovered from the petitioner. This is not a definite finding and that would come at the time of trial. However, on the basis of the materials

brought on record, there is every likelihood that the petitioner may not be convicted in this case. It is further to be examined as to whether there is any likelihood of the petitioner committing any offence while on bail. In this regard, the Supreme Court in the aforesaid decision, held that the satisfaction of the court as regards the likelihood of not committing any

Offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. It is further held that since it is difficult to predict the future conduct of the accused, the Court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and the manner in which he is alleged to have committed the offence. The present petitioner has no criminal antecedents and nothing has been indicated to show that the petitioner has a propensity to commit any offence under the NDPS Act.”

14. Thereafter, in **Rahul Saini(supra)** also the above mentioned proposition of law laid down in **Ram Narayan (supra)** were again reiterated and had again considered a plea for bail to an accused in the case of recovery of 1.5 kgs of diacetylmorphine (heroin). In the said
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case, the purity percentage of diacetylmorphine (heroin) was opined in the first test report to be 54.9% and in the second test report of sample drawn in the Court, the same was opined to be 19.4% only. While, observing the above to be a huge difference, the accused was directed to be released on bail, despite the bars contained in Section 37 of the NDPS Act, on the ground that in the given facts and circumstances, there are reasonable doubts as to what recovery having been made and as also to the connection between the alleged recovery and the accused.

15. It was argued on behalf of the prosecution that in ***Rahul Saini(supra)*** that the above difference in purity percentage of the diacetylmorphine (heroin) may be due to some other facts like lapse of time etc., but the above contention was rejected by the Court on the grounds that the variation was tremendous and the same cannot be explained by mere passage of time and further, while holding that the question is not only of the difference in the purity percentage, but the doubt is with regard to the substance which was actually recovered from the accused and was tested subsequently.

16. I note that the prosecution had argued in **Rahul Saini (supra)** that even by taking purity percentage of diacetylmorphine (heroin) of 19.4% into consideration, the purity weight of contraband substance recovered from the accused would still be a commercial quantity, as is also argued in the present case, however, this argument of the prosecution was discarded by the Court in view of the doubts having been raised about the identity of the contraband substance recovered from the accused and tested vide the said reports.

17. I further note that learned Trial Court has considered all pleas taken by learned counsel for DRI, however, the Trial Court notwithstanding the bars and restrictions contained in Section 37 of the NDPS Act, as in the instant case also there is a huge difference, between two test reports regarding the percentage of diacetylmorphine (heroin) and the first test report it has been stated to be 86%, whereas in the second test report, the same has been opined to be 41.3% in view of the above discussion, learned Trial Court found serious doubts regarding the substance recovered from the accused and that tested in CRCL.

18. The Trial Court has also considered that the respondent / accused is not previously involved in any such case under the NDPS Act. Therefore, the Trial Court did not find any likelihood of commission of any similar offence by the accused in future; in the given facts and circumstances of the case. Learned Trial Court has also considered the arguments of the prosecution regarding the apprehension of the absconding of the accused being a foreigner and this cannot be a ground to deny bail to her, if she is otherwise entitle to the same.

19. To rebut the contention of learned counsel for petitioner, learned counsel for respondent / accused has given the instances of two cases wherein this Court vide **order dated 09.04.2009 in Criminal MC No.436/2009 and Criminal M.A.No.1640/2009 'NCB Vs. Maroof Bakare** wherein the release of foreigner on bail was made, subject to certain conditions to ensure the presence of the accused during trial. Further submits that in **Criminal MC. No.2467/2010 Augustin Vs. State decided on 15.09.2010** has attended the entire trial and thereafter undergone sentence. Also in **NCB Vs. Maroof Bakare** *Crl.M.C.2970/2011 & Crl.M.A.No.10476/2011*

(supra) the accused attended the entire trial before the lower Court and, thereafter, despite he was released on bail, finally acquitted by the Trial Court. He has stated at Bar that he appeared in above two cases on behalf of the accused therein.

20. In the instant case, while admitting the respondent/ accused on bail, she was directed to be released on bail after furnishing a personal bond in the sum of ₹50,000/- with two sureties of the like amount each to the satisfaction of the Trial Court.

21. The Trial Court, keeping in mind that the accused is a foreigner and apprehensions being raised regarding her absconding from the proceedings; following conditions were imposed:-

“(i) That a look out circular shall be issued by the complainant/concerned officer of DRI so that the applicant/accused is not in a position to leave this country from any port at all;

(ii) The Embassy/High Commission of the country, to which the applicant/accused belongs, is directed not to issue any travel document of the applicant/accused during the pendency of

this case and without the no objection to be given by this Court and as undertaking in this regard shall be furnished by an authorised officer of the Embassy/High Commission concerned in this court before the bail bond furnished on behalf of the applicant/accused in terms of this order is accepted by this court; and

(iii) The applicant/accused shall report at the office of DRI, Delhi Zone Unit, CGO Complex, Lodhi Road, New Delhi, once in a every week and shall not leave Delhi without the permission of this Court.

22. Vide order dated 06.09.2011, petitioner – DRI was directed to produce some literature on the aspect that – Whether with the passage of time does the colour and purity of the samples get changed?

