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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Order pronounced on 07.10.2022

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BAIL APPLN. 1656/2022

MS. NTOMBOVUYO NOLUVOYO PRECIOUS MAFANYA

..... Petitioner

Through: Mr. Adarsh Priyadarshi and Mr.
Sachin Tomar, Advocates.

versus

CUSTOM

.....Respondent

Through: Ms. Anushree Narain, Advocate.

CORAM:

HON'BLE MR. JUSTICE TALWANT SINGH

Talwant Singh, J.:

1. This is an application for regular bail in case SC No.441453/2016. The applicant was arrested on 04.05.2016 and since then, she is stated to be in custody.

1.1 The case of the prosecution is that on receipt of information that the petitioner was coming by Flight No. EK-512 on 03.05.2016 and that she might be carrying some contraband/narcotic drugs, she was intercepted near the exit gate of Customs Arrival and on opening of her Dubai Duty Free poly bag, 41 spheroid shaped pellets wrapped in transparent tape were found, which were cut open and they were found to be containing white coloured substance, which was tested and found positive for Cocaine, weighing 595 grams.

1.2 As per the petitioner, nothing incriminating was recovered from her.

The goods were not seized in accordance with the law and sampling was not done as per the prescribed procedure; the forensic report does not state the percentage of Cocaine contained in the recovered contraband and the only evidence *qua* the petitioner is her alleged confessional statement, which is not admissible.

1.3 The bail application filed by the petitioner was dismissed on 03.03.2022. It has been submitted that in view of the various judgements of the Apex Court and the High Courts, the petitioner is entitled to bail. She has no criminal antecedents and her conduct in jail is satisfactory; she has never been convicted by any Court of law, so it has been prayed that she may be released on bail during the pendency of trial and she is ready to abide by all the conditions to be imposed by this Court.

2. Notice was issued.

3. The respondent has filed reply.

3.1 In the reply, the circumstances under which the applicant was arrested, have been mentioned. It has been stated that the applicant had made her voluntary statement under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), wherein she had admitted the recovery of the drugs and other incriminating facts, so after completion of investigation, a complaint under Section 21 and 23 of the NDPS Act was filed before the concerned Court.

3.2 Three witnesses have been already examined and fourth witness is under examination. All the three witnesses have supported the case of the prosecution. The recovery of contraband substance is a matter of record. Due procedure of law was followed during seizure of contraband goods under the NDPS Act and Customs Act.

3.3 Samples were drawn before the learned Magistrate, Dwarka Courts as per details given in the order dated 20.05.2016. A Panchnama dated 04.05.2016 regarding the recovery was produced before learned Metropolitan Magistrate and the same was duly verified after comparing it with the case property. All the proceedings were duly photographed and the said photos were attested by the learned Metropolitan Magistrate on 27.05.2016.

3.4 It has been submitted that the judgements cited by the petitioner are not applicable to the facts of the present case. The respondent has also relied upon certain judgements passed by the Hon'ble Supreme Court and the High Courts. It has been submitted that the mandatory provision of Section 37 of the NDPS Act cannot be ignored.

3.5 In the present case, there is recovery of narcotic drug from the accused in commercial quantity and the same is corroborated by statement of the witnesses and circumstances of the case and there are high chances that the accused would be convicted in the case.

3.6 It has been also submitted that the accused is not entitled for bail as the provisions of Section 37 of the NDPS Act are not satisfied. Moreover, the drug paddlers have to be dealt with strictly as held by the Hon'ble Apex Court. There is, however, likelihood of the present petitioner absconding and frustrating the trial, if she is released on bail as she is the foreign national holding a South-African passport.

4. Arguments have been heard.

5. Both the parties have reiterated their respective case as detailed above during arguments. Both the parties have relied upon certain judgements. Copies of the same have been filed on record.

