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

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Reserved on: 30th September, 2019

Date of Decision: 8th November, 2019

+ **BAIL APPN.127/2019 & CrI.M.As.5620/2019 & 10963-64/2019**

ANIL SHARMA

..... Petitioner

Through: Mr. S.N. Gupta, Advocate.

versus

THE STATE

..... Respondent

Through: Mr. Amit Chadha, APP with SI
Manoj Yadav, PS: Crime
Branch, Delhi.

CORAM:

HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J.

1. This order shall dispose of the present application under Section 439 of the Code of Criminal Procedure, 1973 for the grant of bail in FIR No.90/16, under Sections 20/25/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, ("NDPS Act") PS: Crime Branch, Delhi.

2. The brief facts emanating from the record are that on 06.06.2016 at around 4 AM, an information was received in the office of Narcotics Cell, Kotwali that one Vikas Kumar @ Rahul resident of Aligarh, UP along with his associate Anil Sharma @ Pandit and Zakir both R/o Faridabad would bring huge quantity of Ganja/ Cannabis from Odisha and supply the same in Delhi/ NCR in his vehicle no. HR-38T-2299. It was informed that he would come from Nizamuddin

via Mathura road and around 5.00- 05.30 AM pass through the red light of Delhi High Court towards Pragati Maidan and would supply Ganja to someone there.

3. Pursuant to the above information the raiding team of narcotics crime branch reached near Mathura road, Delhi High Court red light and stopped one brown colour Eicher Tempo No. HR-38T-2299 and found that Vikas kumar@ Rahul was sitting in the vehicle. During the search of the vehicle, two plastic bags were recovered and inside them leaf like seeds and grassy substance which was suspected to be ganja was found. Each plastic bag was weighed and it was found to be containing 30kgs. each. Thus, total weight of recovered ganja was 60 kgs. The same was taken into police possession and the vehicle too was taken into police possession. In this regard a case vide FIR No.90/16, under Sections 20/25/29 of the NDPS Act, was registered at PS: Crime Branch, Delhi.

4. During the course of investigation, accused Vikas Kumar disclosed that he had taken his Eicher tempo to Odisha for the supply of goods, where he made a call to Anil Sharma and called him to Khandgiri Chowk, Odisha and thereafter he took his tempo to Khandgiri Chowk, where Anil Sharma and one Sahil met him and loaded ganja in his tempo for supplying the same in Delhi. Later on, he took his tempo to Badarpur Border where Anil Sharma and Zakir unloaded some ganja from the tempo into their cars and that Anil Sharma instructed him to take the remaining ganja to Delhi for further supply, where he was apprehended by the police. In pursuance to the disclosure made by the accused search of his associates Anil Sharma

@ Pandit and Zakir was made at Faridabad but they were not found.

5. Upon further investigation, certified copies of the CDR of mobile nos. of Zakir, Sahil, Anil Sharma @ Pandit were obtained. On scrutiny of the same, it was found that on 03/ 04.06.2016 location of Anil Sharma @ Pandit, Zakir, and Vikas kumar@ Rahul was in Bhubneshwar, Odisha and they were in constant touch with each other. It was also found that accused/ applicant Anil Sharma @ Pandit, Zakir and Vikas kumar@ Rahul had gone to Odisha from Delhi by air on 23.05.2016 and again on 01.06.2016. On 04.06.2016 after loading the Ganja in the tempo Anil Sharma @ Pandit returned to Delhi from Odisha by air, whereas Vikas kumar@ Rahul alongwith Sahil brought the tempo to Delhi.

6. During investigation the airline details were obtained and on scrutiny of the same, the travel details of Anil Sharma @ Pandit, Zakir and Vikas kumar from Odisha to Delhi and Delhi to Odisha had been verified.

7. On 07.10.2016, information regarding the arrest of accused Anil Sharma @ Pandit in case FIR No. 630/16, under Section 25/54/59 of the Arms Act, registered at PS: Sarna, Faridabad, Haryana was received. On 19.10.2016, accused Anil Sharma was formally arrested in the present case. At the instance of the accused Anil Sharma, a raid was conducted in search of source/supplier of cannabis but no clue about the whereabouts of the supplier came on record. Thereafter, on 1.12.2016, charge-sheet was filed against the petitioner as well as the other accused persons and charges were framed.

