

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

Date of decision: 25th June, 2021

IN THE MATTER OF:

+ **BAIL APPLN. 1207/2021**

ALLAH NOOR

..... Petitioner

Through Mr. C. Mohan Rao, Sr. Advocate with
Mr. Anuj Kumar Ranjan and
Mr. Lokesh Kumar Sharma,
Advocates

versus

NARCOTIC CONTROL BUREAU

..... Respondent

Through Mr. Subhash Bansal, Sr. Standing
Counsel for NCB with Mr. Shashwat
Bansal, Advocate

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This petition under Section 439 Cr.P.C is for grant of bail to the petitioner in Case No. VIII/32/DZU/2019 registered at Narcotics Control Bureau, R.K. Puram, Delhi for offences under Sections 8(A)/21(C)/23(C)/29 of the NDPS Act.

2. The facts, in brief, leading to the filing of the instant petition are as under:

- a) It is the case of the prosecution that on 17.08.2019, at about 11:30 AM, secret information was received that one person namely Noorzai Gul Amin is arriving by Ariana Airlines Flight No. FG-311 at Terminal-3, I.G.I Airport. He has swallowed narcotic drugs in the form of capsules. The said information was reduced into writing by

the Investigating Officer. The note was put up before his superior officer. Accordingly, a team was formed to take necessary action. At the IGI Airport the said person was identified and intercepted. On enquiry Noorzai Gul Amin accepted that he had swallowed drug capsules. He was taken to Safdurjung Hospital, where the Doctor on duty confirmed about the presence of foreign body in the stomach of Noorzai Gul Amin. It is stated that the said Noorzai Gul Amin expelled 119 capsules through passage of stool on 20.08.2019. It is stated that the capsules were counted in the presence of independent witnesses, interpreter, Doctor on duty and the team of the NCB. The Doctor on duty tested each capsule and upon testing it was found that the capsules contained heroin. On weighing all the 119 capsules, it was found that Noorzai Gul Amir was carrying 770 Grams of heroin.

b) Notice under section 67 of NDPS Act was issued to Noorzai Gul Amin who gave voluntary statement in his native language Pashto which was translated by the Interpreter. In his voluntary statement Noorzai Gul Amin revealed that one person namely Naimatullah Mangal offered him Rs.50,000/- for carrying the drug capsules in his stomach and gave him 119 capsules of Heroin, which he swallowed. He also revealed that upon reaching India he had to hand-over the capsules to one person called *Doctor* about whom he does not know much. He revealed that Naimatullah Mangal gave him the mobile number of the said person which is 7290901992. He also revealed that Nimatullah Mangal would arrive in India on 21.08.2019 by KAM Airlines at Delhi Airport. Accordingly, preparations were made to intercept the said Nimatullah Mangal. On

his arrival on 21.08.2019, Nimatullah Mangal was apprehended at IGI Airport.

c) Notice under section 67, NDPS Act was issued to Naimatullah Mangal, and in pursuance thereof he tendered his voluntary Statement accepting that the drug capsules swallowed by Noorzai Gul Amin had to be supplied to one Doctor @ Allah Noor (the petitioner herein) and one Hikmatullah Hikmati. Naimatullah Mangal revealed that he can identify the house of the petitioner herein. The petitioner was apprehended from his house at 137, F-Block, 3rd Floor, Lajpat Nagar-I, New Delhi. Search was conducted at his house. In the search, a mobile phone and some other articles were recovered. Notice under section 67 NDPS Act was issued to the petitioner herein. In his voluntary statement the petitioner herein revealed that the capsules were to be supplied to one Chinonso Stanly Alex who is living with one Goddy and 2-3 other Nigerians at House No. A-27, 1st Floor, Anand Vihar, Near Metro Pillar-595, New Delhi. Hikmatullah Hikmati also tendered his voluntary Statement in Pashto language confirming that the heroin was to be supplied to one Stanley Alex and some Nigerians.

d) The NCB Team reached House No. A-27, 1st Floor, Anand Vihar, and at the said premises Godday Nemonye along with other Nigerians were present. During search of the premises 3.4 Kgs. Heroin was recovered.

e) Hikmatullah Hikmati and the petitioner herein were arrested on 23.08.2019.

f) On 19.12.2019, Chinonso Stanley Okorie@ Chinonso Iwuzo, Bright Right @ Obina Oguchukwu, Collins Nnebolinsa Chiwetalu @ Chidi Nwankwu and Alex Edet Nelson@ Ifeanyi Nwafor surrendered in Deportation Centre New Delhi and they were apprehended. Obina Stanley disclosed that he along with Alex Edet Nelson and Collins were living at House No. 1238, Islampur Village, Sector-38, Gurugram, Haryana, and have kept drugs there. Upon search of said House 220 grams of Cocaine was recovered and seized on 19.12.2019.

g) It is stated that in the entire operation 770 grams of Heroin was recovered on 20.08.2019 from Noorzai Gul Amin, 3.4 Kgs. of Heroin was recovered on 22.08.2019 from House No. A-27, 1st Floor, Anand Vihar and 220 grams of Cocaine was recovered on 19.12.2019 from House No. 1238, Islampur Village, Sector-38, Gurugram.

h) The petitioner herein filed an application for interim bail being Bail Application No.4247/2020, on the ground that he has to undergo urgent surgery. Notice has been issued in the said application and it was posted for hearing on 13.04.2021. The petitioner is in custody since 23.08.2019 and has filed the instant bail application for seeking regular bail.

