Uday S. Jagtap

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 3115 OF 2022

Krishna Murari Prasad S/o
Late Rajendra Prasad .. Applicant

Vs.
Union of India & Anr. .. Respondents

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Ms. Ashwini Achari a/w Taraq Sayed i/b Advait Tamhankar for the applicant
Mr. S.R. Agarkar, APP for the respondent – State
Mr. Shreeram Shirsat, Special P.P. a/w Tanvi Mate and Shekhar Mane for the respondent – NCB

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CORAM : PRITHVIRAJ K. CHAVAN, J.

RESERVED ON : 12th FEBRUARY, 2024.
PRONOUNCED ON : 14th FEBRUARY 2024.

P.C.

1. This is an application for bail.

2. The applicant has been arrested by the respondent on 04.11.2021 in connection with recovery of alleged 700 grams of Heroin from an imported consignment having AWB No.4870807340 under a panchanama dated 01.11.2021.

3. Briefly stated the facts are that pursuant to a secrete

information by the Officer of the respondent on 30.10.2021 to the effect that a person namely Murray Veela resident of 54 Main Avenue, Ferndale, Randburg, Johannesburg, 2001, South Africa had booked a substantial quantity of Heroin through courier parcel bearing Way Bill Number 4870807340 dated 29.10.2021 to the applicant which arrived by Flight EK 0504 dated 01.11.2021 from Dubai to Mumbai.

4. Having obtained necessary authorizations, the respondent's officials proceeded to the Airport and intercepted the consignment under panchanama dated 01.11.2021. Upon opening the said parcel in the presence of panch witnesses, they found 700 grams of Heroin. Subsequently, they approached the applicant and recorded his voluntary statement under Section 67 of the NDPS Act on 03.11.2021. Admittedly, during his voluntary statement which was exculpatory, the applicant appears to have denied any connection with the contraband alleged to have been booked from Johannesburg in his name. The respondent had also seized certain documents in the form of Memorandum of Understanding (MOU), which was required to be signed by the applicant. The panchanama dated 01.11.2021 further reveals following statement.

> *"Thereafter Sh Sudhakar Shinde JIO opened the above parcel and it contained a black coloured leather zip file folder with a label "Terry Pierce and Associates Law Firm". It had address as "140 West St. Sandown, Sandton 2196, Johannesburg, Sought Africa, Tel: +27 11 481 3469". The Black leather zipfile folder was then opened and three white envelopes were found inside and all of them were addressed to "Terry Pierce and Associates, USA Office, 450 Houston TX, 77046, USA". These envelopes were opened and they were found to contain only papers and nothing incriminating was found in any of the envelopes. After removing the envelopes, Sh Sudhakar Shinde JIO observed that the black leather zipfile folder was heavier than a normal zipfile folder. He probed the leather zipfile folder using his hands and expressed his suspicion that some contraband is hidden in the zipfile folder. Then he proceeded to tear the edges of the zipfile folder using a blade and found that there is some sort of concealment among the cardboards. He removed two sheets of unknown material wrapped in black carbon paper having label 'NEXX' which were hidden between the cardboard sheets of the front and back cover of the zipfile folder. Then he proceeded to remove the carbon paper covering one of the sheets and it was found that it was wrapped inside using brown scotch tape. Then he proceeded to remove the brown scotch tape and found a transparent polythene pack containing off-white coloured powder. The other sheet was also opened this way to find transparent polythene pack containing off-white powder."*

5. It is alleged by the prosecution that during the statement of the applicant, it transpired that he had received an e-mail from the investor for 15 million US$ foreign direct investment in India, where the applicant was asked to sign the said MOU for 100% foreign direct investment before fund transfer in India legally through banking system and for getting contact number of his

lawyer for MOU documents namely Mr. Edward P. Anderson, High Court Lawyer in South Africa. The Investigating Agency submitted that the investigation is still in progress and, therefore, sought liberty of the Special Court to file a supplementary complaint in future against the applicant and other persons named by him in his statement as well as other known and unknown persons suspected to be involved directly or indirectly in the criminal conspiracy.

6. I heard learned Counsel for the applicant and the learned APP at length.

7. It is an admitted fact that the alleged contraband has not been seized directly from the possession of the applicant and, therefore, he cannot be said to be in conscious possession of the same. Merely because the consignment was addressed to him, *prima facie*, does not mean that he had sufficient *mens rea* to know the contents of the consignment. As already stated, he had not confessed anything before the respondent. Interestingly, upon being asked to the learned Special Public Prosecutor as to whether any investigation had been conducted by the respondent to unearth the complicity and role of Edward P. Anderson, who alleged to have connected

and entered into a conspiracy with the applicant, he replies that there is no investigation. This itself creates a cloud of suspicion upon the whole case of the prosecution.