8. Learned Counsel for the petitioner submitted that the petitioner

has been falsely implicated in the present case. Learned counsel for the petitioner further submitted that the accused had been arrested by the police of PS Saran, Faridabad at the instance of the police officers of this case and the address of the petitioner must have been added in the disclosure statement of Vikas after he was arrested because if the father's name and the address of the petitioner was known to the Police, they would have referred all this in the alleged secret information. It is also not known as to why the Police could not arrest petitioner after 6.6.2016 till he was arrested on 28.9.2016 in the FIR No.630/2016 under the Arms Act. It is also submitted by learned counsel for the petitioner that it is not known as to why the Police has not been able to locate the alleged supplier of cannabis.

9. Learned counsel for the petitioner also contended that the police has allegedly taken some passenger list of the airlines but there is no 65B Certificate nor any person of the airlines has been made as a witness. Hence, this also clearly shows that the petitioner has been falsely implicated.

10. Learned counsel for the petitioner also submitted that the Police, at the time of hearing the arguments on the first bail application on 20.9.2017 before the learned Trial Court misled the Court as the Police informed the Trial Court that the petitioner is involved in two other matters, i.e., FIR No.630/16 under Sections 25/24/59 of Arms Act, PS Saran, Faridabad and in FIR No.17/14 under Sections 20/25 of the NDPS Act, PS: Sector-31, Faridabad, whereas the fact is that the petitioner was acquitted in case FIR No. 17/14 of NDPS Act on 8.10.2015, i.e, much prior to the registration of

the present FIR and the case under FIR No.630/16 under the Arms Act was registered only on 28.09.2016, i.e., much after the registration of the present FIR. In this case, thus, there are reasonable grounds to believe that the petitioner is not guilty and also that he is not likely to commit any offence on bail.

11. Learned counsel for the petitioner has relied upon the judgment of this Court in Pushpa Rani v Narcotic Control Bureau, 122(2005) DLT 68, wherein it has held that it is not a law that when Section 37 of the NDPS Act is attracted, bail has to be refused as a matter of course and further this Court, in the case of Dalip Singh v. State in Bail Application No.1312/2018, granted bail by referring that disclosure statement is not sufficient evidence and there are reasonable grounds to believe that the petitioner is not guilty of the said offence. This Court, in the case of Ramesh Kumar v. Narcotics Control Bureau in Bail Application No.1652/2018 and Chattisgarh High Court in Ravi Nadar v. State of Chattisgarh, in MCRC No.6299/2018, while granting bail, observed that if no recovery is made from particular person, then no case of conspiracy is made out.

12. Learned counsel for the petitioner also submitted that even the alleged recovery from accused Vikas was not made in the presence of any magistrate or Gazetted Officer and hence there is non-compliance of Sections 41/42/50 of the NDPS Act and in this regard law is very clear that non-compliance of statutory provision is fatal for prosecution. Learned counsel for the petitioner has also placed reliance on State of Punjab v. Balbir Singh, (1994) 3 SCC 299, Arif Khan v. State of Uttarakhand, AIR 2018 SC 2123, Vijay Verma v

State (DHC) in Bail Application No.2653/2018 and Dharambir v. State (DHC) in CrI. A. No.658/2017.

13. Now, it would be appropriate to reproduce the relevant portion of the first order dated 20.9.2017, whereby the regular bail application of the petitioner was dismissed by the Trial Court, which reads as under:

“The allegations against the present applicant/accused are serious in nature as it is a case of commercial quantity of contraband and the embargo of Section 37 NDPS Act is applicable to the facts and circumstances of the present case. In view of the material on record, there is nothing for this Court to be 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.”

14. Further, vide order dated 16.11.2018, the Trial Court, while dismissing the second bail application of the petitioner, held as under:

“The allegations against the present applicant/accused are of trafficking in commercial quantity of contraband. The embargo of Section 37 of NDPS Act is applicable. The witnesses are being examined in the matter. At this stage, in view of the material on record, there is nothing for this Court to be 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. Hence in totality of the facts and circumstances, the present application has no merit and the same is dismissed.”

