

Court No. - 44

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 32492 of 2023

Applicant :- Akash @ Murali Yadav

Opposite Party :- State of U.P.

Counsel for Applicant :- Raghubir Singh

Counsel for Opposite Party :- G.A.

Hon'ble Pankaj Bhatia,J.

1. Counter affidavit has already been filed. A supplementary affidavit has been filed today in Court explaining the criminal antecedent of the applicant, which is taken on record.

2. Heard learned counsel for the applicant, learned AGA and perused the record.

3. In terms of the FIR, it was alleged that five persons were traveling in an I-20 car and on the basis of the search carried out, three persons including the applicant were found in the car. It is further stated that the said persons expressed that they wanted to be searched in the presence of a Gazetted Officer and on the basis of the said request, Gazetted Officer, Assistant Commissioner of Police, Chhatta, Agra, was summoned and in his presence, the I-20 car in which the said three persons were apprehended, was searched. From the car in question, under the driver's seat, one plastic bag containing Alprazolam powder was recovered. Subsequently, on weighing, the said Alprazolam powder weighed 1 kg 300 gms., out of which 100 gms were taken out as a sample and was sent for analysis. Allegations with regard to a forged Aadhar Card were also made which led to the implication of the applicant in the offences under Section 420, 467, 468, 471, 474 IPC besides under Section 8/22 of NDPS Act.

4. Contention of learned counsel for the applicant is that the applicant is not the owner of the vehicle in question and he was merely a person sitting in the said car, as such, the possession from the car cannot be attributed as a 'conscious possession' from the applicant. He further argues that even in terms of the recovery memo, a sample of 100 gm powder was allegedly taken and sent for sampling, which is contrary to the records. He further argues that allegedly the search was carried out on 16.05.2023 whereas in terms of the counter affidavit filed by the State, the sample size shown to be sent to the laboratory was 122 gm and was received on 26.05.2023. In the light of the said, it is argued that the sample

size allegedly drawn and sent are distinct and further the sample was sent after 10 days, however, the Standing Order No.01/89 specifically states that the sample should be sent within 72 hours, which has not been done. He argues that the applicant has no criminal antecedent of an offence under the NDPS Act and in the other two cases, the applicant is on bail which are cases other than the NDPS Act, as such, he argues that the bail application should be allowed.

5. Learned AGA, on the other hand, argues that the possession from the car in which the applicant was also traveling has to be termed as 'conscious possession' in view of the law as explained by the Supreme Court in the case of ***Union of India v. Mohd. Nawaj Khan; (2021) 10 SCC 100***. He argues that the recovery is more than commercial quantity, which is 100 gm in the case of Alprazolam powder, thus, the test of Section 37 NDPS Act has to be satisfied. It is further argued that the recovery was effected in the presence of a Gazetted Officer, as such, the mandate of Section 50 NDPS Act was duly followed, and thus, the bail application should be rejected.

6. Considering the arguments as noted above, on the basis of material, it transpires that the recovery was effected in the presence of Gazetted Officer; the recovery memo on record does not indicate the signature of the Gazetted Officer on each and every paper of the recovery memo; the sample size allegedly drawn and sent to the laboratory are at variance and there is a substantial variance in between the two as the recovery memo records the sample size to be 100 gm whereas the sample size received in the laboratory is 122 gm. There is also substantial delay in sending the samples for analysis as the same was sent after 10 days. All these things render the seizure and the sampling as suspicious and based upon these, this Court can form a view that the applicant may not be able to be prosecuted based upon these discrepancies.

7. In view of the law laid down in the case of ***Mohd Muslim @ Hussain v. State (NCT of Delhi); 2023 LiveLaw (SC) 260***, specifically Para - 18, 19 & 20, based upon the suspicion as indicated above, this Court can *prima-facie* form a view that the applicant may not be held guilty with the offence in question at this stage.

8. As the applicant has no criminal antecedent of an offence under the NDPS Act, in view of the law laid down in the case of ***Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and***

Anr.; (2005) 5 SCC 294, the second of the twin tests prescribed under Section 37 NDPS Act is also satisfied.

9. In view of the above, the applicant is entitled to be enlarged on bail, as such, the bail application is **allowed**.

10. Let the applicant **Akash @ Murali Yadav** be released on bail in FIR No.240 of 2023, under Section 420, 467, 468, 471, 474 IPC & Section 8/22 of NDPS Act, P.S. Etmadaulla, District Agra on his furnishing a personal bond with two sureties of the like amount each to the satisfaction of court concerned with the following conditions:

(a) The applicant shall execute a bond to undertake to attend the hearings;

(b) The applicant shall not commit any offence similar to the offence of which he is accused or suspected of the commission; and

(c) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

Order Date :- 9.11.2023

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