



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

% Judgment reserved on: 01.09.2023
Judgment pronounced on: 13.09.2023

+ BAIL APPLN. 815/2023

VISHAL SINGH

..... Petitioner

versus

STATE (NCT OF DELHI)

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Rakesh Khanna, Senior Advocate with Mr. Kaushal Jeet Kait, Mr. Jatin Yadav, Mr. Daksh Gupta and Mr. Parimal Bhatia, Advocates.

For the Respondent : Mr. Ajay Vikram Singh, APP for State with SI Prahlad Singh, PS Special Cell/SWR.

CORAM:

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

J U D G M E N T

TUSHAR RAO GEDELA, J.

[The proceeding has been conducted through Hybrid mode]

1. This is a bail application under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') filed by the applicant seeking regular bail in the case titled as "*State Vs Sunil Kumar & Ors.*" arising out of F.I.R. No. 09/2019 dated 16.01.2019 under sections 22/29 of the Narcotic Drugs and Psychotropic Substances



Act, 1985 (hereinafter referred to as 'NDPS Act') registered with Police Station Special Cell (SB), Delhi.

2. Brief facts of the case as per the prosecution are that on the intervening night of 15-16.01.2019, co-accused persons namely Lokesh Mehta and Sunil Kumar were apprehended and about 5.2 kgs of Psychotropic substance suspected to be Tramadol powder was recovered. Further on their instance, 5.5 lacs 'Alko-1' (Alprazolam Tablets IP 1 mg) tablets were recovered from a godown, Hari Nagar, Delhi.

3. Thereafter on 17.01.2019, at the instance of co-accused Sunil Kumar and on the basis of secret informer, their associate Satish Sahu r/o Mumbai was arrested after recovery of 5 kgs (approx.) contraband substance suspected to be Tramadol powder. On 20.01.2019, at the instance of accused Satish Sahu, accused Neeraj Arora @ Sonal along with his accomplice Rajesh Dutta @ Raj was apprehended and 200 gms of Ketamine was recovered from conscious possession of accused Neeraj Arora @ Sonal.

4. Thereafter, a raid was conducted at the house of accused Neeraj Arora @ Sonal where manufacturing material of drugs i.e. 100 pieces of Ketajet, 50 injections IP, 10 pieces of LOX injections IP, 1.080 kg suspected to be Amphetamine powder were recovered. Thereafter, a raid was conducted at their godown and total of 7,94,500 Tramadol tablets were recovered which were concealed in 78 blue coloured plastic drums within rice packets.

5. During investigation, accused Neeraj Arora @ Sonal disclosed



that he was directly connected with Vishal Singh, the applicant herein, who constrained him to set up the production of Ketamine. He further disclosed that after production of Ketamine, he used to supply that Ketamine to Vishal Singh who used to further supply Ketamine to his contacts to Mumbai and London.

6. As per the prosecution, the mobile number of co-accused Neeraj Arora @ Sonal was under legal interception through which he was in touch with the applicant, Vishal Singh who was using mobile number 8929739372, 9818690327 and 9999002245. Another co-accused, Rajesh Dutta also named the applicant, Vishal Singh in his disclosure statement.

7. The applicant Vishal Singh was found avoiding arrest therefore, on 18.12.2019, the Learned Special Judge (NDPS) issued NBW against the applicant on an application moved by the IO. The applicant was declared as a Proclaimed Offender by the order dated 09.03.2021 of the learned Trial Court.

8. Thereafter, based upon secret information, a raid was conducted at Shop No. 58, DDA Complex, Village-Naraina, New Delhi, from where the applicant was finally arrested on 29.03.2022. The applicant's voice sample was obtained by FSL officials at FSL, Rohini, Delhi.

ARGUMENTS ON BEHALF OF THE APPLICANT:

9. Mr. Rakesh Khanna, learned senior counsel for the applicant draws attention of the court to the Non Recovery Memo to submit that there is no recovery of any contraband effected from the applicant and he has been apprehended only on the basis of disclosure statements of



the co-accused persons viz. Neeraj Arora and Rajesh Datta.

10. He submits that the recovery of the contraband was effected from the co-accused Neeraj Arora @ Sonal and other co-accused persons and such recovery of contraband cannot be attributed to or linked with the applicant from whom nothing has been recovered. Learned senior counsel relies upon the order of the Co-ordinate Bench of this Court dated 28.07.2022 in BAIL APPLN. 495/2022 titled ***Sunil Vs. The State of NCT of Delhi*** to submit that the individual recovery has to be considered while assessing the culpability of the accused and in the present case, there is no recovery from the applicant.

11. He further submits that on the basis of the alleged phone conversations intercepted between the applicant and the co-accused Neeraj Arora @ Sonal, a case has been framed against the applicant.

