

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

% Reserved on: 12th April, 2023

Pronounced on: 25th April, 2023

+ BAIL APPLN. 3425/2022

GALIV HUSSAIN

..... Petitioner

Through: Mr. Irfan Firdous, Mr. Monish Ali Khan, Mr. Abhinav, Mr. Amit Rana, Ms. Aleena, Ms. Varalika Singh Mr. Ziaul Ansari, Mr. Jatin Solanki and Mr. Hasan Raza Khan, Advocates.

versus

STATE GNCT OF DELHI

..... Respondent

Through: Ms. Richa Dhawan, APP for the State with SI Vikas Kumar, Special Staff, East District.

CORAM:

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

1. By this application, the petitioner seeks regular bail in FIR No.142/2021 PS Kalyanpuri under Sections 21/29 of the NDPS Act. The petitioner has been in judicial custody since 17th April, 2021.

2. As per the case of the prosecution, on 16th April, 2021 around 9.30 pm on the basis of secret information the Office of the Special Staff got approval to conduct a raid and reached Block-20, Kalyanpuri at about 10:35 pm. At 10:45 pm, a TSR was spotted outside the street and two boys

came out of the TSR who were identified, by the secret informer, as the petitioner and Nadeem. Petitioner and Nadeem reached Rais' house and knocked on the door. The door was opened by Rais who was identified by the secret informer. Nadeem handed over a polythene bag to Rais who put the packet in the right pocket of his cargo pants and started talking to each other. ASI Pramod along with the raiding party apprehended all the three accused, namely, Rais, Nadeem and the petitioner and notice under Section 50 of the NDPS Act was served on them. At 11.10 pm, the ACP reached the spot and a personal search of all three accused was conducted. A polythene packet was recovered from the cargo pants worn by Rais out of which a brown colour powder was found which was tested with Field Testing Kit and the result was confirmed as "*smack*". On weighing by the weighing machine, its net weight appeared to be 300 gm which was a commercial quantity. Two samples were taken and seized through the seizure memo. A search of Nadeem and the petitioner was conducted but nothing was recovered. During investigation, it was apparently revealed through the disclosures by the accused that petitioner had joined from Anand Vihar Bus Stand.

3. The petitioner has contended that since there is no recovery from the petitioner and the recovery has been from Rais, the petitioner cannot be implicated for conscious possession. Further, no independent witness had joined and even the secret informant has not been examined.

4. The learned counsel for the petitioner, in support of the petition, contended that *firstly*, there was absence of conscious possession; *secondly*, the petitioner was a mere companion of the main accused and cannot be held to be an accomplice; *thirdly*, there was no *mens rea* which could be established; *fourthly*, the petitioner has already been in custody for a

prolonged period of time and his fundamental rights under Article 21 were violated.

5. The essential thrust of the petitioner's contention is that the petitioner merely accompanied Nadeem who is alleged to have handed over the packet of smack to Rais and even as per the investigation, *albeit* through a disclosure (which is not admissible), the petitioner had joined Nadeem at Anand Vihar Bus Stand. Reliance is placed on ***Union of India v. State of Gujarat***, 2022 SCC OnLine Guj 1533 where the Gujarat High Court based on a similar fact differentiates between the role of a mere informal companion to that of an incriminating role of an accomplice under the NDPS Act and acquits the accused who was merely the wife of the other co-accused. Further reliance is placed on the judgment of this Court in ***Dilbagh Singh v. D.R.I.***, 2009 SCC OnLine Del 1424 where the petitioner/accused was the driver and merely accompanied the other co-accused and was released on bail. It was held that no *prima facie* case could be made out against such an accused, let alone bring a case of conscious possession. The confessional statement under Section 67 was not substantial piece of evidence and the accused did not even come into physical contact with the contraband. It is contended that in this matter, the petitioner also never came in physical contact with the contraband and was merely standing alongside him when the arrest was made. Reliance is placed on the decision of this Court in ***Kamaljeet Singh v. H.K. Pandey***, 2005 (3) JCC 220 where it has been held adverting to Section 35 of the NDPS Act that the accused was not in conscious possession of the contraband and therefore, *prima facie* not guilty of the offence as charged and hence released on bail. It has been further contended that no CDR was ever procured or preserved and no evidence has been brought on record by the prosecution to indicate that petitioner had any information about the

contraband or was a beneficiary in the transaction. Further, there is no previous involvement of the petitioner and he has clean antecedents. The learned counsel for the petitioner has distinguished the decision of ***Union of India v. Nawaz Khan***, (2021) 10 SCC 100 relied upon by the Ld. APP and submitted that reasonable grounds to believe under Section 37 would be based upon the nature of facts and circumstances. Some relevant extracts of the decisions cited by the petitioner are extracted below for ready reference:

