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

% Judgment delivered on: 12.07.2023

+ BAIL APPLN. 2468/2022

KINGSLEY OFOBIKE

..... Petitioner

Through: Mr. Shivendra Singh, Mr.
Bikram Dwivedi, Adv.

versus

NARCOTICS CONTROL BUREAU

..... Respondent

Through: Mr. Subhash Bansal, Sr. SC
with Mr. Shashwat Bansal,
Adv.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J. (ORAL)

1. The present petition has been filed under Section 439 Cr.P.C. seeking regular bail in Sessions Case No.280/2021 arising out of Case No.VIII/21/DZU/2021 under Sections 8(c), 21(c), 23(c) and Section 29 of NDPS Act registered by Narcotics Control Bureau (DZU).

2. The brief facts of the case as borne out from the complaint filed by the respondent/NCB under Section 36A of the NDPS Act are that on the basis of secret information co-accused Hikamtuallah Hakimi, an Afghan national, was apprehended at IGI Airport and 930 gm, 940 gm and 1.32 kg of heroin was recovered from him. On preliminary enquiry, he disclosed that the same is to be delivered to another



Afghan national, namely, Mohd. Nasar. Thereafter, Mohd. Nasar who came to receive the trap delivery was apprehended. From the house of Mohd. Nasar, 90 gm of powder which was used to be mixed in heroin was recovered. From another almirah, same type of powder weighing 03 kg was recovered. Mohd. Nasar disclosed that the heroin which was to be delivered by co-accused Hikamtuallah Hakimi was to be further delivered to Chibueze and the petitioner/Kingsley Ofobike who are partners in illegal business of selling and purchasing of narcotic drugs and psychotropic substances. Thereafter, the petitioner/Kingsley Ofobike was apprehended but no contraband was recovered from him or from his residence. However, the petitioner's mobile was taken into possession. The print out of screen shots of the petitioner's mobile were taken to establish that he used his mobile for dealing in drugs.

3. The learned counsel for the petitioner submits that the petitioner has been arrested only on the basis of the disclosure statement of co-accused namely, Mohd. Nasar. He submits that the disclosure statement recorded under Section 67 of the NDPS Act is inadmissible in evidence. He further submits that no recovery of contraband has been made from the petitioner. He submits that the recovery of contraband is from co-accused Hikamtuallah Hakimi. He further submits that another piece of incriminating material which has been relied upon in the complaint filed by the respondent under Section 36A of the NDPS Act, is the print out of screenshots of WhatsApp chats allegedly taken from the mobile of the petitioner. He submits that the said WhatsApp chats do not connect the petitioner to the



recovery made from the co-accused persons. He also relies on the decision of the Hon'ble Supreme Court in ***Bharat Chaudhary Vs. Union of India***, 2021 SCC OnLine Sc 1235 to contend that print outs of WhatsApp messages were not treated as sufficient material to establish a live link between the petitioner in that case with other co-accused at the stage of considering the bail application under Section 439 Cr.P.C.

4. The bail is opposed by Mr. Subhash Bansal, Senior Standing Counsel for the respondent/NCB on the ground that the offence is of serious nature and the quantity of the contraband recovered from the co-accused is commercial, therefore, the petitioner has to satisfy the twin conditions as mentioned in Section 37 of the NDPS Act before being released on bail. He invites attention of the Court to Annexure 42, which is part of the Criminal Complaint filed by the respondent/NCB. The said Annexure is a response given by the Field Agency of MHA to the respondent that the arrival details of co-accused Hikamtuallah Hakimi and Mohd. Nasar have been traced but the details of the arrival of petitioner in the country are not available. He contends that the petitioner is a foreign national, and if enlarged on bail, he may abscond and flee from justice and may not be available during trial, he therefore urges that the bail application of the petitioner be rejected.

5. To controvert the submission of the learned counsel for the respondents, the learned counsel for the petitioner refers to the decision of the Supreme Court in ***Supreme Court Legal Aid Committee representing Undertrial Prisoners Vs. Union of India &***



Ors., (1994) 6 SCC 731 to submit that the condition laid down by the Supreme Court *apropos* grant of bail under the NDPS Act, 1985 to an undertrial who is a foreigner could also be followed *qua* the present petitioner to address the apprehension of the respondent/NCB that the petitioner, who is a foreign national, may flee from justice if enlarged on bail. The relevant condition reads as under:-

(iv) *In the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner accused belongs that the said accused shall not leave the country and shall appear before the Special Court as and when required.*

6. I have heard the learned counsel for the petitioner as well as learned Senior Standing Counsel for the respondent/NCB and have perused the record.

7. Insofar as incriminating material in the form of WhatsApp chats which have allegedly been retrieved from the mobile of the petitioner are concerned, the probative value of the same shall be tested during trial. At this stage of considering the bail application of the petitioner, the same cannot be treated as sufficient material to establish a link between the petitioner and other co-accused from whom the contraband has been recovered, more particularly, when the recovery of heroin is from the co-accused Hikamtuallah Hakimi. Further, it is not the case of the respondent/NCB that the said accused was in contact with the petitioner.