12. Learned senior counsel submits that the bail application of the applicant was dismissed by the learned Trial Court on the grounds of the CDR alongwith the transcription wherein the applicant and co-accused Neeraj Arora @ Sonal were allegedly talking about Ketamine and its preparation as well as on the basis that the bail application of co-accused Neeraj Arora @ Sonal has been dismissed by the Apex Court. On that, learned senior counsel submits that such observation is contrary to the facts on the record and Section 37 of the NDPS Act has been wrongly invoked against the applicant.

13. Learned senior counsel submits that the call record details do not tally with the timings of the conversations and as such, there is any doubt of amount in the case framed by the prosecution against the



applicant. He further submits that he need not delve deep into the merits of the case at this stage as consideration of the veracity of the alleged phone conversations is a subject matter of trial.

14. Learned senior counsel relies upon the judgement of the Co-ordinate Bench of this Court in ***Kayoom Vs. State*** reported in **2022 SCC OnLine Del 1375**, specifically to para 14, wherein, while granting bail, the Court held that the applicant cannot be kept in judicial custody indefinitely only on the strength of his specimen voice sample matching with the questioned voice recorded during intercepted calls, while he was alleged to have been talking to other co-accused persons, who are already on bail. On this basis, learned senior counsel submits that the veracity of the said CDR records and transcriptions is yet to be tested during the course of the trial by the prosecution and the applicant herein may be enlarged on bail.

15. He further relies upon the judgement of the Co-ordinate Bench of this Court dated 18.11.2022 rendered in BAIL APPLN. 2585/2021 titled ***Jalil Khan Vs. State*** wherein it was held that the detailed transcriptions in respect of conversations between the applicant and co-accused can be appropriately further assessed, in the light of evidence of witnesses, to be led during the course of trial. On this basis, the bail was granted to the applicant in that case, holding that since no recovery was made from the possession of applicants, the requirements of Section 37 of the NDPS Act were satisfied. On this, learned senior counsel submits that the present case is similar in facts and hence, the applicant may also be extended benefit of bail.



16. Learned senior counsel further relies upon the order of the High Court of Bombay passed in *Aryan Shah Rukh Khan Vs. Union of India and Another* reported in **2021 SCC OnLine Bom 4127** to submit that the applicant therein was also not found in possession of any objectionable substance and thus, the Court, while considering the quantity recovered from the co-accused independently and rejecting the theory of conspiracy put forth by the prosecution therein, granted regular bail to the applicant therein.

17. Further reliance is placed on the order of High Court of Kerala in *Iqbal and Another Versus State of Kerala* reported in **2021 SCC OnLine Ker 4711** wherein the Court found no justification in taking the seized quantities from the co-accused together, and held that the same should have been reckoned individually.

18. On this basis, learned senior counsel submits that it is a matter of evidence that whether the applicant had hatched a criminal conspiracy for conducting trade of illegal substances and the same needs to be proved in accordance with law during the course of trial. He further submits that the contraband recovered from the co-accused persons cannot be considered while considering the bail application of the applicant and thus, the rigours of Section 37 of NDPS Act do not apply in the present case as there is no recovery from the applicant.

19. Learned senior counsel also submits that the applicant was declared a Proclaimed Offender by the order dated 09.03.2021 of the learned Trial Court, however, the guidelines laid down by the Co-ordinate Bench of this Court in *Sunil Tyagi Versus Govt. of NCT of*



Delhi and Another reported in **2021 SCC OnLine Del 3597** were not followed. He specifically refers to para 444 of the said judgement to submit that mere non-availability at the address is not sufficient unless the concealment is deliberate to avoid arrest. He further submits that the present applicant has been residing in the same address for over 10 years and no notice under section 67 of the NDPS Act was ever served upon the applicant.

20. Learned senior counsel for the applicant relies upon the judgment of the Supreme Court in *Biswajit Mondal @ Biswajit Mandal vs. The State of West Bengal* in Crl. A. No. 450/2023, *Shariful Islam @ Sarif vs The State of West Bengal* in SLP (Crl.) 4173/2022 and *Mohd. Muslim @ Hussain vs. State (NCT of Delhi)* reported in **2023 SCC OnLine SC 352** and submits that the fundamental right guaranteed under Article 21 of the Constitution of India must override the statutory embargo created under Section 37 of the NDPS Act.

21. Learned senior counsel also submits, by referring to the Nominal Roll that there is no previous involvement of the applicant and the jail conduct is also satisfactory, and as the applicant has already spent around 1 year 5 months in incarceration, he may be enlarged on regular bail.

ARGUMENTS ON BEHALF OF THE RESPONDENT:

22. Mr. Ajay Vikram Singh, learned APP for the State submits that the allegations against the present applicant are not restricted only to CDR, rather alongwith the CDR, there is transcription also and the voice of the applicant has matched with the transcription as per the report of



the FSL.

