Court No. - 76

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 43276 of 2023

Applicant :- Nisar Khan
Opposite Party :- State of U.P.
Counsel for Applicant :- Nanhe Lal Tripathi
Counsel for Opposite Party :- G.A.

Hon'ble Vikram D. Chauhan,J.

1. Learned AGA for the State submits that instructions have been received in the case and the bail application may be heard. With the consent of learned counsel for the parties, the bail application is being heard at this stage.

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

3. A recovery of 1 kg 400 gm of ganja is alleged by the prosecution to have been recovered from the applicant from public place. The quantity of the alleged substance recovered is below the commercial quantity. The applicant is in jail since 30.08.2023. The alleged recovery is made on 29.08.2023.

4. Learned counsel for the applicant submits that the applicant has been falsely implicated. There is no independent witness of the alleged recovery. The alleged recovery has not been made in accordance with law. The recovery (including search and seizure) is in violation of the N.D.P.S Act and Criminal Procedure Code. The said search and seizure has not been made by person authorised or empowered under law. The applicant cannot be permitted to remain in jail as a punitive measure during trial. There was no drug testing kit or others measures with the officials at the time of recovery which could identify the alleged substance as a narcotic and psychotropic substance.

5. It is submitted that as per prosecution case, the abovementioned substance was recovered from public place, however there is no independent witness. It is submitted by counsel for applicant that the criminal history of the applicant has been explained in paragraph no. 20 of the affidavit.

6. Learned AGA for the State has opposed the bail application, however does not dispute the factual matrix. It is further submitted that recovery of abovementioned substance is below commercial quantity. It is further submitted that at the pre-trial stage, the innocence of applicant cannot be adjudged.

7. The right of an accused under the Constitution of India, more particularly under Article 21, do not stand superseded at pre-trial stage specifically when reasonable ground exists for grant of bail. It is settled law that deprivation of liberty may be considered a punishment unless it is required to ensure that an accused person will stand his trial when called upon. It is principle of law that every person is deemed to be innocent until duly tried and duly found guilty.

8. The alleged recovery is required to be established by the prosecution by cogent material. It is for the prosecution to show that the recovery and seizure is made in accordance with provisions of NDPS Act and Criminal Procedure Code.

(a) It is not the case of the opposite party/State that the search and arrest is being made in pursuance of a warrant issued by the Magistrate concerned authorised under law.

(b) No material has been produced by opposite party/State to demonstrate that the search and seizure of the narcotic substance has been made by an officer/person authorised or empowered under law.

(c) No particulars, material or circumstance has been shown to demonstrate that the officer concerned has reason to believe from personal knowledge or information given by any person and taken down in writing that offence under the NDPS Act is committed which lead to search, seizure or arrest.

(d) No document has been produced by the opposite party/State to show that grounds for believe that offence has been committed under the Act which is taken down in writing has been send to the immediate superior officer in accordance with law.

(e) There is no independent witness of the alleged search, seizure and recovery.

(f) No Forensic Science Laboratory report/chemical analyst report has been produced by opposite parties to show that substance alleged to be recovered is a narcotic drug and psychotropic

substance under Act No. 61 of 1985.

9. The presumption under Section 54 of the NDPS Act is applicable at the stage of trial and not at the pre-trial stage when the bail application is being considered. The recovery of the substance is below commercial quantity. Three Judges Bench of this Court in **Tofan Singh Vs. State of Tamil Nadu, AIR 2020 SC 5592,** has held that a confessional statement recorded under Section 67 of the NDPS Act to be inadmissible.

10. Learned AGA has pointed out the criminal antecedents of the applicant. No material or circumstance has been brought to the notice of this Court with regard to tampering of evidence or intimidating of witness in previous criminal cases. In **Ash Mohammad Vs. Shiv Raj Singh (2012) 9 SCC 446 ,** the Apex Court in para 30 has observed:

"We may hasten to add that when we state that the accused is a history-sheeter we may not be understood to have said that a history-sheeter is never entitled to bail. But, it is a significant factor to be taken note of regard being had to the nature of crime in respect of which he has been booked."

Insofar as criminal antecedents of applicant is concerned, it is not the case of the State that applicant might tamper with or otherwise adversely influence the investigation, or that he might intimidate witnesses before or during the trial. The State has also not placed any material that applicant in past attempted to evade the process of law. If the accused is otherwise found to be entitled to bail, he cannot be denied bail only on the ground of criminal history, no exceptional circumstances on basis of criminal antecedents have been shown to deny bail to accused, hence, the Court does not feel it proper to deny bail to the applicant just on the ground that he had criminal antecedent.

11. It is not the case of the State that the applicant has not cooperated in the investigation or proceedings before the trial court.

12. No material, facts or circumstances has been shown by learned AGA for the State that the accused may tamper with the evidence or witnesses or the accused is of such character that his mere presence at large would intimidate the witnesses or that accused will use his liberty to subvert justice or tamper with the evidence.

13. It is settled principle of law that the object of bail is to secure

the attendance of the accused at the trial. No material particulars or circumstances suggestive of the applicant fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like have been shown by learned AGA for the State.

14. Learned AGA for the State has not shown any material or circumstances that the accused/applicant is not entitled to bail in larger interests of the public or State.

15. Considering the facts and circumstances of the case, nature of offence, evidence, complicity of the accused, submissions of learned counsel for the parties and without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

16. Let the applicant **Nisar Khan** involved in Case Crime No. 671 of 2023, under Sections 8/20 of N.D.P.S. Act, Police Station Lalitpur, District Lalitpur be released on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to the following conditions:-

i. The applicant will not tamper with the evidence during the trial.

ii. The applicant will not pressurize/intimidate the prosecution witness.

iii. The applicant will appear before the trial court on the date fixed, unless personal presence is exempted and/or the applicant shall make himself available for interrogation by a police officer as and when required.

iv. The applicant shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected.

v. 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.

vi. The applicant shall not leave India without the previous permission of the Court.

vii. In the event, the applicant changes residential address, the

applicant shall inform the court concerned about new residential address in writing.

17. In case of breach of any of the above condition, the prosecution shall be at liberty to move bail cancellation application before this Court.

Order Date :- 18.10.2023
S.Prakash

Digitally signed by :-
SHASHI PRAKASH
High Court of Judicature at Allahabad