



2024:DHC:4091



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* IN THE HIGH COURT OF DELHI AT NEW DELHI

*Reserved on: 28.03.2024**Pronounced on: 20.05.2024*+ **BAIL APPLN. 441/2024**

YUNUS KHAN

..... Petitioner

Through: Mr. U.A. Khan and Mr. Shahrukh
Khan and Mr. Tushar Upadhyaya,
Advs.

versus

STATE NCT OF DELHI

..... Respondent

Through: Mr. Ritesh Kumar Bahri, APP for
State with SI Virender Singh
Narcotics Cell / ND**CORAM:****HON'BLE MR. JUSTICE VIKAS MAHAJAN****JUDGMENT****VIKAS MAHAJAN, J.**

1. The present petition has been filed under Section 439 Cr.P.C. seeking regular bail in connection with FIR No. 680/2021 under Section 21 (c)/29 of the NDPS Act registered at PS Bhalswa Dairy, Delhi.
2. *Vide* order dated 27.02.2024, notice was issued in the present petition and the respondent/State was directed to file a status report. The State has filed a status report dated 27.02.2024, which forms part of the record.
3. The case of the prosecution as borne out from the status report is that on 21.09.2021 at about 10:30 AM, secret information was received that a person



namely, Imran (co-accused) was indulging in sale and supply of heroin in Delhi after bringing the same from Bareilly, UP. On the basis of secret information co-accused Imran was apprehended and 500 gms heroin was recovered from his possession.

4. During investigation, it was disclosed by the co-accused in his disclosure statement that the heroin was supplied to him by the petitioner. Thereafter, the petitioner was apprehended from his rented house and from his house 260 gms of heroin was recovered besides cash amounting to Rs. 26,40,000/-.

5. The learned counsel for the petitioner invites the attention of the Court to the disclosure statement of co-accused Imran to contend that in the said disclosure statement co-accused Imran has not given any details of the residential address of the petitioner nor any specific place was pointed out from where the recovery could be affected, therefore, it is not understandable as to how raid was conducted by the police on the alleged residential address of the petitioner.

6. He submits that despite prior information available with the police there is no departure or arrival entry in the DD Register insofar as the raid on the premises of the petitioner is concerned.

7. He further submits that no warrants of search were obtained by the empowered officers in terms of Section 41 (2) of the NDPS Act before searching the premises of the petitioner, nor any videography of the search was done.

8. He submits that despite prior information no notice under Section 50 of the NDPS Act was served upon the present petitioner.

9. He further contended that though the disclosure statement of



co-accused Imran was in the form of an information available with the Police *qua* the present petitioner, the same was not forwarded to the higher official in terms of sub-section (2) of Section 42 of the NDPS Act. Thus, he submits that there is no compliance of Section 42 of the NDPS Act.

10. He submits that co-accused Imran from whom heroin weighing 500 gms was recovered has already been granted bail by the Court of Additional Sessions Judge *vide* order dated 04.08.2023. He, therefore, claims parity with co-accused Imran.

11. It is also contended by the learned counsel that a sample of 5 gms of heroin was taken from the contraband allegedly recovered from the petitioner but when the said sample was weighed by the FSL, the same was found to be 4.7 gms, which shows the weighing machine of the investigating agency was faulty and in case the entire quantity recovered is reduced in the same proportion, the same would come to 246 gms, which is less than the commercial quantity of 250 gms in case of heroin. In support of his contention reliance has been placed by the learned counsel on the decision of a co-ordinate bench of this Court in ***Soyab Vs. State NCT of Delhi [BAIL APPN. 2626/2022, date of decision 12.12.2022]***

12. He further submits that the petitioner is in custody since 22.09.2021 which is approximately 2½ years. According to the learned counsel the prosecution has cited as many as 23 witnesses and till date only 02 witnesses have been examined, which according to him will lead to a protracted trial. He places reliance on the decision of the Supreme Court in ***Rabi Prakash vs. The State of Odisha, 2023 SCC OnLine SC 1109***. Likewise reliance has also been placed on the two decisions of a coordinate bench of this Court in ***Rajesh Kumar Vs. State in BAIL APPLN. 2531/2022*** dated 14.02.2024 and in



Gurpreet Singh Vs. State of NCT of Delhi in BAIL APPLN. 857/2023 dated 05.02.2024.

