



* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved On: 21st September, 2023*
Judgment Delivered On: 11th October, 2023

+ BAIL APPLN. 1309/2023

SHEELA

..... Petitioner

Through: Mr. Aditya Aggarwal and Mr. Ankit
Mutreja, Advocates.

versus

STATE GOVT. OF NCT OF DELHI

..... Respondent

Through: Mr. Ritesh Kumar Bahri, APP for
State.
SI Suresh Bhatia, PS Anti Narcotics
Squad/SE.

+ BAIL APPLN. 1689/2023

IQBAL

..... Petitioner

Through: Mr. Divya Kr. Kaushik, Mr. Joni Kr.
Sharma, Ms. Kanika Kaushik and
Mr. Piyush Kumar, Advocates.

versus

STATE OF GNCT OF DELHI

..... Respondent

Through: Ms. Shubhi Gupta, APP for State.
SI Suresh Bhatia, PS Anti Narcotics
Squad/SE.

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

BAIL APPLN. 1689/2023 & BAIL APPLN. 1309/2023

1. By way of the present applications, the applicants seek regular bail in

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BAIL APPLN. 1309/2023 with connected mail



FIR No.251/2022 dated 20th April, 2022 under Sections 20/29/61/85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) registered at Police Station Sarita Vihar. BAIL APPLN. 1309/2023 has been filed on behalf of Sheela and BAIL APPLN. 1689/2023 has been filed on behalf of Iqbal.

2. The case set up by the prosecution is as under :
 - i. A secret information was received at Police Station Sarita Vihar on 20th April, 2022 regarding illegal supply of *Ganja*.
 - ii. A raiding party was constituted and a raid was conducted. During the raid, three people namely, Vinod, Iqbal and Sheela were apprehended travelling in a three-wheeler. Vinod and Sheela were sitting on the back seat while Iqbal was driving the auto. Both the accused persons sitting at the back had one bag each between their legs.
 - iii. Both the carry bags were seized, sealed and taken into possession and all the accused persons were arrested.
 - iv. Samples were drawn and sent for testing. As per the FSL report, the samples were found to be *Ganja*.
 - v. After the completion of the investigation, chargesheet was filed. The FSL report was filed through supplementary chargesheet.
 - vi. *Vide* order dated 29th August, 2023, charges have been framed against all the three accused persons under Section 20(C) read with Section 29 of the NDPS Act which deals with commercial quantity.
3. *Vide* order dated 2nd May, 2023, interim bail was granted to Sheela which has been extended from time to time and continues till date.
4. On behalf of Sheela, it has been submitted that she was apprehended with a bag containing 14.13 kg of *Ganja*, which is an intermediate quantity.

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The co-accused Vinod had a hand bag which contained 24.20 kg of *Ganja* which is a commercial quantity. It is submitted that the quantity recovered from the co-accused cannot be added to the quantity recovered from Sheela and therefore rigours of Section 37 of the NDPS Act will not apply in the present case. Reliance in this regard is placed on order of the Coordinate Bench in *Anita v. State (NCT of Delhi)* in BAIL APPLN. 1538/2022 decided on 20th July, 2022, *Anita @Kallo v. State (NCT of Delhi)* in BAIL APPLN. 957/2023 decided on 18th July, 2023 and *Mohd. Ali Nawaz v. State* in BAIL APPLN. 1305/2023 decided on 17th August, 2023.

5. It is further submitted that the application for taking samples under section 52A of the NDPS Act was filed in a delayed manner. Whereas the applicants were arrested on 20th April, 2022, the application under section 52A was filed on 28th April, 2022 after a delay of 8 days. Reliance in this regard is placed on the judgment of the Coordinate Bench in *Sarvothaman Guhan @Sarvo v. Narcotics Control Bureau* in BAIL APPLN. 2879/2022 decided on 13th September, 2023 and *Kashif v. Narcotics Control Bureau* in BAIL APPLN. 253/2023 decided on 18th May, 2023.

6. Additionally, the applicant in BAIL APPLN. 1689/2023, Iqbal seeks bail on the ground that nothing was recovered from him and he was merely an auto driver. He further submits that a search in terms of Section 50 of the NDPS Act has not been conducted on him and therefore, he should be enlarged on bail.

7. It is submitted by the counsels that the chargesheet has already been filed and there is no possibility of the applicants tampering with the evidence and therefore, the applicants should be enlarged on bail.