8. Merely because the applicant had received an e-mail from one lawyer by name Barrister Hans Hugo regarding 15 million US$ fund investment in India and the applicant's reply to the same in positive does not *ipso facto* mean that the applicant was involved in illicit trafficking of the contraband *sans* any other acceptable material. It is not the case of the respondent that there is some shred of evidence in the MOU, which was allegedly required to be signed by the applicant as regards nature of business, much less, business of illicit trafficking of drugs by his counterparts from the foreign country. Even the documents alleged to have been recovered during the search and seizure does not indicate anything incriminating against the applicant. It is surprising as to why the respondent had not arraigned either Mr. Andrew P. Anderson or Mr. Muray Vella as co-accused in its complaint. It appears that no attempt has been made by the respondent to trace Mr. Andrew P. Anderson and Mr. Muray Vella who alleged to have sent the parcel to the applicant. This is inspite of the fact of furnishing details of

those persons by the applicant to the respondent. The investigation *prima facie* appears to be lopsided. Learned Counsel for the applicant has, therefore, rightly placed reliance on a judgment of this Court in case of **Daisy Angus Vs. Union of India** (Criminal Appeal No.822 of 2006) held in para 16 as follows:-

> *"In Palvinder Kaur Vs. The State of Punjab, AIR 1952 Supreme Court 354, the Supreme Court observed as follows in paragraph 16:-*
> *(16) The statement read as a whole is of an exculpatory character. It does not suggest or prove the commission of any offence under the Penal Code by any one. It not only exculpates her from the commission of an offence but also exculpates Mohinderpal. It states that the death of Jaspal was accidental. The statement does not amount to a confession and is thus inadmissible in evidence. It was observed by their Lordships of the Privy Council in Pakala Narayanaswami V. Emperor, AIR 1939 PC 47, that the word "confession" as used in the Evidence Act cannot be construed as meaning a statement by an accused suggesting the inference that he committed the crime. A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession. A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact, which if true, would negative the offence alleged to be confessed..........*
> *In view of this legal position if statement of the appellant before the Customs officer is read as a whole, it is impossible to come to a conclusion that it was inculpatory statement or confession about the commission of crime about the narcotic drug. Infact, she had consistently tried to explain that she was not aware about the contents of the false bottom of the suitcase and she had simply kept her belongings in the suitcase without any knowledge about Hashish in it."*

9. The learned Counsel has also invited my attention to the fact that there is non-compliance of Section 52A of the NDPS Act which appears to have been done almost after two months, which is in violation of the guidelines of the Supreme Court in the case of **Union of India Vs. Mohanlal & Anr. (2016) 3 SCC 379**.

10. It is difficult to accept the argument of the learned Special Public Prosecutor that the applicant had full knowledge of the alleged consignment addressed to him from South Africa. Learned Special Public Prosecutor is unable to answer as to why no investigation has been carried out or attempt made to procure the presence of either Mr. Andrew P. Anderson or Muray Vella, who alleged to have booked the consignment from South Africa, which reached this country through a courier parcel. Despite having knowledge of the details of the aforementioned foreigners in the month of November 2021, nothing has been shown as to whether any communication has been addressed to the law enforcement agencies of Johannesburg, South Africa and Dubai in order to unearth the truth. Additionally, no satisfactory explanation has been tendered as to how the applicant can be said to be in conscious

possession of the contraband, when admittedly the consignment did not reach his address, much less, acceptance and opening of the said consignment by him.

11. Considering the aforesaid facts and also looking to the nature of evidence placed on record, it would not be desirable to continue the detention of the applicant with no chance of the trial being concluded in near future. There is also no shred of any material indicating any conspiracy alleged to have been hatched by the applicant with the aforesaid foreigners. It is even difficult to accept the argument of the learned Special Public Prosecutor that photographs of contraband have been recovered from the mobile phone of the applicant, which argument merits to be laughed at and wept over at one and the same time. How a contraband can be ascertained on the basis of some photographs on a mobile phone ?

12. It appears that the respondent is more than 60 years of age with roots in the society. It is not the case of the prosecution that applicant has antecedents to his discredit and that he is a flight risk.

13. Having considered the entire circumstances and facts, *prima facie*, I am satisfied that there are reasonable grounds for believing

the applicant not guilty of such offences and is not likely to commit any offence while on bail. As already discussed hereinabove, there are substantial probable causes for believing that the applicant is not guilty of the alleged offences.

14. The findings recorded hereinabove *qua* the applicant are not in the context of finding him not guilty of the offence or whether the applicant has in fact committed or not committed any offence under the NDPS Act. The entire exercise is only for the purpose of considering as to whether he can be enlarged on bail or otherwise.

15. As such I am persuaded to release the applicant on bail by imposing few conditions, which are as follows :-

ORDER

(a) The application is allowed.

(b) The applicant be released on executing a P.R. bond in the sum of Rs.1,00,000/- (Rupees One lac) with one or two sureties in the like amount to the satisfaction of the Special Court in Special Case No. 461 of 2022 for the offence punishable under Sections 8(c) r/w 21(c), 23(c), 28 and 29 of the NDPS Act.

(c) The applicant shall not leave the jurisdiction of the Special Court until conclusion of the trial.

(d) The applicant shall report the office of the NCB, Mumbai on first Friday of every month between 10.00 a.m. to 1.00 p.m. till the conclusion of the trial.

(e) The applicant shall not tamper with the evidence or attempt to influence or contact any of the witnesses or persons concerned with this case.

(f) The applicant shall furnish his latest place of residence and contact details forthwith to the respondent and the Special Court. In case of change of residential address or cell number (contact details), the same shall be forthwith informed to the respondent as well as the Special Court.

(g) The applicant shall attend the trial scrupulously unless exempted.

(h) In case of two consecutive defaults either in attending the respondent or the trial Court or in case of breach of any of the aforesaid conditions, the prosecution shall be at liberty to seek cancellation of his bail.

(i) The applicant shall surrender his passport with the respondent forthwith.

16. The application stand disposed of in the aforesaid terms.

(PRITHVIRAJ K. CHAVAN, J.)