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

% Judgment delivered on: 07.02.2024

+ **BAIL APPLN. 1547/2023**

MOHD NASAR

..... Petitioner

Through: Mr Zishaan Iskandari, Advocate.

Versus

NARCOTICS CONTROL BUREAU & ANR. Respondents

Through: Mr Subhash Bansal, Sr. Standing
Counsel with Mr Shashwat Bansal,
Advocate for NCB.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. The present application has been filed under Section 439 CrPC seeking regular bail in connection with case no. VIII/21/DZU/2021 registered by the Narcotics Control Bureau, Delhi Zonal Unit (hereinafter referred to as 'NCB') under Sections 8(c), 21(c), 23(c) and Section 29 of the NDPS Act.
2. *Vide* order dated 10.05.2023, notice was issued in the bail application and the respondent/NCB was directed to file a status report. The respondent has filed a status report dated 07.08.2023, which forms part of the record.
3. The learned senior standing counsel for the respondent has handed over a copy of the criminal complaint filed by the prosecution before the Court of



the Learned Special Judge, NDPS Act, Patiala House Courts and the same is taken on record.

4. In the present case, co-accused Hikamtuallah Hakimi, an Afghan national, was apprehended on 21.04.2021 at IGI Airport and from the bag of Hakimi, two towels and one bed sheet were recovered which were having a pungent smell. On inspection of the said articles, it was found that a yellow powdery substance was coming out from them and their weight was also more than usual. On being asked, the said co-accused disclosed that all the three articles were dried from the mixture of heroin. The towels were weighed and their weight was found to be 930 gm and 940 gm, respectively, whereas the bed sheet weighed about 1.32 kg. A small piece was cut from both the towels and the bedsheet and upon testing, the same tested positive for heroin. The case of the respondent/NCB is that 3.190 kg of heroin has been recovered. On preliminary enquiry, it was disclosed by the co-accused that the said heroin was to be delivered to another Afghan national, namely, Mohd. Nasar i.e. the present petitioner.

5. Co-accused Hikamtuallah Hakimi further disclosed that the petitioner had called him near Krishna Mandir, Malviya Nagar for taking delivery of the said drugs. Thereafter, a team was constituted to conduct raid and capture the present petitioner. The said team from the NCB reached Krishna Mandir, Malviya Nagar and mounted surveillance near the temple by deputing NCB officials. Co-accused Hikamtuallah Hakimi stood outside the temple with a trolley bag and started waiting for the petitioner, who had to collect the trolley bag. Thereafter, the present petitioner came to the spot, talked to the co-accused and after taking the trolley bag from the co-accused started moving with the co-accused, when he was intercepted by the officials of NCB.



6. During investigation, the petitioner revealed that he had come to receive Hikamatullah on the instructions of one person namely, Kudrat who is stated to be residing in Afghanistan. The petitioner further revealed his place of residence as Top Floor, J-3/47, Khiriki Extension, Malviya Nagar and upon search of the house, a transparent polythene containing a white milky substance was recovered. The said polythene weighed 90 grams. The petitioner revealed that the said substance was used to increase the weight of heroin. Another packet from a different almirah containing a white milky substance was also recovered from the premises of the petitioner, which weighed 3 Kgs.

7. It is the further case of the prosecution that the present petitioner revealed that the said heroin and mixing substance was to be delivered to Chibueze & Kingsley Ofobike, who are partners in illegal business of selling and purchasing narcotic drugs and psychotropic substances. However, upon search of the house of Kingsley Ofobike, no contraband was recovered. Thereafter, the mobile phone of the accused were taken into possession. It is alleged by the prosecution that from the mobile phone of co-accused Hikamatullah, WhatsApp chat has been recovered showing that the petitioner was directed to come near Krishna Mandir, Malviya Nagar and the name of the petitioner has come out in the chat of Hikamtullah.

8. It is in this backdrop, that the present petitioner was arrested by the respondent on 22.04.2021 and since then he has been incarcerated.

