



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

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Reserved on: 15th March 2022
Pronounced on: 13th April 2022

+ **BAIL APPLN. 56/2022**

ALOK SAXENA

... Petitioner

Through: Mr. H. C. Kharbanda, Mr. T. N. Saxena, Mr. Sanjeev Kumar and Mr. Arpit Saxena, Advocates

Versus

THE STATE (NCT OF DELHI)

... Respondent

Through: Ms. Kusum Dhalla, APP for State with Insp. Sandeep Kumar, P. S NR-I Crime Branch

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The present petition has been preferred under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973 (hereinafter, referred to as the "Code") for seeking regular bail in FIR bearing No. 141/2021 under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter, referred to as the "NDPS Act") registered at PS - Crime Branch, Delhi.

2. The brief facts of the case as per the prosecution are that on 24th July 2021, an information was received in SOS-I/Crime Branch, that a



person named Alok Saxena would be supplying smack in Delhi. The information was shared with senior officers and necessary permission under the provisions of the statute was obtained. The applicant was apprehended by the Police and the contraband i.e. smack was recovered in two packets of a total quantity of 2010 gms. Accordingly, FIR bearing No. 141/2021 under Sections 21/25 of the NDPS Act at Police Station Crime Branch, Delhi was registered against the applicant. After completion of the investigation, charge sheet was filed for commission of offence under Section 22 of the NDPS Act against the applicant and Sections 21/25 of NDPS Act was dropped on the basis of FSL report.

3. Learned counsel appearing on behalf of the applicant submitted that the applicant has been falsely implicated in the instant case. It is submitted that the investigation has been completed and a chargesheet has already been filed. It is also submitted that the applicant has been languishing in jail since 24th July 2021 and no useful purpose would be served by keeping the accused/applicant in jail. It is further submitted that the applicant has clean antecedents and has not been involved in any criminal activities of any manner in the past.

4. Learned counsel appearing on behalf of the applicant submitted that the entire story of the prosecution is unreliable, unworthy and is based on concocted facts. It is submitted that as per the FSL report, the material allegedly recovered from the possession of the accused/applicant has been identified as (i) Acetylcodeine, (ii) Tramadol and (iii) Dextromethorphan.



5. Learned counsel appearing on behalf of the applicant submitted that the result of the testing kit is different from that of the FSL report, and these facts create serious doubts in the prosecution's version. It is a well settled law that the benefit of doubt goes in the favour of the accused/applicant.

6. It is further submitted that the material allegedly recovered from the possession of the accused/applicant does not come under the purview of the NDPS Act and therefore, no offence whatsoever, under the NDPS Act is made out. It is also submitted that the applicant is having a valid licence in his favour issued by the Drugs Control Department, Government of NCT of Delhi and is authorized to sell, stock, exhibit, offer for sale, or distribute Tramadol. Learned counsel appearing on behalf of applicant submitted that the mandatory provisions under the NDPS Act especially under Section 50 have not been complied with. It is also submitted that since there is no material on record against the applicant, therefore, there is no chance for conviction for offence punishable under Section 22 of the NDPS Act.

7. It is further submitted that Acetylcodeine is one of the major impurities present in illicitly manufactured Heroin meaning, thereby, unless Heroin is present along with Acetylcodeine, simple recovery of Acetylcodeine has no relevance for the purpose of arriving to conclusion, a case under NDPS Act is made out against the applicant. As per the FSL report, Dextromethorphan is absent.



8. It is submitted that in the case of *State of Uttaranchal vs. Rajesh Kumar Gupta 2006 (3) JCC (Narcotics) 178*, the Hon'ble Supreme Court has held that the provisions of the NDPS Act were *prima facie* not applicable in view of the fact that the drug in question in the said case was not listed in the First Schedule appended to the NDPS Rules, 1985 and the accused could not be stated to have committed any offence under Section 8 read with Section 22 of the NDPS Act. It was also held in such circumstances that the provisions of Section 37 of the NDPS Act were inapplicable.

