



2024:DHC:7714



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

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Reserved on: 30th August 2024

Pronounced on: 04th October 2024

+ **BAIL APPLN. 2372/2024**

WASEEM SEIKH

.....Applicant

Through:

Mr. Jitender Tyagi, Mr. Rajesh
Pandey, Mr. Gaurav Bidhuri and
Mr. Kuldeep Naagar, Advocates

versus

STATE OF NCT DELHI

.....Respondent

Through:

Mr. Amit Ahlawat, APP for State
IO SI Anil Kumar (AATS/ South)

+ **BAIL APPLN. 2878/2024**

RIHANA

..... Applicant

Through:

Mr. Jitender Tyagi, Mr. Rajesh
Pandey, Mr. Gaurav Bidhuri and
Mr. Kuldeep Naagar, Advocates.

versus

STATE OF NCT DELHI

.....Respondent

Through:

Mr. Amit Ahlawat, APP for State
IO SI Anil Kumar (AATS/South)

CORAM:

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. These bail applications have been filed seeking anticipatory bail for the applicants who are husband and wife and have been implicated in FIR no. 208/2024 dated 03rd April 2024 under Sections 21/29/61/85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 [**“NDPS Act”**] registered at Police Station [**“PS”**] Ambedkar Nagar.



2. On 26th July 2024, while considering the anticipatory bail application of applicant Waseem Seikh, the arguments of the APP and the counsel for applicant/accused were noted, notice was issued and orders for interim protection from arrest were given by the Court.

3. As both applicants have been arrayed as co-accused in the above FIR and have taken identical pleas seeking pre-arrest bail, these petitions are being considered by this Court by way of this common judgment.

Factual Background

4. As per the case of prosecution, on 03rd April 2024, SI Deepak Mahla along with staff was present near Khanpur DTC Bus Depot for search and combing operations. During a random check at 04:25 P.M., one lady carrying a pink colour bag deboarded an autorickshaw and started running in a suspicious manner. She was apprehended and, on interrogation, disclosed her name to be Hafiza, resident of Basti, Hazrat Nizamuddin, New Delhi.

5. On a search of the bag, it was found that she was carrying 250 *puriyas* amounting to 73.80 grams of smack, recovered from her conscious possession. She further disclosed that the smack had been given to her by one Rihana for further supply. The contraband was checked and found to be positive for smack.

6. Hafiza was arrested and, on interrogation, disclosed that she used to work for Waseem Seikh and Rihana [*collectively referred to as “applicants”*] for supply of contraband, and that they were jointly indulging in drug supply.



7. Police conducted a raid at the residence of the applicants, being at Krishna Park, Khanpur, New Delhi but found the premises to be locked. The mobile numbers of applicants, as provided by co-accused Hafiza were found to be switched off. Multiple raids were conducted as per the prosecution; however, applicants are stated to not have joined investigation.

8. Applicant Rihana filed an anticipatory bail application before the Trial Court and, *vide* order dated 25th April 2024 got interim protection from arrest till 01st May 2024. Pursuant to the same, on 29th April 2024, she came to the office of AATS (South) and joined investigation. She was interrogated, but did not disclose any source for the contraband, as per the Status Report.

9. Further investigation revealed that, as per the Call Detail Records [“*CDR*”], the applicants were in frequent contact with Hafiza since October 2023. The mobile numbers used by applicants were found to be issued in the name of one Ranjita, resident of Ambedkar Nagar, and she was examined. During enquiry, she stated that she was working as a housemaid at the house of the applicants, and that Rihana got new SIM cards issued on her ID without her consent.

10. Subsequently, 1st anticipatory bail application of applicant Rihana was dismissed by Trial Court *vide* order dated 01st May 2024, whereafter, she again absconded. Multiple searches were conducted; notice under Section 67 NDPS Act was pasted at the main door of the applicants’ abode, as also proclamation under Section 82 CrPC was issued against the applicants. However, they failed to join the investigation.



2024:DHC:7714



11. It is further alleged that she stated that she had thrown a SIM card of mobile number 8882884736. The mobile phones of the arrested accused Hafiza and Rihana were seized and deposited at Forensic Science Laboratory [“*FSL*”] Rohini on 29th May 2024. FSL Report pertaining to the seized mobile phones is still awaited.

12. *Vide* order dated 14th June 2024, applicant Rihana was granted interim protection by Vacation Court, South District, Saket, New Delhi till 27th July 2024 with a direction to join investigation and cooperate with the police.

13. Applicant Waseem’s anticipatory bail application was dismissed as withdrawn by this Court *vide* order dated 02nd July 2024. However, he was granted interim protection subsequently by this Court with a direction to join investigation, pursuant to which the applicants joined investigation.

14. Applicants had joined investigation at the office AATS (South) on 26th July 2024 but are stated to have not cooperated. The 2nd and 3rd bail applications of applicant Rihana were dismissed by Trial *vide* orders dated 17th May 2024 and 08th August 2024, pursuant to which, she is stated to have absconded again. Both Rihana and Waseem’s CDR analysis show contact with a mobile number which belonged to one Kulsum, who is a known drug peddler and had been arrested previously.