9. The learned counsel appearing on behalf of the petitioner at the outset submits that the petitioner is a young man who has been falsely implicated in the present case. He submits that no recovery of contraband has been made from the person of the petitioner or his alleged premises at Khirki Extension,



Malviya Nagar. As per the prosecution's admitted case, the alleged substance which was recovered from the premises of the petitioner did not test positive for any narcotic drug or psychotropic substance when tested with the field testing kit and the same has been alleged by the prosecution to be some neutral substance used to increase the weight of heroin.

10. It was also contended on behalf of the petitioner that the alleged recovery of neutral substance from the petitioner is doubtful for another reason i.e. no rent agreement of the house in Khirki Extension, Malviya Nagar was obtained by the NCB nor the statement of the owner of the said house was recorded by the IO, therefore, there is no material to show that the premises from where the recovery was effected, was the residence of the petitioner.

11. He submits that even the recovery of neutral substance from the petitioner is doubtful as no independent witness was joined at the time of recovery. He submits that the stand of the prosecution that no independent witnesses agreed to join the recovery proceedings, cannot be believed as the petitioner is stated to be living in a crowded area i.e. Khirki Extension, Malviya Nagar.

12. It was further contended on behalf of the petitioner that the rigors of Section 37 of the NDPS Act do not apply in the present case, in as much as, there has been no recovery of contraband from the person of the petitioner or his premises. He further submits that there is nothing on record in the form of CDR's or chats to substantiate the claim of the respondent that the petitioner was called by co-accused to receive the delivery of the alleged contraband.

13. He submits that the actual quantity of contraband which has been recovered in the present case has not been ascertained, in as much as, the



respondent has not disclosed the quantity of heroin and is relying upon the total weight of the two towels and bedsheet as a whole which are merely carriers or containers and not a mixture or neutral substance or preparation to attract the ratio of *Hira Singh v. State*.¹

14. The learned counsel for the petitioner also urged that the petitioner has been apprehended on the disclosure statement of co-accused Hikamatuallah under Section 67 of the NDPS Act, which is inadmissible in law. Reliance in this regard was placed by the learned counsel on the decision of *Toofan Singh v. State of Kerala*.² He contends that merely because the petitioner came to meet co-accused Hikamatuallah near the temple cannot be a ground to implicate the present petitioner, especially when no contraband has been recovered from him.

15. Learned counsel for the petitioner further claimed parity for the petitioner stating the co-accused Kingsley Ofobike, from whom also no recovery was made, has already been granted regular bail by this Court *vide* judgment dated 12.07.2023 in BAIL APPLN 2468/2022.

16. Lastly, it was argued on behalf of the petitioner that the petitioner has been incarcerated for a period of more than two years, investigation is complete and nothing further is to be recovered from the petitioner, therefore, no useful purpose would be served in keeping the petitioner behind bars.

17. *Per contra* the bail is opposed by Mr. Subhash Bansal, Sr Standing Counsel for the respondent/NCB, who argued on the lines of the status report. He submits that the offence is of serious nature and the quantity of the contraband recovered from the co-accused is commercial, therefore, the

¹(2020) 20 SCC 272

²(2021) 4 SCC 1



petitioner has to satisfy the twin conditions mentioned in Section 37 of the NDPS Act before he is released on bail. He invites the attention of the Court to the status report to contend that on 26.04.2021, the petitioner tendered some screen-shots of chats from his phone and the same form part of the documents filed with the complaint. He contends that the aforementioned WhatsApp chats corroborate the involvement of the accused persons in the illegal trade of narcotics. He further submits that the allegations against the petitioner are serious in nature and there is a strong likelihood of him absconding if released on bail having regard to the fact that the petitioner is a foreign national.

18. In rejoinder, the learned counsel for the petitioner submits that it is the categorical stand of the respondent/NCB that the whatsapp chats which were recovered from the phone of the petitioner have not been verified despite the mobile phone of the petitioner being in the custody of the respondent.

