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

Date of Decision: 30.05.2023

+ **BAIL APPLN. 1263/2022**

ANKUSH

..... Petitioner

Through: Mr. Shyam Sunder Aggarwal,
Advocate

versus

THE STATE (GTNCT OF DELHI)

..... Respondent

Through: Mr. Manoj Pant, APP for the
State with SI Vikas Kuhar,
Special Cell, NR & STF,
Delhi

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.(ORAL)

1. The instant application under Section 439 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been filed on behalf of applicant seeking grant of regular bail in case FIR bearing No. 40/2019, registered at Police Station Special Cell, Delhi for the offences punishable under Sections 21/61/85/29 of NDPS Act, 1985.

2. Briefly stated, the facts of the present case are that on 13.03.2019 at about 5:30 AM, information had been received that one Amit indulging in drug trafficking, on direction of Mukesh and Ankush, had brought consignment of heroin for them from Bareilly, U.P. from one Sajid. Amit and Ankush had come to the Service Road, Rohini near



Ram Murti Passi Marg between 6:45 AM to 7:30 AM in a Hyundai Xcent Car No. DL1ZB5851 to deliver the consignment of heroin to them. After observing the mandatory procedures and informing the concerned ACP, Special Cell telephonically, on his direction action was taken in this regard. Inspector Vivekanand Pathak had forwarded the concerned documents to ACP, Special Cell. A raiding party led by SI Ravi Kumar and other members of the team were constituted and a trap was laid in front of Veer Apartment, Rohini. The present applicant Ankush and Amit were apprehended at about 7:15 AM on 13.03.2019. On search of bag of Ankush, two kg of heroin was recovered and two kg was recovered from Hyundai Xcent car which belonged to him. The case was registered and during interrogation, the present applicant informed that he had brought the consignment of heroin from one Sajid, resident of Bareilly through his carrier Amit. He had also disclosed that he works with Mukesh in partnership and he used to supply consignment of heroin to various persons in Delhi. They also disclosed that Mukesh used to his contacts on their mobile phones and used to give directions to them to supply heroin at their places. He also disclosed that he used to supply heroin to contacts of Mukesh in Delhi after communicating with them on their mobile phones. At the instance of present applicant, co-accused Mukesh was arrested in this case from near Max Hospital, Shalimar Bagh, Delhi who also corroborated the facts disclosed by Amit and Ankush. Co-accused Mukesh also corroborated that consignment was brought from one Sajid in Bareilly through their carrier Amit and was further supplied to various persons in Delhi. CFSL report as well as voice samples of the accused persons



were obtained. Transcript of the intercepted conversation was reduced into writing, and charge-sheet was filed.

3. Learned counsel for the applicant states that applicant is in judicial custody for more than four years and trial has not proceeded. He also points out that learned Trial Court has mentioned that it has 23 time bound matters which are going on daily basis and it is not possible for it to speedily conclude the trial in this case. He also draws attention of this Court to the discrepancy in the colour and weight of the sample. He also states that the accused/applicant has been falsely implicated in this case and no secret information was received in this case and that the manner of the seizure of the sample is not as per law. It is also stated that the trial will take time, the accused is in judicial custody for the last four years and, therefore, bail be granted.

4. Learned APP for the State, on the other hand, argues that one sample which was taken by the State has matched with the voice sample of the present applicant. He also states that the recovery of 2 kg heroin was effected from the present applicant himself and the car used in the commission of offence in question also belongs to him. He, therefore, states that even if it is observed on principle of *prima facie* view is to be taken, it cannot be concluded that there is no *prima facie* material on record to form an opinion that the applicant was not connected with the crime in question.

5. The rival contentions raised on behalf of both sides have been heard and material on record has been perused.

6. After hearing arguments and going through the case file, this Court is of the opinion that the recovery in this case of heroin i.e.



psychotropic substance is of about two kg from the present accused/applicant which is a commercial quantity, therefore, bar of Section 37 of NDPS Act is attracted in the present case. Learned counsel for the applicant, during the course of arguments, stated that even in cases of recovery of commercial quantity of psychotropic substance where embargo of Section 37 of NDPS Act has to be considered, the Court still has to examine the 'twin conditions' to grant bail even in such cases.

7. As regards the law under Section 37 is concerned, it will be apt to refer to the observations of the Hon'ble Apex Court in *Narcotics Control Bureau v. Mohit Aggarwal* 2022 SCC OnLine SC 891, which read as under:

“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 Criminal Procedure Code, 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 Criminal Procedure Code, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.

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.”

(Emphasis supplied)

8. The Hon'ble Supreme Court in case of *State of Kerala v. Rajesh* (2020) 12 SCC 122 had observed the following in relation to exercise of power under Section 37 of the Act by Courts:

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with nonobstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. 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. 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..."

9. While this Court agrees with this contention that the Court can consider the test of 'twin conditions' in a case of recovery of commercial quantity of psychotropic substance which will be considered, evaluated and adjudicated upon with caution to decide as to whether to grant or decline grant of bail.