6. The petitioner has relied upon the following judgements:

6.1 '*Bharat Choudhary v. Union of India*', SLP (Crl) No.5703/2021. In this matter it was observed as under:

“the Assistant Commercial Examiner at the foot of the reports stating that '*quantitative analysis of the samples could not be carried out for want of facilities*'. In the absence of any clarity so far on the quantitative analysis of the samples, the prosecution cannot be heard to state at this preliminary stage that the petitioners have been found to be in possession of commercial quantity of psychotropic substances as contemplated under the NDPS Act.”

It is to be noted that in the same paragraph, the following is also mentioned regarding the case:

“Most importantly, none of the tablets were seized by the prosecution during the course of the search conducted, either at the office or at the residence of A-4 at Jaipur, on 16th March, 2020. Reliance on printouts of Whatsapp messages downloaded from the mobile phone and devices seized from the office premises of A-4 cannot be treated at this stage as sufficient material to establish a live link between him and A-1 to A-3, when even as per the prosecution, scientific reports in respect of the said devices is still awaited.”

6.2 The petitioner has also relied on the judgement of Himachal Pradesh High Court in the matter of '*State of H.P. v. Jugal Kishore 2012 SCC Online HP 2979*' wherein the State has challenged the judgement of acquittal and it was observed in para 6 as under:

“6. In the present case also Ex.PW.13/B indicates that Chemical Examiner has found meconic acid and morphine positive and in these facts and circumstances, has opined that contraband good so recovered is opium. Whereas, in view of the observations made in *Ashwani Kumar* (supra), the Chemical Examiner has not mentioned that “contraband good contained the coagulated juice

of the opium” and has also not mentioned the “percentage of morphine”. More so, the Chemical Examiner has also not mentioned that the contraband good is within the definition of Section 2(xv) of the NDPS Act.”

It was also observed as under:

“6. In the present case also Ex.PW.13/B indicates that Chemical Examiner has found meconic acid and morphine positive and in these facts and circumstances, has opined that contraband good so recovered is opium. Whereas, in view of the observations made in *Ashwani Kumar* (supra), the Chemical Examiner has not mentioned that “contraband good contained the coagulated juice of the opium” and has also not mentioned the “percentage of morphine”. More so, the Chemical Examiner has also not mentioned that the contraband good is within the definition of Section 2(xv) of the NDPS Act.

7. In view of the above observations, the prosecution has failed to bring home the guilt to the accused. We find no scope of interference in the impugned judgement of the trial court. The criminal appeal, being devoid of merit, is accordingly dismissed.”

6.3 Reliance has been also placed by the petitioner on the judgement of Allahabad High Court in *Ibrahim Adenda v. Union of India through Sr. Superintendent*’ This appeal was also against the final judgement and order passed by the learned Special Judge. The relevant portion of the judgement is reproduced hereunder:

“10. According to the prosecution case, heroin was recovered from possession of the appellant. Chemical Examiner has not given any data on which the report is based. The opinion of the expert must be supported by reasons and it is the reasons and not the ipse dixit which is of importance in assessing the merit of the opinion, as has been held in the case of *Panaliswamy Vaiyapuri v. State*, reported in AIR 1968 Bom 127. In *Madan Gopal*

Kakkad v. Naval Dubey, reported in (1992) 3 SCC 204 : (1992 AIR SCW 1480) it has been held that the expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although not an expert may form its own judgement on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted it is not the opinion of the medical officer but of the Court. In the present case the materials inclusive of the data have not been mentioned in the report. In Section 2(v) of the Act 'coca derivative' has been defined. In clause (d) all preparations containing more than 0.1 per cent of cocaine has been mentioned. The contraband alleged to have been recovered from possession of the appellant was in form of powder. Section 2(xvi) defines 'opium derivative'. In clause (d) heroin has been mentioned. According to the prosecution case the contraband was heroin. Clause (e) of Section 2(xvi) of the Act says 'all preparations containing more than 0.2 per cent of morphine or containing any diacetylmorphine'. If the contraband is taken to be coca derivative, then the expert should have mentioned that it contained more than 0.1 per cent of cocaine. The expert has not mentioned the percentage of cocaine in the contraband. If the contraband is taken to be opium derivative then also the percentage of more than 0.2 of morphine or diacetylmorphine should have been mentioned. Since the expert has not mentioned any percentage of either of the two, it is difficult to hold that the contraband was either of the two, it is difficult to hold, that the contraband was either coca derivative or opium derivative. In view of the above it cannot be said that narcotic drug has been recovered from possession of the appellant.