19. I have heard the learned counsel for the petitioner, as well as, the learned senior standing counsel for the respondent and have perused the record.

20. The gravamen of allegations against the petitioner is that the petitioner on a communication being made by the co-accused, namely, Hikamtuallah Hakimi came to Krishna Mandir to collect the heroin, which was to be circulated for further supply.

21. Undisputedly, no recovery of contraband has been made either from the person or the alleged premises of the petitioner. A white milky substance that was recovered from the house of the petitioner, on being tested by the drugs detection kit, was not found to be a contraband. It is alleged to be a substance which is mixed with the heroin to increase its quantity.



22. The question then would arise is that whether the rigors of section 37 of the NDPS Act will apply to the petitioner for the recovery of contraband made from the co-accused Hikamtuallah Hakimi. Needless to say, that the rigors to section 37 of NDPS Act would become applicable only when the quantity of the recovered contraband is commercial and there is an incriminating material to show that the petitioner was involved in conspiracy with co-accused Hikamtuallah Hakimi, from whom contraband was recovered in commercial quantity.

23. The quantity of contraband also assumes relevance as quantum of sentence to be awarded for an offence of possessing or transporting a contraband committed under the Act is also dependent on the fact whether the quantity of such contraband is “small quantity”, “commercial quantity” or an “intermediate quantity”.

24. Therefore, it was necessary for the respondent/NCB to determine the quantity of contraband which has been recovered before an obligation is cast upon the petitioner to fulfill the twin conditions under Section 37 of the NDPS Act, viz., (i) to satisfy the court that there are reasonable grounds for believing that he is not guilty of such an offence, and (ii) that he is not likely to commit any such offence while on bail.

25. The case of the respondent in regard to the weight of contraband recovered is borne out from the complaint, the relevant extract of which reads as under:

“4.....Thereafter, Sh. Harender Dagar, JIO, took personal search of Hikamatullah Hakimi but nothing incriminating was recovered from the search of his body and thereafter Sh. Harender Dagar, JIO, took personal search of



*Hikamatullah Hakimi but nothing incriminating was recovered from the search of his body and thereafter, Sh. Harender Dagar, JIO asked about the bag from Hikamatullah Hakimi and he showed his dark blue colour trolley bag which belonged to Hikamatullah Hakimi. Sh. Harender Dagar, JIO opened the said trolley bag in the presence of Hikamatullah Hakimi and found contain his clothes, one black empty bag, **two towels and one bed sheet which were kept at the bottom and the same were light blue colour and were not looking like usual towels and bed sheet having pungent smell. On the inspection of those articles in the hand, a light yellow colour powdery substance was coming out from them and their weight was also more than usual** and Sh. Harender Dagar, JIO asked Hikamatullah Hakimi about the articles with the help of the translator, to which **Hikamatullah Hakimi told that all these 3 clothes were dried from the mixture of heroin. Thereafter, Sh. Harender Dagar, JIO cut a small part of the towel from one towel and tested with the help of DD Kit which gave positive result for heroin. Thereafter, the said towel was put into transparent polythene and weighed which came out to be 930 grams. Thereafter, Sh. Harender Dagar JIO put the said towel into markin cloth, made into pullinda and given Mark-A. Thereafter, a small part of the second towel was cut and tested with the help of DD Kit which also gave positive result for heroin in the said towel. The towel was then put into transparent polythene and weighed which came to be 940 grams. The article (Towel) was then put into markin cloth, made into pullinda and given Mark-B. Thereafter, a small part of the bed sheet was cut and tested with the help of DD Kit which also gave positive result for heroin from the bed sheet. The bed sheet was then put into transparent polythene and weighed which came out to be 1.320 Kg. The article (Bed Sheet) was then put into markin cloth, made into pullinda and given Mark-C. No other objectionable material was found in the blue trolley bag on making search of the said bag however some documents were found which were taken into***



possession for investigation purposes and the detail of the same is given in Annexure-A attached with the Panchnama.

