



2024:DHC:3276



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Date of decision: 23rd April, 2024*+ **BAIL APPLN. 4193/2023**

SUMIT FAGNA

..... Applicant

Through: Mr. J. P. Singh and Mr.
Pramod Kumar, Advs.

versus

THE STATE OF NCT DELHI & ANR. Respondents

Through: Mr. Yasir Rauf Ansari,
ASC for the State with Mr.
Alok Sharma and Mr.
Vasu Agarwal, Advs. with
SI Rohit, ANTF, Crime
Branch Delhi Police.**CORAM:****HON'BLE MR. JUSTICE AMIT MAHAJAN****AMIT MAHAJAN, J. (Oral)**

1. The present bail application is filed under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') seeking regular bail in FIR No. 205/2023 dated 22.08.2023, registered at Police Station Crime Branch, for offences under Sections 20/22/25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

2. It is alleged that on 22.08.2023, on the basis of secret information, accused Sahil was apprehended and a recovery of 67 grams of MDMA was made from him. A further recovery of 133 grams of MDMA, 1200 grams of Charas and 2580 grams of Ganja was made from the car of accused Sahil.

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3. During the course of investigation, co-accused Tanay was arrested later at the instance of accused Sahil. A further recovery of 52 grams of MDMA was effectuated from the flat of accused Sahil on the basis of his disclosure statement.

4. Furthermore, two riders, namely, Sachin and Maan Pratap, were arrested at the instance of accused Sahil. Later, two more riders, namely, Chandan Kumar Mehto and Sonu Sharma, were also arrested and a total recovery of 107 grams of hybrid Ganja and 3.87 grams of MDMA was made from them.

5. It is alleged that thereafter on 24.08.2023, the present applicant was arrested on the basis of the disclosure statement of co-accused Sachin. It is the prosecution's case that the applicant was also a rider and used to transport and supply the contraband.

6. The learned counsel for the applicant submits that the applicant has deep roots in the society and clean antecedents.

7. He submits that the applicant was arrested on the basis of the disclosure statement of the co-accused Sachin and no recovery has been effected from him.

8. He submits that the disclosure statement of the co-accused is *per se* not substantial without being corroborated by the recovery. He further submits that the same is inadmissible and cannot be relied upon to implicate the applicant.

9. He further submits that Section 37 of the NDPS Act is not attracted *qua* the applicant in the present case, and his bail application ought to be considered without applying the rigours thereof.

10. He submits that all the witnesses are police officials

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whereby there is no possibility of the applicant tampering with the evidence if he is released on bail.

11. *Per contra*, learned Additional Public Prosecutor for the State opposes the grant of bail to the applicant. He submits that the disclosure statement of the co-accused has been corroborated by the CDR which shows that more than 900 calls were exchanged between the applicant and the co-accused over the period of two years.

12. He further submits that for every delivery the riders used to get a payment of ₹200- ₹300. He submits that there are certain financial transactions between co-accused Sachin and the applicant as well.

ANALYSIS

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

14. The applicant has been implicated in the present case primarily on the basis of the disclosure statement of the co-accused Sachin.

15. It is relevant to note that while the veracity of the disclosure statement of the said 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)

16. A Coordinate Bench of this Court in ***Phundreimayum Yas Khan Vs. State (GNCT of Delhi) : 2023 SCC OnLine Del 135***, held that when there is no material to link the applicant with the recovery of the commercial quantity from the co-accused persons, the rigors of Section 37 would not apply. It was further



held that the disclosure statement of co-accused is per se not admissible without there being any corroboration.

17. Apart from the disclosure statement of co-accused Sachin, the only material against the applicant is the CDR and certain monetary transactions between the applicant and co-accused Sachin. There is no other evidence to show that the applicant was involved in the commission of the alleged offence. No material has been placed on record yet to establish that the monetary transaction was in relation to the concerned contraband.

18. 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)



19. 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, the same is not sufficient to *prima facie* establish the offence against the applicant. The probative value of any material, including the CDR, shall be tested during the trial.

20. At this stage of considering the bail application of the applicant, *prima facie*, the material on record cannot be deemed sufficient to link the applicant to the alleged offence.

21. 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.

22. 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.

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. It is not disputed that the applicant has clean antecedents. The chargesheet has already been filed and the investigation in relation to applicant is stated to be complete.

27. In view of the facts of the case, in the opinion of this Court, the applicant has *prima facie* established a case for grant



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of bail.

28. The applicant is, therefore, directed to be released on bail on furnishing a personal bond for a sum of ₹20,000/- with two sureties of the like amount, subject to the satisfaction of the learned Trial Court, on the following conditions:

- a. The applicant shall 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 applicants shall under no circumstance leave the boundaries of Delhi without the permission of the learned Trial Court;
- c. The applicant shall appear before the learned Trial Court as and when directed;
- d. 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;
- e. 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.

29. 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.

30. 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.



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

AMIT MAHAJAN, J

APRIL 23, 2024

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