

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

+ **BAIL APPLN. No. 548/2020**

Order Reserved on: 21.08.2020

Order Pronounced on: 24.12.2020

MAHESH GOYAL

Through:

..... Applicant

Mr.G.P.Thareja,
Mr.HarshitThareja&Mr.
SatyamThareja,
Advocates.

Versus

STATE

.....Respondent

Through: Mr. Kamal Kumar Ghei, APP
for State.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The applicant vide the present petition seeks the grant of regular bail in relation to FIR No. 192/2017, Police Station Crime Branch, Daryaganj, registered under Sections 22/29 of the NDPS Act, 1985. It has been submitted on behalf of the applicant by the learned counsel for the applicant that the applicant has been falsely implicated in the instant case with the allegations levelled against the application of the alleged recovery of 20 gms of MDMA (a psychotropic substance) at the apartment adjacent to Raman Apartments where the applicant resides are wholly erroneous and false.

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2. Notice of the application was served to the State and accepted on behalf of the State.

3. The prosecution version as set forth through the status reports that have been submitted by the State dated 16.3.2020, 18.6.2020, 14.8.2020 and 20.8.2020 states to the effect that on 29.10.2017, ASI Pawan Kumar of the Narcotics Cell, Crime Branch received a secret information that a person named Kamal Kalra, the co-accused in the FIR, a resident of Rohini, Delhi was involved in the sale and supply of Ecstasy (a party drug) in the area of Delhi & NCR and the informer revealed that Kamal Kalra would come near the Goodwill Apartment Sector-13, Rohini Delhi with his associate between 6:30 p.m. to 7 p.m. to deliver Ecstasy to someone and thereafter the secret information was shared with Inspector/N&CP, who verified the facts about the secret information from the informer and conveyed the same to the ACP/N&CP and the ACP ordered the conducting of a raid and that the secret information was reduced into writing vide DD No. 07 dated 29.10.2017 at 5:50 p.m. at the Narcotics Cell Crime Branch which was forwarded to the senior officers in compliance of Section 42 of the NDPS Act, 1985.

4. It has been further put forth by the State that after obtaining permission from the senior officers and following all the mandatory provisions required under NDPS Act, ASI Pawan Kumar organized a raiding comprising himself, ASI Satbir Singh No. 338/ Crime, HC Satender Pal No. 328/Crime and left for the spot vide DD No. 8 at 6 p.m. in a private vehicle No. HR-10N-0449 and on the way to the spot, public persons were requested to join the raiding party but none

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of them agreed and a trap was laid at the spot and at the instance of the informer one person whose identity was revealed as Kamal Kalra S/o Rajinder Kalra R/o F-3/58 (2nd Floor) Sector-11, Rohini, Delhi was apprehended at about 7:05 p.m. and that that apprehended person was apprised of the secret information and his legal right to be searched in the presence of a Gazetted Officer or a Magistrate and a written notice under Section 50 of the NDPS Act, 1985 was also served upon him but he declined the offer to be searched in the presence of a Gazetted Officer or a Magistrate whereafter the formal search of Kamal Kalra was conducted and 100 pills of Ecstasy (weighing 42 grams) were recovered from his possession and the recovered contraband was seized after taking out two samples of 10 pills each and an FIR No. 192/17 under Sections 22/29 of the NDPS Act, 1985 was got registered at the Police Station Crime Branch and that the further investigation of the case was carried out by ASI Dushyant Kumar.

5. It has been put forth further by the prosecution that during investigation the IO ASI Dushyant Kumar arrested the accused Kamal Kalra in the case who had made a disclosure statement stating therein that he had procured the recovered contraband from Mahesh Goel, i.e. the present applicant, and disclosed the Mobile number of Mahesh Goel as being 9821071319 and that Kamal Kalra was allowed to use his seized mobile phone bearing No. 7777077964 during police custody remand in order to apprehend the source Mahesh Goel (i.e., the present applicant) and at the instance of the accused Kamal Kalra, the applicant herein was apprehended at 8:30 p.m on 31.10.2017 from Dwarka and recovery of 20 grams of MDMA (a Psychotropic