(Emphasis Supplied)

26. From the aforesaid part of the complaint, it is clear that the respondent has included the weight of two towels and one bed-sheet in the weight of the total contraband which was recovered from the co-accused Hikamtullah Hakimi. In such a scenario, the next question which confronts the court is whether the weight of the carrier (being the towels and bedsheets) could be included for determining that the quantity of the recovered contraband is “small or commercial quantity”.

27. The answer is not far to seek. The Supreme Court in ***Hira Singh v Union of India***³ has held that *in case of seizure of mixture of narcotic drugs or psychotropic substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the “small or commercial quantity” of the narcotic drugs or psychotropic substances.* The term ‘neutral substance’ has not been defined under the NDPS Act, however, for this purpose reference may be had to para 10.3 of ***Hira Singh (supra)***, which reads as under:

“10.3. At this stage, it is required to be noted that illicit drugs are seldom sold in a pure form. They are almost always adulterated or cut with other substance. Caffeine is mixed with heroin, it causes that heroin to vaporise at a lower rate. That could allow users to take the drug faster and get a big punch sooner. Aspirin, crushed tablets, they could have enough powder to amend reversal doses of drugs. Take the example of heroin. It is known as powerful and illegal street drug and opiate derived from

³(2020) 20 SCC 272



morphine. This drug can easily be “cut” with a variety of different substances. This means that drug dealer will add other drugs or non-intoxicating substances to the drug so that they can sell more of it at a lesser expense to themselves. Brown sugar/smack is usually made available in powder form. The substances is only about 20% heroin. The heroin is mixed with other substances like chalk powder, zinc oxide, because of these, impurities in the drug, brown sugar is cheaper but more dangerous. These are only few examples to show and demonstrate that even mixture of narcotic drugs or psychotropic substance is more dangerous. Therefore, what is harmful or injurious is the entire mixture/tablets with neutral substance and narcotic drugs or psychotropic substances. Therefore, if it is accepted that it is only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, in that case, the object and purpose of enactment of the NDPS Act would be frustrated. There may be few punishment for “commercial quantity”. Certainly that would not have been the intention of the legislature.”

(Emphasis Supplied)

28. From the above paragraph in **Hira Singh** (supra), it appears that neutral substance in the context of contraband is to be understood as a substance which is mixed with the offending part of the contraband to either increase the weight of the entire contraband, in order to yield higher profits or to increase potency of the contraband or is an integral part of the contraband in order to facilitate the delivery or consumption of contraband.⁴

29. This being the position, this Court is of the *prima facie* view that the towels and bed sheet do not qualify to be a neutral substance and their weight cannot be included in the weight of the contraband for determining whether

⁴H.S. Arun Kumar v. State of Goa, 2022 SCC OnLine Bom 4696; Yethul T. v. State of Kerela, 2023 SCC OnLine Ker 1695.



seized contraband is of “small or commercial quantity”. However, this aspect will be considered in detail by the learned Trial Court during the trial uninfluenced by the aforesaid *prima facie* view, but the Court cannot be unmindful of the fact that at this stage of consideration of bail application of the petitioner, there is no material on record to show that the weight of the actual content of contraband excluding the weight of two towels and one bed sheet is of “commercial quantity” so as to attract the rigors of section 37 of the Act.

30. Further, the case of the prosecution is that the petitioner came to meet the co-accused and to collect the contraband when he was apprehended by the officials of the respondent. There is nothing on record to indicate that the petitioner had any knowledge of the contents of the bag which was handed over to the petitioner by the co-accused, therefore, lack of material in this regard will also enure to benefit of the petitioner. Reference in this regard may be had to the decision of a co-ordinate bench in ***Lhingneihat Lhouvum v. IO, Narcotics Control Bureau***,⁵ the relevant part of which reads as under:

“13. As per the case of the prosecution, the two consignments from which the contraband has been recovered, were consigned in the name of the present applicant. It is also the case of the prosecution that the present applicant, alongwith co-accused had gone to take delivery of the first consignment on 14.07.2020, when she was apprehended by the respondent. Apart from the applicant’s statement under Section 67 of the NDPS Act, there is no material to indicate that the present applicant had knowledge of the contents of the said consignments, which were booked in her name. There is nothing on record, as per the case of the prosecution, that the applicant had received any similar consignment in the past.”