- a. In ***Union of India v. State of Gujarat***, 2022 SCC OnLine Guj 1533 it was held as under:

“8. We have extensively heard learned advocate Mr. Pandya for the applicant. The testimony of PW-2-Mr. Sajansing Dhisaramsing, Intelligence Officer, Serving with NCB Office, Ahmedabad whose deposition recorded below Exhibit-32 establishes that accused No 3-Imtekhhab was found with contraband Charas contained in a bag he hold. It is found and noticed by us that accused Nos. 1 and 2 did not hold the bag and neither anything incriminating was found from their person. On scrutiny of evidence, the learned trial Judge found that respondent No. 2 was merely a companion of her husband-accused No. 1-Shaikh Mohammed Rafik and she was not an accomplice in the crime. The submissions of learned Advocate Mr. Pandya that all the three accused were travelling together and not strangers to one other in their tour from Ahmedabad to Jammu and back and therefore the culpability presumption of Section 35 of NDPS Act comes into play and burden shifts upon respondent No. 2 to prove that she was not aware or had any knowledge to the fact that the bag contains the contraband Charas. No doubt, the moment the person had intention or knowledge of the fact, he or she is said to have culpable intention. In a case on hand, accused No. 3-Imtekhhab was holding the bag with key. As deposed by PW 2, he did not part with the key and therefore the Officer broke open the lock

and thus respondent No. 2 being companion of her husband and except for her presence as her husband's companion right from the receipt of information, her conscious possession as understood under the law does not surface even reasonable doubt. No any call details prior to and after the incident is placed on record between accused No. 3-lmtekhhab and respondent No. 2.

9. Thus, the learned trial Judge on appraisal of entire evidence and so also here no doubt of a reasonable degree can be entertained that she had real knowledge of the nature of the substance locked in the bag and key in possession of accused No. 3.”

(emphasis added)

b. In ***Dilbagh Singh v. D.R.I.***, 2009 SCC OnLine Del 1424 it was held as under:

“9. The submissions have been considered. The case of the DRI is that the petitioner was driving the Tata Indica car which was parked at the aforementioned place, i.e., the main entrance road of H-3 Block, Vikas Puri. The petitioner admittedly was driving the said car but remained in the front seat while co-accused Williams was in the rear seat. The facts as narrated by the prosecution show that Rohit Goel who drove the Opel Corsa car dropped the two black coloured pollythene carry bags in the rear seat of the Tata Indica car. The parcels therefore were not delivered to the petitioner who was sitting on the front seat of the Tata Indica car. It is co-accused Williams who was in the rear seat. In the circumstances, it cannot be said that the petitioner was in possession of the drug in question and clearly he was not in conscious possession thereof. Soon thereafter the team of DRI officers intercepted both cars. The Tata Indica car was stopped even before it moved. Thereafter, the petitioner could not be said to have even transported the drug.

10. The wording of Section 21 NDPS indicates that the offence gets attracted only if at least one of the contingencies mentioned therein is attracted. On the

facts of the present case, counsel for the DRI was only seeking to bring the present case under the offence of being in possession of a narcotic drug. Clearly, on the facts as narrated the petitioner was not in possession of the narcotic drug. The petitioner was not in any physical contact with the bags containing the drug in question. It was his co-accused passenger, Williams, who was sitting in the rear seat. The two polythene bags containing 14.871 kgs of heroin were dropped off on the rear seat. The Petitioner therefore could not have been proceeded against for the offences under Section 21 or Section 29 of the NDPS Act.”

(emphasis added)

c. **Kamaljeet Singh v. H.K. Pandey**, 2005 (3) JCC 220 held as under:

“14. Thus, the accused may discharge the burden cast upon him by virtue of the presumptions raised under Section 35 and Section 54 of the NDPS Act by either relying on the materials available in the prosecution evidence itself or elicit answers in cross-examination from prosecution witnesses to dispell the doubts or he may adduce evidence of his own. The learned counsel for the petitioner submitted in this context that the facts of the present case are similar to that in the case of Abdul Rashid Ibrahim Mansuri(supra), where the appellant had been acquitted for not being in conscious possession of the offending articles. He further submitted that the only piece of evidence that has been put up by the prosecution in the present case is the alleged statement of the petitioner under Section 67 of the NDPS Act. He submits that even if the statement is taken to be entirely correct, firstly, it is not a confessional statement and, secondly, it clearly discloses that the petitioner did not have conscious possession of the contraband. In fact, the learned counsel for the petitioner also submitted that the statement of Virender Sharma as mentioned in the complaint itself also does not disclose any knowledge about the recovered substance. Therefore, it is his submission that on the basis of the very materials which

have been put forth by the prosecution, it is apparent that the petitioner was not in conscious possession of the offending articles.

