



2024: DHC: 2646



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

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Judgment delivered on: 03.04.2024

+ **BAIL APPLN. 840/2023**

**ILIYAS KHAN**

**..... Applicant**

versus

**NARCOTICS CONTROL BUREAU**

**..... Respondent**

**Advocates who appeared in this case:**

For the Applicant : Mr. Vikram Hegde and Mr. Abhinav Hansaraman, Advs.

For the Respondent : Mr. Subhash Bansal, Senior Standing Counsel for NCB with Mr. Shashwat Bansal, Adv.

**CORAM**

**HON'BLE MR JUSTICE AMIT MAHAJAN**

**JUDGMENT**

1. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973 (**CrPC**) seeking regular bail in Crime No. VIII/78/DZU/2021 under Sections 8/22/23/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (**NDPS Act**).

2. Brief facts of the case are that on 07.12.2021, on the basis of secret information received by Sh. Chetan Sharma, Investigating

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Officer, Narcotics Control Bureau (NCB), a recovery of 14,800 tramadol tablets (4.881 Kgs) from parcel AWB No. N21916829 destined to USA, was made at DTDC SuperHubSamalkha, New Delhi, in the presence of independent witnesses. It is alleged that as per the documents annexed with the parcel, it was booked at DTDC ExpressPvt. Ltd.'s franchise at Kanpur.

2.1 During the course of investigation, it was found that the persons who had booked the parcel AWB No. N21916829 had come to the courier office at Kanpur. Thereafter, notices under Section 67 of the NDPS Act dated 10.12.2021 were served upon Mohd. Faiz Ahmad, and Sheikh Abdul Muttalib, pursuant to which, they tendered their voluntary statements. In response to the notice under Section 67 of the NDPS Act, Mohd. Faiz Ahmad in his voluntary statement alleged that present applicant directed him to book the seized parcel using fake ID, which was provided to him by the present applicant. He further disclosed the name of the co-accused Sheikh Abdul Muttalib who allegedly, was an associate of the present applicant. On the basis of the recovery and the statement made by the co-accused Mohd. Faiz Ahmad, he was arrested on 10.12.2021.

2.2 On 11.12.2021, Sheikh Abdul Muttalib tendered his voluntary statement wherein he admitted his involvement in the illegal trade of NR<sub>x</sub> tablets and also confirmed his association with the present applicant for booking another parcel containing NR<sub>x</sub> tablets to the USA bearing AWB No. 287173190040.



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2.3 Pursuant to the statement tendered by Sheikh Abdul Muttalib under Section 67 of the NDPS Act, on 11.12.2021– 1.6 Kgs golden colour and 400 grams of white colour NR<sub>x</sub> tablets were recovered from a parcel bearing AWB No. 287173190040 from Delhivery Courier Company House, New Custom House, IGI Airport. Consequently, Sheikh Abdul Muttalib was arrested on 11.12.2021. As per the CRCL report, the seized tablets were – 1.6kgs of Acetaminophen and Diclofenac, and 400 grams of Melatonin.

2.4 During investigation, the present applicant was served notice under Section 67 of the NDPS Act, whereupon he tendered his voluntary statement on 07.01.2022 and revealed that the seized parcel was booked at his instance using fake ID which was provided by him. Consequently, the present applicant was arrested on 07.01.2022.

2.5 The bail application filed by the present applicant before the learned Trial Court was dismissed by order dated 12.01.2023, due to the embargo under Section 37 of the NDPS Act.

3. The learned counsel for the applicant submitted that the investigation in respect of the applicant is complete and nothing incriminating has been recovered from the applicant. He further submitted that the applicant has clean antecedents and has been in custody since 07.01.2022, and no purpose would be served keeping him in further incarceration.

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4. He contended that the applicant has been indicted in the present case merely on the basis of the disclosure statement of the co-accused persons, and no contraband is recovered from his possession or at his instance.

5. He submitted that the disclosure statement of the co-accused is *per se* insubstantial without being corroborated by any recovery. To buttress this argument, 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.***

6. He further submitted that Section 37 of the NDPS Act is not attracted *qua* the applicant in the present case, and his bail applicant ought to be considered without applying the rigours thereof.

7. He submitted that the learned Trial Court *vide* order dated 23.03.2023, granted bail to the co-accused namely Sheikh Abdul Muttalib on the ground that the parcel bearing AWB No. 287173190040, which was recovered at his instance was found to be containing Melatonin, Acetaminophen and Diclofenac which are neither psychotropic substances nor narcotic / controlled substances within the definition of the NDPS Act. The CRCL Report with respect to the same is already on record. Hence, the applicant is entitled to be released on bail on the ground of parity.

8. He placed reliance on the judgments passed by the Hon'ble Apex Court in the case of ***Sanjeev Chandra Agarwal and Another v.***



***Union of India: (2021) 20 SCC 57.*** He further placed reliance on the judgments passed by this Hon'ble Court in the cases of ***Md. Irshad v. State NCT of Delhi : 2022:DHC:1723*** and ***Gurmito v. Central Bureau of Investigation : 2022:DHC:2888.***

9. *Per contra*, the learned Special Standing Counsel (SSC) for the NCB submitted that the sequence of events *prima facie* establishes conspiracy on the part of the applicant. He also submitted that the applicant is part of a drug syndicate indulged in illegal business of drug trafficking and thus, is not entitled to bail.

10. The learned SSC contended that the learned Trial Court has rightly dismissed the applicant's bail application by order dated 12.01.2023. He stated that all the grounds of the applicant, including his contention that no recovery has been effected from him directly, have been effectively dealt by the learned Trial Court and requires no interference.