13. In the backdrop of aforesaid factual matrix it is urged by the learned counsel to enlarge the petitioner on bail.

14. *Per contra*, the learned APP for the State has argued on the lines of status report. He submits that the present case is under the NDPS Act and pertains to commercial quantity, therefore, the negation of bail is the rule and grant of bail is an exception thereto. He submits that apart from the recovery made from the present petitioner there is recovery of 500 gms made from the co-accused and regard being had to the fact that Section 29 of the NDPS has been invoked, the quantity recovered from the two accused persons has to be clubbed for ascertaining whether the same is commercial quantity or not. It is also submitted that there is material to show conspiracy between them.

15. He further submits that the charges have already been framed by the learned Special Judge opining that the contraband is of commercial quantity. He submits that the said order has not been challenged by the petitioner at any stage and the same has attained finality.

16. Controverting the submissions of the learned counsel for the petitioner that the disclosure statement does not mention the address of the petitioner or the place from where the recovery could be made, the learned APP has handed over in Court "Pointing Out Memo" to contend that the premises of the petitioner wherefrom the contraband was recovered was pointed out by co-accused Imran and the said memo also bears the signatures of owner of the premises namely Rajesh, whose statement under Section 161 CrPC was also recorded.

17. He further submits that Section 50 of NDPS Act is not applicable to the



present case in as much as the recovery in the present case has not been made from the person of the present petitioner, rather the recovery was made from the premises of the petitioner.

18. Insofar as compliance of Section 42 of NDPS Act is concerned, the learned APP has drawn the attention of the Court to the entry of DD No. 3 to contend that the said DD entry with reference to the secret information specifically mentions the name of co-accused Imran as well as the present petitioner. He submits that this information was forwarded to the ACP (Operation) Sh. Richhpal. A copy of the DD entry so handed over in the Court, is also taken on record.

19. He further contends that the compliance of Section 42 of NDPS Act insofar as present petitioner is concerned was not required on the basis of the disclosure statement as the disclosure statement is not an information in terms of Section 42 of the NDPS Act and the same is also hit by Section 25 and 26 of the Evidence Act.

20. He further submits that even if there is irregularity in the search, the same will not vitiate the proceedings. In support of this contention the reliance has been placed on the decision of the Constitution Bench of the Hon'ble Supreme Court in *Pooran Mal Vs. Hanuman Pershad Ganeriwala*, AIR 1974 SC 348 and the *State of H.P. Vs. Priti Chand*, 1996 2 SCC 37.

21. He submits that the petitioner is not entitled to bail on the ground of parity, in as much as co-accused Imran was granted bail only due to the defect in the notice under Section 50 of NDPS Act whereas the said requirement is not applicable to the present petitioner. He further submits that the period of incarceration in a case under the NDPS Act, where the twin conditions under Section 37 of NDPS Act are applicable, is not relevant. In support of his



contention reliance has been placed on the decision of Hon'ble Supreme Court in *NCB Vs. Mohit Aggarwal, 2022 SCC OnLine SC 891*.

22. As regards the discrepancy in the weight in the sample, the submission of the learned APP is that the same is a factual aspect and has to be seen by the learned trial Court at the stage of trial. Even otherwise, the discrepancy is very minor and does not affect the present case especially when recovery of 500 gms made from the co-accused Imran is to be added having regard to the angle of conspiracy, which is writ large from the CDR records showing connectivity between accused persons.

23. He submits that the CDRs between the present petitioner and co-accused Javed have also been placed on record alongwith the supplementary chargesheet.

24. Insofar as CDR is concerned, the learned counsel for the petitioner in rejoinder submits that the said CDR are not pertaining to the present petitioner and co-accused Imran. He submits that the CDR only shows that the present petitioner was in touch with co-accused Javed, but no recovery has been made from the co-accused Javed. He submits that in any case co-accused Javed was granted anticipatory bail by this Court and he has joined the investigation.