9. Learned counsel appearing on behalf of applicant submitted that post the FSL analysis, it was revealed that the seized material contained "Tramadol", an item listed at Serial No. 110Y in the schedule annexed to NDPS Act and the same is also listed at Serial No. 45 in Schedule H1 to The Drugs Rules, 1945, the applicant/accused has licences in Form 20B & 21B (Composite in Form 21C) in Schedule A to The Drugs Rules, 1945 which permits the applicant to sell, stock, exhibit, offer for sale or distribute the said drug. Therefore, there is no illegality whatsoever in possessing the said drug. Learned counsel appearing on behalf of applicant undertakes that the applicant shall cooperate in the investigation/trial and abide by all the conditions imposed by this Court while granting bail.

10. *Per contra*, learned APP for State has strongly opposed the instant application on the ground that even if it is assumed that the accused/applicant is having a valid licence for sale of "Tramadol", even then, the accused/applicant is liable under NDPS Act as he has violated



the conditions of the licence. As per the condition of the licence, the accused/applicant was supposed to receive/procure "Tramadol" from authorized person/company and sell the same to the authorized person/company only and that too, in a sealed condition. Also, the licence was issued on 21st May 2009 and was renewed till 20th May 2019. However, the FIR was registered on 24th July 2021 and the accused/applicant cannot escape the liability of the seizure of "Tramadol" mixture from his possession on the basis of an expired licence.

11. It is submitted that at the instance when the contraband was recovered, it was in unsealed condition, therefore, the same falls within the clutches of the NDPS Act and the protection of licence is no longer available to the accused/applicant. It is vehemently submitted that the accused/applicant has mixed three different substances namely Tramadol, Acetylcodeine and Dextromethorphan and mixing of such substances is neither permissible under the Drugs and Cosmetic Act nor under the NDPS Act. It is further submitted that Acetylcodeine is not mentioned in any list under the Drugs and Cosmetic Act. Learned APP for State submitted that 'Codeine' is present naturally in opium and the same is converted into Acetylcodeine, i.e., the synthetic by-product during acetylation of "Morphine", to produce illicit Heroin. Further, a total of 2 kgs and 10 grams of contraband was recovered from accused Alok Saxena. Therefore, the accused Alok Saxena kept contraband in his exclusive and conscious possession and committed the offence under section 22 of the NDPS Act. It is submitted that the quantity recovered



from the possession of the accused/applicant is commercial and therefore, the bar under Section 37 of the NDPS Act is applicable.

12. Learned APP for State has also pointed out to the fact that vide notification dated 26th April 2018, “Tramadol” was included in the list of Psychotropic Substances specified in Schedule after Serial No. 110X. Therefore, there is no force in the arguments advanced by the learned counsel appearing on behalf of applicant that “Tramadol” is not a scheduled prohibited contraband as per the NDPS Act.

13. Heard learned counsels for the parties and perused the record, specifically the averments made in the Application, the contents of the FIR, and the Status Reports filed by the State.

14. In the instant case, as per the annexure no. 7 i.e., the result of the FSL report, the seized substance contains Acetylcodeine, Tramadol & Dextromethorphan. Tramadol is a psychotropic substance mentioned in the NDPS Act Schedule I at Serial Number 110 Y (as per notification of the Central Government dated 26th April 2018) and, as per annexure 1 (pg. 35) the license issued on 21st May 2009 was renewed up till 20th May 2019. However, the FIR was filed on 24th July 2021.

15. Furthermore, as per the conditions of the licence, the accused is supposed to receive Tramadol from the authorised person/company and is also supposed to sell/dispose of the same to authorised person only and that too in a sealed condition. It is further submitted that the recovered contraband was in the form of a cocktail including Tramadol along with other substances that is violative of the conditions of license, and therefore



the same falls within parameters of NDPS Act and hence is not entitled to the protection of license.

