



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

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Reserved on : 31.05.2023

Pronounced on : 24.07.2023

+ **BAIL APPLN. 1892/2023**

ASHA @ PASHO @ BAZI

..... Petitioner

Through: Mr. D.B. Goswami and Mr. Harinath
Ram, Advs.

versus

STATE OF NCT DELHI

..... Respondent

Through: Mr. Amit Ahlawat, APP for the State.

CORAM:

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

ORDER

RAJNISH BHATNAGAR, J.

CRL.M.A. 15380/2023

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

BAIL APPLN. 1892/2023

1. This is a petition filed by the petitioner under Section 439 Cr.P.C. seeking regular bail in case FIR No. 168/2021 under Sections 21/29 NDPS Act registered at Police Station Crime Branch, Narcotic Cell, Delhi.



2. In brief the facts of the case are that on 25.08.2021 at about 5:30 PM, one person, namely, Alam was arrested on the secret Information and from his possession 550 gm Heroin was recovered. On 26.08.2021, the accused in his confessional statement disclosed that he used to purchase smack from Azim, resident of Sunder Nagar, Delhi and Rahul, resident of Majnu Ka Tila, Delhi. Thereafter, on 28.08.2021 the accused further disclosed that besides Rahul he also used to purchase smack from Asha @ Pasho @ Bazi (petitioner herein) of Majnu Ka Tila. On 03.09.2021, when the police team was gathering information in the alleged area of Majnu Ka Tila, the petitioner and Sunil @ Rahul were located standing together in a gali in Gujarati Colony, Majnu Ka Tila, Delhi. Upon sensing the police team, both of them tried to escape and threw the small cloth bag which was in their hands but were apprehended at the spot. The said cloth bags were checked and found containing 260 gm and 10 gm heroin. As a result, the present FIR was registered against the petitioner.

3. I have heard the learned counsel for the petitioner, learned APP for the State and perused the records of this case.

4. Learned counsel for the petitioner submitted that the petitioner has been falsely implicated in this case and is in judicial custody since 03.09.2021. It is mainly urged by the Ld. counsel for the petitioner that the weight of the contraband in question as the precise weight of the contraband substance is 260 gm including the weight of the plastic bag in which it was allegedly kept. He further submitted that police officials did not comply with the Section 52-A(1) of NDPS Act which requires that the contraband substance be weighed separately from the bag or container in which it was



kept, moreover, when the contraband was weighed before the learned Metropolitan Magistrate, it's weight increased from 260 gm to 262 gm, indicating that the case property was tampered as the weight of a solid substance in brittle form may decrease as it is weighed more than once, however in this instance, the weight of the contraband is raised. He further submitted that the co-accused person, namely, Sunil has already been released on bail and the present petitioner thus, seeks parity. He further submitted that petitioner is a widow aged around 47 years and has clean past antecedents. Lastly, he submitted that the trial would take a long time to conclude and therefore, no fruitful purpose will be served by keeping the petitioner in judicial custody

5. On the other hand, Ld. APP for the State has vehemently opposed the bail application and has argued that prima facie case of conspiracy is made out and there is embargo under Section 37 of NDPS Act as the recovery of contraband i.e., 260 gm heroin from the petitioner is commercial quantity. He further submitted that no ground for parity is made out in the present case as the co-accused Sunil @ Rahul has been released on regular bail by the Ld. ASJ considering that the recovery from him is of intermediate quantity, whereas, the contraband recovered from the petitioner herein is of commercial quantity. He further submitted that keeping in view the total recovery in this case which is of 820 gm of Heroin, recovery of 260 gm heroin from the petitioner and the serious allegations against the petitioner, there is strong likelihood of him absconding if released on bail.



6. In the present case, there is recovery of 550 gm of Heroin from accused Alam, who disclosed that he used to purchase smack from the present petitioner, namely, Asha @ Pasho @ Bazi and co-accused Sunil. Thereafter, 260 gm of Heroin was recovered from the petitioner herein and 10 gm of Heroin from co-accused accused Sunil @ Rahul. It is also pertinent to note that the total quantity of contraband recovered in this case is 820 gms of Heroin which falls under the commercial quantity and embargo of Section 37 of the NDPS Act is applicable.

7. The scheme of Section 37 NDPS Act reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the Cr.P.C., but is also subject to the limitation placed by Section 37 which commences with non-obstante 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.

8. The expression "*reasonable grounds*" means something more than prima facie grounds. It contemplates substantially 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.



9. Ld. counsel for the petitioner has relied upon Section 52-A of the NDPS Act. For further adjudication it is necessary to look into Section 52-A of the NDPS Act, which reads as follows:

“52 A. Disposal of seized narcotic drugs and psychotropic substances:-

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of

(a) certifying the correctness of the inventory so prepared; or

(b) taking in the presence of such Magistrate, photographs of such drugs, substances or conveyances and certifying such photographs as true; or



(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

10. By this petition, the petitioner seeks bail on the ground of non-compliance of Section 52-A of NDPS Act which requires that the contraband substance be weighed separately from the bag or container in which it was kept, however, the same does not come to the rescue of the petitioner as though there is no dispute with regard to the said proposition of law, but given the facts and circumstances of the present case, even if it is considered that separate weighment was not done by the police officials, it hardly makes any difference in the quantity of the contraband recovered from the possession of the petitioner which is 260 gm of Heroin as even if the weight of the plastic thaili/ bag is deducted from it, the same would still be commercial quantity considering that a plastic thaili or bag will be weighing very little.

11. Ld. counsel for the petitioner has further contended that when the contraband was weighed before the learned Metropolitan Magistrate, it's weight increased from 260 gm to 262 gm indicating that the case property was tampered, does not cut much ice as these are issues which do not go to the root of the matter warranting grant of bail and can be looked into at the



time of trial as one doesn't know as to how and in what condition the contraband was weighed in both situations. Furthermore, the present petitioner is not entitled to parity with co-accused Sunil @ Rahul as the co-accused has been released on regular bail considering that the contraband recovered from him is intermediate quantity whereas the contraband recovered from the petitioner herein is commercial quantity.

12. Therefore, looking into the entire circumstances of the present case and the fact that the total recovery in this case is of 820 gm of Heroin out of which 260 gm of Heroin which is commercial quantity has been recovered from the present petitioner, there are no reasonable grounds for believing that the petitioner is not guilty of the offence. That being the case, the limitations prescribed for the grant of bail under Section 37 NDPS Act are not satisfied and thus, no benefit can be given to him at this stage. The bail application is, therefore, dismissed.

13. Nothing stated hereinabove shall tantamount to the expression of any opinion on the merits of this case.

RAJNISH BHATNAGAR, J

JULY 24, 2023/