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substance used in rave parties) was effected from the applicant who was then arrested. The exhibits are stated to have been sent to the FSL for analysis and the report thereof received as being positive for Ecstasy (MDMA). Inter alia it has been submitted by the State that the CDR analysis of the mobile phones of both the accused, i.e., Kamal Kalra and the applicant herein also confirm their proximity and presence at the place of delivery of the contraband and after completion of the investigation the charge sheet was filed in the Court and the CDR details of both the accused, i.e., Kamal Kalra and the applicant herein, was a part of the charge sheet but that there was no transcription/conversation in existence. It is further submitted by the prosecution that charges have been framed by the learned Trial Court on 15.11.2018 qua the alleged commission of offences under Section 22/29 of the NDPS Act, 1985 against both the co-accused, Kamal Kalra and Mahesh Goel i.e., the applicant herein with the charge against the applicant being of having been apprehended on 31.10.2017 at the instance of the co-accused from the road outside Gokul Apartments Sector-11 Dwarka, Delhi with 20 gms of MDMA having been recovered from his possession and of both Kamal Kalra and the applicant herein having assisted each other in pursuance to their criminal conspiracy for supply/trafficking of psychotropic substance apart from the applicant having also been found in possession of 20gms of MDMA Ecstasy and having committed an offence punishable under Section 21 and 22 of the NDPS Act, 1985 and of thus having committed offences punishable under Sections 22/29 of the NDPS Act, 1985.

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6. Through the status report dated 18.6.2020, the State has submitted the CDR details and location of the applicant and of the co-accused Kamal Kalra to the effect:

“CDR details and location of appellant Mahesh Goel are as:-

- **Mahesh Goel Mobile No – 9821071319**
- **Kamal Kalra Mobile No – 7777077964**

• CDR analysis shows that appellant and accused Kamal Kalra were also in contact with each other on 29.10.17

Calling No. Location	Called No. Location	Date/Time	Dur	Cell 1 of Appellant
9821071319 Janakpuri	7777077964 I.P Estate, Ring Road, Delhi	31/10/17 At 13:44:16	36sec	32061_9735 Janakpuri
9821071319	777707796 Chanakyapuri, Delhi	31/10/17 At 14:31:35	62sec	31081_60435
7777077964 Moti Bagh	9821071319	31/10/17 At 14:36:14	66sec	31081_25263
7777077964 Gurgaon, Haryana	9821071319 Sec-5, Dwarka	31/10/17 At 18:47:32	37sec	31061_7506 Sec-5, Dwarka

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7777077964 Sec 5 Dwarka	9821071319 Sec-12, Dwarka	31/10/17 At 20:20:07	16sec	31061_26810 Sec-12, Dwarka
7777077964 Sec-12, Dwarka	9821071319 Sec-12, Dwarka	31/10/17 At 20:26:44	23sec	31061_50893 Sec-12, Dwarka
9821071319 Sec-12, Dwarka	7777077964 Sec-12, Dwarka	31/10/17 At 20:29:16	15sec	31061_26816 Sec-12, Dwarka

”

7. It has further been submitted on behalf of the State that the contraband recovered from the applicant was of commercial quantity and that the release of the applicant on bail would result in his involvement in drug trafficking again and that he will also flout the condition of the grant of bail and may abscond.

8. As per averments made in the application filed by the applicant, it is sought to be submitted that the Psychotropic substance allegedly recovered from the applicant has not been analyzed quantitatively by the FSL Expert and the actual quantity of the Psychotropic substance and the percentage of the actual chemical in article allegedly recovered has not been determined and thus it cannot be contended on analysis that a commercial quantity of contraband has allegedly been recovered from the applicant. In relation to this contention at the outset itself it has to be observed that in view of the verdict of the

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Hon'ble Supreme Court in *Hira Singh & Anr. V. Union of India & Anr.*, *Criminal Appeal No.722/2017*, dated 22.04.2020 whereby it was observed to the effect in para 10 :

“10. In view of the above and for the reasons stated above, Reference is answered as under:

(I). The decision of this Court in the case of E. Micheal Raj (Supra) taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law;

(II). In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the “small or commercial quantity” of the Narcotic Drugs or Psychotropic Substances;

(III). [Section 21](#) of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the [NDPS Act](#) including Notification No.S.O.2942(E) dated 18.11.2009 and Notification S.O 1055(E) dated 19.10.2001;

(IV). Challenge to Notification dated 18.11.2009 adding “Note 4” to the Notification dated 19.10.2001, fails and it is observed and held that the same is not ultra vires to the Scheme and the relevant provisions of the [NDPS Act](#). Consequently, writ petitions and Civil Appeal No. 5218/2017 challenging the aforesaid notification stand dismissed.

