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

+ **BAIL APPLN. 502/2020**

MOHD. UBAISH

..... Petitioner

Through

Mr.Sanjiv Kumar, Sr. Adv. with
Mr.S.K.Santoshi and Mr.Hemraj
Murmu, Advs.

versus

STATE

..... Respondent

Through

Mr. Izhar Ahmed, APP for State with
SI Anukul, Special Cell

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

ORDER

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16.03.2020

1. The present petition has been filed by applicant/petitioner under Section 439 of Cr.P.C. for grant of bail in case FIR No. 141/2018 registered at Police Station Special Cell.
2. Case of prosecution is that on 30.11.2018 at about 5:25 AM, prosecution received secret information that one Salim and his associate Amjad, on direction of petitioner had procured heroin from Malda (West Bengal) and supply the same in Delhi & U.P. and on the said date, they were going to supply it near Gokulpuri Flyover between 7:30 AM to 8:30 AM. In follow-up action, both Salim and Amjad were apprehended on 30.11.2018 from the alleged spot and 2 kg heroin was allegedly recovered from them.
3. It is further alleged that two mobiles phones, having three SIM cards, bearing Nos.7557080833, 9647241921 and 6294991469 were recovered from possession of accused Salim. Whereas, two mobile phones having Nos.9609582825 and 8972097108 were allegedly recovered from possession of accused Amjad. Said accused persons made disclosure about

petitioner. During follow up on 01.12.2018, in pursuance of a secret information, co-accused Tauseef Ali, was apprehended in Bareilly while travelling in a Car having its number as UP-25-BH-2493 and was identified by co-accused Salim. However, nothing incriminating was recovered either from his possession or from above-mentioned car. Two mobile phones bearing Nos.9761742149 and 6395823819 were recovered from possession of co-accused Tauseef Ali.

4. Case of petitioner is that after two months on 03.02.2019, in pursuance of secret information, petitioner was apprehended in Bareilly (U.P.). However, nothing incriminating was recovered either from his possession or at his instance. But it is further claimed by prosecution that one mobile phone bearing No.9756583557 (in the name of Mohd Junaid) was allegedly recovered from his possession.

5. Mr.Sanjiv Kumar, learned senior counsel appearing for petitioner submits that mobile phone having No. 9756583557 has not been used in any of the eight intercepted calls relied upon by prosecution. It has been further claimed by prosecution that petitioner was also using four other mobile Nos. i.e. 9627440660 and 8445838366 (in the name of petitioner), 9761087184 (in the name of Satyavir Singh) and 9761083389 (in the name of Pushpa), however, which have not been recovered, despite a confessional statement made by petitioner during his Police remand.

6. Further claimed by prosecution that total eight intercepted calls were allegedly made between all accused persons, which were within the period from 09.07.2018 to 28.11.2018.

7. Learned Senior Counsel submits that out of eight intercepted calls, five intercepted calls were between petitioner and co-accused Tauseef Ali

from the mobile No.9627440660 and 8445838366 (in the name of petitioner) on the above mobile Nos.9761742149 and 6395823819 of co-accused Tauseef Ali. But, it is not in dispute that Tauseef Ali has already been discharged by the Trial Court vide its order dated 18.12.2019.

8. Learned APP has opposed the present petition by stating that at the stage of granting bail, *prima-facie* case and the material on record is to be taken into consideration. That interception of mobile calls were made prior to apprehension of accused persons and incriminating voice calls were recorded showing their involvement in illicit business of drugs. The accused have refused to give their voice samples, therefore, adverse inference to be drawn against them. The alleged conversation between Tauseef Ali and petitioner shows cryptic talks between them. The conversation between petitioner, Salim and Mama categorically shows that they were talking about rates, delivery, etc. Thus, *prima-facie* offence under Sections 21/29 of NDPS Act is made out against accused Salim Sheikh and Amjad Ali and offence under Section 29 of NDPS Act is made out against petitioner. Thus, Section 37 of NDPS Act is applicable in this case, hence, bail may not be granted to petitioner.

9. It is pertinent to mention here that while arguing on discharge of co-accused Tauseef Ali, learned counsel submitted before Trial Court that there was no incriminating recovery effected from him and both mobile phones recovered from him are in his name. Undisputedly, after two months of his arrest, petitioner was apprehended from Bareilly and nothing incriminating was also recovered from him. Mobile No.9756583557 alleged to be recovered from petitioner has not been found to be used in any of the eight intercepted calls relied by prosecution. The eight calls categorically

intercepted by prosecution are between 09.07.2018 and 28.11.2018 which were retrieved on 18.04.2019 but co-accused Tauseef Ali was not confronted with conversation of alleged intercepted calls.

10. Case of prosecution is that co-accused Tauseef Ali (already discharged) and petitioner are relatives. There are five intercepted calls between Tauseef Ali and petitioner from two Mobile Nos.9761742149 and 6395823919 (in the name of co-accused Tauseef Ali) and 9627440660 and 8445838366 (in the name of petitioner).

11. Trial Court, while discharging co-accused Tauseef Ali, recorded that there is no evidence connecting said accused with conspiracy, firstly; there is no incriminating recovery and secondly; the voice call recording do not suggest any kind of mischief dealing between petitioner and co-accused Tauseef. The calls between the two cannot be held to be incriminating particularly as both are relatives. The only material against petitioner is disclosure statement of Tauseef who is already discharged, moreover, disclosure statement of other co-accused is inadmissible as per law.

12. It is not in dispute that remaining three alleged intercepted called claimed to be between petitioner and Mama (not arrested) were made on 28.11.2018 at 10:20:47 and the Mobile No.976108184 allegedly used by petitioner was found in the name of Satyavir Singh of Bareilly, however, said mobile has not been recovered from petitioner. Call between petitioner and Salim on Mobile No.6294991569 made on 28.11.2018 at 10:42:53 is in his name. The said mobile has also not recovered during investigation. Regarding call made by petitioner from Mobile No.9761086889 on 04.11.2018 at 09:33:46 allegedly used by petitioner was found to be in the name of Pushpa of Bareilly, U.P. but has not been recovered. Further, none

of the persons, in whose names the mobile phones were found, were interrogated or tried to be found out, though the addresses of those persons were available with the prosecution.

13. Role assigned to the petition in the charge-sheet is nothing except his name was mentioned in the alleged secret information. The disclosure statement of the accused persons which does not lead to recovery is not an admissible piece of evidence. Even, the confessional statement which also does not lead to any recovery, is not an admissible piece of evidence.

14. However, it is not in dispute that petitioner was arrested on disclosure statement of co-accused, Tauseef Ali, who has already been discharged by Trial Court vide its order dated 18.12.2019

15. In view of above facts and without commenting on merits of prosecution case, I am of the view that present case is fit for bail as *prima-facie* case is in favour of petitioner.

16. Accordingly, petitioner shall be released on bail on his a furnishing personal bond in the sum of ₹25,000/- with two surety of the like amount to satisfaction of Trial Court.

17. The present petition 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, J

MARCH 16, 2020/rk