15. It was further submitted that applicants had been found to be previously involved in a double murder case in FIR bearing no. 156/2021 under Sections 302/307/120B of the Indian Penal Code 1860 [“*IPC*”] and Sections 25 and 27 Arms Act registered at PS Hazrat Nizamuddin.



16. As on 01st June 2024, chargesheet in the present case has been filed before the Trial Court against arrested co-accused Hafiza and the matter is still under investigation relating to remaining accused persons.

Submissions of Parties

17. Counsel for applicant contended that no seizures have been made from the applicants and the alleged recovery was only made from co-accused Hafiza. On the basis of her disclosure, proceedings against the applicants had been moved.

18. Moreover, applicants had joined investigation as per the Status Report, and lack of cooperation could not be considered as a trigger for denying bail as has been stated by Supreme Court in *Hemant Kumar v. State of Haryana* SLP (CRL.) 232/2024, decision dated 06th March 2024.

19. Further, it was contended that reliance by APP for the State on *Srikant Upadhayay v. State of Bihar & Ors.* 2024 INSC 202, in that bail cannot be granted once NBWs have been issued and they were found as absconding is not relevant, since, applicant Waseem Seikh had already moved an anticipatory bail application and the Court had granted interim protection, and applicant Rihana did join investigation.

20. Moreover, the seizure of 73.80 g smack from Hafiza was itself an intermediate quantity and, therefore, the rigors of Section 37 NDPS Act will not apply.

21. More importantly, it was contended that the Trial Court, *vide* order dated 14th June 2024, while granting interim protection to applicant Rihana,



2024:DHC:7714



noted that counsel for Rihana had admitted that Rihana and Hafiza were childhood friends, but the latter had been sent to Rihana by one Sharafat Sheikh and one Nadeem in order to implicate the applicants. This is in background of a complaint which was given against Sharafat Sheikh and his son in-law Allauddin, by her husband Wasim on 26th November 2023 and 06th March 2024.

22. A complaint had recorded that Sharafat Seikh was a high-profile gangster involved in drug trafficking and he and his family members were threatening the applicants and trying to extort money from them.

23. Rihana's sister was the wife of Sharafat Seikh who had died in an incident on 3rd April 2024 and for which the FIR bearing no. 156/2021 had been registered at PS Hazrat Nizamuddin in which applicants had been implicated.

24. The false implication of applicants was due to the complaints dated 26th November 2023 and 6th March 2024 where Rihana had stated that Allauddin, who is the son-in-law of Sharafat, misbehaved with her, came in the car and flashed a light on her face. He came once in a drunken condition with few other people being Dildar, Azhrum, Laiq, and Ismail and abused them and threatened them not to come to Nizamuddin, which prompted them to shift to a rented accommodation in Khanpur.

25. Applicant Waseem's complaint also stated that he got a call on his mobile number on 05th March 2024 from Sharafat Seikh who forced him to comply with his illegal demands of extortion of Rs. 5 lacs and was threatening his family.



26. He was instructed to hand over the amount to Allauddin, his son-in-law. Sharafat Seikh is supposedly a known gangster and a habitual offender with a history of involvement in drug trafficking and was under imprisonment and facing charges in FIR 96/2020 under Sections 21/25/29 NDPS Act lodged at PS Crime Branch.

27. On this basis, it was alleged that they have been falsely implicated, not only in the previous FIR, but specifically in this FIR through Hafiza, who used to report to Sharafat Seikh, and in a disclosure, she had merely stated the name of the applicants.

28. The CDR connectivity would have no relevance, since there is no proof that there was a discussion relating to the contraband recovered from Hafiza, and it was already stated that Rihana and Hafiza knew each other since their childhood.

29. Reliance was placed on *Prabhakar Tewari v State of UP & Anr.* CrI.A. No. 152/2020, decision dated 24th January 2020 where the Supreme Court had stated that even if the offence is grave and serious and several criminal cases are pending against the accused, they cannot be, by themselves, grounds for refusal of a prayer for bail.

Analysis

30. Heard counsel appearing for parties and perused the material placed on record. For the purposes of reference, bare text of Section 438, CrPC is extracted as under:

438. Direction for grant of bail to person apprehending arrest.—



(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including—

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1). 2



(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code (45 of 1860).

31. Principles pertaining to grant of anticipatory bail have been elucidated in the landmark judgement of ***Sidhharam Satlingappa Mhetre v. State of Maharashtra & Ors.*** (2011) 1 SCC 694; relevant portions are extracted as under:

“111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] that the High Court or the Court of Session has to exercise their jurisdiction under Section 438 CrPC by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:



- (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
- (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;
- (iii) The possibility of the applicant to flee from justice;
- (iv) The possibility of the accused's likelihood to repeat similar or other offences;
- (v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;
- (vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;
- (vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;
- (viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;
- (ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;



(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

113. *Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.*

114. *These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualise all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the Judge concerned, after consideration of the entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the Judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the Court of Session or the High Court is always available.”*

(emphasis added)



32. Subsequently, parameters were discussed and again enunciated in the decision of the Apex Court in ***Sushila Aggarwal v. State (NCT of Delhi)*** (2020) 5 SCC 1. Relevant portions thereof are extracted as under:

92. This Court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438 CrPC:

...

