



2024:DHC:1475



\$~11

* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Judgment Delivered on: 26.02.2024*+ **BAIL APPLN. 2645/2022****HABIBULLAH NABI ZADA**

..... Petitioner

Through: Mr. Gautam Khazanchi and Mr.
Vinayak Chawla, Advs.

versus

N.C.B.

..... Respondent

Through: Mr. Subhash Bansal, Sr. SC with Mr.
Shashwat Bansal, Adv.**CORAM:****HON'BLE MR. JUSTICE VIKAS MAHAJAN****JUDGMENT****VIKAS MAHAJAN, J.**

1. The present petition has been filed under Section 439 r/w Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C) seeking grant of regular bail to the petitioner in Crime No. VIII/02/DZU/2020 under Sections 8/21/23/29 NDPS Act instituted by the NCB.
2. *Vide* order dated 05.09.2022, notice was issued in the bail application of the petitioner and the respondent/NCB was directed to file a status report. The respondent has filed a status report dated 31.10.2022, which forms part of the record.
3. The case of the prosecution as borne out from the status report/reply is that on the basis of a secret information dated 28.12.2019, Habibullah Nabi Zada (the petitioner herein) and Abdul Wadood Ahmadi (co-accused), who arrived by Flight No. FG-313 of Arena Airlines at T- 3, IGI Airport, were intercepted near the exit of terminal building.

Signature Not Verified

Digitally Signed
By: NARENDRA SINGH
ASWAL
Signing Date: 26.02.2024
18:04:04**BAIL APPLN.2645/2022***Page 1 of 11*



4. Upon enquiry, both the suspects voluntarily disclosed that they had swallowed 15 drug capsules each. Thereafter they were brought to Safdarjung Hospital, where the Doctor on duty confirmed about foreign body in the stomach of both of them. Accordingly, they were admitted in the said Hospital for medical support in ejection of the said foreign bodies.
5. Thereafter, upon ejection of the foreign bodies from the stomach of the accused persons on 03.01.2020, the NCB Team alongwith Doctor on duty and interpreter Ms. Puspa, in the presence of independent witnesses, counted all capsules, cut-opened each capsule and then tested one by one each capsule.
6. Firstly, upon testing set of 15 capsules eased out by Habibullah Nabi Zada, the same were found to contain off-white-powdery substance in each capsule. When tested, the powder gave positive result for Heroin and it was the same substance in all capsules.
7. On weighing the powdery substance compressed in said 15 capsules, it came out 225 Grams. Thereafter, second set of 15 capsules eased out by Abdul Wadood Ahmadi were also cut opened and upon testing, each capsule was found to contain similar type of substance and tested for Heroin. On weighing, the substance from said 15 capsules weighed 225 grams Heroin.
8. It is in this backdrop that the present case was registered by the respondent/prosecution and the accused persons including the present petitioner came to be arrested on 03.01.2020.
9. Mr. Gautam Khazanchi, the learned counsel appearing on behalf of the petitioner, at the outset submits that the petitioner is a farmer belonging to a poor segment of the society having family comprising of wife and 07 children, who are dependent on the petitioner for their survival.



10. On merits, he submits that the rigors of Section 37 of the NDPS Act are not applicable in the present case and the prosecution has erroneously attributed the weight of the total contraband to the petitioner to allege that 450 grams have been recovered in the present case, which is a commercial quantity.

11. He contends that the alleged recovery from the stomach of the petitioner is only 225 grams, which is an intermediate quantity and thus, the petitioner is not required to meet the threshold under Section 37 of the NDPS Act.

12. He submits that the recovery made from the stomach of co-accused cannot be attributed to the petitioner since the petitioner did not have the conscious/physical possession of the 225 grams of heroin which has been allegedly recovered from the stomach of the co-accused. In these circumstances, the petitioner could not have exercised any control or dominion over the alleged heroin which was allegedly recovered from the stomach of the co-accused. To support his aforesaid contention, the learned counsel relied upon the judgments of the Punjab & Haryana High Court in *Amit Dhanak v. State of Haryana*¹, *Sukhwinder Singh v. State of Punjab*², *Sukhdev Singh v. State of Punjab*³.