11. In view of the above discussion, the conviction and sentence of the appellant cannot be sustained and the appeal is liable to succeed. The appeal is allowed. The order of conviction and sentence of the appellant is set aside. He is in jail. He shall be set at liberty forthwith, if not required in any other criminal case.

12. *Appeal allowed.*”

6.4 Further reliance has been placed on the judgement of the Rajasthan High Court in the matter of ‘*State of Rajasthan v. Naresh Kumar*’. In this judgement, reference has been made to earlier judgements of the said Hon’ble High Court and the leave to appeal against acquittal was dismissed with the following words:

“It is to be noted that the amendments inserted in Section 21 of the Act, dividing punishment into three parts i.e for ‘small quantity’, ‘*lesser than commercial quantity*’ and ‘*commercial quantity*’. These amendments were made to rationalise the punishment on the basis of the quantity of the recovered contraband because looking to the deterrent punishment it was thought fit that the persons who only carries should be dealt with leniently according to the recovered contraband from their possession and those who deal with drug trafficking should be dealt with strenuous punishment. So under the rationalised sentence structure, the punishment would vary depending upon the quantity of offending material. As per the definition of the ‘opium’ or ‘opium derivative’ if the preparation contains more than 0.2 per cent of morphine or any diacetyl-morphine then and then only the recovered contraband can be covered under the provisions of the Act as per Section 2(xiv) or 2(xvi-e). Therefore, for punishing the appellant under Section 21 of the Act it has to be proved that the substance recovered from the possession of the appellant is a ‘opium derivative’ as per the definition of Section 2(xvi)(e) of the Act.

As a result of the discussions hereinabove the leave to appeal lacks merit and deserves to be dismissed.

Consequently, leave is refused and the leave to appeal is, dismissed.”

6.5 Reliance has been also placed on the judgement of the Punjab and Haryana High Court in the matter of ‘*Atma Singh v. State of Punjab 2016*

SCC Online P&H 5520'. This is again a challenge to the final judgement of conviction and order of sentence passed by the learned Special Judge in the case. It has been held as under:

“18. There appears to be substance in the statement of learned counsel for the appellant when he submitted that neither the Executive Magistrate nor the Gazetted Officer, was summoned at the spot to witness the recovery. While discussing this issue, this Court is conscious of the fact that non-compliance of Section 50 of the NDPS Act, would be mandatory only when the contraband is recovered from the person of the accused. But in view of the backdrop and the shortcomings in the prosecution case, this issue also assumed importance in favour of the appellant.

19. While perusing the material, this Court finds that the samples were not drawn while mixing the whole contents properly. If the investigating officer had effected the recovery from the upper part of the gunny bags, then it cannot be said that the samples drawn were representative samples of the whole bulk. This issue would assume importance when the report of the Chemical Examiner (Ex. PG) is perused, in which percentage of Morphine has not been described by the Chemical Examiner. No doubt, the Court cannot and should not throw the whole case of the prosecution on that score and the Court has to take into consideration the overall issues involved in the case.

20. The Court is not much impressed from the argument raised with regard to non-putting a question relating to conscious possession of the contraband to the appellant in his statement recorded under Section 313, Cr.P.C., and, as such, that argument is not accepted in favour of the appellant. However, it has been put to the appellant that he was seen sitting on the gunny bags.

21. It is settled proposition that if sentence to be awarded is severe like minimum rigorous imprisonment for ten years in addition to a minimum fine of rupees one lac, then the Court has to look for qualitative prosecution evidence.