25. I have heard the learned counsel for the petitioner, as well as, the learned APP for the State and have perused the material on record.

26. The gravamen of allegations against the present petitioner is that he was apprehended on the disclosure statement of co-accused namely, Imran from whom 500 grams of heroin was recovered. Thereafter, acting on the information of the co-accused, the premises of the petitioner was searched and 260 grams of heroin was recovered. Thus, the total quantity of contraband



recovered in the present case is 760 grams of heroin, which is commercial in nature.

27. It has been contended by the learned counsel for the petitioner that due to discrepancy in weight of the representative sample, the quantity of total contraband recovered from the premises of the petitioner has to proportionately reduced and thus, calculated, the quantity recovered will only be an intermediate quantity, thus, the rigours of Section 37 of the Act do not have any application in the present case. This submission of the learned counsel is premised on the notion that there cannot be any clubbing of contraband recovered from the co-accused, Imran and the petitioner. In this view of the matter, it is necessary to first ascertain whether the contraband which has been recovered from Imran and the contraband recovered from the petitioner can be clubbed or not. Reference in this regard may be had to the judgment of this Court in *Awadhesh Yadav v. State of NCT of Delhi*, 2023:DHC : 8529 where after referring to various precedents on the aspect of clubbing of quantities of contraband, it was held as under:

“49. From the provisions of law and the essence of case-laws, as discussed above, following principles can be culled out governing clubbing of the quantity of contraband recovered from two or more co-accused, at the stage of bail:

i. invocation of offence of abetment and/or conspiracy under Section 29 of the Act is must for clubbing of quantity. However, there cannot be a straight jacket formula for clubbing the quantity of contraband recovered from all the accused, merely on the basis of invocation of offence under Section 29 of the Act. It will depend on the factual backdrop of each case and the incriminating material available against the accused persons.



ii. the incriminating material relied upon to invoke the offence of abetment and/or conspiracy under Section 29 of the Act, has to be cogent and convincing against each one of the accused charged with the offence of abetment and/or conspiracy.

iii. in a case where joint recovery of contraband has been effected from two or more co-accused, the recovered contraband cannot be equally divided amongst the number of accused to determine whether the quantity of contraband recovered in “commercial quantity” or not.

iv. where accused persons are travelling together in the same private vehicle individually carrying contraband, it will not be proper to consider the alleged recovery to be an individual recovery and the contraband recovered from all persons can be clubbed.

v. if an accused is a habitual offender, it gives rise to an inference that he knows the tricks of the trade. In such a situation, previous involvement of the accused in the case(s) under the NDPS Act, is an additional factor which could be considered, besides other incriminating circumstances, for adding the quantities of contraband recovered from two or more co-accused.”

28. Bearing the aforesaid principles in mind, the present case has to be considered on its own facts. The prosecution has filed the chargesheet under Section 21/25/29 of the NDPS Act, however, the Status report filed by the prosecution is conspicuously silent on the incriminating material which links the present petitioner with co-accused Imran. No material in the form of CDR's, CAF or financial transactions have been placed on the record of this Court to *prima facie* record a satisfaction that co-accused and the petitioner are in conspiracy with one another. In this backdrop, the recovery made from co-accused Imran cannot be attributed to the petitioner herein.



29. The first contention of the learned counsel for the petitioner is that the quantity of contraband attributed to the petitioner has to be proportionately reduced in terms of the deficient weight cannot be accepted in view of the judgment of this Court in ***Gita Lama Tamang v. State of (G.N.C.T.) of Delhi, 2007 (93) DRJ 813*** the relevant part of which reads as under:

“26. The next submission made by the learned counsel for the appellant was that there is a difference in weight of the samples. Case of the prosecution is that sample weighing 5 grams was taken. However, the CFSL report reveals that when it arrived there, it weighed 3.29 grams.

27. To my mind this argument does not turn the corner. There can be many reasons as to why there was difference in weight. In Gurdev Kaur v. State of Haryana, 2002 Crl.L.J. 3016 (P&H), it was held:—

“No doubt, in the report of the Forensic Science Laboratory, Madhuban, Ex. PMJ, the weight of the sample of opium had been mentioned as 8.29 grams approximately. This marginal difference in the weight as such cannot be taken as the basis for a conclusion that here had been tampering of the sample during the period Constable Roshan Lal had taken the sample to deposit the same with Forensic Science Laboratory, Madhuban.”