8. It is also not the case of the respondent that recovery of



contraband has been made from the petitioner. The petitioner has been implicated only on the basis of the disclosure statement made by the co-accused Mohd. Nasar under Section 67 of the NDPS Act, which has been held to be inadmissible in evidence by the Hon'ble Supreme Court in *Toofan Singh Vs. State of Tamilnadu*, (2021) 4 SCC 1. The relevant paragraphs of the judgment read as under:-

“155. Thus, to arrive at the conclusion that a confessional statement made before an officer designated under Section 42 or Section 53 can be the basis to convict a person under the NDPS Act, without any non obstante clause doing away with Section 25 of the Evidence Act, and without any safeguards, would be a direct infringement of the constitutional guarantees contained in Articles 14, 20(3) and 21 of the Constitution of India.

156. The judgment in Kanhaiyalal then goes on to follow Raj Kumar Karwal in paras 44 and 45. For the reasons stated by us hereinabove, both these judgments do not state the law correctly, and are thus overruled by us. Other judgments that expressly refer to and rely upon these judgments, or upon the principles laid down by these judgments, also stand overruled for the reasons given by us.

157. On the other hand, for the reasons given by us in this judgment, the judgments or Noor Aga and Nirmal Singh Pehlwan v. Inspector, Customs are correct in law.

158. We answer the reference by stating:

158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the



provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

[Emphasis supplied]

9. A Coordinate Bench of this Court in ***Phundreimayum Yas Khan Vs. State (GNCT of Delhi)***, 2023 SCC OnLine Del 135, has held that the disclosure statement of co-accused is *per se* not admissible without there being any corroboration. The relevant part of the decision reads as under:-

“24. The case of the prosecution, in so far as the applicant is concerned, is circumstantial, i.e. based solely on disclosure statement of the co-accused Sayed Javed Hussain which is per se not admissible without there being any corroboration. The prosecution has not been able to establish any connection between the subject offence and the location/CDRs of the accused persons, where the applicant is alleged to be present at the time when the contraband was collected by Sayed Javed Hussain. Merely because the applicant had been having frequent calls with the co-accused, would not be sufficient to hold that applicant is guilty of the subject offence.”

10. Though the recovery of contraband (heroin) from the co-accused Hikamtullah Hakimi is of commercial quantity but since no recovery has been made from the petitioner herein and there is no material to link the said commercial quantity recovered from the co-accused Hikamtullah Hakimi to the petitioner, except the statement



of co-accused Mohd. Nasar, which is *per se* not admissible, the rigours of Section 37 of the NDPS Act do not apply.¹

11. That apart, on the basis of so-called incriminating material relied upon by the respondent/NCB against the petitioner, there is a reasonable ground to believe that the accused is not guilty of the alleged offence. Further, nothing has been pointed out to show that the petitioner has been involved in any other case. The antecedents of the petitioner being clean, he is not likely to commit any offence while on bail.

12. In view of the above, this Court is of the opinion that the petitioner has made out a case for grant of regular bail. Accordingly, the petitioner is admitted to regular bail, subject to his furnishing personal bond in the sum of Rs.1,00,000/- and a surety bond of the like amount subject to the satisfaction of the learned Special Judge. Considering that the petitioner is a foreign national and regard being had to the apprehension expressed by the learned senior standing counsel for the respondent, the grant of bail to the petitioner shall be further subject to the following conditions:-

- i. The petitioner shall furnish a valid visa in his favour. In case, the petitioner does not have a valid visa, he shall be at liberty to apply for the visa and till the time he gets the visa, he shall be kept in the detention/deportation center.
- ii. The petitioner will not leave the country without prior permission of the concerned Trial court and will deposit his passport with the Trial Court. The concerned Trial Court shall

¹ *Phudreimayum Yas Khan Vs. State (GNCT of Delhi)*, 2023 SCC OnLine Del 135 (paragraph 23)



also requisition a certificate of assurance from the concerned Embassy/High Commission of the country to which the petitioner belongs that the petitioner shall not leave the country and shall appear before the Trial Court as and when required;

- iii. The petitioner shall provide his mobile phone number to the Investigating Officer (IO) concerned - at the time of release, which shall be kept in working condition at all times, the petitioner shall not switch-off, or change the same without prior intimation to the IO concerned, during the period of bail. The petitioner shall “drop-a-pin” on location app to indicate his location;
- iv. The petitioner shall provide his residential address to the Investigating Officer (IO) concerned - at the time of release. The petitioner shall not change the same without prior intimation to the IO concerned, during the period of bail. The IO shall provide his number to the learned counsel for the petitioner for being shared with the petitioner;
- v. The petitioner shall mark his attendance with the SHO/IO concerned and keep him informed of his whereabouts every Friday between 11:00 A.M. to 12 noon and between 5:00 P.M. to 6:00 P.M. through video call and if video call is not possible, he may send SMS *apropos* his whereabouts;
- vi. The petitioner shall not leave the NCT of Delhi without prior permission of the concerned Trial Court;
- vii. The petitioner shall not indulge in any criminal activity during bail period.



13. The petition stands disposed of.
14. Copy of the order be forwarded to the concerned Jail Superintendent for necessary information and compliance.
15. Order be uploaded on the website of this Court.

JULY 12, 2023
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VIKAS MAHAJAN, J

