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

+ **BAIL APPLN. 4084/2023**

KUMAR KANDIVALASA Applicant
Through: Adv. Mr. Mayank Jain,
Adv. Parmatma Singh,
Adv. Madhur Jain & Adv.
N. Kumar.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent
Through: Mr. Utkarash, APP for the
State.

CORAM:
HON'BLE MR. JUSTICE AMIT MAHAJAN

% **ORDER**
26.02.2024

1. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973 read with Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('**NDPS Act**'), seeking regular bail in FIR No.717/2022 dated 16.09.2022 registered at Police Station Bawana for offences under Sections 20/25/29 of the NDPS Act.

2. Briefly stated, the facts relevant for adjudication of the present application are as under:

2.1 On 15.09.2022, on the basis of a secret information, during routine checking, a car having registration number HR 26 CA 3731 was stopped and upon checking, it was found to contain contraband (Ganja) in two bags weighing 20kg and 21kg respectively, and the three co-accused persons namely, Samir, Soyab and Tasim, who were occupying the said car were arrested subsequently.

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2.2 Thereafter, the present applicant was arrested from Rajmundary, Andhra Pradesh on 21.09.2022 on the basis of the disclosure statement of co-accused, namely, Tasim. It is alleged that one ATM card of account holder, namely, Borra Varalakshmi was recovered from the possession of the applicant, wherein certain money transactions were made by co-accused Tasim for the purpose of purchasing contraband from him.

3. The learned counsel for the applicant submits that the applicant is in custody since 21.09.2022, the investigation is complete and the chargesheet in the present case has been filed and charge has been framed by order dated 07.10.2023 under Section 29 *qua* the applicant.

4. The learned counsel for the applicant submits that all other co-accused persons have been released on regular bail by the learned Sessions Court. Hence, the applicant is entitled to be released on bail on the grounds of parity.

5. He submits that the present applicant was arrested on the basis of the disclosure statement of the co-accused and no recovery has been effected from his possession. Hence, the disclosure statement of the co-accused is *per se* not substantial without being corroborated by the recovery. He submits that the only allegation against the applicant is that he used to supply the contraband to the other co-accused persons and used the ATM cards to withdraw the money alleged to be related to the contraband.

6. He submits that the statement of other co-accused and the accused is inadmissible and cannot be relied upon to implicate the applicant.

7. He further submits that Section 37 of the NDPS Act is not attracted *qua* the applicant in the present case, and his bail

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application ought to be considered without applying the rigours thereof.

8. He submits that the entire evidence is documentary in nature and the same is already within the custody of the prosecution. He submits that there is no likelihood of the applicant tampering with the evidence or threatening the witnesses.

9. He submits that the applicant has a child aged 2 years who is suffering from epilepsy and has recurring faints due to malnutrition. The applicant's parents being of old age themselves are suffering from various ailments.

10. He submits that the applicant has deep roots in the society and clean antecedents. He submits that previous involvement cannot be a ground to deny bail to the applicant.

11. *Per Contra*, learned Additional Public Prosecutor for the State opposes the grant of bail to the applicant and submits that the applicant was arrested at the instance of the co-accused namely, Tasim and at the time of arrest one ATM card SBI in the name of Borra Varalakshmi was recovered from the possession of the applicant in which the alleged transactions took place between the accused persons for the purpose of buying cannabis. He submits that sequence of events *prima facie* establishes conspiracy on the part of the applicant.

12. He also placed reliance on the CDR between the applicant and the co-accused to impress upon this Court that both of them were in constant touch, and were actively involved in drug trafficking.

13. He submits that the co-accused persons have been released on bail by the learned Sessions Court only on the technical



grounds of non-compliance of statutory provisions which is not applicable to the present applicant.

14. He further submitted that the seized contraband involves commercial quantity of Cannabis and the embargo under Section 37 of the NDPS Act would squarely apply in the present case. He contended that there are no reasonable grounds for believing that the accused is *prima facie* not guilty of the alleged offence.

CONCLUSION

15. I have heard the learned counsel for the parties.

16. It is not in dispute that no recovery of the contraband has been made from the applicant and the co-accused persons have been released on bail.

17. The applicant has been implicated only on the basis of the disclosure statement of co-accused, Tasim. 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, however, this Court cannot lose sight of the decision of the Hon'ble Supreme Court in ***Tofan Singh v. State of Tamil Nadu : (2021) 4 SCC 1***, 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. In the present case, apart from the CDR and verified ATM card, which was allegedly in the name of one ‘Borra Varalakshmi’ and in which the alleged transactions were made by the co-accused Tasim for buying Cannabis from the applicant, there is no evidence to show that the applicant was involved in the commission of the alleged offence.

19. 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)

20. It is pertinent to note that no recovery has been effectuated from the applicant in the present case. 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.

21. It is alleged that the transaction in relation to purchase of contraband was made through the account of which the ATM card was found from the applicant. There is no material at this stage to show that the transfer of money was for the purpose of purchase of contraband. The same would be decided during the course of trial.

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 the accused appears to be unbelievable and does not seem to be sufficient for the purpose of conviction of the accused.

23. The respondent has contended that the applicant cannot be enlarged on bail unless the conditions laid down in Section 37 of the NDPS Act are met.

24. 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.”

25. 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.”

26. In the present case, no recovery has been effected from the applicant and merely having telephonic conversations with the co-accused from whom contraband was recovered is not sufficient to hold that applicant is guilty of the alleged offence. Even though the allegations are made that the money was transferred by the co-accused into the account of which the ATM card was found with the applicant, the same is not corroborated

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by the other material. As noted above, the ATM card was not in the name of the applicant. The co-accused persons have been enlarged on bail noting that there is non-compliance of the mandatory provisions of Section 50 of the NDPS Act. Therefore, there are reasonable grounds to believe that the applicant is not guilty of the alleged offence. The antecedent of the applicant also does not show that he had earlier being charged for an offence under NDPS Act.

27. In view of the above, the fact that the co-accused has already been enlarged on bail, and without commenting further upon the merits of the case, applicant is admitted to bail on his furnishing personal bond in the sum of ₹50,000/- with one surety in the like amount, to the satisfaction of the learned Trial Court/Duty MM/ Link MM, on the following conditions:

- a. 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;
- b. The applicant shall under no circumstance leave the country without the permission of the Trial Court;
- c. The applicant shall report to the local police station once in every week;
- d. The applicant shall appear before the learned Trial Court as and when directed;
- e. The applicant shall provide the address where he would be residing after his release and shall not change the address without informing the concerned IO/ SHO;
- f. 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.

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

29. 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.

30. The bail application is allowed in the aforesaid terms.

AMIT MAHAJAN, J

FEBRUARY 26, 2024

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