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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 29.03.2022

Delivered on : 25.04.2022

+ BAIL APPLN. 3291/2021

BIPIN BIHARI LENKA

..... Petitioner

Through: Ms.Sushma Sharma, Mr.Girish Kr. Sharma, Mr.Karan Verma and Ms.Shreya Bhardwaj, Advocates.

versus

NARCOTIC CONTROL BUREAU

..... Respondent

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

CORAM:

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

ORDER

ANOOP KUMAR MENDIRATTA, J.

1. This is an application under Section 439 of Cr.P.C. filed on behalf of the petitioner seeking regular bail in Complaint No.VIII/18/DZU/2020, SC No.: 160/2020, under Sections 8/20/29 of NDPS Act.

2. In brief, as per the case of prosecution, on 25.02.2020, around 3:30 A.M., a truck with registration No.AP16TB8577 being escorted by two cars, namely, Eco Sport & Swift Dzire was intercepted by the NCB team on secret information near Sarita Vihar Metro Station, Delhi. Upon questioning, the truck driver introduced himself as Bipin Bihari Lenka, the petitioner in the



present application. Other persons were identified as Mayadhar Behra and Achuta Pradhan (Khalasi). The persons sitting in Swift Dzire were identified as Arjun Pahadi with driver and those in Eco Sport as Virender Tanwar and Sunil Behra with driver. On questioning, they revealed that contraband (Ganja) was concealed in a cavity behind the cabin of the truck. Mayadhar with the help of Achuta Pradhan opened the secret door of the cavity with the help of plier and packets wrapped in brown tape were recovered. Mayadhar and Arjun Pahadi confirmed that Ganja is packed inside the brown packets.

The vehicles were thereafter taken to a secured place/NCB Office for security reasons and search proceedings resumed at 0500 hrs. 106 packets were recovered from the cavity, out of which 58 were of big size and 48 were of small size. On examination of each packet, brown colour grass with leaves was found, which on being tested was found positive for Ganja. Each of the big packets was found to contain 5 Kgs. Approx and each of the small packets weighs 2 Kgs. Approx. The total quantity weighed to be 386 Kgs.

Further, 58 packets were divided in separate lots of eleven and 48 small packets in two lots. All the packets recovered from the truck were thus divided in 13 lots. Two samples of 25 gms. each was drawn from each lot (after taking small substance from each packet) and in total 26 samples were drawn. The complete seizure proceedings were conducted as per Panchnama dated 25.03.2020. A seizure report under Section 57 of NDPS Act was accordingly submitted to the Superintendent, NCB by Shri Manoj Kumar, Jr.IO, NCB on 25.03.2020 regarding the seizure.



3. In furtherance to the notices issued under Section 67 of NDPS Act, all the accused persons appeared before Sh. Rajeev Sehrawat, IO and their statements were recorded. Accused Sunil Behera in his statement disclosed that he is engaged in business of supplying Ganja since last one year with the help of his brother Mayadhar Behera & Arjun Pahadi. Further, he came to Virender Tanwar's home on 17.02.2020 to collect advance money. Virender Tanwar disclosed that he had already deposited all the amount with Mayadhar Behra and Arjun Pahadi's bank account.

Accused Arjun Pahadi disclosed in his statement that he along with co-accused Mayadhar Behera was involved in Ganja business from last one year and they used to supply the said contraband from Ganjam, Orissa to Delhi NCR and Haryana. Further he stated that two months ago co-accused Virender Tanwar came to Orissa and requested him to supply 34 quintals of Ganja to Delhi and also sent money to the bank account of Arjun Pahadi's wife for the same. He also added in his statement that he arranged Ganja and booked a truck for transportation of the contraband to Delhi. Further, on 21.02.2020 he along with Mayadhar Behera and Achuta Pradhan loaded 386 Kgs. Ganja in the cavity of truck made behind the cabin. A Taxi was also hired by him to escort the truck loaded with Ganja but they didn't disclose to taxi driver about the trafficking of Ganja. On 22.02.2020, Achuta Pradhan (khalasi) and petitioner Bipin Bihari Lenka in truck No.AP16TB8577 and Arjun Pahadi and Mayadhar Behra along with driver in Maruti Swift Dzire No.OD07B5757 left for Delhi. They reached Delhi early in the morning on 25.02.2020 where they were subsequently apprehended by the NCB.



In his statement, petitioner Bipin Bihari Lenka disclosed that he works as a driver in Ganjam, Orissa. On 22.02.2020, co-accused Achuta Pradhan had handed over the keys of the truck to him and he drove the truck from Orissa to Delhi. The petitioner was therefore arrested with all other co-accused persons on 25.02.2020.

