



2024 : DHC : 2645



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 03.04.2024

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BAIL APPLN. 3269/2023 & CRL.M.A. 3958/2024

GILBERT APEH EMEKA

..... Applicant

versus

NARCOTIC CONTROL BUREAU

..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Vikas Gautam, Adv.

For the Respondent : Mr. Utsav Singh Bains, SPP with Mr.
Prashant Pathak, Adv.

CORAM

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') seeking regular bail in Crime No. VIII/82/DZU/2021, registered for offences under Sections 8/21(C)/22(C)/25/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (**NDPS Act**).

2. Initially, the present case was registered by Delhi Police in FIR No. 660/2021 at Police Station Mohan Garden. However, the ACP

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Headquarter (Co-ord), Delhi Police *vide* order dated 14.12.2021 transferred the investigation of the present case to Narcotic Control Bureau (NCB).

3. The brief facts of the case are as follows:

- 3.1 On 23.11.2021, on the basis of secret information received by SI Shri Subhash Chand, Anti-Narcotic Cell, Dwarka, the co-accused person, namely, George Uchenna, who is a person of African descent, was intercepted at an open space near the corner of Ganda Nala Road, Lal Farm, A-2 Block, Bhagwati Garden and a recovery of 270 grams of Heroin was made from a polythene found in his pocket. The co-accused George Uchenna was therefore arrested.
- 3.2 In his disclosure statement, co-accused George Uchenna admitted to the recovery of the contraband from his possession and stated that the applicant had met him at a party and induced him to join the drug business. He stated that the applicant used to get consignments of drugs from different parts of India and used to supply them to him for delivery to clients.
- 3.3 On 25.01.2022, it is alleged that information was received from a reliable source that the applicant, who was involved in drug trafficking and used to supply drugs to the co-accused George, was coming near Devi Charitable Dental Hospital, Uttam Nagar, New Delhi. It is alleged that the raiding team



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reached the spot and issued notice under Section 67 of the NDPS Act to the applicant. In compliance of the said notice, the applicant accompanied the raiding team to tender his statement.

- 3.4 It is alleged that the applicant, on 25.01.2022 and 26.01.2022, in his voluntary statement under Section 67 of the NDPS Act, disclosed the details of his residential address. It is stated that the house of the applicant was searched in presence of independent witnesses but no drugs were found there. However, a copy of two tenant verification forms in the name of the applicant and one, Zenith Ugwa (alleged girlfriend of the applicant), were found during search and taken into possession.
- 3.5 The applicant, in his statement, further disclosed that he was engaged in cloth business, however, he had also indulged in drug business and Hawala business in India. He disclosed that he had given more than 5kg of contraband to co-accused George to keep at his rented accommodation. He further disclosed that he and Zenith Ugwa used to collect parcels containing drugs from the associates of his cousin, namely, Jude to store at Zenith's and George's rented house. He also stated that Zenith and George were his associates who used to assist him in transporting and procuring drugs. He stated that the some of the said drugs were handed to his cousin. He also

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stated that he operated multiple mobile phones and disclosed two of the mobile numbers used by him.

3.6 The applicant was arrested on 26.01.2022.

3.7 On 26.01.2022, on the basis the disclosure of the applicant, the respondent conducted a search of the house rented by co-accused Zenith Ugwa (tenant verification form of co-accused Zenith in respect of the said property was found at the house of the applicant). It is alleged that 500 grams of Methamphetamine and 2.250 kg of Heroin was recovered from the said address.

3.8 Co-accused Zenith was subsequently arrested. She allegedly disclosed that the applicant was involved in drug trafficking and had promised to give her good money for assistance in the transportation of the drugs.

3.9 The learned Additional Sessions Judge, NDPS, Patiala House Courts, New Delhi *vide* order dated 12.05.2023 dismissed the bail application of the applicant on account of the bar under Section 37 of the NDPS Act.

4. The learned counsel for the applicant submitted that the investigation in respect of the applicant is complete and nothing incriminating has been recovered from the applicant. He further submitted that the applicant has been in custody since 26.01.2022 and no purpose would be served keeping him in further incarceration.



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5. He contended that it is the admitted case of the respondent that no recovery has been effectuated from the possession of the applicant or at his instance. He also submitted that nothing was recovered from the house of the applicant either.

6. He submitted that the applicant has been indicted in the present case merely on the basis of the disclosure statement of the co-accused George and the applicant himself.

7. He submitted that the disclosure statement made under Section 67 of the NDPS Act is *per se* insubstantial and has no evidentiary value, if the same is not corroborated by any recovery. To buttress this argument, he placed 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***.

8. He submitted that the house from where the recovery was made was admittedly taken on rent by co-accused Zenith Ugwu and not the applicant, as was also confirmed by the landlord.

9. He submitted that the respondent has placed no independent evidence on record to suggest that the applicant was in active or conscious possession of the contraband substance at any point of time. In this regard, he placed reliance on the judgment of ***Mohan Lal v. State of Rajasthan : (2015) 6 SCC 222***, where the Hon'ble Apex Court held that for presumption of culpable mental state, conscious possession of contraband is necessary.



