

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

BAIL APPLN. 1493/2019

Reserved on : 13.08.2019

Date of Decision : 19.08.2019

IN THE MATTER OF:

SHAFI @ LOVELY

..... Petitioner

Through: Mr. R.P. Luthra, Mr. Sourabh Luthra
and Mr. Mohit Budhiraja, Advocates.

versus

THE STATE

..... Respondent

Through: Ms. Radhika Kolluru, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present application has been filed under Section 439 Cr.P.C. seeking regular bail in FIR No. 72/2018 under Sections 21/29 of NDPS Act registered at PS Crime Branch, Delhi.
2. Learned counsel for the petitioner submits that the petitioner has been falsely implicated. He submits that charge sheet has already been filed and the petitioner is no more required for any investigation. He further submits that his search was not conducted before the Gazetted Officer in terms of Section 50 of NDPS Act therefore he ought to be released on bail.
3. In support of his submission he has relied upon the decisions rendered in Arif Khan @ Agha Khan Vs. State of Uttarakhand reported

as **AIR 2018 SC 2123**, the judgment passed by the Co-ordinate Bench in Gurtej Singh Bath Vs. State reported as **254 (2018) DLT 551** (orders passed in Sunny Khanna Vs. State (Govt of NCT of Delhi) in **BAIL APPLN. 218/2019** decided on 25.04.2019 and Deepak Singh Vs. State in **BAIL APPLN. 1854/2017** decided on 31.10.2018).

4. Learned counsel for the petitioner has not pressed any other argument.

5. Per contra, learned APP for the State has vehemently opposed the bail application. It is submitted that charge sheet has already been filed and charges have been framed under Section 21/29 of NDPS against the petitioner and the co-accused. Out of the twelve witnesses, one witness has been examined and the cross-examination of the second witness is pending. She further submits that on receipt of a secret information, Md. Shakil, co-accused, was apprehended on 14.03.2018 and 260 grams of heroin was recovered from the right pocket of his pant. Md. Shakil disclosed that the recovered heroin was procured by him from the present petitioner. Thereafter, the trap was laid and the present petitioner was arrested. On search being made, 100 grams of heroin was recovered from a polythene bag kept in the pocket of his pant. She further submits that the present petitioner has been found involved in following FIRs under the NDPS Act:

- i) FIR No. 40/12 registered under Section 21 of NDPS Act at PS Seemapuri, Delhi.
- ii) FIR No. 69/17 registered under Section 21/29 of NDPS Act & Section 77 of J.J. Act at PS Seemapuri, Delhi.

6. In rejoinder, the learned counsel for the petitioner submits that in FIR No. 69/17, he has been released on bail vide order dated 14.09.2017 and the trial is pending. In the FIR No.40/12, he has been acquitted vide judgment dated 05.11.2014 passed by ASJ (North East), Delhi.

7. I have heard learned counsel for the parties as well as gone through the case record.

8. The investigation in the present case started with the receipt of a secret information that one Md. Shakil (co-accused) resident of Ghaziabad, UP would come near the foot-over bridge, Nand Nagari to supply heroin. The information was recorded and necessary steps under Section 42 of NDPS Act were taken. A trap was laid which led to the apprehending of the co-accused, Md. Shakil. During the investigation, Md. Shakil disclosed that he had procured the “heroin” from the present petitioner. Accordingly, a trap was led and on identification of Md. Shakil, the present petitioner was arrested. Notice under Section 50 was served and read over to the present petitioner. On his refusal to the search before a Gazetted Officer or a Magistrate, a search was conducted. A polythene, containing 100 grams of heroin, was recovered from the pant worn by him. After the investigation was completed, a charge-sheet under Sections 21/29 of NDPS Act was filed against the petitioner as well as co-accused, Md. Shakil.

9. The petitioner was involved in a similar offence in FIR No.69/17 and while being on bail in that case, the petitioner has committed the offence in the present FIR.

10. Section 37 of the NDPS Act holds certain offences to be cognizable and non-bailable. Section 37 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 3 [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.]”

11. The petitioner besides being charge-sheeted for offence under Section 21, was also charge-sheeted for offence under Section 29. The petitioner is alleged to be the “Source” from whom the co-accused has procured the heroin which was found to be 260 grams. The case, in totality, involves commercial quantity. Section 37 of the NDPS Act, besides giving an opportunity to the public prosecutor to oppose the bail application it also requires satisfaction of the “twin” conditions i.e. (i) satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and (ii) that he is likely to commit any offence while on bail. It has been held that the conditions are cumulative and not alternative. It has also been held that

the recording of the satisfaction is a sine qua non for grant of bail under the NDPS Act.

12. In Babua Vs. State of Orissa reported as **(2001) 2 SCC 566**, it was held as under:-

"3. In view of Section 37(1)(b) of the Act unless there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail alone will entitle him to a bail. In the present case, the petitioner attempted to secure bail on various grounds but failed. But those reasons would be insignificant if we bear in mind the scope of Section 37(1)(b) of the Act. At this stage of the case all that could be seen is whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, we cannot say that the accused is not guilty of the offence if the allegations made in the charge are established. Nor can we say that the evidence having not been completely adduced before the Court that there are no grounds to hold that he is not guilty of such offence. The other aspect to be borne in mind is that the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the court, and the validity of Section 37(1)(b) having been upheld, we cannot take any other view."

13. In Union Of India vs Rattan Mallik @ Habul reported as **(2009) 2 SCC 624** while interpreting Section 37 of the NDPS Act it was held as under:-

"13. It is plain from a bare reading of the non-obstante clause in the Section and sub-section (2) thereof that the

power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression 'reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [Vide Union of India Vs. Shiv Shanker Kesari] Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail."

14. In so far as the contention with respect to the non-compliance of Section 50 of NDPS Act is concerned, the Constitution Bench in Vijaysinh Chandubha Jadeja v. State of Gujarat reported as **(2011) 1 SCC 609**, while approving the earlier judgment of the Constitution Bench of the Supreme Court in State of Punjab v. Baldev Singh, (1999) 6 SCC 172, 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 sub-section (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 sub-section (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." (Emphasis added)

15. Be that as it may, as noted above, the petitioner is found involved in the present FIR on 15.03.2018 while he was on bail vide order dated 14.09.2017 in FIR No. 40/12 registered under Section 21 of NDPS Act at PS Seemapuri, Delhi. The petitioner has misused and abused the liberty granted to him. The petitioner has two cases, including the present one, that are pending trial under the NDPS Act. In view of the above, there is no reasonable ground for believing that the petitioner is not likely to commit any offence while on bail.

16. The reliance by the petitioner on the decisions cited is misplaced as the facts of the present case are not pari materia with the facts of those case. The petitioner is alleged to be the source from whom the heroin was procured by the co-accused.

17. In view of the above, the bail application of the petitioner is dismissed.

(MANOJ KUMAR OHRI)
JUDGE

AUGUST 19th, 2019
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