10. In the present case, the contention of the learned counsel for the applicant is that the manner of drawing of sample and the delay of sending the same to FSL in itself creates suspicion regarding the genuineness of the case of the prosecution and cannot rule out tampering with the same. This Court, at this stage, cannot go into this aspect since it is a matter of trial and whether the sample was tampered with or not is a question of fact, law and evidence mixed together which can be tested only during trial. This Court holds this opinion in the facts of the present case particularly since the only contention regarding apprehension of tampering with sample is due to a minimal change in the colour and weight of the sample and the duration when it was drawn and sent to FSL. This Court is, however, of the opinion that this minimal change in the weight of the drawn sample and the colour cannot become ground for grant of bail, and holding that the recovery of



the psychotropic substance was under suspicion or that it was tampered with till evidence of the witnesses in this regard is recorded.

11. As far as the other plea regarding the twin test to be considered by this Court is concerned, this Court is of the opinion that in this case, there are multiple *prima facie* evidences which point out towards involvement of the accused in the offence in question. It is clear from the record that the accused was apprehended at the spot itself which is not disputed by the learned counsel for the applicant. Learned counsel for the applicant also does not dispute that the vehicle in question i.e. Hyundai Xcent car belongs to the present accused/applicant and is registered in his name from which recovery was effected. It is also a matter of record that two kg of heroin was not only recovered from the accused/applicant at the spot but further two kg of heroin was recovered at his instance from the car which is owned by him and registered in his name. There is report of FSL which supports the claim of the prosecution that substance recovered from the accused/applicant was psychotropic substance called heroin. Further, the voice samples of the accused persons were obtained and were sent for matching with their voice samples and the report confirms that it is the voice sample of the present accused/applicant. Further, adding to strong suspicion at this stage against the present accused/applicant is the fact that he was in constant touch with the co-accused persons who are suppliers and carriers of heroin. There are multiple conversations which have been put before this Court in the form of transcripts which point out towards money transactions and supply of certain products for which there was no explanation from the side of the accused. Therefore, this Court is



confronted with evidence in the form of FSL report regarding the psychotropic substance in question, CDRs pointing out towards his involvement and constant communication with the co-accused persons, his voice samples matching with the intercepted conversation which incriminates him, the car being registered in his name from where further recovery of two kgs heroin was effected, he being arrested at the spot with the psychotropic substance, the co-accused persons being arrested on his disclosure statements and instance, point out at nothing else but a strong suspicion regarding his involvement in the present case. Therefore, this Court cannot hold that there is no strong suspicion or credible or plausible grounds to believe his prima facie involvement in the present case. Therefore, based on the same, this Court also cannot hold that there is no apprehension that he may indulge in such cases in the future again.

12. The quantity recovered from the present accused/applicant is commercial in nature. Though the Court has to be conscious of the right of the accused to speedy trial and personal liberty, when the same is weighed in the weighing scale of the offence he is alleged to have committed and its larger repercussions on younger generation, their families and their future, the offence committed by him against which there is a strong suspicion has to give way to his right of personal liberty. Right to personal liberty is subject to restrictions by the State in case of criminal offences for the larger good of the public and their safety. With four kgs of heroin in his possession and the number of people he was supplying it to can also be gauged from the fact that he has made 238 calls to the co-accused persons and some other persons



regarding such transactions. The target groups of the drug supply are younger generation.

13. Though the absence of reasonable suspicion is significant in assessing as to whether the accused will be entitled to bail or not, the presence of reasonable and grave suspicion will justify rejection of bail depending on the facts of each case. The credibility of the witnesses and admissibility of evidence cannot be gone into at this stage by this Court in face of the material before it produced by the prosecution after conducting extensive investigation including electronic evidence which has been placed before this Court. The gravity of the offence is one determinative factor while deciding a bail application. The magnitude and extent of the illicit drug trade and its severe impact on the lives of the consumers also have to guide the Court regarding severity of the offence.

14. In light of the above discussion, this Court is of the opinion that taking in view the entire facts, circumstances and the material before this Court at this stage, no ground for bail is made out against the present accused/applicant.

15. Accordingly, the present application stands dismissed.

16. This Court, however, cannot overlook the right of the accused to a speedy trial. While the report was called from the learned Trial Court regarding the time taken for conducting trial, this Court was informed that the Court concerned had 23 time bound matters, some of which have to be taken up on day-to-day basis. In these circumstances, this Court requests the concerned learned District and Sessions Judge to ensure that the time bound matters are also distributed equally amongst



the presiding officers as far as possible. Learned Trial Court is also requested to expedite the trial of the matter in this case, subject to the condition that the learned APP for the State and the learned counsel for the applicant will also not take unnecessary adjournments.

17. A copy of this order be forwarded to the concerned learned District and Sessions Judge as well as to the learned Trial Court.

18. Nothing expressed hereinabove shall tantamount to an expression of opinion on merits of the case.

19. The order be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

MAY 30, 2023/ns