In his statement, Achuta Pradhan stated that he is working as Khalasi on Truck No.AP16TB8577 and came to Delhi in the truck. He accepted his involvement in trafficking of Ganja and arrested vide arrest memo dated 25.02.2020.

Virender Tanwar disclosed in his statement that he gave money to Mayadhar Behra and Arjun Pahadi to deliver 386 Kgs of Ganja to him in Delhi-NCR. He also accepted his involvement and arrested vide arrest memo dated 25.02.2020.

Mayadhar Behra stated that he along with Arjun Pahadi arranged 386 Kgs. of Ganja and came to Delhi to deliver the same to Virender Tanwar. He was arrested vide arrest memo dated 25.02.2020.

4. I have heard the Ld. Counsel for the parties & perused the records of this case.

5. Learned counsel for the petitioner contends:

- i) That by collecting and mixing the contents of all the recovered packets in lots and drawing samples subsequently, led to losing of the sanctity of the case property in each individual packet. Reliance is further placed on judgments passed by this Court in *Amani Fidel Chris v. NCB*, decided on 13.03.2020 in CrI. A. 1027/2015, *Basant Rai v.*



State in CrI. A. 909/2005 and *Satish v. State of U.P.*, Bail Application No.24444/2020 dated 14.10.2020.

- ii) That the initial secret information was not against the present applicant. Further, the prosecution has failed to prove or even establish the foundation of possession by the petitioner/applicant since no call records between the petitioner and other co-accused have been established. It is submitted that the accused was unaware of the contraband and was merely a driver who had been engaged to drive the truck. The said truck is also stated to be not owned by the petitioner and as such the rigors of Section 35 and 54 of the NDPS Act are not applicable. It is also submitted that no monetary benefit was received by applicant for driving the truck.
- iii) That the rigors of Section 37 of NDPS Act are not attracted as no specific role was attributed against the petitioner during the alleged recovery and the petitioner has clean past antecedents.
- iv) That the statements given to the investigating agency under Section 67 of NDPS Act were inadmissible in view of the observations made by Hon'ble Supreme Court in *Tofan Singh vs. State of Tamil Nadu*, (2021) 4 SCC 1.

6. On the other hand the bail application has been vehemently opposed by learned counsel for the respondent/NCB. Reliance is also placed on the judgment passed by the Supreme Court in *Union of India through Narcotics Control Bureau, Lucknow v. Md. Nawaz Khan* in Criminal Appeal No.1043/2021.



It is submitted that a huge quantity of Ganja weighing about 386 Kgs. has been recovered from the vehicle which was driven by the petitioner all the way from Orissa to Delhi. The presumption would arise in respect of conscious possession by the accused. Further, no case for grant of bail is made out having regards to the provisions of Section 37(1)(b)(ii) of NDPS Act.

7. I have given considered thoughts to the contentions raised.

Under Section 37(1)(b)(ii), the limitations on the grant of bail for offences punishable under Sections 19, 24 or 27A and also for offences involving a commercial quantity are :

- (i) The Prosecutor must be given an opportunity to oppose the application for bail; and
- (ii) There must exist 'reasonable grounds to believe' that (a) the person is not guilty of such an offence; and (b) he is not likely to commit any offence while on bail.

Based upon the precedents, the test which this Court is required to apply while granting bail is whether there are reasonable grounds to believe that accused is not guilty of such an offence and whether he is likely to commit any offence while on bail.

8. In order to appreciate the contentions raised by the learned counsel for the petitioner, it is important to refer to the observations of the Hon'ble Supreme Court in *Madan Lal and Anr. v. State of Himachal Pradesh* , (2003) 7 SCC 465, with reference to the concept of possession as occurring in Section 20 to 22 of NDPS Act.



19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record are that all the accused persons were travelling in a vehicle and as noted by the trial court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

22. The expression “possession” is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supdt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja* [(1979) 4 SCC 274 : 1979 SCC (Cri) 1038 : AIR 1980 SC 52] to work out a completely logical and precise definition of “possession” uniformly applicable to all situations in the context of all statutes.



Thus, the knowledge of the possession of contraband has to be gleaned from the facts and circumstances of a case.

This Court is cautious of the fact that physical possession means physical possession with animus, exercise of dominion and control as a result of concealment or personal knowledge as to existence of the contraband and the intention based on this knowledge.