(emphasis supplied)

30. In the present case as well there is no material to support tampering of sample.

31. Reference in this regard may also be had to the judgment of a co-ordinate bench of this Court in ***Kulwant Singh v. Narcotics Control Bureau***, 2010 CRL 248/1997 decided on 18.01.2008, the relevant paragraph of which reads thus:



“21. A plea has been taken by the appellant that weight of sample, as found by forensic laboratory was 4.6 gm and not 5 gm. The discrepancy in the weight of the sample as found in the test laboratory is no ground to doubt the case of the prosecution. Anybody having a little knowledge of science and the scientific instruments knows that every scientific instrument has a least count. The accuracy of a scientific balance is much more than the ordinary balance used by a I.O and there may be a variation of weight plus or minus depending upon the least count of the scientific balance. The atomic balances are more accurate than scientific balance. Such balances are used in more sensitive laboratories and are accurate to .0001 gm and even more accurate. An Investigating Officer, who draws sample for testing, need not have a balance of a high accuracy in order to draw the samples. He can draw sample weighing approximately 05 gm using ordinary balance. If the same sample is weighed at an accurate scientific balance used in CRCL, the weight of each sample is bound to differ. The difference in weights of samples rather shows the genuineness of the case. If the case had been a made up or a false case, the IO might have used more accurate balance and weighed the samples with accuracy. One may have doubt on the genuineness of the case if the each sample weigh the same on accurate balance used in CRCL, but one cannot doubt if the weight difference is found as in this case. Such difference in weight is natural. No malafide can be drawn by the appellant by this difference of weight. Thus the weight difference in the sample cannot be considered as a ground for acquittal.”
(emphasis supplied)

32. Similarly, a Learned Single Judge of the Allahabad High Court in ***Chhotey Lal v. Union of India***, CRL Misc Bail App No. 6298/2020 has held as under:

“16. Minor discrepancy in the weight of the sample sent at the Forensic Laboratory cannot shake the roots of the prosecution case.”



33. This Court has also gone through the judgment of a co-ordinate bench of this Court in *Soyab* (*supra*), wherein this Court noted that in the order of the learned MM passed under Section 52A of the Act it was recorded that the representative sample weighed 5 grams but the FSL reported the sample to be 4.08 grams. In that case, the quantity of the sample seemed to be under the significant cloud as the weight of the sample was found to be deficient by 0.92 grams, whereas, in the present case, the sample has been found to be deficient by 0.30 grams. This minor discrepancy could even be attributed to the presence of moisture content in the contraband when the sample was taken, however, that is an aspect which will be considered during the trial. At this stage suffice it to say that no material has been pointed out which suggests the tampering of sample. This being the position, no benefit of minor deficiency in weight of the sample when weighted by the FSL, will enure to the benefit of the petitioner while considering the present bail application.

34. Thus, from the aforesaid discussion, it is luminous that the rigours of Section 37 of the NDPS Act are applicable in the present case and only when the petitioner can satisfy that there are reasonable grounds for believing that he is not guilty can he be released on bail pending trial.

35. The next contention of the learned counsel for the petitioner is that despite prior information, no notice under Section 50 of the NDPS Act was served on the petitioner. This contention of the learned counsel is not sustainable as it is no more *res integra* that the provisions of Section 50 are applicable only when recovery has been effected from the person of the accused and not from the premises of the accused as in the present case.