15. It is the case of the prosecution that the petitioner had called the accused Vikas Kumar in Orissa at Khandgiri and loaded the ganja in his vehicle for supply in Delhi. The petitioner came back to Delhi by

air and again met Vikas at Badarpur Border and took the ganja from him. The petitioner thereafter instructed Vikas to take the ganja to Delhi for further supply where Vikas was apprehended at the red light of the Delhi High Court with ganja in his vehicle. It is also the case of the prosecution that the call detail records of the petitioner show that he went to Odisha at the time disclosed by Vikas Kumar and he had called the petitioner at Khandgiri Chowk, Odisha for loading ganja in his truck. The airlines record also shows that the petitioner had gone to Odisha as per the disclosure of Vikas Kumar. It is also the case of the prosecution that the petitioner is not entitled to bail as he was found indulged in trafficking of commercial quantity of contraband and embargo of Section 37 NDPS Act is applicable. The petitioner is also stated to be previously involved in FIR No.630/2016, under Sections 25/54/59 of the Arms Act at PS:Saran, Faridabad and FIR No.17/14, under Sections 20/25 of the NDPS Act at PS:Sector-31, Faridabad. However, learned counsel for the petitioner submitted that the petitioner has already been acquitted in both the cases.

16. There is no dispute that in this matter, the quantity involved is a commercial one and the rigours of Section 37 of the NDPS Act are applicable. 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 [offences under section 19 or section 24 or section 27A and also for offences 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 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 (2 of 1974) or any other law for the time being in force, on granting of bail.

17. In *Saju v. State of Kerala*, 2001(1) SCC 378, the Supreme Court observed as under:

“8. ...It is a settled position of law that act or action of one of the accused cannot be used as evidence against other. However, an exception has been carved out under Section 10 of the Evidence Act in the case of conspiracy. To attract the applicability of Section 10 of the Evidence Act, the Court must have reasonable ground to believe that two or more persons had conspired together for committing an offence. It is only then that the evidence of action or statement made by one of the accused could be used as evidence against the other.”

18. In *Mir Nagvi Askari v. Central Bureau of Investigation*, (2009) 15 SCC 643, it was ruled in the same vein that while drawing an inference from the materials brought on record to arrive at a finding as to whether the charges of the criminal conspiracy have been proved or not, it must always bear in mind that a conspiracy is hatched

in secrecy and it is difficult, if not impossible, to obtain direct evidence to establish the same.

19. The Supreme Court in the case of *Mohd. Amin v. CBI*, (2008) 15 SCC 49 has held as under:

“74. The principles which can be deduced from the above noted judgments are that for proving a charge of conspiracy, it is not necessary that all the conspirators know each and every details of the conspiracy so long as they are co-participants in the main object of conspiracy. It is also not necessary that all the conspirators should participate from the inception of conspiracy to its end. If there is unity of object or purpose, all participating at different stages of the crime will be guilty of conspiracy.”

20. Further, *in Union of India v. Ram Samujh and Anr.*, (1999) 9 SCC 429, the Supreme Court observed as under:

“8. To check the menace of dangerous drugs flooding the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless mandatory conditions provided in Section 37, namely,
(i) there are reasonable grounds for believing that accused is not guilty of such offence; and
(ii) that he is not likely to commit while on bail,
are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany

trafficking illegally in the dangerous drugs, the Court should implement the law in the spirit with which the Parliament, after due deliberation, has amended.”

21. In *Supdt., Narcotics Control Bureau, Chennai v. R. Paulsamy*, (2000) 9 SCC 549, the Supreme Court has held as under:

“6. In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the public prosecutor unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Sections 52 and 57 have been pre-judged by the learned single Judge at the stage of consideration for bail. The minimum which learned single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned single Judge during bail stage regarding the compliance of the formalities mentioned in those two sections.

7. We may also observe that learned single Judge has not recorded a finding in terms of Section 37 of the Act which is sine qua non for granting bail to an accused involved in the offence under the Act.”

22. It is also a fact noticed by the Courts that generally, the conspiracy is hatched in secrecy and it may be difficult, if not impossible, to obtain direct evidence to establish the same. The acts of various parties to the conspiracy will infer that they were done with

reference to common intention, hence it is held, time and again, that the conspiracy can be proved by indirect circumstantial evidence, which should be of an impeccable nature. It is also not necessary that all the conspirators should know each other and also every detail of the plot, so long as they are co-participants in the main object thereof and it is also not necessary that all of them should participate from the inception of the stratagem till the end, the determinative factor, being unity of object or purpose and their participation at different stages.

