

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**CRM-M No.28674 of 2020
Date of Decision: 07.05.2021**

Abhijeet Singh

.....Petitioner

Versus

Narcotic Control Bureau Chandigarh and another

.....Respondents

CORAM: HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present: Mr. Sandeep Verma, Advocate,
for the petitioner.

Mr.Amit Kumar Goyal, Advocate,
for Respondent No.1-NCB.

Mr. B.S. Sewak, Addl. Advocate General, Punjab
for respondent No.2-State.

SUDIP AHLUWALIA J.

The instant petition has been filed under Section 439 of the Code of Criminal Procedure seeking regular bail on behalf of the petitioner in case Crime No.13 dated 14.02.2020, under Sections 8, 21, 22, 25, 29 & 50 of the Narcotic Psychotropic Substances Act, 1985 registered at Police Station Narcotic Control Bureau Chandigarh, after such bail was declined by the Ld. Judge, Special Court/Duty Judge, SAS Nagar (Mohali) on 05.06.2020 vide his impugned order Annexure P-2.

[2] The case of the prosecution /Narcotics Control Bureau, Chandigarh is that the Petitioner and his father/ co-accused Mandeep Singh were found in possession of 520 grams of heroin without any permit or license while they were travelling in car No. PB-11-AY-6043 and were arrested on 14.02.2020.

[3] It has been mentioned in the petition that the aforesaid story set forth by the prosecution is highly improbable. It has also been mentioned that although the Respondent had prior information regarding the contraband, but no preparation were made to join the Executive Magistrate or any other independent witness before effecting the alleged recovery. It has been further contended in the petition that admittedly according to the prosecution the Petitioner was sitting in the rear seat of the car and was not in conscious possession of any contraband. The car was allegedly being driven by his father Mandeep Singh and the alleged recovery was effected from the dash board of the vehicle. As such there is no question of any recovery from the conscious possession of the Petitioner.

[4] The bail prayer has been opposed on behalf of the Respondent NCB, Chandigarh which has filed its detailed reply dated 26.10.2020. It has been contended on behalf of the Respondent that the Petitioner is not entitled to be released on bail since the recovery of the contraband in the form of 520 grams of heroin was effected from the conscious possession of the Petitioner and the co-accused Mandeep Singh, who is his father, in a situation when the said contraband was being trafficked from Delhi. It has further been submitted that the Petitioner in his statement recorded under Section 67 of the NDPS Act had admitted the manner and factum of such recovery from his conscious possession. Besides, it is the assertion of the Respondent side that notwithstanding the fact that the Petitioner was allegedly travelling as a rider on the rear seat of the car in which the contraband was being allegedly carried, still his complacency / involvement in such trafficking is established from his talks with a Nigerian handler/supplier of the contraband over phone and WhatsApp communications.

Photographs of the screen shots from the mobile phone of the Petitioner bearing No. 9592522147 regarding his interaction on WhatsApp with the supplier of Nigerian origin having mobile No. +27710070586 has been filed along with the reply of the Respondent as Annexure R-2. It may be mentioned that when the matter had earlier come up for hearing before this Court on 06.04.2021, this Court had directed the Respondent No.1 to place the actual photographs referred to in the chat Annexure R-2, and also appropriate material to show that the mobile phone/ Sim Card bearing No. 9592522147 belongs to the Petitioner.

[5] In response, the Respondent filed its original reply by way of affidavit of Kumar Manohar Manjul, Intelligence Officer, NCB Chandigarh, along with copy of the Petitioner's statement recorded under Section 67 of the NDPS Act and detailed photographs of the WhatsApp chat in between the Mobile No. +27710070586 and the phone allegedly seized from the Petitioner for the period between 08.02.2020 till 14.02.2020, which photographs had not been appended to the reply and Annexures earlier received by way of Email in the year 2020.

[6] Ld. Counsel for the Petitioner, however, now seeks bail by submitting that his client is a young boy who had just crossed the age of 18 years a few days before the relevant date, and is totally innocent of the allegations made out against him. It has been further submitted that the Petitioner is a semi-literate boy who has read only upto class 6 and does not know, nor is able to write English. Consequently, there is no question of his having engaged himself in the WhatsApp chat with the alleged Nigerian handler/ supplier of contraband, who being a foreign national, would have been unable to understand Hindi or Punjabi, which are the only two