13. He submits that case set up by the prosecution that the petitioner along with the co-accused came by the same flight after procuring the contraband from 'Janan' is premised on the disclosure statement of the petitioner, as well as, his co-accused recorded under Section 67 of the NDPS Act, which are inadmissible in law. For this proposition, he relies upon the

¹ CRM-M-33684-2020, P&H HC

² CRM-M-13534-2022, P&H HC



judgment of the Supreme Court in of *Toofan Singh v. State of Kerala*.⁴ He submits that apart from the above disclosure statements there is no incriminating material to show any kind of conspiracy between the petitioner and the co-accused, therefore, the quantity of contraband recovered from the co-accused cannot be added for ascertaining whether the recovered contraband is of small, intermediate or commercial quantity.

14. He submits that merely because the petitioner and his co-accused were coming from Afghanistan on the same flight cannot be the basis for drawing an inference that the petitioner and his co-accused were in conspiracy without any other cogent evidence to prove that conspiracy, especially when the flight was a public transport. Additionally, he submits that in the absence of material on record, knowledge as to what was swallowed by the co-accused, the contents and quantity thereof, cannot be attributed to the petitioner. In support of his contention, he places reliance on the decision of Supreme Court in *UOI v. Mohd. Nawaz Khan*.⁵

15. Lastly, it was submitted that the petitioner was arrested in the present case on 03.01.2020 and has completed almost 04 years in custody. Accordingly, it was prayed that the petitioner be enlarged on bail as the conclusion of trial is likely to take some time because the prosecution has cited as many as 18 witnesses and only 4-5 witnesses have been examined. In support of his contention, reliance has been placed upon *Rabi Prakash v. State of Odisha*.⁶

³ CRM-M-53872-2021(O&M), P&H HC

⁴ (2021) 4 SCC 1.

⁵ (2021) 10 SCC 100

⁶ SLP (Crl) No. 4169/2023.



16. *Per contra*, the grant of bail is opposed by the Sr Standing Counsel for the respondent/NCB, who has argued on the lines of the status report. He submits that the offence is of serious nature and the total quantity of the contraband recovered from the petitioner along with the co-accused is commercial, therefore, the petitioner has to satisfy the twin conditions mentioned in Section 37 of the NDPS Act before being released on bail. He submits that it is apparent from the facts of the present case that the petitioner and the co-accused were in a conspiracy with one another as they arrived in Delhi on the same flight, from the same country i.e. Afghanistan and on the same day, by concealing drug capsules in their stomach.

17. He submits that both the accused persons voluntarily revealed in their statements that they had procured the contraband from same person namely, Janan, and had travelled together to India. He further submits that the petitioner is a foreign national and there is a possibility that he may flee from administration of justice in case, he is enlarged on bail.

18. I have heard the learned counsel for the petitioner as well as the Sr Standing Counsel for the respondent/NCB and perused the record.

19. For the offences involving commercial quantity, an accused has to satisfy the twin conditions under Section 37 of the Act before he is enlarged on bail viz., (i) the public prosecutor has been given an opportunity to oppose the bail application; and (ii) the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any such offence while on bail, are satisfied.

20. It is the case of the prosecution that the heroin individually recovered from the petitioner and his co-accused is of 225 gm each, whereas the



commercial quantity of heroin is 250 gm and above. It would thus, be imperative to ascertain whether the quantity of contraband recovered from the petitioner as well as the co-accused can be clubbed together.

21. This Court in the case of *Awadesh Yadav v. State of NCT of Delhi*,⁷ had the occasion to consider the circumstances under which it is permissible to club the contraband which has been recovered from two or more accused persons, who are alleged to be in conspiracy with one another. It was held that clubbing of contraband is permissible in law when there is cogent and convincing incriminating material to show conspiracy between the co-accused.