8. Per contra, learned APP submits that all three accused persons entered

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into a criminal conspiracy for supply of *Ganja*. As per the CDRs, all three accused were in touch with each other. Further, recoveries of contraband have been affected jointly from all the accused persons. Reliance in this regard has been placed on the judgment of the Supreme Court in ***Union Of India v. Md. Nawaz Khan*** in Criminal Appeal No.1043/2021 decided on 22nd September, 2021.

9. Learned APP submits that whether there was any delay in filing an application under section 52A of the NDPS Act would be a matter of trial and bail cannot be granted to the applicant only on account of delay. Reliance in this regard has been placed on the order passed by a Coordinate Bench in ***Sunny v. State*** in BAIL APPLN. 3054/2022 decided on 15th March, 2023.

10. With regard to compliance of Section 50 of the NDPS Act, it is submitted by the learned APP that since no drugs were recovered from the person of Iqbal, Section 50 is not applicable. Reliance in this regard is placed on the judgment of the Supreme Court in ***Kallu Khan v. State of Rajasthan***, AIR 2022 SC 50.

11. I have heard the counsels for the parties and perused the material on record.

12. The first issue to be considered in the present case is whether the quantity recovered from Sheela in the present case is commercial quantity or intermediate quantity. As per the allegations in the FIR, both the co-accused Vinod and Sheela were sitting on the backseat of the auto-rickshaw when they were nabbed. Both of them had separate bags between their legs which they were holding with one hand.

13. In ***Madan Lal v. State of Himachal Pradesh***, (2003) 7 SCC 465, the

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Supreme Court was dealing with a case where all the accused persons were travelling in a vehicle when they were nabbed and recoveries were made from them. The relevant extracts from the said judgment are set out below:-

“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.”

14. The aforesaid judgement of **Madan Lal** (Supra) was relied upon by the Supreme Court in **Md. Nawaz** (supra), a car in which the co-accused were travelling was intercepted and the search of the car revealed two polythene packets hidden in the car. The first packet contained 1.740 kg and the second packet contained 1.750 kg samples. The samples were sent for testing and tested positive for heroin. One of the co-accused sought bail on the ground that he was only a companion in the vehicle and was not in conscious possession of the contraband and provisions of Section 50 of the NDPS Act were not complied with. The Supreme Court rejected the bail application while noting that the accused was not an unknown passenger in the vehicle but was someone in close contact with the other co-accused. The relevant observations of the same are extracted below:-

“30. The following circumstances are crucial to assessing whether the High Court has correctly evaluated the application for bail,

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having regard to the provisions of Section 37:

(i) The respondent was travelling in the vehicle all the way from Dimapur in Nagaland to Rampur in Uttar Pradesh with the co-accused;

(ii) The complaint notes that the CDR analysis of the mobile number used by the respondent indicates that the respondent was in regular touch with the other accused persons who were known to him;

(iii) The quantity of contraband found in the vehicle is of a commercial quantity; and

(iv) The contraband was concealed in the vehicle in which the respondent was travelling with the co-accused.”

15. In **Anita** (supra), relied upon by the applicants, it was observed that recovery made from one co-accused cannot be added to the quantity recovered from the other co-accused. The said judgment was followed by me in **Anita @Kallo** (supra) and bail was granted to the accused in view of the fact that the quantity of heroin recovered from the applicant therein was intermediate quantity. However, in these cases, the co-accused were not travelling together in a vehicle like in the present case. Therefore reliance placed on these cases is misplaced.

16. Further, reliance placed on behalf of the applicant on **Mohd. Ali Nawaz** (Supra) is misplaced as in the said case, the Trial Court had framed charges for commission of offence involving an intermediate quantity. In the present case, charges have been framed for offences involving commercial quantity.

17. In the present case, all the accused persons were travelling together in

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the same vehicle and the total quantity of *Ganja* was 14.13 kg and 24.20 kg in two separate bags. Merely because the bag with 24.20 kg *Ganja* was between the legs of the co-accused Vinod and the bag of 14.13 kg *Ganja* was between the legs of the Sheela, it cannot be said that the recovery made from Sheela was only 14.13 kg.

18. In the Status Report filed on behalf of the State, it has been stated that there were 287 telephonic calls made between Sheela and Iqbal from the period 22nd September, 2021 to 19th April, 2022; and 19 calls between Iqbal and co-accused Vinod between 22nd February, 2022 and 4th March, 2022, which shows that all the accused persons were acting together and were in constructive and conscious possession of the total quantity of *Ganja* amounting to 38.33 kg.