3. Heard Mr. C. Mohan Rao, learned Senior Advocate appearing for the petitioner and Mr. Subhash Bansal, learned Senior Standing Counsel appearing for the NCB and perused the material on record.
4. Mr. C. Mohan Rao, learned Senior counsel appearing for the petitioner states that the petitioner is in judicial custody since 23.08.2019. He states

that other than the disclosure statements, given by the petitioner under Section 67 of the NDPS Act, there is no material against the petitioner. He states that the statement given by the petitioner under Section 67 of the NDPS Act has no evidentiary value and the petitioner cannot be convicted only on the basis of those statements. The learned Senior Counsel places reliance on the following judgments of the Supreme Court to substantiate his contention that the statements given by an accused to police officers under various acts including the NDPS Act, cannot be accepted as evidence and no conviction can be based only on the statements:

- a) Tofan Singh v. State of T.N., (2013) 16 SCC 31.
- b) Abdul Rashid v. State of Bihar, (2001) 9 SCC 578.
- c) A.K. Mahboob v. Intelligence Officer, Narcotic Control Bureau, (2001) 10 SCC 203.
- d) Surinder Kumar Khanna v. Intelligence Officer, Directorate of Revenue Intelligence, (2018) 8 SCC 271.
- e) Vasanti v. State of A.P., (2005) 5 SCC 132.
- f) State of Maharashtra v. Vishwanaih Marana Shcitty, (2012) 10 SCC 561.
- g) Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra & Anr., (2005) 5 SCC 294.

5. The learned Senior Counsel further states that that as per the version of the prosecution the search and seizure at the residence o the petitioner was conducted on 22.08.2019, however, as per the Seal Movement Register of the NCB, seal was given to the IO Rampal Singh on 21.08.2019 at 13:15 Hours and it was returned on 21.08.2019 at 17:00 Hours and the entry has been signed by both the IO and the issuing officer. He further states that as

per the NCB movement register the operation was done on 21.08.2019 and not on 22.08.2019. He states that the entire case of the prosecution regarding search and seizure conducted at the house of the petitioner on 22.08.2019 by the IO cannot be accepted and the petitioner is entitled to acquittal on this very ground. He further states that the petitioner is in custody since 23.08.2019, the investigation is complete and trial is yet to begin. He also states that the petitioner is not in good health and he has already filed an application for interim bail on health grounds. He therefore states that in view of the fact that the investigation is complete and the trial will not commence in the near future, the petitioner be released on bail.

6. *Per contra*, Mr. Subhash Bansal, learned Senior Standing Counsel for NCB contends that the petitioner is a part of a well organized syndicate dealing with narcotics. He states that a total of 770 grams of Heroin was recovered on 20.08.2019 from Noorzai Gul Amin and 3.4 Kgs. of Heroin was recovered on 22.08.2019 from House No. A-27, 1st Floor, Anand Vihar on the basis of the disclosure statement of the petitioner and 220 grams of Cocaine was recovered on 19.12.2019 from House No. 1238, Islampur Village, Sector-38, Gurugram. The learned Senior Standing Counsel further states that the mobile phone of the petitioner herein and the SIM card having number 7290901992 was recovered from the petitioner. He states that from the phone of the petitioner, a mirror image of the phone was extracted from which photographs of Heroin, capsules, and photographs of heroin weight, image of passports, image of Currency, chats between Naimitullah Mangal and the petitioner herein and their photograph were found. It is also stated that in the phone of the petitioner Whatsapp Calls between the petitioner and Naimatullah Mangal in Chat window from 02.07.2019 to 17.08.2019 were

also found. The learned Senior Standing Counsel for NCB places reliance on para 113 and 114 of the complaint which reads as under:

“113. That in response of request Sh. Anand Kumar, IO for providing the mobile mirror image, Director, SIFS provide the Mirror image of Mobile pertaining to accused Allah Noor Mobile Samsung S-10+ along with certificate under Sections 65 B of the IEA and mobile detail. In the mirror image deleted data and date stored in mobile extract from mobile and found photographs of weighing machine, weighing the heroin, image of heroin capsules, image of passports, huge Indian currency. Chatting with Nimatulla Mangal, photograph of Passport of Afghani in the mobile photograph of the accused Allah Noor and Himatullah Hikmate together found.