22. This Court on the overall scanning of the case of the prosecution and the evidence led in defence, has arrived at the conclusion that there are severe latches in the prosecution case and the benefit of the same has to be extended to the appellant.

23. As the sequel to the above discussion, while accepting the appeal the impugned judgement of conviction and the order of sentence passed by learned Judge, Special Court, Sangrur, is hereby set aside. The appellant/accused is hereby acquitted of the charge levelled against him.”

6.6 The judgement of Karnataka High Court, in the matter of '*Bright Ighalo v. State of Karnataka 2017 SCC Online Kar 301*' has been also relied upon by the learned counsel for the petitioner wherein the following order was passed:

“2. The allegation of the prosecution is, the accused persons being Nigerian citizens were found in possession of 300 grams of cocaine and were trading the substance. As per the prosecution case, 140 grams of substance was seized from the possession of the petitioner herein and 125 grams was seized from the possession of accused No.2. The sample test was subjected to chemical analysis and as per the FSL report, it was a combination of Paracetamol with cocaine. The percentage of the cocaine is not ascertained. Accused No.2 is on bail vide order of this Court dated 8.12.2016 in CrI.P. No.8239/2016.

3. The investigation since complete, there is no impediment to allow this petition.

4. The petition is allowed. Petitioner is enlarged on bail in Crime No.220/2016 of the respondent/Police, subject to the following conditions:

(i) He shall execute a self-bond for a sum of Rs.2,00,000/- with one local surety for the likesum to the satisfaction of the concerned Court.

(ii) He shall mark his attendance before the Investigating Officer on every alternate Friday during the office hours till conclusion of the trial.

(iii) He shall not indulge in activities as alleged against him.”

6.7 Learned counsel for the petitioner has also relied upon the judgement in the matter of ‘*Supreme Court Legal Aid Committee representing under trial prisoners v. Union of India and others (1994) 6 SCC – 731*’ wherein it was directed as under:

“(i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribed the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the terms set out in (i) above provided that his bail amount shall in no case be less than Rs 50,000 with two sureties for like amount.

(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial accused is charged for the commission of an offence punishable under Sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge on the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said

accused shall not leave the country and shall appear before the Special Court as and when required.

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.”

6.8 Reliance is also placed on the matter titled as ‘*Sanawar Ali v. Union of India*’, C.R.M. 9314/2020 decided by the Kolkata High Court, wherein a question was raised that whether restrictions imposed *via* Section 37 of the NDPS Act are overridden by the directions given by the Hon’ble Apex Court in ‘*Supreme Court Legal Aid Committee v. Union of India (1994) 6 SCC 731*’ in the matter of grant of bail to under trials wherein learned Division Bench reached to the following conclusion:

“In the light of the aforesaid discussion, we are of the view that the directives in *Supreme Court Legal Aid Committee* (supra) applies with full force to the facts of this case and the petitioner ought to be released on bail on the score of inordinate delay in trial infracting his fundamental rights under Articles 14 and 21 of the Constitution.”

6.9 Reliance is also placed on Bail Application No.2477/2021 in ‘*Atul*

Aggarwal v. Directorate of Revenue Intelligence’ decided on 21.12.2021 by a coordinate bench of this Court. In the said case, the petitioner was in custody for 9 years and keeping in view the fact that the applicant was charged under Section 9A/21/23/25A of the NDPS Act and the minimum imprisonment was specified as 10 years and the petitioner had been in custody for more than 9 years, he was ordered to be released on bail.

6.10 The petitioner has also relied on the judgement of the Hon’ble Supreme Court in the matter of *‘Mossa Koya KP v. State (NCT of Delhi)* in Criminal Appeal No.1562/2021 decided on 06.12.2021, wherein the sentence of the convict was suspended relying upon various judgements including *‘Daler Singh v. State of Punjab 2006 SCC Online P&H 1951’* and in the said case, the petitioner had almost undergone 8 years of actual imprisonment out of total sentence of 10 years. It was observed that in all probability, the entire sentence would have been undergone by the time the appeal is heard, so under those circumstances, the remaining sentence of the petitioner was suspended.