92.2. It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the Public Prosecutor and obtain facts, even while granting limited interim anticipatory bail.

92.3. Nothing in Section 438 CrPC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified — and ought to impose conditions spelt out in Section 437(3) CrPC [by virtue of Section 438(2)]. The need to impose other restrictive conditions, would have to be judged on a case-by-case basis, and depending upon the materials produced by the State or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise,



conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

92.4. Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

(emphasis added)

33. Applicants were implicated in the present matter on the disclosure statement of co-accused Hafiza from whom an intermediate quantity of smack was recovered.

34. Although the disclosure statement of co-accused under Section 67 NDPS Act is not in itself reliable/admissible in light of observations of the Supreme Court in *Tofan Singh v. State of Tamil Nadu* (2021) 4 SCC 1, in the decision in *State of Haryana v. Samarth Kumar* order dated 20th July 2022 in Criminal Appeal No. 1005/2002, the Apex Court has held that benefit of the aforesaid decision may not be availed to the accused at the stage of anticipatory bail. Relevant portions of the same are extracted as under:

4. The High Court decided to grant pre-arrest bail to the respondents on the only ground that no recovery was effected from the respondents and that they had been implicated only on the basis of the disclosure statement of the main accused



Dinesh Kumar. Therefore, reliance was placed by the High Court in the majority judgment of this Court in Tofan Singh vs. State of Tamil Nadu reported in (2021) 4 SCC 1.

5. But, it is contended by the learned Additional Advocate General appearing on behalf of the State of Haryana that on the basis of the anticipatory bail granted to the respondents, the Special Court was constrained to grant regular bail even to the main accused-Dinesh Kumar and he jumped bail. Fortunately, the main accused-Dinesh Kumar has again been apprehended. According to the learned Additional Advocate General, the respondent in the second of these appeals is also a habitual offender.

6. Learned counsel appearing on behalf of the respondent in the first of these Appeals contends that the State is guilty of suppression of the vital fact that the respondent was granted regular bail after the charge-sheet was filed and that therefore, nothing survives in the appeal. But, we do not agree.

7. The order of the Special Court granting regular bail to the respondents shows that the said order was passed in pursuance of the anticipatory bail granted by the High Court. Therefore, the same cannot be a ground to hold that the present appeals have become infructuous.

8. In cases of this nature, the respondents may be able to take advantage of the decision in Tofan Singh vs. State of Tamil Nadu (supra), perhaps at the time of arguing the regular bail application or at the time of final hearing after conclusion of the trial.



9. To grant anticipatory bail in a case of this nature is not really warranted. Therefore, we are of the view that the High Court fell into an error in granting anticipatory bail to the respondents.

35. Further, this Court also notes the observations recently made by the Apex Court vis-à-vis grant of anticipatory bail in cases related to NDPS Act in **Anarul SK v. The State of West Bengal**, order dated 19th September 2024 in SLP (Crl.) 12621/2024; same are extracted as under:

“4. The Grant of anticipatory bail in cases involving Narcotic Drugs and Psychotropic Substances (NDPS) is a very serious issue. We, therefore, direct the State to consider as to whether it proposes to file an application for the cancellation of bail granted to the other co-accused.”

(emphasis added)

36. In the present case, no recovery of contraband has been attributed to the applicants herein, however, perusal of the Status Report filed on behalf of State shows that Section 67 notices have been evaded by applicants. It is pertinent to note that the applicants have joined investigation only on particular occasions i.e. under interim protection of concerned Courts was in force. Otherwise, applicants have been absconding, not providing their active mobile phone numbers, as also not found to be at addresses known to be their residence.

37. It is also the case of the State that CDR analysis has shown applicants to be in frequent contact with the arrested co-accused Hafiza. It may not be appropriate for this Court to go into whether said details would be reliable or not. While the contraband seized is of intermediate quantity and hence rigours



2024:DHC:7714



of Section 37 may not apply, it cannot be said, at this juncture, that no evidence apart from the disclosure statement of co-accused Hafiza exists to incriminate the applicants.

38. Besides, whether custodial interrogation is required, necessitated or not is a discretion to be exercised by the IO. Needless to say, they shall keep in mind all guidelines and parameters to be complied with, as enunciated and mandated by the Supreme Court.

39. At this stage, investigation being at a nascent stage *inter alia* for unearthing the supply chain of the contraband, no ground is made out for grant of anticipatory bail.

40. Needless to state that nothing herein shall be construed as an expression of opinion on the merits of the case, or the investigation that is yet to be concluded.

41. Accordingly, present petitions are dismissed.

42. Judgement be uploaded on the website of this Court.

ANISH DAYAL, J

OCTOBER 04, 2024/RK/sc