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it is thus apparent that the quantum of the whole substance that is recovered from an accused has to be taken into account and thus it cannot be sought to be contended on behalf of the applicant that the allegations levelled against the applicant of alleged possession of 20 gms of MDMA, cannot be accepted even *prima facie*, at this stage.

9. The other contention raised on behalf of the applicant was to the effect that on 29.10.2017 after 4:10 p.m. after detention of the co-accused Kamal Kalra his phone was switched off and there was no incoming and outgoing calls from the said mobile number till his phone was switched on 30.10.2017 at about 4:10 p.m. and that the calls then had been made by the prosecution to falsely implicate the applicant as the applicant was known to the co-accused Kamal Kalra and that the mobile phone of Kamal Kalra was switched off on 30.10.2017 and had been switched on 31.10.2017 at 1:44 p.m. and that the petitioner had received a call from the mobile number 8920889497 at about 1 p.m. enquiring about the acquaintance of the petitioner with Kamal Kalra and also asking him to make a call to the co-accused Kamal Kalra and at the instance of the said caller, the petitioner called on the mobile phone of the co-accused Kamal Kalra and immediately thereafter the police had arrested the applicant by calling him outside Raman Apartment where the petitioner lived and which apartment was adjacent to Gokul Apartments outside which the Investigating Agency claims to have apprehended the applicant with the aid of the mobile of the co-accused Kamal Kalra.

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10. It has thus been submitted on behalf of the applicant that the substance described as MDMA has been planted on Kamal Kalra and as also on the applicant.

11. As regards the aspect of alleged false implication of Kamal Kalra, the same does not form part of the domain of the consideration of the Bail Appln. No. 548/2020 which is the bail application of the present applicant Mahesh Goel.

12. It has further been submitted on behalf of the applicant though Crl.M.A. No. 5692/2020 seeking to urge additional grounds in support of the plea for grant of bail to contend to the effect that on enquiry in as much as the arrest of the co-accused Kamal Kalra vide order dated 17.10.2019 was found to be false and illegal and without jurisdiction, in as much as the co-accused Kamal Kalra S/o Rajinder Kalra as per photographs on record was detained in the name of Tarun S/o Rajinder at 4:10 p.m. with the claim of the prosecution in the charge sheet being to the effect that Kamal Kalra was arrested at 7:10 p.m. in front of the Goodwill Apartment, the arrest of Kamal Kalra had been held to be illegal and without any jurisdiction and it has thus been submitted on behalf of the applicant that the consequential arrest of the applicant pursuant to the alleged disclosure statement of Kamal Kalra, cannot thus be presumed to be trustworthy. It has *inter alia* been submitted on behalf of the applicant that there was no requisite authorization for conducting any search in relation to the applicant and no requisite authorization under Section 42 of the NDPS Act, 1985, also given nor was the alleged search of the applicant in compliance of the provisions of Section 50 of the NDPS Act, 1985, and thus in the absence of

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compliance of Section 50 of the NDPS Act, 1985, the grant of bail to the applicant cannot be restricted by Section 37 of the NDPS, Act, 1985.

13. There are other aspects that have been sought to be contended on behalf of the applicant in relation to the non-details of record in relation to the seals issued to the Investigating Agency in relation to the alleged search made from the applicant to contend that the alleged seizure of 20 gms of the Ecstasy MDMA from the applicant, cannot be believed.

14. *Inter alia* it has been submitted on behalf of the applicant that the details in the Diary of Correspondence of the prosecution against Item no. 1922 in relation to the applicant is wholly unreadable which casts a doubt on the veracity of the prosecution version. It has also been submitted on behalf of the applicant that there is nothing to indicate that the copy of the Special Report was sent to the superior officer under Section 57 of the NDPS Act, 1985.