⁵BAIL APPLN 1278/2023



(Emphasis Supplied)

31. Another incriminating material that has been relied upon by the respondent/NCB is the print outs of Whatsapp chats alleged to have taken place between the petitioner and respondent. It is the case of the prosecution that the petitioner has been in constant contact with the co-accused Hikamtuallah Hakimi *via* WhatsApp and is thus, a part of the criminal conspiracy in the supply of heroin. It is not in dispute that the WhatsApp chats have not been verified, despite the mobile phone of the petitioner having been seized by the respondent/NCB. Further, the Supreme Court in ***Bharat Chaudhary v. Union of India***,⁶ has held that the print outs of WhatsApp messages in the absence of scientific reports cannot be treated as sufficient material to establish a live link between the co-accused at the stage of considering a bail application. The relevant part of the decision reads thus:

“10...Reliance on printouts of Whatsapp messages downloaded from the mobile phone and devices seized from the office premises of A-4 cannot be treated at this stage as sufficient material to establish a live link between him and A-1 to A-3, when even as per the prosecution, scientific reports in respect of the said devices is still awaited.”

32. Thus, the only remaining incriminating material is the disclosure statement of co-accused Hikamtuallah Hakimi under section 67 of the NDPS Act, who disclosed that the petitioner was to receive the contraband from him. Suffice it to state that the disclosure statement of the co-accused is not admissible in evidence as has been held by the Supreme Court in *Toofan Singh v. State of Tamilnadu*.⁷ Therefore, there is no material to *prima facie*,

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⁷ (2021) 4 SCC 1



indicate that the petitioner had entered into a conspiracy with Hikamtullah Hakimi.

33. Though the rigors of section 37 of the NDPS Act may not be applicable to the petitioner for the reasons discussed above, but at the same time the court is satisfied that there are reasonable grounds for believing that the petitioner is not guilty of the offence alleged. Further, it is not the case of the respondent/NCB that the petitioner was involved earlier also in any offence under the NDPS Act or has any criminal record, therefore, petitioner is not likely to commit any offence while on bail.

34. In view of the above, the petitioner is entitled to the grant of regular bail. Accordingly, the petitioner is admitted to regular bail, subject to his furnishing personal bond in the sum of Rs. 50,000/- and a surety bond of the like amount and further subject to the satisfaction of the learned Special Judge and further subject to the following conditions:-

- A. The petitioner will not leave the country without prior permission of the concerned Trial Court and shall furnish his passport/travel documents, if any, at the time of furnishing his bail bond.
- B. The petitioner shall provide his mobile phone number to the Investigating Officer (IO) concerned- at the time of release, which shall be kept in working condition at all times, the petitioner shall not switch off, or change the same without prior intimation to the IO concerned, during the period of bail.
- C. The petitioner shall provide his residential address to the Investigating Officer (IO) concerned, during the period of bail. The IO



shall provide his number to the learned counsel for the petitioner for being shared with the petitioner,

D. The petitioner shall mark his attendance with the SHO/IO concerned every Saturday between 11:00 AM to 12 noon through video call and if video call is not possible, he may send SMS *apropos* his whereabouts thus, keeping them informed of his whereabouts;

E. The petitioner shall remain present before the Trial Court on the dates fixed for the hearing of the case. The petitioner shall not leave NCT of Delhi without prior permission of the concerned Trial Court.

F. The petitioner shall not indulge in any criminal activity during the bail period.

35. The petition stands disposed of.

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

37. Copy of the order be forwarded to the concerned Jail Superintendent for necessary information and compliance.

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

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

VIKAS MAHAJAN, J.

FEBRUARY 07, 2024
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