



2024:DHC:2138



IN THE HIGH COURT OF DELHI AT NEW DELHI
% Judgment delivered on :18.03.2024
+ **BAIL APPLN. 1011/2023**

ABUL KALAM @ SULTAN Applicant

versus

THE STATE GOVT OF NCT OF DELHI
& ANR. Respondents

Advocates who appeared in this case:

For the Applicant : Mr. Sunil Mehta and Mr. Mohd.
Shajahan Islam, Advs.

For the Respondent : Mr. Utkarsh, APP for the State with
SI Parminder, Spl. Cell NR & STF,
Rohini Sec-6 ND.

CORAM:
HON'BLE MR. JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present application is filed under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973 ('CrPC') seeking grant of regular bail in FIR No.161/2020 dated 22.06.2020, registered at Police Station Special Cell for offences under Sections 21/29/61 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

2. Brief facts of the case are that some mobile numbers which were suspected to be involved in suspicious activities were put on lawful interception and persons using these numbers were found to be communicating in code words. On 22.06.2020, a



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secret information was received by the Special Cell, Rohini, Delhi at about 9:45 a.m. that two persons namely Md. Samiul and Md. Mukhtiyar who were residents of West Bengal, would be carrying drugs from Manipur for supplying them in Delhi NCR. It was further informed that they would be coming at Nigam Bodh Ghat, ISBT Kashmere Gate, Delhi in their vehicle – Mahindra bearing No. WB-73B-4972 from Siliguddi, West Bengal in between 11:00 a.m. to 1:00 p.m. Thereafter, a raiding team was formed which reached the spot and at around 11:30 a.m., the said car was spotted coming from Yamuna Bazar flyover and was stopped by the raiding team on the side of the road. Two persons debarked the said vehicle and were identified by the informer as Md. Samiul and Md. Mukhtiyar.

3. After complying with the statutory provisions, a search of their bags was conducted and 5 kgs Heroin was recovered from each of the bags. This led to the registration of the present FIR. During interrogation, Md. Samiul and Md. Mukhtiyar disclosed that they received 10 kg of the said contraband from one Manju Didi who is the resident of Manipur, West Bengal. They further disclosed that they used to supply the said contraband to the applicant and Islam from Malda area, West Bengal and to Akbar, who is the resident of Noida, Delhi NCR.

4. Pursuant to the disclosure statements, both Md. Samiul and Md. Mukhtiyar were arrested.

5. On 24.06.2020, a Police team along with co-accused Md. Samiul @ Raj reached Siliguddi, West Bengal in search of the

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other accused persons involved in the present case. On 28.06.2020, the present applicant was identified by co-accused Md. Samiul @ Raj and he was subsequently arrested on that day only, in relation to the supply of 4 kg Heroin.

6. During the interrogation, the present applicant disclosed that he used to receive the contraband from the co-accused persons and used to further supply the same to one person, namely, Joy of Bangladesh.

7. The learned Trial court had dismissed the regular bail application preferred by the applicant by order dated 19.01.2023. Hence, the present bail application.

8. The learned counsel for the applicant submitted that the applicant is in custody since 28.06.2020, the investigation is complete and the chargesheet in the present case has been filed under Sections 29/61 of the NDPS Act *qua* the applicant.

9. It is submitted by the learned counsel for the applicant that the name of the applicant surfaced from the disclosure statement of the co-accused Md Samiul, and neither any contraband is recovered from his possession nor at his instance.

10. The learned counsel submitted that the learned Trial court *vide* its order dated 20.11.2023 granted bail to the co-accused persons namely Md. Samiul and Mukhtiyar who were apprehended with 10kgs of Heroin at the time of search and recovery. Hence, the applicant is entitled to be released on bail on the grounds of parity.



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11. He submitted that the disclosure statement of the co-accused is *per se* not substantial without being corroborated by the recovery. To buttress this argument, he placed reliance on the judgement of *Tofan Singh v. State of Tamil Nadu : (2021) 4 SCC 1*.

12. He submitted that the applicant has been in judicial custody since 28.06.2020, and no purpose would be served by keeping him in further incarceration.

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

14. He further submitted that the chargesheet has already been filed and there is no possibility of the applicant tampering with the evidence and therefore, the applicant should be enlarged on bail.

15. The learned Additional Public Prosecutor (**APP**) for the State submitted that the sequence of events *prima facie* establishes conspiracy on the part of the applicant. It is also submitted that the applicant is part of a drug syndicate indulged in illegal business of drug-trafficking as he is the main receiver, and thus is not entitled to bail on the contours of Section 37 of the NDPS Act.

16. The learned APP submitted that there is sufficient material against the applicant to show his involvement in the present case. He submitted that based on the CDR report, he was found to be



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in constant touch with the other accused persons. Further, the FSL result of the voice calls intercepted lawfully, matches with their intercepted voice calls. He submitted that there was recovery of ₹1,29,000/- from the house of the applicant.

17. He further submitted that the seized contraband involves commercial quantity of Heroin and the embargo under Section 37 of the NDPS Act would squarely apply in the present case. He contended that there are no reasonable grounds for believing that the accused is *prima facie* not guilty of the alleged offence.

CONCLUSION

18. I have heard the learned counsel for the parties.

19. The applicant has been implicated only on the basis of the disclosure statement of co-accused person. It is relevant to note that 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 impermissible as evidence without corroboration. The relevant paragraphs of the said judgment read as under:-

“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.



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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)

20. 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.

21. Insofar as the incriminating material in the form of CDR data and transcripts of the conversation, showing that the applicant was in constant touch with the co-accused persons, is concerned, the probative value of the same shall be tested during



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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.

22. This Court, in the case of ***Dalip Singh v. State (NCT of Delhi)*** : 2019 SCC OnLine Del 6494, had 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)

23. It is pertinent to note that no recovery has been effectuated from the applicant in the present case. 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.

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24. 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.

25. 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.”

26. 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

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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.”

27. The Hon'ble Apex Court in the case of ***Man Man dal & Anr. V. The State of West Bengal : SLP(CRL.) No. 8656/2023*** considered that the trial was likely to take considerable amount of time and granted bail to the petitioner therein, on the ground that the accused had suffered long period of incarceration.
28. It is also not disputed that the co-accused persons, from whom the recovery has been effectuated in the present case, have been released on bail.
29. Considering the facts and circumstances of this case; the fact that the co-accused from whom contraband was recovered are already on bail; nothing has been recovered from the applicant in the form of contraband or money, the embargo of Section 37 of the NDPS Act does not come in the way of granting bail to the applicant.
30. 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



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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;
- 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.

31. 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 way of filing an application seeking cancellation of bail.

32. It is clarified that any observations made in the present



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order are for the purpose of deciding the present bail application and should not influence the outcome of the Trial.

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

AMIT MAHAJAN, J

MARCH 18, 2024
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