23. As per the provision of Section 37 of the NDPS Act, it is mandatory that before the petitioner is entitled to be released on bail, the Court has to be satisfied that there are reasonable grounds for believing that the petitioner is not guilty of such an offence and that he is not likely to commit the same again while on bail.

24. As far as the present case is concerned, *prima facie* it is evident from the investigation that all the accused persons are part of the conspiracy and they are connected with each other, in view of the respective documents, statements and the recoveries made in the matter by the prosecution. The record and the alleged statements *prima facie* demonstrate that the petitioner was in contact with Vikas Kumar, who was apprehended at the red light, Delhi High Court. The call detail records of the petitioner *prima facie* show that he went to Odisha at the time disclosed by accused Vikas Kumar and he had called him at Khandigiri for loading ganja in his vehicle. The disclosure of Vikas *prima facie* clearly demonstrates that the petitioner was in contact with him.

25. However, so far as the contention of the learned counsel for the petitioner regarding non-compliance of Section 50 of the NDPS Act is concerned, the Constitution Bench of the Supreme Court, in *Vijaysinh Chandubha Jadeja v. State of Gujarat*, (2011) 1 SCC 609, held as under:

“29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under subsection (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

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31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez and Prabha Shankar Dubey is neither borne out from the language of subsection (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been

met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.”

26. Even otherwise, it has been held by the Supreme Court in the matter of *State of Punjab v. Baljinder Singh & Anr.*, in Criminal Appeal No.1565-66/2019, decided on 15.10.2019 that non-compliance of Section 50 during ‘personal search’ cannot invalidate recovery from vehicle. The mandate of Section 50 of the Act is confined to “personal search” and not to search of a vehicle or a container or premises. Hence, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle.

27. The contraband in this case was recovered from the vehicle, hence, no benefit, if any, regarding non-compliance of Section 50 of the NDPS Act can be extended to the petitioner in view of the facts of the present case, in any manner. Even otherwise, in view of the decision in *Vijaysinh Chandubha Jadeja v. State of Gujarat* (supra), the question as to whether or not the procedure prescribed has been followed and the requirements of Section 50 of the NDPS has been met, is a matter of trial.

28. It is an admitted fact that two criminal cases bearing FIR No.630/16, under Sections 25/24/59 of the Arms Act and FIR No.17/14, under Sections 20/25 of the NDPS Act were registered against the petitioner, though he has been acquitted later on in both the cases.

29. So far as the cases relied upon by the learned counsel for the petitioner are concerned, they are of not much help to the petitioner, as the facts of the present case are not *pari materia* with the facts of those

cases. The questions put to PW-3 are also of not much help to the case of the petitioner at this stage, in view of the facts, the evidence and the documents placed on the record. Further, whatever factual contention is raised by learned counsel for the petitioner regarding the question asked from PW-3, cannot be looked into in isolation and has to be read along with the material, which has been brought before the Court and/or has to be proved by the prosecution during trial.

30. The present case *prima-facie* appears to be a case where the conspiracy was hatched by the petitioner along with other co-accused to bring the contraband to Delhi for further supply. Admittedly, the case is one where recovery is of a commercial quantity. The rigours and the principles of Section 37 of the NDPS Act are attracted which creates an embargo on the powers of the Court to grant bail.

31. It is mandatory under Section 37 of the NDPS Act that before the petitioner is held to be released on bail, the Court has to satisfy itself that there are reasonable grounds for believing that the petitioner is not guilty of such offence and that he is not likely to commit any offence, while on bail, again. However, *prima-facie*, in view of the material available, there is nothing on the record to satisfy this Court that there are reasonable grounds for believing that the petitioner is not guilty of such an offence and that he is not likely to commit the offence again, while on bail.

32. Taking into consideration the nature, the gravity of the offence and the role of the accused as well as the fact that there is nothing on record to satisfy this Court, at this stage, that there are grounds or more to say reasonable grounds for believing that the petitioner is not

guilty of such an offence and he is also not likely to commit the offence again while on bail, hence, this Court does not find any merit in the bail application of the petitioner and the same is, accordingly, dismissed. Pending applications are also dismissed.

33. The Trial Court is directed to expedite the proceedings.

34. It is made clear that nothing stated or observed hereinabove shall tantamount to any expression on the merits of the case.

CHANDER SHEKHAR, J

NOVEMBER 8, 2019

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