15. Of course, these are all materials which will have to be gone into at the stage of trial. However, when an application for bail is under the consideration of this court and the rigours of Section 37 of the NDPS Act are attracted, it is incumbent upon this court to examine as to whether there exist or do not exist reasonable grounds for believing that the petitioner is guilty of the offence charged. This consideration has to be on the basis of the materials available on the date on which the application for bail is considered. Moreover, the satisfaction recorded by the court at this stage is only a prima facie view and would not affect the consideration of the case by the trial court.

16. Looking at the entire factual material, as indicated above, it does appear that apart from the so-called confessional statement and the admission that one packet was recovered from under the seat on which the petitioner was seated in the said Maruti 800 vehicle, there is no other evidence available with the prosecution. The so-called confessional statement, at this stage, does not appear to me to be a confession at all. In fact, the statement discloses that the petitioner did not know of the contents of the packet.

17. This being the case, it does appear that the petitioner was not in conscious possession of the said contraband. Therefore, I am satisfied that there are reasonable grounds for believing that the petitioner is not guilty of the offences for which he has been charged. As regards the question as to whether he is likely to commit any offence while on bail, no circumstance has been brought to my notice which would indicate that there is such a likelihood. It is also not the case of the State that the petitioner has been involved in any other NDPS related cases. In this view of the matter, the petitioner is directed to be released on bail on furnishing a personal bond in the sum of Rs.50,000/-

with two sureties of the like amount to the satisfaction of the concerned trial court.”

(emphasis added)

6. It was submitted that for the last two years of incarceration no substantial material was provided by the prosecution to corroborate culpable mind, conscious possession or knowledge about contraband other than his mere presence at the crime scene. It was stated that the family of the petitioner was gravely prejudiced due to his prolonged custody and the social stigma attached.

7. In view of the above facts and circumstances, this Court is of the considered opinion that there are reasonable grounds for believing that the petitioner is not guilty of the offence and further there is no material on record to show that he was likely to commit any offence while on bail. There is no other involvement which has been brought to the notice of this Court and except for the fact that the petitioner was standing aside Nadeem when he transferred the contraband to Rais and no recovery has been made from the petitioner. The petitioner has been incarcerated for a period of two years now.

8. Reference is also made to the recent decision of the Hon'ble Supreme Court in *Mohd. Muslim v. State (NCT of Delhi)*, 2023 SCC OnLine SC 352 where the Hon'ble Supreme Court has stated in a matter relating to NDPS:

“20. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within

constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

21. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India v. Rattan Malik¹⁹). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.

(emphasis added)

9. In light of the above, and that the trial in the matter is likely to take some time, and it would not be prudent to keep the petitioner behind bars for an indefinite period, this Court finds it to be a fit case for grant of bail to the petitioner. Consequently, the petitioner is directed to be released on bail on furnishing a personal bond in the sum of Rs. 50,000/- with one surety of the like amount subject to the satisfaction of the Ld. Trial Court, further subject to the following conditions:

- i. Petitioner will not leave the country without prior permission of the Court.

- ii. Petitioner shall provide permanent address to the Ld. Trial Court. The petitioner shall intimate the Court by way of an affidavit and to the IO regarding any change in residential address.
- iii. Petitioner shall appear before the Court as and when the matter is taken up for hearing.
- iv. Petitioner shall join investigation as and when called by the IO concerned.
- v. Petitioner shall provide all mobile numbers to the IO concerned which shall be kept in working condition at all times and shall not switch off or change the mobile number without prior intimation to the IO concerned. The mobile location be kept on at all times.
- vi. Petitioner shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses, the complainant/victim or any member of the complainant/victim's family or tamper with the evidence of the case.

Needless to state, any observation touching the merits of the case is purely for the purposes of deciding the question of grant of bail and shall not be construed as an expression on merits of the matter.

10. Copy of the order be sent to the Jail Superintendent for information and necessary compliance.

11. Accordingly, the application is disposed of.

12. Order be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

APRIL 25, 2023/MK

Signature Not Verified

Digitally Signed
By: MANISH KUMAR
Signing Date: 26.04.2023
10:08:45

BAIL APPLN. 3425/2022