6.11 Reliance is also placed in the matter of *‘Baba Fakruddin Sheikh @ Fakru v. The State’* in Bail Application No.334/2021, decided by a coordinate bench of this Court on 25.03.2021. This order was challenged before the Hon’ble Supreme Court in the matter of *‘Baba Fakruddin Sheikh @ Fakru v. The State (NCT of Delhi)*, Special Leave to Appeal (Crl.) No.13/2022 decided on 16.02.2022 wherein the Hon’ble Supreme Court keeping into consideration the fact that the petitioner had suffered incarceration of 7 years and 6 months and there was no possibility of trial concluding in the near future, bail was granted to the petitioner.

6.12 Reliance has been also placed upon Bail Application No.997/2022,

titled as '*Ejike Jonas Orji v. Narcotics Control Bureau*' decided by a coordinate bench of this Court on 13.06.2022. In the said case, the petitioner was in custody for 8 years; 6 PWs were yet to be examined. In this judgement, the learned Coordinate Bench of this Court has held that there cannot be a different consideration in the case of foreign nationals who have come before Court while applying for bail as the judgement of the Hon'ble Supreme Court Legal Aid Committee, the Hon'ble Supreme Court had expressly dealt with the question of grant of bail to foreign accused under the Act. In the said case, although, the applicant was a foreign citizen but he was married to a citizen of India and also has a child who is a resident of New Delhi. The said address stood verified and the applicant was found to be having roots in the society despite his citizenship status. For these reasons, the bail was granted.

6.13 Reliance has been also placed on a judgement of Hon'ble Supreme Court in SLP (CRL.) 5769/2022 in the matter of '*Nitin Adhikary @ Baban v. The State of West Bengal*' decided on 01.08.2022. In the said case, the petitioner had undergone custody for a period of 1 year and 7 months as on 09.06.2022, trial was at preliminary stage as only one witness was examined and the petitioner did not have any criminal antecedents, so the petitioner was granted bail in a case under Section 21(c) and 37 of the NDPS Act. 7.

7. In a recent decision of Full Bench of Supreme Court of India, in the matter of '*N.C.B. v. Mohit Aggarwal 2022 Live Law (SC) 613*', the following has been observed:

“10. The provisions of Section 37 of the NDPS Act read as follows:

“[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 subsection (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.]

11. It is evident from a plain reading of the non-obstante clause inserted in sub-section (1) and the conditions imposed in sub-section (2) of Section 337 that there are certain restrictions placed on the power of the Court when granting bail to a person accused of having committed an offence under the NDPS Act. Not only are the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973 to be kept in mind, the restrictions placed under clause (b) of sub-section (1) of Section 37 are also to be factored in. the conditions imposed in subsection (1) of Section 37 is that (i) the Public Prosecutor ought to be given an opportunity to oppose the application moved by an accused person for release and (ii) if such an application is opposed, then the Court must be satisfied that there are reasonable grounds for believing that the person accused is not guilty of such an offence. Additionally, the Court must be satisfied that the accused person is unlikely to commit any offence while on bail.

12. The expression “*reasonable grounds*” has come up for discussion in several rulings of this Court. In **“Collector of Customs, New Delhi v. Ahmadalieva Nodira”**, a decision rendered by a Three Judges Bench of this Court, it has been held thus:-

“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 added]

13. The expression “reasonable ground” came up for discussion in **“State of Kerala and others Vs. Rajesh and others”** and this Court has observed as below:

“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 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.” [emphasis added]

14. To sum up, the expression “reasonable grounds” used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.

15. We may clarify that at the stage of examining an application for bail in the context of the Section 37 of the Act, the Court is not required to record a finding that the accused person is not guilty. The Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the Court is expected to undertake at this stage is for the limited purpose of releasing him on bail. Thus, the focus is on the availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail.