16. Total quantity of the mixture seized as per the status report is 2 kgs 10 gms. As per the notification of the Central Government dated 26th April 2018, the amount prescribed for commercial quantity of Tramadol is 250 gms. Since, a mocktail of contraband has been recovered, in order to determine whether the quantity of the drug is small or commercial quantity, it is appropriate to refer to the position of law laid down in this context. In the judgement of ***Hira Singh v. Union of India 2020 SCC OnLine SC 382***, it has been held by the Hon'ble Supreme Court as under:

“65. (II) In case of seizure of mixture of Narcotic Drugs or Psychotropic substance with one or more neutral substance, the quantity of neutral substance 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 Drug or Psychotropic substances;”

17. In the aforesaid judgment the Hon'ble Court further reiterated:

“59. Therefore, considering the statement of objects and reasons and the preamble of the NDPS Act and the relevant provisions of the NDPS Act, it seems that it was never the intention of the legislature to exclude the quantity of neutral substance and to consider only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity....”



18. Therefore, it is settled law that in case of recovery of a mocktail of contraband, the entire quantity must be considered while determining the small or commercial quantity of the Narcotic Drug or Psychotropic substances.

19. In light of the aforesaid and especially since the recovered contraband is of commercial quantity, it is pertinent to refer and analyze the provisions and objective of the NDPS Act. Section 37 of the 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.

In view of the gravity of the consequences of drug trafficking, the offences under the Act have been made cognizable and non-bailable. The Section does not allow granting bail for offences punishable under Section 19 or Section 24 or Section 27A and for offences involving commercial quantity unless the twin conditions prescribed under the Section have been met. The conditions include - first, hearing the Public Prosecutor and second, satisfaction of the Court based on reasonable grounds that the accused is not guilty of the offence and that he is likely to not commit an offence of a similar nature.

20. The fetters on the power to grant bail do not end here, rather they are over and above the consideration of relevant factors that must be done while considering the question of granting bail. The court also needs to be satisfied before grant of bail about the provisions of Section 439 of the Code. Thus, it is evident that the present section limits the discretion of the court in matters of bail by placing certain additional factors over and above what has been prescribed under the Code.

21. The contours of Section 37 of the NDPS Act have been analysed by the Hon'ble Supreme Court in the case of ***Union of India v. Ram Samujh (1999) 9 SCC 429***. The Hon'ble Court extracted the Statement of Objects and Reasons for the introduction of Section 37 of the Act amended through Bill No. 125 of 1988. It is relevant to extract those for the present analysis, which reads as:



“6. The aforesaid section is incorporated to achieve the object as mentioned in the Statement of Objects and Reasons for introducing Bill No. 125 of 1988 thus:

“Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt.”(emphasis supplied)

*7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier v. Chief Secy., Union Territory of Goa* [(1990) 1 SCC 95: 1990 SCC (Cri) 65] as under: (SCC p. 104, para 24)*

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24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country



and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.”

22. Thus, what is evident from the above is that the offences prescribed under the Act are not only a menace to a particular individual but to the entire society at large especially, the youth of the country. Such offences have a cascading effect and are in vogue these days, thus destroying the capabilities and lives of a big chunk of the population and trend has been growing over the years. Therefore, in order to prevent the devastating impact on the people of the nation, Parliament in its wisdom deemed it fit to introduce stringent conditions for grant of bail under the Act. The Court must stay mindful of the legislative intent and mandate of the Act while considering the question of bail in such matters.

23. As far as the condition under Section 37(b)(i) is concerned, there is no ambiguity in its interpretation. It is merely a manifestation of the doctrine of *audi alteram partem*. Since the crime is an act against the society, the legislature has contemplated that the Public Prosecutor must be given an opportunity to oppose a Bail Application under the Act. Additionally, under Section 37(b)(ii) of the NDPS Act, the Court is not required to be merely satisfied about the dual conditions i.e., *prima facie*



opinion of the innocence of the accused and that the accused will not commit a similar offence while on bail, but the court must have ‘reasonable grounds’ for such satisfaction.