114. That in response of request Sh. Anand Kumar, IO for providing the mobile mirror image, Director SIFS provide the mirror image of mobile data make Samsung Galaxi-J-B pertaining to accused Nimatullah Mangal along with certificate under Sections 65 of the IEA and mobile detail. In the mirror image deleted data and data stored in mobile extract from mobile and found that the mirror image photograph related to Drug/heroin capsules, chatting with Allah Noor, Photograph of accused Noorzai Gul Amin Air tickets print of accused Noorzai Gul Amin dated 17.08.2019. Photographs of Air Ticket of Nimatullah Mangal dated 21.08.2019, Air tickets of different person suspected top came to India swallowed the Heroin capsules, connection with Drug Trafficker found in the mobile photographs of the accused Alla Noor.”

(emphasis supplied)

The learned Senior Standing Counsel for the NCB states that in his voluntary disclosure statement the petitioner disclosed that Nimatullah Mangal had called him up nine days back and told him that his uncle one

Abdul, who is doing drug business, is sending one person with Heroin capsules by Ariana Airlines on 17.08.2019 and further told him that he will come to Delhi on 21.08.2019 to collect money \$6,000/- which is pending from the last delivery which has been supplied to one Stanley Alex and Himatullah Hikmate. The learned Senior Standing Counsel, contends that apart from disclosure statements there are various recoveries made at the instance of the petitioner which show the complicity of the petitioner in the crime. He states that the petitioner is a part of well organized drug syndicate. The learned Senior Standing Counsel appearing for NCB states that the discrepancies regarding the seal movement register cannot be conclusive/decisive at this stage and it cannot lead to a conclusion that the entire case of the prosecution is false. He states that the discrepancy in the seal movement register is not relevant at this juncture and would be considered at the stage of trial.

7. The quantity of heroin and cocaine recovered in the instant case is commercial quantity. It is well settled that the jurisdiction of a Court to grant bail for offences under NDPS Act in cases of recovery of commercial quantity is circumscribed by the provision of Section 37 of the NDPS Act. Section 37 of the NDPS Act 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 [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.]"

8. A perusal of Section 37 of the NDPS Act indicates that bail can be granted only when there are reasonable grounds for believing that the accused is not guilty of an offence and he is not likely to commit any offence when released on bail. The parameters for grant of bail to an accused under Section 37 of the NDPS Act have been laid down in a number of judgments. The Supreme Court in Collector of Customs v. Ahmadalieva Nodira reported as **(2004) 3 SCC 549** has observed as under:

*"6. As observed by this Court in Union of India v. Thamisharasi [(1995) 4 SCC 190 : 1995 SCC (Cri) 665 : JT (1995) 4 SC 253] clause (b) of sub-section (1) of Section 37 imposes limitations on granting of bail in addition to those provided under the Code. **The two limitations are: (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court that 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.

7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. 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" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence....." (emphasis supplied)

9. In Union of India v. Rattan Mallik reported as (2009) 2 SCC 624, the Supreme Court has observed as under :

"12. It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act 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 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".

13. 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 v. Shiv Shanker Kesari* [(2007) 7 SCC 798 : (2007) 3 SCC (Cri) 505]). 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." (emphasis supplied)

10. In State of Kerala & Ors. v. Rajesh & Ors. reported as (2020) 12 SCC 122, the Supreme Court has observed as under :-

"19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."

11. Applying the law laid down by the Supreme Court to the present case, the material on record, at this juncture, shows the involvement of the petitioner as a part of the drug syndicate. Heroin was concealed in capsules ingested by persons. It shows that the operation was extremely well planned. A total of 770 grams of Heroin was recovered on 20.08.2019 from Noorzai Gul Amin, 220 grams of Cocaine was recovered on 19.12.2019 from House

No. 1238, Islampur Village, Sector-38, Gurugram and 3.4 Kgs. of Heroin was recovered on 22.08.2019 from House No. A-27, 1st Floor, Anand Vihar on the basis of the disclosure statement of the petitioner. Photographs of Heroin and capsules, image of passports, image of Currency and chats between Naimitullah Mangal and the petitioner herein and their photographs were found from the phone of the petitioner which demonstrates the complicity of the petitioner in the crime. The well organized operations of this syndicate shows the possibility of the petitioner indulging in the same activity again if he is released on bail. The discrepancy in the seal movement register and its effect would be considered/analysed at the stage of trial and that discrepancy alone is not sufficient for this Court to come to the conclusion that the entire case of the prosecution is false at this stage. This Court is, therefore, not inclined to grant bail to the petitioner herein.

12. Accordingly, the bail application is dismissed along with the pending applications, if any.

SUBRAMONIUM PRASAD, J.

JUNE 25, 2021

Rahul