16. Coming back to the facts of the instant case, the learned Single Judge of the High Court cannot be faulted for holding that the appellant NCB could not have relied on the confessional statements of the respondent and the other co-accused recorded under Section 67 of the NDPS Act in the light of law laid down by a Three Judges Bench of this Court in Tofan Singh (supra), wherein as per the majority decision, a confessional statement

recorded under Section 67 of the NDPS Act has been held to be inadmissible in the trial of an offence under the NDPS Act. Therefore, the admissions made by the respondent while in custody to the effect that he had illegally traded in narcotic drugs, will have to be kept aside. However, this was to the only material that the appellant-NCB had relied on to oppose the bail application filed by the respondent. The appellant-NCB had specifically stated that it was the disclosures made by the respondent that had led the NCB team to arrive at and raid the godown of the co-accused, Promod Jaipuria form of tablets, injections and syrups. Counsel for the appellant-NCB had also pointed out that it was the respondent who had disclosed the address and location of the co-accused, Promod Jaipuria who was arrested later on and the CDR details of the mobile phones of all coaccused including the respondent herein showed that they were in touch with each other.

17. Even *dehors* the confessional statement of the respondent and the other co-accused recorded under Section 67 of the NDPS Act, which were subsequently retracted by them, the other circumstantial evidence brought on record by the appellant-NCB ought to have dissuaded the High Court from exercising its discretion in favour of the respondent and concluding that there were reasonable grounds to justify that he was not guilty of such an offence under the NDPS Act. We are not persuaded by the submission made by learned counsel for the respondent and the observation made in the impugned order that since nothing was found from the possession of the respondent, he is not guilty of the offence for which he has been charged. Such an assumption would be premature at this stage.

18. In our opinion the narrow parameters of bail available under Section 37 of the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, for him to have been admitted to bail. The length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by

themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 3 of the NDPS Act.

(Emphasis Supplied)

19. As a result of the aforesaid discussion, the present appeals are allowed and the impugned order releasing the respondent on post-arrest bail, is quashed and set aside. The bail bonds of the respondent are cancelled and he is directed to be taken into custody forthwith.

8.1 In view of the above observations, the bail application of the petitioner is to be considered as this judgement lays down the latest law of the land on the point of bail.

9. In the present case, *de hors* the statement recorded under Section 67 of the NDPS Act, the following factors are taken into account:

9.1 Recovery of Cocaine from the possession of the petitioner;

9.2 Recovered Cocaine falls in commercial quantity;

9.3 Petitioner was intercepted near the exit gate of Customs Arrival Hall at the airport;

9.4 Statements of recovery witnesses were recorded at the time of recovery; and

9.5 Samples were drawn before the learned Magistrate and proceedings were duly photographed and videographed;

9.6 The trial has commenced and Examination of the witnesses is under progress.

10. The strict conditions for granting bail under Section 37 of the NDPS Act cannot be said to be satisfied in the present case. None of the ground argued by the learned counsel for the petitioner can be made basis of

reaching to the conclusion that there are reasonable grounds to believe that the petitioner is not guilty of the offence. These may be good grounds to be argued at the stage of final arguments, but at the present stage, this Court cannot reach to a reasoned conclusion that petitioner has not committed the offence.

11. Similarly, there is nothing on record to satisfy that if the petitioner is released on bail, she will not again indulge in the same crime, during the bail period.

12. In my view, the twin conditions set out in Section 37 of the NDPS Act for granting bail are not satisfied.

13. Nothing stated hereinabove will be considered as an opinion on merits of the case when the learned Sessions Judge will decide the case.

14. No grounds are made out for grant of bail to the petitioner at this stage. The bail application is accordingly dismissed.

TALWANT SINGH, J

OCTOBER 7, 2022/pa

[Click here to check corrigendum, if any](#)