24. The term ‘reasonable grounds’ under Section 37(b)(ii) has been interpreted by the Hon’ble Supreme Court in the case of ***Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798***. It was a case where an appeal was preferred against the order granting bail under the NDPS Act by the High Court. The prosecution alleged that the raiding party seized nearly 400 kgs. of poppy straw from the possession of the accused therein. The Special Court rejected the bail while the High Court granted the bail on the ground that the recovery was not from the exclusive possession of the accused. The Supreme Court set aside the order granting bail. In this context, it interpreted ‘reasonable grounds’ under Section 37 of the Act, as under:

“7. The expression used in Section 37(1)(b)(ii) is “reasonable grounds”. The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged. The word “reasonable” has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word “reasonable”.



25. Thus, the term ‘reasonable grounds’ is not capable of any rigid definition, but its meaning and scope will be determined based on the surrounding facts and circumstances of each case. What may be reasonable in one set of facts may not be reasonable in another set of facts. However, the standard of satisfaction in such cases is more than mere satisfaction on a *prima facie* opinion. Thus, the Court before exercising its discretion for granting the bail must record the reasonable grounds before granting bail to the accused.

26. The Hon’ble Supreme Court recently in the case of ***Union of India v. Md. Nawaz Khan (2021) 10 SCC 100*** has reiterated the position of law with respect to Section 37 of the Act. After analysing its previous decisions, the Court prescribed the following test for granting bail under Section 37 of the Act:

“20. Based on the above precedent, the test which the High Court and this Court are required to apply while granting bail is whether there are reasonable grounds to believe that the accused has not committed an offence and whether he is likely to commit any offence while on bail. Given the seriousness of offences punishable under the NDPS Act and in order to curb the menace of drug-trafficking in the country, stringent parameters for the grant of bail under the NDPS Act have been prescribed.”

27. Thus, the Court must be conscious about the mischief that is sought to be curbed by the Act and the consequences that might ensue if the person accused of the offence under the Act is released on bail. The Court must be satisfied on the basis of *reasonable grounds* discernible from the



facts and circumstances that the Applicant is not *prima facie* guilty of offences that the accused is charged with.

28. Additionally, the Court also needs to be satisfied that the person so released will not commit the offence while being on bail. Both the conditions are interlinked because the Parliament in its wisdom, intends that in cases where there is a possibility of commission of this grave offence under the Act, the person need not be released. It is so because if the person is released, he is most likely to repeat the offence, thus impacting the society at large. Thus, to not give any leeway to the accused, the Court must be satisfied about the dual conditions on reasonable grounds.

29. Proceeding to the application of Section 37 in the instant matter, the Public Prosecutor has been heard who has vehemently opposed the bail petition with reasons. With respect to the second condition prescribed thereunder, this Court is satisfied that there are no reasonable grounds, based on the analysis of the provision in the foregoing paragraphs and its application to the facts of the case, for this Court to believe that the Petitioner is not guilty of the offence that he has been charged with. Since this court is not satisfied on this ground, there is no question to consider that the accused will not commit the offence while on bail.

30. In view of the aforementioned facts, circumstances, analysis and reasoning, keeping in mind the legal provisions and the underlying intent as well as the mischief that is sought to be curbed by the NDPS Act, this Court is of the considered view that the conditions stipulated under



Section 37 of the Act are not satisfied and there are no 'reasonable grounds' to presume the accused as not being guilty of the offence.

31. Accordingly, taking into consideration the amount of the contraband recovered from the possession of the applicant and the gravity of the allegations against the backdrop of the facts of the case and the reasoning mentioned hereinabove, this Court is not inclined to allow the instant Bail Application as being devoid of any merit and hence, is liable to be dismissed.

32. Therefore, in light of the aforesaid analysis of the provisions of the law, the jurisprudence pertaining thereto, and the relevant rulings of the Hon'ble Supreme Court referred above as well as application to the facts of the instant case, the instant Bail Application stands dismissed.

33. It is made clear that observations made herein shall have no bearing whatsoever on the merits of the case at any stage during the trial or any other proceedings before any other Court.

34. Pending applications, if any, also stand disposed of.

35. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

APRIL 13, 2022
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