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

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Reserved on: 27.10.2022
Pronounced on: 31.10.2022

+ **BAIL APPLN. 2646/2022**

AMJAD ALI

..... Petitioner

Through: Mr. B. S. Arora with Mr. Tausif
Alam Advocates

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Manoj Pant, APP for the
State with SI Deepak Joshi,
Special Cell

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

ORDER

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31.10.2022

1. The present bail application has been filed by the petitioner seeking regular bail in FIR No. 141/2018 under Sections 21/29/61/85 of the NDPS Act, 1985 registered at Police Station Special Cell (Lodhi Road), New Delhi.

2. Brief facts of the instant case are that on 30.11.2018, on receipt of secret information, SI Ravi Kumar was informed that one Salim and his associate Amjad both resident of Malda West Bengal, on the direction of one Uvesh, resident of Faridpur, Bareilly, U.P. procures heroin from Malda and supplies the same in Delhi and Uttar Pradesh.

He was also informed that they will be coming near Gokalpuri flyover for delivery of a huge consignment of heroin between 7:30 AM to 8:30 AM to Uvesh. The said information was reduced into writing and SI Ravi Kumar had produced the secret informer before Inspector Vivekanand Pathak, who had made enquiries from the secret informer. Thereafter, the information was conveyed to ACP, Manoj Dixit telephonically who had directed SI Ravi Kumar to take appropriate legal action and had authorised him for search and seizure. After lodging DD No.2A, SI Ravi Kumar produced the written information before Inspector Vivekanand Pathak in compliance of Section 42 of NDPS Act and thereafter, Inspector Vivekanand Pathak forwarded the same to the office of ACP. On the directions of ACP, the raiding party was prepared along with secret informer and the raiding party took position near Gokalpuri at 7.45 AM, two persons coming from Maujpur side had topped near a corner of the road who were having bags on their shoulders. On the pointing out of the secret informer that they were Amjad and Salim, they were apprehended who disclosed that they had come to Delhi to supply Heroin on the directions of Uvesh. Notice under Section 50 NDPS Act was served upon the accused and they were apprised of their right to be searched before the Gazetted Officer or Magistrate. However, they refused to be searched before Gazetted Officer or Magistrate. The bags of both the accused were searched and were found to contain 02 kg of heroin each, samples were drawn and on testing the same were found to be heroin. Further investigation was handed over to SI Anukul who reached the spot and conducted further proceedings. Accused Amjad Ali and

Salim Sheikh were arrested. Two mobile phones were recovered from accused Salim Sheikh and two mobile phones were recovered from accused Amjad Ali. Thereafter, the accused was produced before the concerned court and seven days police custody/remand of Salim Sheikh and three days police custody/remand of Amjad Ali were obtained. During investigation, they disclosed that they were part of an inter-state narcotic syndicate and used to receive supply of heroin from one Samuel@Mama, Hasmat and Krishna, all residents of Malda, West Bengal. Accused Salim Sheikh also disclosed that he used to supply heroin after obtaining it from Samuel @ Mama, Hasmat and Krishna and used to supply the same to various persons including Nasir at Delhi and Tausif Ali, resident of Bareilly. The IO alongwith the accused had gone to Bareilly on 01.12.2018 to trace the source person of heroin on receipt of secret information, Tausif Ali wanted in this case was informed to be visiting Milak village to meet someone, the information was passed on to Inspector Vivekanand Pathak who after constituting a raiding team with ACP consulted the ACP, who directed and authorised him to take legal action and conduct search and seizure. At about 9.40 PM, at Milak Village, a car had stopped and accused Salim Sheikh pointed out towards Tausif, associate of Uvesh. Notice under Section 50 NDPS Act was given to him but nothing was recovered from his personal search. Nothing incriminating was recovered from his car also. On interrogation, he disclosed that he is indulging in drug supply for the last three years and used to procure the same from one Salim Sheikh of Malda, West Bengal and he and his associate Uvesh were partners and used to

supply heroin to various persons in U.P. including Akram, Aslam and Sheikh Ali, residents of Bareilly and Asha and Baby, residents of Gangapur, Bareilly. He also disclosed that he used to communicate with Uvaish at his mobile phone numbers as disclosed in the Status Report. The mobile phones of accused were recovered and were put on switch on mode. The car was also taken into possession. Two days police custody/remand was taken. On 03.02.2019, the secret informer informed about the movement of Mohd. Uvaish, who was also apprehended but nothing was recovered from his personal search and notice under Section 50 NDPS Act was served upon him. One Samsung mobile, having been used in crime in question, was recovered from him which was also put on switch on mode. Seven days police custody remand of accused Uvaish was obtained, however, other accused could not be traced. The car recovered from Tausif Ali was found to be belonging to accused Taufik Ali. Application to take voice samples of accused Salim Sheikh, Amjad Ali, Tausif Ali and Mohd. Uvaish was moved. The mobile phones were kept under interception and incriminating communication was recorded. The intercepted voice calls in which accused were talking about drug trafficking activity were collected as evidence of conspiracy. Accused Salim Sheikh and Amjad Ali were chargesheeted for offences punishable under Section 21/29 of NDPS Act as recovery had been affected from them and there was evidence of intercepted calls and CDR to prove their role as conspirators of narcotic syndicate. Accused Tausif Ali and Mohd. Uvaish were chargesheeted under Section 29 of NDPS Act as no recovery was affected from them and

calls between them and other accused persons and association to prove their role as one of their narcotic syndicate was on record.