9. It is pertinent to note that the possession in the present case is from a private vehicle with few persons known to each other. In the facts and circumstances, it is difficult to assume at this stage that the petitioner who had been driving from Orissa to Delhi with known individuals was unaware of the concealment of contraband. It also does not strike to reason that the petitioner would have been driving the truck without any remuneration or benefit as it is claimed that no monetary benefit was gained by the petitioner.

10. Next, the procedure for obtaining the samples by the investigating agency has also been vehemently challenged. Reliance has also been placed upon by learned Counsel for the petitioner upon Bail Appln 3076/2020 titled as *Ahmed Hassan Muhammed v. The Customs* decided by Hon'ble Mr. Justice Suresh Kait on 11.02.2021 wherein the benefit of bail was extended, considering the decision dated 02.07.2012 passed in CrI. Appeal 909/2005 titled as *Basant Rai v. State* and decision of Coordinate Bench of this Court dated 13.03.2020 in CrI. Appeal No.1027/2015 titled as *Amani Fidel Chris v. NCB* wherein the accused was acquitted also on the ground that mixing of substance before drawing any sample vitiates the entire sample. Reference is also made to *Gopal Das v. NCB* Bail Appln No.3491/2020 decided on 04.02.2021 by Hon'ble Mr. Justice Suresh Kait.



11. It may be noticed that in *Amani Fidel Chris v. NCB*, decided on 13.03.2020 in CrI. A. 1027/2015, the findings were given at the stage of appeal after the trial had been concluded. The four packets containing suspicious powdery substance were found concealed in a stroller bag and IO without weighing the contents of each individual packet mixed the powder from all the four packets in one polythene bag and then drew the sample. Thus, in aforesaid circumstances, it was held that IO ought to have followed the procedure outlined in para 2.4 of Standing Order 1/89 or 1.7(a) of Standing Order 1/88 by drawing sample in duplicate from each of four packets separately and then sending the sample for testing.

Similarly, in *Basant Rai v. State (supra)*, under somewhat similar circumstances accused was found carrying polythene bag containing eight smaller polythene bags having brown colour substance and IO took small pieces of charas from each packet, mixed the same and drew two sample parcels which were sent to FSL for analysis.

Further, it may be observed that in *Ahmed Hassan Muhammed v. The Customs (supra)*, the case related to import of certain consignment in which the contraband was recovered and as such apart from the benefit on account of sampling, the contentions had been made that the involvement was alleged on the basis of conspiracy and no incriminating material was recovered from the person of the petitioner/accused therein.

12. Observations of the learned Trial Court in order dated 06.08.2021 while dismissing the application on the point of sampling may be noticed:

“As the recovery was from the truck which he was driving therefore, there is definite presumption u/s 35 and 54 NDPS



Act against this accused at this stage, which could be rebutted during trial (Madan Lal vs. State of HP 2003(7) SCC 465 and Mohan Lal Vs. State of Rajasthan 2015 (6) SCC 222). The substance from each packet was tested individually and was found positive for ganja thereafter, all the 106 packets were divided into 13 lots and total 26 samples were drawn after mixing of the substance homogeneously and this procedure was found as due compliance as per mandate of judgment Sumit Tomer Vs. State of Punjab, Crl. Appeal No.1690-1691/2012 dated 19.10.2012 (SC). Furthermore, Delhi High Court in a recent judgment titled Santinu Simone Vs Department of Customs, Crl Appeal No.1088/2017 dated 05.10.2020 in paragraph 83 held that the prosecution had failed to establish that the content of each packet was separately tested however in present case prima facie the each packet were separately tested. Furthermore, any infirmity in the procedure which do not go into the root of the matter cannot be appreciated at this stage.”

13. The procedure followed in the present case appears to be distinguishable as referred in the typed copy of the complaint annexed with the application. In the present case, total 58 big packets were divided in 11 lots and 48 small packets were divided in 02 lots. Two samples of 25 gms. each were drawn from each lot (after taking small substance from each packet). Thus, total 26 samples were drawn. I am of the view that at this stage, it may be premature to hold that the procedure adopted for sampling



vitiates the entire proceedings since the sampling was done after each of the packets tested positive for Ganja. The prejudice, if any, on account of alleged improper sampling as contended by counsel for the petitioner, can only be appropriately considered after the examination of the witnesses during the course of trial.

14. In the facts and circumstances and considering the connecting evidence on record, wherein the contraband has been recovered from private vehicle driven by the petitioner, I am of the considered opinion that no grounds for grant of bail are made out in the light of twin conditions laid down in Section 37 of NDPS Act.

The application is accordingly dismissed.

(ANOOP KUMAR MENDIRATTA)
JUDGE

April 25, 2022/R