



\$~1

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **BAIL APPLN. 2533/2023**

MD LITONApplicant
Through: Mr. Rahul Sharma, Mr. Deepak
Ghai, Mr. Kshitij Goel,
Advocates

versus

STATE NCT OF DELHIRespondent
Through: Mr. Sanjeev Bhandari, ASC with
Ms. Spriha Bhandari, Ms. Charu
Sharma, Mr. Arjit Sharma & Mr.
Vaibhav Vats, Advocates for the
State, with SI Kartar Singh &
ASI Raj Kumar, Narcotics Cell

CORAM:
HON'BLE MR. JUSTICE AMIT MAHAJAN

% **ORDER**
20.08.2024

1. The present application is filed under Section 438 of the Code of Criminal Procedure, 1973 ('CrPC') seeking pre-arrest bail in FIR No. 308/2023 dated 15.03.2023 registered at Police Station Bhalswa Dairy for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (**NDPS Act**).
2. It is alleged that on the basis of secret information, a person namely, Mustafa was apprehended by the police at kudda khatta, kabaddi wali gali, Bhalswa dairy, and during a cursory search, 2.02 KG of 'Ganja' was recovered from him. It is alleged that during the interrogation, co-accused Mustafa disclosed that he had procured the contraband – Ganja from the present applicant and another person namely 'Badal'. FIR was thereafter registered under Section 20 of the NDPS Act.



3. The learned counsel for the applicant submits that the applicant has been implicated in the present case only on the basis of the disclosure statement made by the co-accused Mohd. Mustafa and no recovery has been effected from the applicant/accused. He further stated that after completion of investigation, the charge sheet has already been filed.

4. He submits that the disclosure statement of the co-accused person is *per se* insubstantial and has no evidentiary value, as the same is not corroborated by any recovery. He places 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*** in this regard.

5. He further submits that the co-accused – Mustafa has already been granted bail in the present matter.

6. He submits that the applicant has joined the investigation pursuant to the order dated 01.08.2023 passed by this Court.

7. *Per contra*, the learned Additional Standing Counsel ('ASC') for the State opposes the grant of any relief to the applicant. He submits that the applicant was an active participant in the entire transaction. He submits that the applicant does not have clean antecedents and is involved in other cases as well.

8. He submits that the applicant did not cooperate with the investigation and he had not disclosed the relevant information to the concerned Investigating Officer.

9. I have heard the learned counsel for the parties and perused the record.

10. *Prima facie*, the applicant has been implicated in the present case primarily on the basis of the disclosure statement of the co-accused. 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 is 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)

11. It is pertinent to note that no recovery has been effectuated from the applicant in the present case. At this stage, *prima facie*, the material on record cannot be deemed sufficient to link the applicant to the alleged offence or other co-accused persons.

12. It is also pertinent to note that the applicant was granted



interim protection by this Court *vide* order dated 28.11.2023.

13. It is not the case of the prosecution that the quantity recovered from the main accused, namely, Mustafa is commercial in nature and hence, the rigours of the Section of 37 of the NDPS Act are attracted in the present case.

14. The status report filed by the Investigating Officer also reveals that the present applicant has joined the investigation as of 02.08.2023.

15. It is evident that there is no recovery from the applicant in the present case and the only piece of evidence against the applicant is a confessional statement of the main accused, who has already been granted bail in the present matter.

16. It is not in doubt that order for bail cannot be passed in a routine manner so as to allow the accused to use the same as a shield. At the same time, it cannot be denied that great amount of humiliation and disgrace is attached with arrest. In cases where the accused has joined investigation and is not likely to abscond, the custodial interrogation should be avoided.

17. The learned ASC for the State submits that the antecedents of the applicant do not entitle him of any relief. He submits that the applicant also, on an earlier occasion, was found to be involved in an offence under Section 20 of the NDPS Act.

18. It is further stated that the applicant is a declared bad character of Police Station Bhalswa Dairy. The applicant has, admittedly, been on bail in other cases. Mere pendency of the criminal cases cannot itself be a ground for denial of bail to the accused.

19. As noted above, the applicant was sought to be implicated on the basis of a disclosure of accused – Mustafa in whose custody, the contraband was recovered. The accused – Mustafa has already been admitted on bail. The alleged quantity



recovered from Mustafa is also not commercial in nature so as to attract the rigours of Section 37 of the NDPS Act.

20. In view of the above, it is directed that the applicant, in the event of arrest, be admitted on bail on furnishing a bail bond for a sum of ₹20,000/- with one surety of the like amount subject to the satisfaction of the learned Trial Court, on the following conditions:

- a. The applicant shall join and cooperate with the investigation as and when directed by the IO;
- b. 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;
- c. The applicant shall under no circumstances leave the boundaries of the country without the permission of the learned Trial Court;
- d. The applicant shall appear before the learned Trial Court as and when directed;
- e. The applicant shall provide the details of his address to the concerned IO/ SHO and shall not change the same without informing them;
- f. The applicant shall give his mobile number to the concerned IO/SHO and shall keep her mobile phone switched on at all times.

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

22. 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.

23. The bail application is allowed in the aforementioned terms.

AMIT MAHAJAN, J

AUGUST 20, 2024

“hkaur”