15. The status report dated 14.8.2020 of the State has submitted to clarify this aspect by submitting to the effect :

“ i.e. 29.10.2017, prior to the seizure of contraband Ecstasy (M.D.M.A), another secret information had also been received by the then Inspector Brijpal Singh of Narcotic Cell Crime Branch through an informer that one person namely Gurpreet, involved in supply of illegal weapons, would come in between 4:00-4:30 PM near Neelkanth Apartment Sector-13, Rohini, Delhi to deliver a consignment of illegal weapons, to someone. The secret information was shared with the then ACP/Narcotics who ordered to conduct raid. Inspector Brijpal Singh recorded the secret information in Daily Diary Register and made his departure vide DD No. 4 at 2:50 PM along with

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raiding party members and the informer. As per DD Entry No. 4, dated 20.10.17, at about 4:05 PM a Swift Dezire Car reached the spot near Neelkanth Apartent Sector-13 Rohini, whose driver was identified as Gurpreet by the informer. Two persons found present in the car were overpowered who revealed their identities as (1) Gurpreet Singh s/o Late Surjeet Singh r/o Rohini and (2) Tarun s/o Rajinder r/o Prashant Vihar, Delhi. Search of the car and both the above mentioned persons was made but no illegal weapon was found during search of the apprehended persons and their car, therefore they were relieved at that time itself. On reaching back to office Narcotics Cell, Inspr. Brijpal Singh made the arrival of Police Party vide DD No. 6 at 4:55 PM by mentioning all the facts.

2. That, later on, on the same day, ASI Pawan Kumar of Narcotics Cell Crime Branch, received a secret information that one person namely Kamal Kalra resident of Rohini Delhi is involved in sale & supply of ECSTASY (a party drug) in Delhi & NCR. The informer further revealed that Kamal Kalra would come near Goodwill Apartment Sector-13, Rohini Delhi with his associate Akshay, in-between 06:30 PM to 07:00PM to deliver Ecstasy to someone. Acting upon the said information a raid was conducted by ASI Pawan Kumar along with raiding team and apprehended one person at about 7:05 PM, whose identity revealed as Kamal Kalra s/o Rajinder Kalra r/o F-3/58 (2nd Floort) Sector-11, Rohini Delhi. **It was revealed that Kamal Kalra and Tarun was the same person and he had disclosed his wrong name as "Tarun" to Inspr. Brijal Singh when he was caught with Gurpreet Singh as per available record.**

3. That, it is clarified here that as per DD entries lodged the places of occurrence of both the incidents were different but in a same locality i.e. in Sector 13 Rohini, Delhi. Applicant is trying to mislead by clubbing two separate raids/incidents. The trial court has already framed charge against the appellant and the co-accused Kamal Kalra and also dismissed the bail application of the appellant. Further, the CDR's of both the accused persons, arrested in the present case, confirms their association with each other and even their presence at the place of delivery of contraband at Dwarka."

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16. On a consideration of the submissions that have been made on behalf of either side the Court is of the considered view that as regards the aspect as to whether or not there has been a requisite compliance of the provisions of Section 42 and Section 50 of the NDPS Act, 1985, the same are aspects which can only be determined at the time of trial.

17. The allegations levelled against the applicant relate to the alleged possession of 20 grams of MDMA (Ecstasy) which is a psychotropic substance and which was possessed by the applicant beyond the small quantity of 0.5 gms prescribed under the NDPS Act, 1985 at serial No. 134 of the table notified specifying small and commercial quantity thereof and as the allegations levelled against the applicant relate to the alleged possession of 20 gms of the MDMA which is a commercial quantity, it is apparent that the embargo of Section 37 of the NDPS Act, 1985 would apply.

18. As regards the aspect raised on behalf of the applicant with regard to the discrepancies in the DD Entries, the same can only be determined on trial. In the instant case, taking into account the alleged possession of 20 gms of MDMA as observed hereinabove, which falls within the ambit of the commercial quantity in terms of Serial no. 134 of the Table to the NDPS Act, 1985, there is no ground whatsoever for grant of bail to the applicant in view of the embargo which applies in terms of Section 37 of the NDPS Act, 1985.

19. The Bail Application No.548/2020 is thus declined.

ANU MALHOTRA, J.

DECEMBER 24, 2020/SV

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