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

Date of decision: 13.02.2020

+ BAIL APPLN. 44/2020

RAJU DIWAKAR @ PAPPU

..... Petitioner

Through Mr.Saurabh Kansal, Adv. with
Mr.Tushar Alok & Miss Ashu
Chaudhary, Advs.

versus

THE STATE

..... Respondent

Through Mr. Panna Lal Sharma, APP for State.
Insp.Jitendra Tiwari Special Cell.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (O R A L)

1. The present petition is filed under section 439 of Cr.P.C. on behalf of the petitioner for setting aside order dated 04.12.2019 passed by learned ASJ, Patiala House Courts, Delhi in SC No.8792/2016 and for grant of regular bail in FIR No.28/2012 registered at Police Station Special Cell for the offences punishable under sections 21/29/61/85 of NDPS Act.
2. Case of the prosecution is that on 12.10.2012, raid was conducted on secret information at main road from Dhaula Kuan to Gurgaon and two persons in Quallis car were intercepted with contraband goods, resulting into

detailed interrogation. During interrogation, the police officials arrested the co-accused persons and on disclosure statement of one accused P. Mary, Petitioner herein was arrested and allegedly about 510 grams heroin was recovered from his house.

3. It is not in dispute that petitioner is in judicial custody since 15.10.2012 i.e. for a period of about seven years.

4. Learned counsel for the petitioner submits that as per the alleged recovery, the powder which was recovered from the Petitioner was 510 grams out of which 10% (i.e. 51 grams) was Diacetylmorphine (Scientific name of heroin).

5. Learned APP submits that as per the notification of 2009, it is the total quantity which is to be taken into consideration and not the percentage of substance.

6. As per the recent judgment passed by this Court in the case of '**Sandeep Kumar vs. Central Bureau of Narcotics**', decided on 08.07.2019, 2019 Lawsuit (DEL) 2001, after appreciating the law laid down by the Hon'ble Supreme Court in '**Rafiq Qureshi vs. NCB, Eastern Zonal Unit**', decided on 07.05.2019, 2019 Lawsuit (SC) 1179, the Court adjudicated the matter on the basis of purity percentage available in the contraband.

7. Thus, total quantity of substance recovered from the petitioner is 510 grams, out of which 10% (i.e. 51 grams.) was Heroin, which is intermediate quantity whereas the commercial quantity is 250 grams.

8. It is undisputed fact that recovery of the substance from accused is as under:

S.No.	Recovery	Name of accused	% of purity as per FSL in total recovery
1	700 grams of heroin	Arun Kumar	(Exhibit B) 11.2% of 700 grams = 78.4 grams
2	510 grams of heroin	P. Mary	(Exhibit C-1) 15.3% of 510 grams = 78.03 grams
3	510 grams of heroin	Raju Divakar @ Pappu (petitioner herein)	(Exhibit E-1) 10% of 510 grams = 51 grams
4	6.2 kgs of hasish	Alex and Zidane	(Exhibit I-1)
5	1 kg of heroin	Zidane	(Exhibit H-1) 11.5% of 1 kg = 115 grams

6	800 grams of heroin	Anil Pratap Singh Chauhan	(Exhibit A-1) 10.6% of 800 grams = 84.8 grams
Total recovery (if added) = 78.4+78.03+51+115+84.8 = 407.23 grams of heroin and 6.2 kgs of hashish			

9. Learned counsel for petitioner has informed this Court that quantity of heroin recovered from Anil Pratap Singh Chauhan, one of the accused, is 800 grams and purity of same is 10.6%. Thus, total substance recovered from said accused is 84.8 grams. The said accused has expired, therefore, charges have not been framed against him. Thus, recovery cannot be proved against that accused and that recovery cannot be added in total recovery. Moreover, he submits that recovery from accused persons were effected at different time, places and quantities. In such a case, total quantity recovered from all accused cannot be clubbed.

10. Similar issue came before High Court of Punjab & Haryana at Chandigarh in *Vicky Kaur vs. State of Punjab*, wherein while citing case of LawSuit (P&H) *Amar Singh Ramji Bhai Barot vs. State of Gujarat* (2005) 7 SCC 550 held that quantity of contraband carried by both accused could not be added to bring it within the meaning of commercial quantity and

Section 29 will not be attracted.

11. However, learned counsel for petitioner clarified that Supreme Court has not observed that Section 29 will not be attracted in similar facts and circumstances rather it is said that keeping in view facts and circumstances of each case, Section 29 can be attracted.

12. In afore-cited case, it is further held that petitioner's bail application under Section 167 (2) Cr.P.C. has been dismissed while ignoring the fact that recovery of poppy husk from different persons on different date, time and place cannot be put together for the purpose of determining quantity of poppy husk and to determine that it would be commercial quantity for which 180 days is stipulated for the purpose of filing challan would not be arbitrary and contrary to factual aspects, statutory provisions and afore-cited decisions. Thus, petitioner has made out a case to extend benefit of bail under Section 167 (2) Cr.P.C.

13. In present case, undisputably, recovery is effected from different accused, at different places and time.

14. However, without commenting on merits of prosecution case as petitioner is in custody since 15.10.2012 and has already undergone about 8 years and also keeping in view the fact that purity of recovered contraband

from petitioner is less than 250 grams, petitioner deserves benefit of the aforesaid judgments.

15. Accordingly, he shall be released on bail on his furnishing personal bond of ₹20,000/- with one surety each of the like amount to the satisfaction of the Trial Court.

16. Before parting with the order, it is relevant to mention that nothing contained in this order shall be construed as an expression on the merits of the case.

17. The present bail application is allowed and disposed of.

18. Copy of this order be transmitted to the Jail Superintendent and the Trial Court concerned for compliance.

19. Order *dasti* under the signatures of Court Master.

(SURESH KUMAR KAIT)
JUDGE

FEBRUARY 13, 2020/rk