



\$~5

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

+ **BAIL APPLN. 2411/2023**

RAJEEV KUMAR

..... Petitioner

Through: Mr. Rishabh Sahu, Mr. Vishal Kumar
Singh and Mr. Mayank Solanki, Advocates

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Ms. Richa Dhawan, APP for State
with ASI Sanjeev Kumar, PS: Moris Nagar.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

ORDER

27.02.2024

%

1. This is an application preferred on behalf of the Applicant Rajeev Kumar S/o Sh. Kameshwar Prasad Yadav, under Section 439 Cr.P.C. seeking regular bail, in case FIR No. 63/2023 dated 27.04.2023 under Section 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') registered at PS: Maurice Nagar. Applicant is in judicial custody since 03.05.2023.

2. The case of the prosecution as put forth in the Status Report is that on 27.04.2023, secret information was received by HC Ravinder Dhaka that one person, namely, Shiv Kant, resident of Bihar, was involved in supplying narcotic contrabands and that he would be supplying heroin on the said day to someone near Shri Ram Institute, Shri Ram Road, Delhi and if a raid was conducted, he might be apprehended with huge quantity of contraband. The information was immediately lodged and conveyed to ACP concerned telephonically, who directed to take necessary action as per law and



authorized HC Ravinder Dhaka to conduct the raid, search and seizure and to take proper legal action. A raiding party reached the spot where an attempt was made to join some independent public witnesses but none joined citing various reasons. At 09:25 PM, one person came from Bonta Park Side Chowk, Delhi and stopped near the bus stand. Informer pointed towards the said person and identified him as Shiv Kant who was involved in drug trafficking. The Police team surrounded and apprehended Shiv Kant and carried out his search. Shiv Kant was apprised of his legal rights and a notice under Section 50 of the NDPS Act was served on him. After receiving notice, Shiv Kant refused for being searched before a Magistrate or a Gazetted Officer.

3. It is further stated in the report that upon search of Shiv Kant, a black polythene was recovered from his left hand, in which a white coloured polythene tied with a rubber band was found. On checking, with the help of field-testing kit, the Matiyala colour powder was found to be heroin and on being weighed on the electronic weighing machine, the contraband weighed 320 grams. Accused Shiv Kant @ Aakash was arrested and during interrogation, he disclosed that he received the recovered contraband from Manoj Yadav @ Mahatam Yadav and his associate Rajeev Kumar (Applicant).

4. During Police remand, raid was conducted on 03.05.2023 at Village Mahuli, District Bhojpur, Bihar at the instance of Shiv Kant @ Aakash and the Applicant was apprehended and notice was served upon him under Section 50 of NDPS Act. Applicant refused in writing to be searched before the nearest Magistrate or a Gazetted Officer. Heroin weighing 100 grams was recovered from the Applicant, which was found in a black polythene in



his left hand. Applicant was arrested and is in judicial custody since 03.05.2023.

5. Learned counsel appearing on behalf of the Applicant submits that the Applicant is languishing in jail since 03.05.2023. The quantity of heroin allegedly recovered from the Applicant is 100 grams, which is an intermediate quantity and therefore, rigours of Section 37 of the NDPS Act would not apply. Prosecution is erroneously making out a case of recovery of commercial quantity by combining and adding the commercial quantity of 350 grams heroin allegedly recovered from the co-accused, which is impermissible in law in view of the orders of this Court in *Anita @ Kallo v. The State (NCT of Delhi), in BAIL APPLN. 957/2023, decided on 18.07.2023* and *Awadhesh Yadav v. State Govt. of NCT of Delhi, 2023 SCC OnLine Del 7732*. It is urged that in *Anita (supra)*, this Court held that recovery made from the Applicant therein, which was 89 grams of heroin, could not be clubbed with the recovery from the co-accused so as to give it a colour of commercial quantity and therefore, rigours of Section 37 of the NDPS Act would not apply. In *Awadhesh Yadav (supra)*, this Court has culled out the principles governing clubbing of quantity of contraband recovered from two or more co-accused and has given illustrations of cases where clubbing can be done. It is also argued that it is not the case of prosecution that the co-accused Shiv Kant has any link or connect with the Applicant based on call details etc. *albeit* examination of CDRs of mobile phones is a matter of trial, as held by the Supreme Court and this Court in many judgments. Mere disclosure statement of the co-accused cannot be relied upon by the prosecution to oppose the bail application in view of the judgment of the Supreme Court in *Tofan Singh v. State of Tamil Nadu*,



(2021) 4 SCC 1.

6. Learned APP, on the other hand, opposes the bail application on the ground that the total quantity recovered from co-accused Shiv Kant and the Applicant is 420 grams by adding and clubbing the recoveries, as both conspired and it is on the disclosure statement of Shiv Kant that the Applicant was apprehended. Recovery from the Applicant cannot be seen in isolation as all co-accused form part of a syndicate involved in the serious and heinous crime of trafficking of contrabands. Investigation is pending and Charge Sheet is yet to be filed. One of the co-accused Manoj Yadav is still absconding and the FSL report for chemical examination of the recovered contraband is awaited. Applicant is not a permanent resident of Delhi and the chances of his fleeing from justice, if released on bail are high.