3. During the course of arguments, learned counsel for the applicant Amjad Ali pointed out several discrepancies and irregularities in the statement of the witnesses and the procedure adopted for serving notice and seizure of alleged heroin. He also argued that the entire raid is fictitious. He argued that there is no conversation incriminating the present applicant. He also argued that no call of the present applicant was ever intercepted by the police. It was also argued that the accused is in custody for the last 3 ½ years however, only four witnesses have been examined yet out of 23 witnesses.

4. Learned Additional Public Prosecutor for the State, however, argues that recovery of 2 kg of heroin had been affected from the present applicant which is commercial in nature. He also states that the incriminating voice calls clearly show that the present accused is also involved in the illegal narcotic syndicate. It is also argued that the case is at the stage of recording of prosecution evidence and in view of the definite embargo under Section 37 of NDPS Act, no ground for bail is made out in favour of the accused/applicant.

5. After hearing the arguments and having given thoughtful consideration to the documents placed on record, this Court is of the opinion that this is a case where recovery of 2 kg of heroin, which is commercial quantity, has been made from the accused/applicant. In cases under NDPS Act, the definite embargo under Section 37 of the Act has to be kept in mind in view of judgment of *State of Madhya*

Pradesh v. Kajad, (2001) 7 SCC 673, making it clear that negation of bail is the rule and granting of bail is an exception under Section 37 of NDPS Act. Twin conditions have to be satisfied before granting bail in a case of recovery of commercial quantity of narcotic substance; first being the satisfaction of the court that there is reasonable ground for believing that accused is not guilty of offences he is charged with and for the satisfaction that he will not commit any such offence while on bail. In ***State of Kerala v. Rajesh (2020) 12 SCC 122***, it was observed as under:

18. The jurisdiction of the Court to grant bail is circumscribed by the provisions of Section 37 of the NDPS Act. It can be granted in case there are reasonable grounds for believing that accused is not guilty of such offence, and that he is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed. At this juncture, a reference to Section 37 of the Act is apposite. That provision makes the offences under the Act cognizable and non bailable. It reads thus:

*"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." (emphasis supplied)

6. The discrepancies in the statements of witnesses and the infirmities pointed out by the learned counsel at the time of seizure cannot be appreciated at this stage. Four witnesses have been examined by the learned trial court. On the basis of record and the evidence recorded as yet by the learned Trial Court, there is nothing to infer that the accused has not committed the offence entitling him to release on bail. In the case of ***Union of India v. Prateek Shukla (2021) 5 SCC 430***, it was held by the Hon'ble Supreme Court that the provisions of Section 37 NDPS Act have to be applied strictly at the time of deciding bail application of an accused. It has also been observed by the Apex Court in case of ***State v. Lokesh Chadha (2021) 5 SCC 724*** that the judgment of ***State of Kerala v. Rajesh (supra)*** has to be followed while deciding bail application under NDPS Act.

7. The arguments of the learned counsel that the accused is in judicial custody for more than three years at this stage can also be of no help to him. In this regard, it will be pertinent to refer to the

judgment of the Apex Court in case of *Sheru v. Narcotics Control Bureau, Crl. Appeal Nos. 585-586/2020 arising out of SLP (Criminal) Nos. 2249-2250/2020*, wherein though the accused had been in judicial custody for almost eight years, the Court expressed that mere passage of time cannot be a ground for grant of bail under NDPS Act. However, since the situation was different due to Covid-19 pandemic, the Apex Court had granted bail to the accused therein, but with a clarification that the same shall not be treated as a precedent. The observations of the Apex Court are as under:

"We have given a thought to the matter and there is no doubt that the rigors of Section 37 would have to be met before the sentence of a convict is suspended and bail granted and mere passage of time cannot be a reason for the same. However, we are faced with unusual times where the Covid situation permeates. We are also conscious that this Court has passed orders for release of persons on bail to de-congest the jail but that is applicable to cases of upto seven years sentence.

In the given aforesaid facts and circumstances of the case, we consider it appropriate to enlarge the appellant on bail on terms and conditions to the satisfaction of the Trial Court.

At the instance of the learned Additional Solicitor General, we clarify that the order has been passed in the given facts of the case and not to be treated as a precedent."

8. However, considering that total 23 witnesses have to be examined by the learned Trial Court and the accused is in judicial custody for the last three years, the learned Trial Court is requested to

expedite recording of evidence in the present case. At this stage, no ground for bail is made out against accused Amjad Ali. The application stands rejected.

SWARANA KANTA SHARMA, J

OCTOBER 31, 2022/ns