23. Pursuant to the said order, learned counsel for petitioner, has produced a photocopy of letter dated 09.09.2011 issued from the Director (Revenue Laboratories), CRCL to Shri R. K. Sharma, Additional Director General, (Directorate of Revenue Intelligence), Delhi Zonal Unit, Lodhi Road, New Delhi and have given the following observations:-

“1) There are no guidelines of CRCL functions for second test in respect of the narcotic drugs.

2) a) Illicit seized NDPS materials of natural, semi-synthetic in origin i.e. Opium, Charas, Ganja and Heroin etc non-homogeneous in nature, hence, if re-sampled, sample variation in contents of active substances can occur.

b) If re-sampling is done after a gap of considerable duration, then great variation in percentage of active content may occur, which could be due to the following reasons:

i) Improper storage(Deterioration due to effect of light, variation in temperature and humidity etc.)

ii) Natural products are prone to get infected with bacterial and fungal micro-organisam, which may cause a change in chemical composition, thereby it may decompose, partly or fully.”

24. Additionally, learned counsel for petitioner has produced *“Studies on the degradation of heroin”* from Forensic Science International 67 (1994) 147-154. Same reads as under:-

“Studies on the degradation of heroin” The question of the possible change in the heroin content of a given sample of putative heroin-containing brown powder, from chemical degradation of its di-acetyl morphine content,

frequently arises whilst giving testimony in courts in cases involving heroin in Sri Lanka.

Sample	Initial	End of 1 st week	End of 2 nd week	End of 3 rd week	End of 4 th week	End of 5 th week	Decrease in heroin %age
01	87.2	87.2	87.2	87.2	87.2	87.2	
02	43.9	21.6	5.4	3.2	2.3	0.7	98.4
03	44.7	30.3	13.4	9.4	6.2	3.8	91.5
04	33.1	26.6	18.4	15.2	12.8	8.2	75.2
05	47.5	20.2	3.4	2.1	1.2	0.3	99.4
06	53.3	15.5	4.7	3.4	2.0	0.0	100.0
07	32.1	25.9	14.1	8.5	6.4	4.2	86.9
08	55.3	51.2	32.2	22.3	16.8	10.3	81.4
09	55.7	26.3	7.4	4.3	1.1	0.0	100.0
10	35.5	28.3	19.5	15.2	11.8	9.4	73.5
Average	44.6	27.3	13.2	9.3	6.7	4.1	90.8

Discussion

The analytical results showed that for methanolic solutions at ambient temperatures (26 °C) the degradation of heroin during the 5-week period resulted in an average decrease in its heroin content by 90.8 %. Complete degradation of the heroin content of all samples was observed at the end of the eighth week, while the heroin contents of four samples were completely degraded at the end of the seventh week, four at the end of sixth week and two samples at the end

of fifth week.

Under refrigerated conditions (6-8 °C), the degradation of heroin during the 5-week period resulted in an average decrease in its heroin content by 69.7%.

Conclusions:

This means that the significance of the present work is enhanced in the numerous cases where 'seizures' involve small quantities of heroin. The reason being that the quantity of heroin contained in a sample analysed after several weeks would be appreciated less than was present at the time of seizure, and might well result in a significantly reduced penalty."

25. Learned counsel for petitioner has not pointed out that if the impugned order is bad in law or finding of the learned Trial Court is perverse. The Trial Court has considered the facts and material placed before it; and this case is fully covered by **Rahul Saini(supra)** on change of colour plus percentage. Further submits that literature produced by learned counsel for petitioner is a report on '*dissolved powder*' whereas the contraband substance in the present case is a powder form, therefore, material produced in the Court by learned counsel for petitioner has no

relevance.

26. Additionally, learned counsel for respondent/accused has drawn the attention of this Court to the *Panchnama* dated 14.12.2008. As per the *Panchnama* the packet was found to contain white colour powder. He has also drawn the attention of this Court to the deposition of PW5 Mrs.Anju Singh, IO/DRI wherein she has stated that on opening a yellow colour envelop/packet, one transparent polythene packet was taken out having written 'A' and same is stapled. On opening the same, one packet was taken out and it was wrapped with black colour adhesive tape and same was containing white colour powder substance.

27. Further, it is deposed that said polythene pouch was containing substance having earth (*Matiala*) colour. As submitted above, the colour of the substance was found to be different from the substance recovered from the respondent/accused. Further submitted that colour of the sample changed only in one packet and not in other packet. Therefore, the sample sent to laboratory and the percentage is totally doubtful.

28. The issue of change of colour or purity has already been dealt in catena of cases as discussed above. Purity in percentage may be due to some other factors like lapse of time and place of storage etc. but the variation in the present case is tremendous and same cannot be explained by mere passage of time. Additionally, the doubt is with regard to the substance which was actually recovered from the accused and tested subsequently.

29. In my view, the Trial Court has dealt with all the issues raised by the learned counsel for petitioner. The conditions imposed by learned Trial Court are such, it may be very difficult for the respondent/accused to leave country or will not repeat the offence in these circumstances.

30. In view of above discussion, I find no discrepancy in the impugned order passed by the Trial Court.

31. The Jail authorities are directed to release the respondent/accused forthwith, subject to due compliance of the order of the Trial Court passed on 24.08.2011.

32. Accordingly, Criminal M.C. 2970/2011 & Criminal M.A.No.10476/2011 are hereby dismissed with no order as to costs.

SURESH KAIT, J

September 16, 2011

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