



2024:DHC:4847



IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on : 01.07.2024

+ **BAIL APPLN. 324/2024 & CRL.M.A. 2805/2024**

PANKAJ RAI

..... Applicant

versus

STATE GOVT. OF NCT OF DELHI Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Aditya Aggarwal, Mr. Naveen Panwar and Ms. Kajol Garg, Advs.

For the Respondent : Mr. Sanjeev Bhandari, ASC for the State with Ms. Anvita Bhandari, Mr. Kunal Mittal, Ms. Charu Sharma, Mr. Arjit Sharma and Mr. Vaibhav Vats, Advs. with SI Rajesh Kumar, NR-1/Crime Branch, Prashant Vihar, Delhi.

CORAM

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present bail application is filed under Section 439 of the Code of Criminal Procedure, 1973 (**CrPC**) seeking regular bail in FIR No. 225/2011 dated 31.08.2011, registered at Police Station Crime Branch, for offences under Sections 20/25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (**NDPS Act**).

2. The facts of the present case are as under:

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2.1 On 31.08.2011 at about 01:15 PM, a secret information was received with respect to a person namely, Ranjan Rai *alias* Kalu Rai, relative of the applicant that he would supply Ganja to a lady named Shakina near Balmiki Hospital, Pooth Khurd, in front of a petrol pump, at around 3:00pm to 3:15pm on the same day.

2.2 Acting on the said information, a raiding team was prepared and at about 3:05pm, a Vikram Tempo was seen coming from Pooth Khurd towards Bawana Road, which was identified by the informer as the vehicle carrying ganja. It is alleged that the informer identified the person sitting next to the driver as Rajan Rai *alias* Kalu Rai.

2.3 It is alleged that the tempo stopped in front of a lady, and Rajan Rai *alias* Kalu Rai alighted from the tempo and handed over a white plastic carton to the lady named Shakina. It is alleged that the driver, namely, Pankaj Yadav along with accused persons – Shakina and Rajan Rai *alias* Kalu Rai were apprehended by the police officials.

2.4 Thereafter, a notice under Section 50 of the NDPS Act was served upon them and they were informed that they had the right to be produced before a Magistrate or a Gazetted Officer prior to their search or such officer can be called to the spot and their search can be conducted in his/her presence.

2.5 Thereafter, the carton recovered from Shakina@Kabiran was checked and it was found to be containing Ganja weighing 25kgs. The carton recovered from Rajan Rai *alias* Kalu Rai was also checked and was found to be containing 25kgs Ganja as well.

2.6 The content was seized and a seizure memo was drawn and

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accordingly, the present FIR was registered.

2.7 During the investigation, accused Rajan Kumar Rai disclosed that the applicant used to supply the contraband to one person namely- Gautam Sinha. He stated that he had come to Delhi on the direction of the applicant to deliver the two cartons containing Ganja to Gautam Kumar Sinha and on his directions he delivered the said cartons to accused – Sakina.

2.8 During further investigation, accused Gautam Sinha was also arrested on 05.11.2011 however, the applicant was not apprehended and was declared as proclaimed offender by the learned Trial Court by order dated 20.12.2011.

2.9 After completion of the investigation, the chargesheet in the present case was filed and on 17.08.2018, accused Gautam Kumar Sinha was acquitted by the learned Trial Court and the other accused persons namely Rajan Kumar Rai @ Kalu Rai and Sakina@Kabiran were convicted by the learned Trial Court.

2.10 Thereafter, the applicant was arrested on 15.03.2023 and supplementary chargesheet was filed against him and charges were framed against him for offences under Section 20, 29 of the NDPS Act and Section 174-A IPC.

2.11 The learned Trial Court dismissed the applicant's regular bail application *vide* order dated 18.11.2023. Hence, the present application.

3. The learned counsel for the applicant submitted that applicant has been falsely implicated in the present FIR and has been implicated



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merely on the basis of disclosure statement of the co-accused persons.

4. He submitted that the applicant has been in custody since 15.03.2023 and no purpose would be served by keeping him in further incarceration.

5. He submitted that the allegations against the applicant are based on the statements recorded under Section 67 of the NDPS Act which are not admissible as evidence against the applicant. He submitted that the same is *per se* insubstantial. He placed reliance on the judgment passed by the Hon'ble Apex Court in the case of ***Tofan Singh v. State of Tamil Nadu : (2021) 4 SCC 1*** in this regard.

6. He submitted that no recovery has been made from the applicant or at his instance. He submitted that the applicant was not even arrested from the spot of the incidence. He submitted that no CDR has been placed on record to prove the connectivity between applicant and co-accused persons.

7. He submitted that there is no monetary transaction between the co-accused and the applicant. He submitted that the prosecution itself, in the supplementary charge sheet, has stated that the applicant does not have a bank account of his own, and there is no established link between the applicant and the amount received in the bank account of the applicant's father, namely Ramanand Rai.