7. I have heard the learned counsel for the Applicant and the learned APP for the State.

8. From the reading of the status report, it is evident that even as per the case of the prosecution, the quantity of heroin recovered from the Applicant is 100 grams though the quantity recovered allegedly from co-accused Shiv Kant is a commercial quantity being 320 grams heroin. The question therefore that arises for consideration at this stage is whether the quantity of heroin recovered from the co-accused can be added/clubbed to the 100 grams heroin recovered from the Applicant. In *Anita (supra)*, this Court has taken a view that clubbing of quantities of contraband recovered from co-accused cannot be clubbed. Relevant paragraph is as follows:-

“8. In the present case, recovery made from the petitioner is 89 grams of Heroin which amounts to intermediate quantity and not commercial quantity. In light of the judgment in Anita (supra), the recovery made from the petitioner cannot be clubbed with the recovery made from the coaccused. Therefore, in my considered view, the rigours of Section 37 of



the NDPS Act would not apply in the facts and circumstances of the present case.”

9. The same view was taken by another Co-ordinate Bench of this Court in ***Mohd. Farman v. State Govt. of NCT of Delhi, 2023 SCC OnLine Del 5451***, where Applicant was found in possession of 500 gram of charas and claimed that being an intermediate quantity, rigours of Section 37 of the NDPS Act would not be applicable. Case of the prosecution was that 500 gram of charas was recovered from the co-accused and therefore, the total quantity of contraband comes within the category of commercial quantity, requiring the Applicant to establish how the twin conditions postulated under Section 37 of the NDPS Act for grant of bail did not pose an impediment in his case. Court granted bail to the Applicant relying on the judicial precedents and holding that the 500 grams of charas recovered from the Applicant could not be clubbed with an equal quantity found in possession of the co-accused and since the 500 grams charas recovered from the Applicant was an intermediate quantity, he would be entitled to bail.

10. In a recent judgment of this Court in ***Awadhesh Yadav (supra)***, the Court, after analysing the provisions of NDPS Act and following judicial precedents on the subject, carved out principles which would largely govern clubbing of the quantity of contraband recovered in a given case from two or more co-accused, at the stage of bail. From a reading of the principles so culled out as well as the judgments relied upon by the Court and the illustrations cited, broadly what the Court has held is that it is not in all cases that the prosecution can be permitted to club the quantities recovered from two or more co-accused. It would depend on the facts and circumstances of each case, as for instance, where the two co-accused are found travelling in



the same vehicle or where the CDRs of the mobile numbers of the co-accused reveal that they were constantly in touch and had conspired together to procure and transport the drug or where there is overwhelming incriminating material in the form of numerous, frequent and bulk money transactions through PayTm or bank accounts, photographs, parcel receipts, WhatsApp chats etc., as in the case of ***Aakash Mehra v. Narcotics Control Bureau, 2023 SCC OnLine Del 5597.***

11. Coming to the facts of this case, reading of the status report shows that the Applicant was apprehended on the disclosure statement of Shiv Kant while Shiv Kant was at Delhi and the Applicant was in Bihar. There is no reference in the status report to any telephonic communications exchanged between the two co-accused and/or any money transactions etc. for this Court to come to even a *prima facie* finding that there was a conspiracy hatched between the two, permitting the prosecution to club the 320 grams heroin recovered from Shiv Kant to the 100 grams allegedly recovered from the Applicant. Since the quantity allegedly recovered from the Applicant is 100 grams, which is an intermediate quantity, rigours of Section 37 of NDPS Act shall not apply. Disclosure statement of co-accused cannot be relied upon by the prosecution to oppose the bail application in view of the judgment of the Supreme Court in ***Tofan Singh (supra)***, in the absence of any other incriminating or corroborative evidence. Applicant has been in custody since 03.05.2023 and his jail conduct is 'satisfactory', as per the nominal roll.

12. For all the aforesaid reasons, Applicant has made out a case for grant of regular bail. Accordingly, it is directed that the Applicant be released on regular bail subject to his furnishing a personal bond in the sum of



Rs.50,000/- with two sureties of the like amount to the satisfaction of the Trial Court of which one surety will be of a person who is a permanent resident of Delhi and further subject to the following conditions:-

- i. Applicant shall not leave the country without prior permission of the Trial Court;
- ii. He shall provide his mobile number to the IO concerned and keep the same active at all times and shall not change the number without prior intimation to the IO and the Trial Court;
- iii. He shall furnish his permanent residential address to the concerned IO and shall intimate the IO as well as the Trial Court by filing an affidavit regarding any change in his residential address;
- iv. He shall appear before the Trial Court as and when the matter is taken up for hearing unless exempted by the Trial Court;
- v. He shall not indulge in any criminal activity or contact any witness and/or any other person associated with the present case; and
- vi. He shall report to concerned IO once a month on every third Monday at 2:00 PM.

13. It is made clear that nothing stated in this order shall tantamount to expression of an opinion on merits of the case.

14. Application stands disposed of.

15. Copy of the order be sent to the concerned Jail Superintendent for information and necessary compliance.

JYOTI SINGH, J

FEBRUARY 27, 2024/kks/shivam