languages in which the Petitioner is able to converse. Ld. Counsel has further submitted that the prosecution has been unable to show that the Sim Card bearing No. 9592522147 belongs to the Petitioner and has also contended that it could not have been in the Petitioner's name since he had just crossed the age of majority (18 years) only a couple of weeks before the date of alleged occurrence (14.02.2020), and therefore, could not have acquired the Sim Card in his personal name before having reached the age of majority. In addition, recordings of the alleged WhatsApp conversations between the Petitioner/ holder of the Mobile Phone at the relevant time, and the contraband supplier / Nigerian National have also not been revealed or made available to show the Petitioner's involvement. It has lastly been contended that in view of the decision of the Hon'ble Supreme Court in **Tofan Singh vs. State of Tamil Nadu, (2013) 16 SCC 31** any confessional statement made under Section 67 of the NDPS Act even before an Officer of the Narcotics Control Bureau is inadmissible in evidence, on account of which, there is no tangible material on record to show actual involvement of the Petitioner in the matter of the alleged trafficking of heroin, which was recovered from the Dash Board of the car being driven by his father Mandeep Singh.

[7] In the opinion of this Court, reliance of the Petitioner on the reference decision in **Tofan Singh's** (supra) would be of only a partial consequence. It may be mentioned that the reference was made for a re-look into the ratio of the previous decisions in **Raj Kumar Karwal v. Union of India, (1990) 2 SCC 409** and **Kanhaiyalal v. Union of India, (2008) 4 SCC 668**, and certain other judgments referred to in para 2 of the detailed decision in **Tofan Singh's** case. The accepted legal position before the

decision dated 29.10.2020 pronounced by the Supreme Court in **Tofan Singh's** case was that an empowered Officer under Section 42 or 53 of the NDPS Act is not to be regarded as a “Police Officer” within the meaning of Section 25 of the Evidence Act, and consequently any statement/confessional statement recorded by such an Officer in terms of Section 67 of the NDPS Act would be admissible in evidence. The reference has been answered by the Supreme Court with the following observations *inter alia* -

“152. Thus, to arrive at the conclusion that a confessional statement made before an officer designated under [section 42](#) or [section 53](#) can be the basis to convict a person under the [NDPS Act](#), without any non obstante clause doing away with [section 25](#) of the Evidence Act, and without any safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India.

153. The judgment in Kanhaiyalal (supra) then goes on to follow Raj Kumar Karwal (supra) in paragraphs 44 and 45. For the reasons stated by us hereinabove, both these judgments do not state the law correctly, and are thus overruled by us. Other judgments that expressly refer to and rely upon these judgments, or upon the principles laid down by these judgments, also stand overruled for the reasons given by us.

154. On the other hand, for the reasons given by us in this judgment, the judgments of Noor Aga (supra) and [Nirmal Singh Pehlwan v. Inspector, Customs](#) (2011) 12 SCC 298 are correct in law.

155. We answer the reference by stating:

(i) That the officers who are invested with powers under [section 53](#) of the NDPS Act are “police officers” within the meaning of [section 25](#) of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of [section 25](#) of the Evidence Act, and cannot be taken into account in order to convict an

accused under the NDPS Act.

(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

[8] It is, however, noted that the above answer by the three Judge Bench of the Supreme Court is not unanimous. HMJ Indira Banerjee dissented from the above conclusion and recorded her detailed reasons for doing so running into as many as 271 additional paragraphs in the self-same judgment with the following conclusion -

'428. For the reasons discussed above, I am of the view that the Judgment of this Court in Raj Kumar Karwal (supra), which has reaffirmed the verdict of three Constitution Benches does not require reconsideration. Nor does Kanhaiyalal (supra) require reconsideration.'

[9] Now the aforesaid referral decision which is not unanimous, was pronounced after a long period of nearly nine months from the date of the original arrest of the Petitioner on 14.02.2020, and the regular Complaint/ Prosecution Report (AnnexureP-3) following the alleged recovery was filed by the Respondent-NCB within before the expiry of 180 days from the date of such arrest on 11.08.2020, at a stage when still the legal position regarding the admissibility of the confessional statement under Section 67 on the basis of the decisions in **Raj Kumar Karwal** (supra) and **Kanhaiyalal** (supra) was in vogue. But even ignoring the confessional statement in the present case (Annexure R-2), for the purpose of considering the Petitioner's entitlement for bail, this Court still has to consider the other material available against him on record.