11. He placed reliance on the location of the present applicant as per the CDR on 03.12.2021 as well as on 09.12.2021 to contend that the applicant was present along with co-accused Mohd. Faiz Ahmad at the booking place of the seized parcel. He further submitted that the applicant went from Lucknow to Kanpur with co-accused Mohd. Faiz Ahmad to book the parcel AWB No. N21916829 containing 4.881 Kgs of Tramadol tablets. Therefore, it cannot be said that there are reasonable grounds to believe the applicant is not guilty of the alleged offence.



12. He submitted that the matter is at the stage of arguments on charge and the applicant's release at this stage could adversely affect the trial. He further submitted that the seized contraband involves commercial quantity of Tramadol tablets and the embargo under Section 37 of the NDPS Act would squarely apply in the present case.

### ANALYSIS

13. The applicant has been implicated only on the basis of the disclosure statements of co-accused persons. It is relevant to note that while the veracity of the disclosure statements 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 impermissible as evidence without corroboration. The relevant paragraphs of the judgment are 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. 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. A Coordinate Bench of this Court in ***Phundreimayum Yas Khan Vs. State (GNCT of Delhi) : 2023 SCC OnLine Del 135***, has held that when there is no material to link the applicant with the recovery of the commercial quantity from the co-accused, the rigors of Section 37 would not apply. It was further held that the disclosure statement of co-accused is per se not admissible without there being any corroboration.

15. Insofar as the incriminating material in the form of CDR data and CCTV footage, showing that the applicant was in constant touch with the co-accused persons and had gone to book the seized parcel with the co-accused, is concerned, the probative value of the same shall be tested during the trial. At this stage of considering the bail application of the applicant, the same cannot be treated as sufficient material to establish a link between the applicant and other co-accused persons from whom the contraband was recovered.

16. The learned Trial Court, by order dated 23.03.2023, while



granting bail to the co-accused Sheikh Abdul Muttalib specifically noted that the only evidence against him was the disclosure statement of co-accused and the location of the mobile phone as per the CDR. The said evidence was found insufficient to establish the conspiracy between the applicant therein and the main accused person at whose instance the recovery of psychotropic substance was made.

17. This Court while granting bail, in the case of ***Dalip Singh v. State (NCT of Delhi) : 2019 SCC OnLine Del 6494***, observed as under:

*11. On perusal of the record, it is prima facie seen that there are two major missing links in the case of the prosecution. There is no link established by the prosecution between the petitioner with the alleged supplier Manoj. Further the entire case of the prosecution, in so far as petitioner is concerned is circumstantial i.e. based solely on disclosure statement of a co-accused which is per se not admissible without there being any corroboration. Prosecution has not been able to establish any connection between the subject offence and the bank accounts, where the petitioner is alleged to have been depositing money or with the holders of those accounts. Merely because the petitioner has been having telephonic conversation with the co-accused, would not be sufficient to hold that petitioner is guilty of the subject offence. There is no recovery made from the petitioner.*

*12. I am of the view that requirement of Section 37 of the NDPS Act are satisfied. In so far as the petitioner is concerned, there are reasonable grounds to believe that petitioner is not guilty of the said offence.*

(emphasis supplied)

18. It is pertinent to note that no recovery has been effectuated from the applicant and he has been arrested solely on the basis of disclosure



statements made by the co-accused Sheikh Abdul Muttalib and Mohd. Faiz Ahmad. In such circumstances, merely because the applicant was in regular touch with the co-accused, is not sufficient to *prima facie* establish the offence against the applicant.

19. The Courts are not expected to accept every allegation made by the prosecution as a gospel truth. The bar, as provided in Section 37 of the NDPS Act, cannot be invoked where the evidence against an accused appears to be unbelievable and does not seem to be sufficient for the purpose of conviction of the accused.

20. The Hon'ble Apex Court, in the case of ***Union of India v. Shiv Shanker Kesari* : (2007) 7 SCC 798**, has observed as under:

*“11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.*

*12. Additionally, the court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.”*

21. The Hon'ble Apex Court, in the case of ***Mohd. Muslim v. State (NCT of Delhi)* : 2023 SCC OnLine SC 352**, has reiterated the law in regard to Section 37 of the NDPS Act as under:



*“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.”*

22. In view of the above, this Court is of the opinion that the embargo of Section 37 of the NDPS Act does not come in the way of granting bail to the applicant.

23. It is relevant to note that the present case is at the stage of framing of charge. It is also not in dispute that the applicant does not have any criminal record. The antecedents of the applicant being clean, he is not likely to commit any offence while on bail. Speedy trial in the present case does not seem a possibility. 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.

24. The applicant is in custody since 07.01.2022. The Hon'ble Apex Court in the case of ***Man Mandal & Anr. v. The State of West Bengal: SLP(CRL.) No. 8656/2023*** had granted bail to the petitioners therein, in an FIR for offences under the NDPS Act, on the ground that the



accused had been incarcerated for a period of almost two years and the trial was likely going to take considerable amount of time.

25. In the present case, the prosecution has been given an adequate opportunity to oppose the present application. In view of the facts of the case, in the opinion of this Court, the applicant has *prima facie* established a case for grant of bail.

26. In view of the aforesaid discussion and keeping in mind the legal provisions specially on the ground of parity and without commenting upon the merits of the case, the applicant is directed to be released on bail on furnishing a personal bond in the sum of ₹50,000/- with one surety of the like amount, subject to the satisfaction of the learned Trial Court/Duty MM/ Link MM, 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 report to the local police station once in every week;
- d) The applicant shall appear before the learned Trial Court as and when directed;
- e) 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;



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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.

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

28. 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 expression of opinion on the merits of the case.

29. The bail application is allowed in the aforesaid terms.

**AMIT MAHAJAN, J**

**APRIL 3, 2024**  
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