22. The petitioner and his co-accused were apprehended on the basis of source information. There is no material placed on record by the prosecution in the form of CDR / CAF records or bank account statements to show that the petitioner and the co-accused were in conspiracy with one another. Further, the petitioner and the co-accused entered the country in a flight which is a public transport as against a private vehicle. In *Mohd. Nawaz Khan* (supra) it was held that the standard of conscious possession would be different in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. The relevant part of the decision reads thus:

“26. What amounts to “conscious possession” was also considered in Dharampal Singh v. State of Punjab [Dharampal Singh v. State of Punjab, (2010) 9 SCC 608 : (2010) 3 SCC (Cri) 1431], where it was held that the knowledge of possession of contraband has to be gleaned from the facts and circumstances

⁷ BAIL APPLN 1692/2023 (Judgment dated 29.11.2023).



of a case. The standard of conscious possession would be different in case of a public transport vehicle with several persons as opposed to a private vehicle with a few persons known to one another. In Mohan Lal v. State of Rajasthan [Mohan Lal v. State of Rajasthan, (2015) 6 SCC 222 : (2015) 3 SCC (Cri) 881], this Court also observed that the term “possession” could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge.”

23. In so far as the incriminating circumstance in the form of statements of the petitioner and the co-accused to the effect that they came by the same flight after procuring the contraband from one ‘Janan’, are the statements under Section 67 NDPS Act, which have been held to be inadmissible by the Supreme Court in **Toofan Singh** (supra). The relevant part of the decision reads 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.

156. The judgment in Kanhaiyalal [Kanhaiyalal v. Union of India, (2008) 4 SCC 668 : (2008) 2 SCC (Cri) 474] then goes on to follow Raj Kumar Karwal [Raj Kumar Karwal v. Union of India, (1990) 2 SCC 409 : 1990 SCC (Cri) 330] 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 of Noor Aga [Noor Aga v. State of Punjab, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748] and Nirmal Singh Pehlwan v. Inspector, Customs [Nirmal Singh Pehlwan v. Inspector, Customs, (2011) 12 SCC 298 : (2012) 1 SCC (Cri) 555] 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)

24. In case the disclosure statements recorded under section 67 of the Act are excluded, there is no other incriminating material available to establish conspiracy between them. There also appears to be some substance in the submission of the learned counsel that in the absence of any cogent and convincing material, personal knowledge as what the co-accused has swallowed, the contents and quantity thereof cannot be attributed to the petitioner merely on the basis of fact that they were travelling on the same flight. That apart, it is not the case of the prosecution that there is any other case under the Act registered against the petitioner or that he is a habitual offender. Therefore, in the given circumstances, *prima facie*, the quantity of contraband recovered from the co-accused cannot be added with the quantity



of contraband recovered from the petitioner for invoking the rigors of Section 37 of the Act.

25. The contention of the learned counsel for the petitioner that the petitioner deserves the concession of regular bail as he has been in custody for almost 4 years also has merit because it has been brought on record that despite the charge being framed against the petitioner in the year 2020, only 5-6 prosecution witnesses out of 18 have been examined. Evidently, the trial will not be concluded anytime soon and the petitioner cannot be kept in custody for indefinite period to await the outcome of trial. For this reason also, the rigors of Section 37 of the Act will not apply to the present case. Reference in this regard may be had to the observations of the Supreme Court in *Rabi Prakash* (Supra), which read as under:

“As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent – State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.”

26. In so far as the apprehension expressed by the respondent's counsel that the petitioner is foreigner and he might jump the bail, the said apprehension could be allayed by imposing appropriate conditions. Further, since all the witnesses are official witnesses, there is no possibility of the petitioner influencing them in the event he is enlarged on bail.



27. In view of the above, this Court is of the opinion that the petitioner has made out a case for 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 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.

28. The petition stands disposed of.

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

30. What remains for this Court is to place an appreciation on record of the valuable assistance rendered by a young legal aid counsel, Mr. Gautam Khazanchi, who had been nominated by the Delhi High Court Legal Services Committee to represent the petitioner in this case. Not only he was thoroughly prepared but assisted the court with case laws on each aspect of the matter.

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

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

VIKAS MAHAJAN, J.

FEBRUARY 26, 2024

MK/N.S. ASWAL