IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 25.04.2024

\+ **BAIL APPLN. 3124/2023**

VINOD YADAV **..... Applicant**

versus

THE STATE **..... Respondent**

Advocates who appeared in both the cases:

For the Applicant : Ms. Preeti Sirohi & Mr. Sudhanshu Tiwari, Advs.

For the Respondent : Mr. Mukesh Kumar, ASC for the State with Ms. Akshita Tyagi, Adv.
SI Deep Sharma, PS-SRRS
SI Vinod, PS- Vigilance, Rohini

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 FIR No. 41/2022 dated 26.12.2022, registered at Police Station Sarai Rohilla, for offence under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('**NDPS Act**'). Chargesheet has already been filed against the applicant for the offence under Section 18 of the

Signature Not Verified
Digitally Signed
By:HARMINDER KAUR
Signing Date:25.04.2024
19:36:08

NDPS Act.

2. It is alleged that on 26.12.2022, on the basis of secret information, the applicant and co-accused Ravinder were intercepted at the Shakur Basti Railway Station.

3. It is alleged that the applicant was holding a saffron *gamchha* (towel) in which some heavy items were tied in a knot. It is alleged that on checking, it was found that the towel had two transparent polythene bags. It is alleged that a total of 2.330 Kg of Opium was recovered from the same.

4. It is alleged that co-accused Ravinder had a white bag in his hand which also had two transparent polythene bags in it. It is alleged that 3.086 Kg of Opium was recovered from the said polythene bags.

5. It is the prosecution's case that the accused persons stated in their disclosure statements that they used to work as labourers, however, they did not earn enough to fulfill their requirements They stated that they had been tasked to deliver the contraband to a man in Bathinda, Punjab by one person, namely, Vinod Paswan. It is alleged that Vinod Paswan had given the contraband to the accused persons on 25.12.2022 near Bus Stand of Hunter Ganj, Jharkhand. Thereafter, the accused persons had travelled to Delhi where they were intercepted by the police officials.

6. The bail application filed by the present applicant before the learned Trial Court was dismissed on 06.07.2023.

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

Signature Not Verified
Digitally Signed
By:HARMINDER KAUR
Signing Date:25.04.2024
19:36:08

8. She submitted that the applicant is the sole bread earner in his family consisting of his wife, ailing mother and his two daughters.

9. She submitted that the investigation in the present case is complete and chargesheet has been filed, however, the charges are yet to be framed. She stated that the prosecution has named 15 witnesses and the trial is not likely to be completed in near future.

10. She submitted that the search and seizure, in the present case, is also riddled with anomalies wherein the search and seizure of the contraband took place in the absence of any public witnesses.

11. She submitted that the contraband allegedly recovered from the applicant is of intermediate quantity and thus the rigors of Section 37 of the NDPS Act are not attracted in the present case.

12. *Per Contra*, the learned Additional Public Prosecutor ('**APP**') for the State opposed the grant of any relief to the applicant in the present matter and submitted that the allegations against the applicant are serious in nature since commercial quantity of illegal substance (Afeem) weighing 5.416 Kg has been recovered from the applicant and the co-accused person.

13. He submitted that in the present case the recovery has been effectuated directly from the applicant.

ANALYSIS

14. It is settled law that the Court, while considering the application for grant of bail, has to keep certain factors in mind, such as, whether there is a *prima facie* case or reasonable ground to believe that the

Signature Not Verified
Digitally Signed
By:HARMINDER KAUR
Signing Date:25.04.2024
19:36:08

accused has committed the offence; circumstances which are peculiar to the accused; likelihood of the offence being repeated; the nature and gravity of the accusation; severity of the punishment in the event of conviction; the danger of the accused absconding or fleeing if released on bail; reasonable apprehension of the witnesses being threatened; etc. However, at the same time, period of incarceration is also a relevant factor that is to be considered.

15. It has been argued by the learned counsel for the applicant that the bar under Section 37 of the NDPS Act would not be attracted in the present case as only intermediate quantity of the contraband has allegedly been recovered from the applicant. On the other hand, the learned APP has contended that the rigours of Section 37 of the NDPS Act will be attracted as the total amount of the recovered contraband is more than the threshold of commercial quantity since both the accused persons were travelling together.