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10. He submitted that the applicant was not carrying any mobile phone with the number that has been attributed to him. He submitted that even so, it is the admitted case of the respondent that there is no recorded conversation between the parties that indicates that the applicant was involved in the alleged offence.

11. *Per contra*, the learned Special Public Prosecutor (**SPP**) for the NCB submitted that the learned Trial Court has rightly dismissed the applicant's bail application by order dated 12.05.2023. He stated that all the grounds of the applicant, including the contention that the applicant is not the owner of the house from where the contraband has been seized and that no recovery has been made from him, have been effectively dealt by the learned Trial Court and requires no interference.

12. He submitted that the investigation indicates that the accused persons, including the applicant, are all members of an International Drug Syndicate and had knowingly conspired and indulged in the storing, sale/ supply and transport of Heroin and Methamphetamine.

13. He submitted that the recovery of the contraband drugs from the house of co-accused Zenith was made on the basis of the disclosure of the applicant.

14. He submitted that the disclosure statements of co-accused Zenith and George are consistent on the fact that the applicant had offered them monetary incentive for assistance in transportation of the

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drugs. He submitted that co-accused George had also clearly mentioned in his disclosure statement that the contraband recovered from him was supplied by the applicant.

15. He submitted that as per the CDRs, the applicant was found to be telephonically in touch with co-accused persons, that is, Jude, George and Zenith.

16. He submitted that the trial in the present case is pending and the applicant's release at this stage could adversely affect the same. He further submitted that the seized contraband involves commercial quantity of Heroine and Methamphetamine and the embargo under Section 37 of the NDPS Act would squarely apply in the present case.

ANALYSIS

17. *Prima facie*, the applicant has been implicated essentially 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 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.

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)

18. It is not in dispute that the recovery of contraband was made from co-accused Zenith and George. It is alleged that the applicant used to store the contraband in the house of Zenith. It is, however, not disputed that the said premises was taken on rent by co-accused Zenith and not by the applicant.

19. Insofar as the CDR data showing that the applicant was in constant touch with the co-accused persons and the alleged financial transactions between the applicant and co-accused Zenith is



concerned, the probative value of the same shall be tested during 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.

20. 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)

21. It is pertinent to note that no recovery has been effectuated from the applicant in the present case and the present applicant has been arrested on the basis of disclosure statement made by the co-accused George. 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.

22. 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.

23. 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.”

24. 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 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.”

25. In view of the above, this Court is of the opinion that the embargo of Section 37 of the NDPS Act does not come in the way of granting bail to the applicant.

26. Furthermore, speedy trial in the present case does not seem a possibility. The object of jail is to secure the appearance of the accused persons during the trial. The object is neither punitive nor preventive and the deprivation of liberty has been considered as a punishment without the guilt being proved. The applicant cannot be made to spend the entire period of trial in custody especially when the trial is likely to take considerable time.

27. The Hon'ble Apex Court in ***Badsha SK v. The State of West Bengal : Special Leave Petition (Crl.) 9715/2023*** had directed release of the accused on bail considering that he was in custody for more than two years and four months and trial had yet to begin.

28. In ***Dheeraj Kumar Shukla v. State of U.P. : 2023 SCC OnLine SC 918***, the Hon'ble Apex Court directed release of accused on bail from whom commercial quantity of the contraband was recovered. It



was observed that in the absence of criminal antecedents and on account of the fact that the accused had been in custody for two and a half years, the bar of Section 37 of the NDPS Act can be dispensed with.

29. In the present case, the prosecution has been given an adequate opportunity to oppose the present application. In view of the facts of the case, in the opinion of this Court, the applicant has *prima facie* established a case for grant of bail. Moreover, it is also not disputed that the applicant has clean antecedents, and is thus not likely to commit any offence whilst on bail.

30. However, keeping in mind the fact that the applicant is a foreigner, appropriate conditions have to be imposed while granting bail, as stipulated by the Hon'ble Apex Court in the case of ***Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India : (1994) 6 SCC 731.***

31. The applicant is, therefore, directed to be released on bail on furnishing a personal bond for a sum of ₹1,00,000/- with two sureties 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 will not leave the boundaries of the National Capital Region without prior permission of the Court, and will deposit his passport with the learned Trial Court;
- c. The applicant shall provide the details of his permanent address



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to the learned Trial Court and intimate the Court, by way of an affidavit, as well as the IO about any change in his residential address;

- d. 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;
- e. The applicant shall appear before the learned Trial Court on every date of hearing;
- f. The applicant shall, after his release, appear before the concerned SHO on every Friday at 5 PM;
- g. 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;
- h. The learned Trial Court is directed to ensure that the certificate of assurance, from the Embassy/ High Commission of the applicant's native country, that is, Nigeria, that the applicant shall not leave the country and shall appear before the learned Trial Court as and when required, is placed on record.

32. 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.

33. 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



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expression of opinion on the merits of the case.

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

AMIT MAHAJAN, J

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