23. He further submits that in the transcription, the applicant and co-accused Neeraj @ Sonal are talking about Ketamine. The applicant is stating that he put Ketamine on his tongue and also smelled it and both, the co-accused and the applicant are talking about the preparation of Ketamine stating that in 1 kg, 2 liters of vial is to be added. On this basis, learned APP submits that from the abovesaid interception which has been corroborated by the CDR of accused Neeraj @ Sonal and the applicant herein, it is apparent that both the accused persons are talking about Ketamine and its preparation.

24. Learned APP submits that the cases relied upon by the learned senior counsel for the applicant cannot be considered in the present bail application as they can be distinguished on facts as well as on the basis that the contents of the conversation during the intercepted calls in those cases are unknown. He further submits that however, in the present case, there is a clear discussion of the preparation of the contraband between the applicant and co-accused.

25. He further submits that it is not the case where the trial is yet to commence. The trial is going on and around 15-17 witnesses have been examined, and the witnesses are supporting the case of the prosecution. He also submits that the clear evidence of the intercepted calls between the applicant and the co-accused have also been corroborated by the FSL.

26. Learned APP submits that though there is no recovery directly from the applicant, but he is actively involved in the preparation of



Ketamine and thus, he cannot be absolved of the liability merely for the reason that there is no direct recovery from the possession of the applicant.

27. He further submits that it is not necessary that contraband will be recovered from each of the accused persons involved in the transaction and as such, even without the recovery, the applicant can be tied to the crime on the basis of the transcriptions which clearly prove the complicity and culpability of the applicant.

28. Mr. Singh further submits that the applicant was found avoiding arrest and therefore, on 18.12.2019, the learned Special Judge (NDPS) issued NBW against the applicant and subsequently, he was declared a Proclaimed Offender by the order dated 09.03.2021 of the learned Trial Court. He further submits that the applicant was finally arrested after more than a year, on 29.03.2022.

29. Learned APP submits that the transcription of the intercepted calls between the applicant and the co-accused clearly proves the complicity and culpability of the applicant and thus, the rigours of Section 37 of the NDPS Act apply in the present case, and as such, learned APP submits that the applicant is not entitled to be enlarged on regular bail and requests that the present application may be dismissed.

REBUTTAL OF THE APPLICANT

30. Mr. Rakesh Khanna, learned senior counsel submits that in the case of *Kayoom (supra)* also, the FSL report had confirmed that the specimen voice sample of the accused matched with the questioned voice recorded during the intercepted calls yet the learned Co-ordinate



Bench of this Court had taken a view that the same has to be proven by the witnesses in accordance with law and the bail was granted to the applicant therein.

31. He further submits that there is no trail of any monetary transactions between the applicant and the co-accused persons to prove that they were involved in the offence together. Reliance is placed on the order dated 23.05.2022 of this Court in BAIL APPLN. 1189/2020 titled *Amit Ranjan Vs. Narcotics Control Bureau, Delhi*.

32. He further submits that in the present case, the fact remains undisputed that the timings of the CDR calls do not tally with the CDR records and the said discrepancies are enough to raise a reasonable doubt in the mind of this court as to the complicity and culpability of the applicant in the alleged offences.

33. Learned senior counsel also submits that the co-accused Lokesh Mehta, from whom there was a direct recovery of the contraband, has also been granted bail from the learned Trial Court by the order dated 05.08.2023, though on the basis of non compliance of Section 52A of the NDPS Act. On this basis, learned senior counsel requests that the applicant herein may also be considered for enlargement on bail.

OBSERVATION AND DECISION

34. This Court has considered the arguments addressed by the learned senior counsel for the applicant as well as the learned APP for the State.

35. The co-accused persons have already been granted regular bail by the learned Trial Court, order whereof has been handed over the bench. This Court has also perused the same. It is observed that the same has



been granted on the basis of violation of section 52A of the Act, 1985. In the present case, there is no question of recovery at all, thus the case of the other co-accused persons being granted bail on technical grounds may not be available to the applicant.

36. Ordinarily, when there is no recovery effected from a person, the rigours of section 37 NDPS Act, 1985 get diluted subject to there being no other attending circumstance incriminating or at least, *prima facie*, indicating the complicity or culpability of such person.

37. In the present case, there cannot be any doubt that there has been no recovery effected from the applicant, however, the prosecution relies very heavily upon the interception of the calls between the applicant and the co-accused along with the transcripts to argue that bail ought not to be granted.

38. Unlike other cases of recovery being effected at the spot or after arrest upon the disclosure of the person so arrested, in the present case, the prosecution's allegations against the applicant are that not only is he a part of the syndicate but also that he trades and had also pushed the co-accused into production of Ketamine drug for the purposes of sale and trade. According to the prosecution, a huge quantity of such raw material and Tramadol tablets were recovered during raid, which material would be used for purposes of production of contraband. The same were at the instance of the co-accused of the applicant.