19. The next issue to be considered is whether the delay of 8 days in filing an application under section 52A of the NDPS Act can by itself be a ground for grant of bail.

20. In *Kashif* (supra), a Coordinate Bench of this Court granted bail on account of delay in compliance with provisions of section 52A of the NDPS Act. However, it is to be noted that in *Kashif* (supra), the application under section 52A of the NDPS Act was filed after an inordinate delay of 51 days.

21. In *Sarvothaman Guhan* (supra), the delay in filing an application under Section 52A of the NDPS Act was only one of the reasons for the grant of bail. There were various other reasons given for the grant of bail including (i) non-recovery of commercial quantities of contraband (ii) non-compliance with provisions of sections 41 and 42 of the NDPS Act and (iii) grounds of parity.

22. A Coordinate Bench of this court in *Arvind Yadav v. Govt. of NCT of*

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Delhi in BAIL APPLN. 1416/2021 decided 6th July, 2021 relying upon the judgment of the Supreme Court in **Union of India v. Mohanlal and Anr.** (2016) 3 SCC 379, had rejected bail on the ground of non-compliance with the provisions of section 52A of the NDPS Act. Relevant paragraph of **Arvind** (Supra) is set out below-

“13. By this petition, petitioner seeks bail on the ground of noncompliance of Section 52A of the NDPS Act, however, in view of the fact that the trial does not stand vitiated by drawing the samples at the spot in the absence of a Magistrate for being sent to FSL analysis for filing a appropriate charge-sheet before the Special Court for ascertaining the nature of contraband and whether the sanctity of drawing the samples was vitiated for the non-presence of the Magistrate would be an issue to be seen during the course of trial, hence this Court finds no ground to grant bail to the petitioner on this ground.”

23. The judgment of **Arvind Yadav** (Supra) was relied upon by the Coordinate Benches in **Sunny v. State(Govt. of NCT of Delhi)** in BAIL APPLN. 3054/2022 decided on 15th March, 2023 and in **Surender Kumar v. Central Bureau of Narcotics** in BAIL APPLN. 1212/2023 decided on 22nd August, 2023 while rejecting bail on the ground of non-compliance with provisions of section 52A of the NDPS Act.

24. Now I shall deal with the submission made on behalf of Iqbal with regard to non-compliance with section 50 of the NDPS Act. A reference may be made to provisions of Section 50(1) of the NDPS Act:-

“50. (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.”

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25. As the language of the section itself suggests, the section would apply when a person himself/herself is searched. In this regard, learned APP has correctly relied upon the judgment of the Supreme Court in **Kallu Khan** (Supra), wherein it has been held that compliance of Section 50 of the NDPS Act would not apply in cases where seizure of contraband has been made from a motor vehicle. Relevant observations are set out below:-

“15. Simultaneously, the arguments advanced by the appellant regarding non compliance of Section 50 of NDPS Act is bereft of any merit because no recovery of contraband from the person of the accused has been made to which compliance of the provision of Section 50 NDPS Act has to follow mandatorily. In the present case, in the search of motor cycle at public place, the seizure of contraband was made, as revealed. Therefore, compliance of Section 50 does not attract in the present case. It is settled in the case of Vijay Singh (supra) that in the case of personal search only, the provisions of Section 50 of the Act is required to be complied with but not in the case of vehicle as in the present case, following the judgment of Surinder Kumar (supra) and Baljinder Singh (supra). Considering the facts of this Court, the argument of noncompliance of Section 50 of NDPS Act advanced by the counsel is hereby repelled.”

26. In the present case, there was no seizure from the person of Iqbal and therefore, section 50 of the NDPS Act is not attracted. The seizure was made from other co-accused who were travelling together with Iqbal in the vehicle.

27. Considering the aforesaid facts and circumstances and that the accused persons were travelling together in a vehicle and that large commercial quantities of *Ganja* have been recovered from their possession, in my considered opinion, the twin conditions as mentioned in Section 37 of

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the NDPS act are not satisfied and hence, bail cannot be granted to the applicants at this stage. Accordingly, the bail applications are dismissed.

28. Sheela, the applicant in BAIL APPLN. 1309/2023, who is on interim bail, shall surrender within one week.

29. Needless to say, the observations made on the merits of the matter are purely for the purpose of adjudicating the present applications and shall not be construed as expressions on the merits of the matter.

AMIT BANSAL, J.

OCTOBER 11, 2023

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