36. Considerable arguments were also made by the learned counsel on the aspect that there is non-compliance of Section 42(2) of the Act as the



information *qua* the petitioner was not forwarded to the higher officials. A perusal of daily dairy entry DD No. 3 shows that secret information was recorded and forwarded to the ACP (Operations), Sh. Richhpal and the said information contains the name of the petitioner besides co-accused Imran. Therefore, the argument of the learned counsel is not tenable. In any case, this aspect cannot be appreciated at the stage of bail and has to be considered by the learned Trial Court at the stage of trial. Reference in this regard may be had to the judgment of the Supreme Court in ***Union of India v. Md. Nawaz Khan: (2021) 10 SCC 100*** the relevant part of which reads as under:

*“33. In the complaint that was filed on 16-10-2019 it is alleged that at about 1400 hours on 26-3-2019, information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. **The complaint states that the information was immediately reduced to writing. Therefore, the contention that Section 42 of the NDPS Act was not complied with is prima facie misplaced. The question is one that should be raised in the course of the trial.**”*

(emphasis supplied)

37. Similarly, the effect of non-obtaining of warrants of search under Section 41(2) of the NDPS Act before effecting recovery from the premises of the petitioner is a consideration which will be appreciated by the learned Trial Court. Further, it is a trite principle of law that the case of the prosecution cannot be wholly negated on the ground that the contraband is recovered pursuant to an illegal search. Reference in this regard may be had to the judgment of the Supreme Court in ***State of H.P. v. Pirthi Chand (supra)***, the relevant paragraph of which reads:



5. It would be seen that the organised traffic in contraband generates deleterious effect on the national economy affecting the vitals of the economic life of the community. It is settled law that illegality committed in investigation does not render the evidence obtained during that investigation inadmissible. In spite of illegal search property seized, on the basis of said search, it still would form basis for further investigation and prosecution against the accused. The manner in which the contraband is discovered may affect the factum of discovery but if the factum of discovery is otherwise proved then the manner becomes immaterial.

6. In Radha Kishan v. State of U.P. [AIR 1963 SC 822 : (1963) 2 LLJ 667] this Court held that the evidence obtained by illegal search and seizure would not be rejected but requires to be examined carefully. In State of Maharashtra v. Natwarlal Damodardas Soni [(1980) 4 SCC 669 : 1981 SCC (Cri) 98 : AIR 1980 SC 593] , even if the search was illegal, it will not affect the validity of the seizure and further investigation of the authorities or the validity of the trial which followed on the complaint by the customs officials. In Shyam Lal Sharma v. State of M.P. [(1972) 1 SCC 764 : 1972 SCC (Cri) 470 : AIR 1972 SC 886] it was held that even if the search and seizure is illegal being in contravention of Section 165, that provision does not have any effect in its application to the subsequent steps taken in the investigation. In State of Kerala v. Allasserry Mohd. [(1978) 2 SCC 386 : 1978 SCC (Cri) 198 : AIR 1978 SC 933] this Court had held that failure to comply strictly with the statutory provisions by the Food Inspector would not vitiate the trial and conviction of the accused.

7. It would thus be settled law that every deviation from the details of the procedure prescribed for search does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The court is required to scan



the evidence with care and to act upon it when it is proved and the court would hold that the evidence would be relied upon.”

(emphasis supplied)

38. There is also force in the contention of the learned APP for the State that the petitioner cannot claim parity with co-accused Imran as he was enlarged on bail considering that contraband was recovered from his person and there was a defect in the notice under Section 50 of the NDPS Act. However, in the case of petitioner, the recovery has been effected from his house and in such a scenario, the provisions of Section 50 of the Act are not applicable.

39. Further, the petitioner cannot be granted the concession of bail solely on the basis of period of incarceration in view of the dictum of the Hon'ble Supreme Court in ***NCB Vs. Mohit Aggarwal (supra)***, the relevant paragraph of which reads as under:

“18. In our opinion the narrow parameters of bail available under Section 37 of the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, for him to have been admitted to bail. The length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act”

(emphasis supplied)

40. In view of the aforesaid discussion, at this stage it cannot be said that there are reasonable grounds for believing that the petitioner is not guilty of



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the offence alleged. Accordingly, the present petition, along with pending applications, if any, is dismissed.

41. It is made clear that the observations made herein are only for the purpose of considering the bail application and the same shall not be deemed to be an expression of opinion on the merits of the case.

42. The petition stands disposed of.

43. Order *dasti* under the signatures of the Court Master.

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

VIKAS MAHAJAN, J

MAY 20, 2024/N.S. ASWAL