39. The prosecution has placed on record the transcript of the intercepted conversation between the applicant and the co-accused. A perusal of the same indicates two persons engaged in conversation



regarding Ketamine and the manner of its production. The FSL also is stated to have confirmed not only the voice samples of the applicant as well as the co-accused, but also the conversation itself which is stated to match with the transcript placed on record. Though this Court at this stage, and that too, at the time of consideration of the bail application does not minutely scrutinise the evidence, however, on a *prima facie* consideration, the transcript appears to cover a conversation regarding Ketamine and its manner of production. Whether the said transcript and the intercepts are admissible in evidence or not, is for the trial.

40. That coupled with the fact that during the raid, huge quantity of Tramadol and raw material for production of the contraband was seized at the instance of the very same co-accused person with whom the applicant is alleged to have had the above conversation, creates a slight doubt about the innocence of the applicant herein. This Court is mindful that every person accused of an offence is innocent until held guilty, however, the presumption of culpable mental state under section 35 of the said Act would get attracted to the facts of the present case.

41. Learned senior counsel for the applicant fairly did not argue at length on this issue of the transcript and the admissibility of the same as evidence, however, this Court too has examined the same only with a view to test the proposition in section 35 of the NDPS Act, 1985.

42. So far as the judgements relied upon by the learned senior counsel of the applicant rendered by the Supreme Court in ***Biswajit Mondal, Mohd. Muslim (supra)*** and others are concerned, there is no quarrel to the ratio laid down therein. However, it is not the embargo under section



37 of the Act which may get diluted in the facts of the case, but the presumption of culpable mental state under section 35 of the Act that appear to be attracted to the present facts. To appreciate the applicability, it would be apposite to extract the provisions of section 35 of the Act, hereunder:

“35. Presumption of culpable mental state.

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.--In this section "culpable mental state" includes intention motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.”

A plain reading would lead this Court to observe that on one hand, the burden of proof upon the prosecution is beyond all reasonable doubt, however, the presumption against the accused person can be discharged by preponderance of probabilities. As to the application of the same to the facts of this case, the transcripts which match not only with the conversation but also the voice samples of the applicant and the co-accused would, though itself be a rebuttable presumption, it would still be a presumption, as of now.

43. That so far as the judgements of Coordinate Bench of this Court are concerned in *Kayoom (supra)*, *Jalil Khan (supra)* and *Aryan Khan (supra)*, the question of such transcripts and voice samples both matching and the conversation regarding preparation of Ketamine etc.



are not common to the other cases. This Court has considered the cases relied upon by the applicant and the same do not seem to share the same peculiar facts and as such, may not be treated as precedent for the present case. The effect and applicability of section 35 of the Act have also not been considered in the aforesaid judgements.

44. The argument regarding “conscious possession” too would be irrelevant at this stage since there has been no recovery from the applicant, the said question does not arise for consideration. As observed above, this Court has only considered the conversation, only *prima facie*, and read the same with the presumption of culpable mental state and thus, it need not examine whether there was in existence any issue of “conscious possession”.

45. This Court has also perused the order dated 21.02.2023 passed by the learned Trial Court in respect of the bail application filed by the applicant and observed that the learned Trial Court has very minutely examined the conversations before rejecting the said bail application. At that point of time, the FSL report was not available. However, now the FSL confirming the voice samples and the transcript are available and are stated to have already been filed before the Special Court. In the present case, it is stated that trial also has commenced and about 15-17 witnesses have already been examined and roughly around 37 more witnesses are to be examined.

46. The prosecution has also submitted that the applicant was evading arrest and proceedings under section 82 Cr.P.C., 1973 had to be invoked and he was arrested only after a year of the applicant being declared a



Proclaimed Offender. The prosecution apprehends that with the previous record of abscondence, the applicant may jump bail if granted and that there is no possibility of ascertaining that the applicant would not involve himself in similar offences, if granted bail.

47. The view of this Court is fortified by the 3 Judge Bench judgement of Hon'ble Supreme Court in ***Narcotics Control Bureau v. Mohit Aggarwal***, 2022 SCC OnLine SC 891, wherein it was observed that:-

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 37 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 Criminal Procedure Code, 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.....

13.....

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 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.”

48. In that view of the matter, the application of the applicant seeking regular bail is rejected.

49. Nothing in this order shall be construed as an expression of opinion on the merits of the pending matter.

50. The learned trial court shall make all endeavours to expedite the trial.

51. The application is disposed of in the above terms.

TUSHAR RAO GEDELA, J.

SEPTEMBER 13, 2023/lr