[10] Recovery of the mobile phone with the Sim Card bearing No. 9592522147 was effected from the Petitioner. There can't be any dispute at this preliminary stage regarding the said mobile phone which itself does not constitute any 'contraband' in the nature of any prohibited drugs or controlled substance within the meaning of the NDPS Act, 1985. While it is the submission of Ld. Counsel for the Petitioner that there is little material to show that the aforesaid Sim Card belonged to the Petitioner himself, at the same time the counter submission raised on behalf of the Respondent in this regard cannot be brushed aside. It has been submitted and correctly so, that to operate a WhatsApp account on a mobile phone it is not essential that the specific Sim Card inserted at any given time must have to be necessarily linked to the WhatsApp account. In fact once 'WhatsApp' has been installed on any given handset, it would not automatically get deactivated even if the Sim Card is removed or changed unless the person handling such handset himself chooses to link it with a new Sim Card at any stage. So the vital consideration in the given case would be identity of the person from whom the handset itself is recovered, which happens to be the present Petitioner here. Now a glance over the WhatsApp chat with screen shots of the typed messages between the alleged contraband supplier/handler of Nigerian origin having the phone No. +27710070586, and the holder of the seized handset which would logically be the Petitioner from this side, goes to show that there was a prolonged exchange of text messages, as well as audio and video chats for six days between 3:30 P.M from 08.02.2020 till 4:13 A.M on 14.02.2020, which also happens to be the date of the actual recovery of the contraband. The screen shots of such typed, audio and video chats between the Petitioner run into as many as five

pages constituting Annexure R1/2 to the reply of the Respondent. A glance over the typed messages exchanged further goes to reveal clear interaction between not only the holder of the seized mobile handset as well as the alleged Nigerian handler/contraband supplier, but even indicates the involvement of the Petitioner's brother who was apparently required to call the Nigerian handler in his text message to the Petitioner on 13.02.2020 at 7:09 P.M. Thereafter, at 8:56 P.M. the Nigerian handler asked the petitioner to send him “all picture money”, in response to which as many as six pictures were sent from the Petitioner's side promptly after seven minutes with the messages 'OK' and '350'. Thereafter, there was an audio call from the Nigerian handler in the very next minute, and at 4:13 A.M. from the Petitioner's side a video call was made, which also goes to show his picture in the WhatsApp chat, in response to which exactly a minute later, a text message was received from the Nigerian handler specifying a particular address which happens to be - *“Pilla number 763 dwarka moi Red Rose Model School Rama Park”*.

[11] It is significant that thereafter the car in which the Petitioner and his father were coming from Delhi with the contraband was to reach Shambhu Toll Plaza, District Ambala sometime between 7- 8 A.M. on that very morning (14.02.2020), and was ultimately intercepted at 07:45 hours after Charmar river bridge near Lahli Police Station, which was 3½ hours after the last WhatsApp chat text message intimating the scheduled destination by the Nigerian handler.

[12] With reference to the aforesaid material placed on record on behalf of the Respondent, submission of Ld. Counsel for the Petitioner is

that contents of the voice recordings in the WhatsApp conversations have yet not been revealed on behalf of the Respondents. In reply, submission from the Respondents' side is that since the entire WhatsApp chat is end-to-end encrypted so it could not be opened by the NCB officers themselves, who were, therefore, constrained to send it to the Forensic Specialists for its opening and analysis, and once the relevant report comes, it would also be made available. Ld. Counsel appearing for the Respondent - NCB further informed the Court that such WhatsApp conversation was sent for analysis on 08.04.2021, as it was not considered necessary earlier in view of the Petitioner's confessional statement under Section 67, which was legally admissible in evidence on account of the law prevalent on the relevant date when the Prosecution Report was filed (11.08.2020) long before the referral decision in *Tofan Singh's* case (supra) was pronounced by the Supreme Court. Consequently, the Respondent Authorities were subsequently constrained to send the WhatsApp conversations for Forensic analysis with the intent to submit its report at an appropriate stage during trial, which procedure itself is not contrary to law. Considering these overall circumstances, this Court is also convinced that at this stage it cannot be said that there is absolutely no material available to indicate conscious involvement of the Petitioner in the matter of trafficking of a commercial quantity of heroin along with his father on the relevant date, on account of which the statutory bar under Section 37 of the NDPS Act would appear to be clearly applicable.

[13] For the aforesaid reasons, this Court finds no justification to release the Petitioner on bail at this stage. The petition is, therefore, dismissed. However, the Petitioner would be at liberty to apply for bail

afresh at an appropriate stage if the trial tends to get unduly delayed for want of the Forensic Analysis Report, or if such report when available does not indicate involvement of the Petitioner in the audio/video recordings forming part of the WhatsApp conversational chats.

07.05.2021

Satyawan

(SUDIP AHLUWALIA)
JUDGE

Whether speaking/reasoned: Yes/No

Whether reportable : Yes/No