16. The Coordinate Bench of this Court in ***Awadhesh Yadav v. State Govt. of NCT of Delhi*** **: 2023 SCC OnLine Del 7732**, relying on a catena of judgments, culled out the relevant principles governing the clubbing of recovered contraband from two or more accused persons. The relevant portion of the judgment is reproduced hereunder:

> "***49.*** *From the provisions of law and the essence of case-laws, as discussed above, following principles can be culled out governing clubbing of the quantity of contraband recovered from two or more co-accused, at the stage of bail:*
>
> *i.* ***invocation of offence of abetment and/or conspiracy under Section 29 of the Act is must for clubbing of quantity.***

Signature Not Verified
Digitally Signed
By:HARMINDER KAUR
Signing Date:25.04.2024
19:36:08

However, there cannot be a straight jacket formula for clubbing the quantity of contraband recovered from all the accused, merely on the basis of invocation of offence under Section 29 of the Act. It will depend on the factual backdrop of each case and the incriminating material available against the accused persons.

ii. the incriminating material relied upon to invoke the offence of abetment and/or conspiracy under Section 29 of the Act, has to be cogent and convincing against each one of the accused charged with the offence of abetment and/or conspiracy.

iii. in a case where joint recovery of contraband has been effected from two or more co-accused, the recovered contraband cannot be equally divided amongst the number of accused to determine whether the quantity of contraband recovered in "commercial quantity" or not.

iv. where accused persons are travelling together in the same private vehicle individually carrying contraband, it will not be proper to consider the alleged recovery to be an individual recovery and the contraband recovered from all persons can be clubbed.

v. if an accused is a habitual offender, it gives rise to an inference that he knows the tricks of the trade. In such a situation, previous involvement of the accused in the case(s) under the NDPS Act, is an additional factor which could be considered, besides other incriminating circumstances, for adding the quantities of contraband recovered from two or more co-accused.

50. *Needless to state that the above noted circumstances are only illustrative and not exhaustive. As a matter of principle, bail applications are to be decided having regard to facts and circumstances of each case and the aforementioned principles may only act as guiding factors."*

17. Another Coordinate Benche of this Court in ***Anita v. State (NCT of Delhi)*** **: BAIL APPLN. 1538/2022** had observed that the

Signature Not Verified
Digitally Signed
By:HARMINDER KAUR
Signing Date:25.04.2024
19:36:08

recovery made from the co-accused person could not be added to the quantity recovered from the applicant, and granted bail to the accused person.

18. Section 29 of the NDPS Act reads as under:

> *"29. Punishment for abetment and criminal conspiracy-*
> *(1) Whoever abets, or is a party to a criminal conspiracy to commit an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence.*
> *(2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which-*
> *(a) would constitute an offence if committed within lndia; or*
> *(b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India."*

19. It is relevant to note that the present FIR is registered against the applicant only for the offence under Section 18 of the NDPS Act. No allegation of conspiracy under Section 29 of the NDPS Act has been levelled against the applicant. Chargesheet has been filed under Section 18 of the NDPS Act.

20. *Prima facie*, the contraband recovered from the accused persons cannot be clubbed together and treated as commercial quantity.

Signature Not Verified
Digitally Signed
By:HARMINDER KAUR
Signing Date:25.04.2024
19:36:08

21. It is not denied that the contraband recovered from the applicant is Opium weighing 2.330 Kg which is an intermediate quantity, and the rigours of Section 37 of the NDPS Act therefore would not apply.

22. There is no cavil that only because the bar under Section 37 of the NDPS Act is not attracted, the accused would be entitled for bail automatically. In such circumstances, the Court has to consider the parameters as enshrined in relation to grant of bail.

23. The learned counsel for the applicant has contended that the process of search and seizure in the present case was carried out in the absence of any public witnesses. She has disputed the recovery made from the applicant. There is no other evidence about the recovery of contraband from the applicant except the Police witnesses. Any allegations or defences in this regard will be a matter of trial.

24. Furthermore, it is relevant to note that the charges have not been framed in the present case till now as the FSL report of the seized samples is still awaited. There are 15 witnesses who are to be examined in the present case. Speedy trial in such circumstances does not seem to be 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.

25. The applicant is in custody since 26.12.2022. The Hon'ble Apex Court in the case of ***Man Mandal & Anr. v. The State of West***

Signature Not Verified
Digitally Signed
By:HARMINDER KAUR
Signing Date:25.04.2024
19:36:08

***Bengal*: SLP(CRL.) No. 8656/2023** had granted bail to the petitioner therein, in an FIR for offences under the NDPS Act, on the ground that the accused had been incarcerated for a period of almost two years and the trial was likely going to take considerable amount of time.

26. It is not disputed that the applicant has clean antecedents. The applicant is also stated to be the sole bread earner in his family.

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 of bail.

28. The applicant is therefore directed to be released on bail on furnishing a personal bond for a sum of ₹25,000/- with two sureties of the like amount, subject to the satisfaction of the learned Trial Court/ Duty MM/ Link MM, on the following conditions:

a. The applicant shall not leave the boundaries of the country without permission of the learned Trial Court;
b. 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;
c. 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;
d. The applicant shall appear before the learned Trial Court as and when directed;
e. 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

Signature Not Verified
Digitally Signed
By:HARMINDER KAUR
Signing Date:25.04.2024
19:36:08

the case, in any manner whatsoever.

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.

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

AMIT MAHAJAN, J

APRIL 25, 2024
ssh

Signature Not Verified
Digitally Signed
By:HARMINDER KAUR
Signing Date:25.04.2024
19:36:08