8. He submitted that since the disclosure statement of the applicant cannot be looked into, no recovery of commercial contraband can be attributed to the applicant, whereby the embargo under Section 37 of the NDPS Act would not apply in the present case.



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9. He submitted that apart from the disclosure statements of the co-accused persons and the applicant, there is no other material to implicate the applicant in the present case.

10. He submitted that there is no direct financial transaction between the applicant and the other co-accused persons which link her to present offence.

11. *Per contra*, the learned Additional Standing Counsel for the respondent vehemently opposed the grant of any relief to the applicant. He submitted that the learned Trial Court had rightly dismissed the applicant's bail application. He submitted that the applicant is actively involved in the commission of the offence and illicit trafficking of drug. He submitted that the complicity of the applicant in commission of the offence is evident from the circumstances in the present case.

ANALYSIS

12. It is settled law that the Court, while considering the application for grant of bail, has to keep certain factors in mind, such as, whether there is a *prima facie* case or reasonable ground to believe that the accused has committed the offence; circumstances which are peculiar to the accused; likelihood of the offence being repeated; the nature and gravity of the accusation; severity of the punishment in the event of conviction; the danger of the accused absconding or fleeing if released on bail; reasonable apprehension of the witnesses being threatened; etc. Period of incarceration is also a relevant factor that is to be considered.



13. It is relevant to note that the case of the prosecution is essentially based upon the disclosure statement of the co-accused persons. While the veracity of the disclosure statement of the co-accused is to be tested at the time of the trial, this Court cannot lose sight of the decision of the Hon'ble Supreme Court in **Tofan Singh v. State of Tamil Nadu** (*supra*), wherein it was held that a disclosure statement made under Section 67 of the NDPS Act is not admissible as evidence without corroboration. The relevant paragraphs of the said judgment is set out below:-

“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 in 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.



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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)

14. The disclosure statement of the co-accused thus, is *per se*, not admissible, without there being any corroboration. The Courts also are not supposed to accept every allegation made by the prosecution as a gospel truth so as to apply rigours of Section 37 of the NDPS Act in every case where the allegations are made against the accused person. When there is no material to link the accused with the recovery of the contraband of commercial quantity from the other co-accused persons, the rigours of Section 37 of the NDPS Act cannot be applied mechanically.

15. The prosecution has sought to corroborate the allegation against the applicant by contending that funds were received from the co-accused persons into the bank account of the applicant's father. It is further contended that the account number of the applicant's father was mentioned in the diary recovered from the co-accused persons which mentions monetary transactions.

16. It is, thus, alleged that the money from the sale of contraband has been received by the applicant into the bank account of his father. It is, however, relevant to note that despite the specific allegation that the father of the applicant has received the money from the co-accused persons, he has not been named as an accused; no statement of the applicant's father has ever been recorded and he has also not been named as the witness in the chargesheet filed against the applicant.



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17. It is also vehemently contended that the applicant was declared as a Proclaimed Offender and, thus, should not be released on bail.

18. The learned counsel for the applicant had argued that the family properties were partitioned sometime in the year 2010-11 and the applicant had, thereafter, left his home in the village. Admittedly, the notices under NDPS Act were served on the village address. The learned counsel for the applicant had also taken this Court through the statement of the villagers recorded by the respondent, State. It has been stated by the villagers that the applicant had left the village sometime in the year 2011 and has not been staying with his father. In such circumstances, when the notice was, admittedly, not served on the applicant, his declaration as a Proclaimed Offender is, *prima facie*, doubtful.

19. The applicant is in custody since 15.03.2023. The investigation is already complete and the chargesheet has been filed. The object of jail is to secure the appearance of the accused persons during the trial. The object is neither punitive nor preventive and the deprivation of liberty has been considered as a punishment without the guilt being proved. The applicant cannot be made to spend the entire period of trial in custody especially when the trial is likely to take considerable time.

20. Admittedly, the applicant also has clean antecedents.

21. In view of the above, this Court is of the opinion that the applicant has made out a *prima facie* case for grant of bail.

22. The applicant is, therefore, directed to be released on bail on



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furnishing a personal bond for a sum of ₹50,000/- with two sureties of the like amount, subject to the satisfaction of the learned Trial Court, on the following conditions:

- a. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- b. The applicant shall under no circumstance leave the country without the permission of the learned Trial Court;
- c. The applicant shall appear before the learned Trial Court as and when directed;
- d. The applicant shall provide the address where he would be residing after his release and shall not change the address without informing the concerned IO/ SHO;
- e. The applicant shall report to the local police station once in every week;
- f. The applicant shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times.

23. In the event of there being any FIR/DD entry / complaint lodged against the applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

24. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the trial and also not be taken as an



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expression of opinion on the merits of the case.

25. The bail application is allowed in the aforementioned terms.

AMIT MAHAJAN, J

JULY 01, 2024

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