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

% Judgment delivered on: 04.09.2023

+ BAIL APPLN. 3494/2021

CHINEDU PATRICK Petitioner

Through: Mr Vikas Gautam, Advocate.
versus

NARCOTICS CONTROL BUREAU Respondent

Through: Mr Utsav Singh Bains, SPP for
NCB.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J. (ORAL)

1. The present petition has been filed under Section 439 CrPC seeking regular bail in case titled as “Narcotics Control Bureau vs. Vinay Kumar Ray & Ors.” bearing Sessions Case No.427/2019 under Sections 21(b), 22(c) and 29 NDPS Act pending adjudication in the Court of Shri Sudhir Kumar Sirohi, Special Judge-NDPS, Patiala House Court, New Delhi.

2. The case of the prosecution is that a parcel bearing Airway Bill No. 7571728953, destined to New Zealand, containing nebulizers was suspected to conceal narcotic drugs/psychotropic substances. Accordingly, the said parcel was intercepted at DHL Express, Rama Road, Kirti Nagar, New Delhi. Upon search of the parcel, it was revealed that the said parcel was bearing the name of Vinay Kumar



Ray as the consignor and M/s Sarah Eaglestor as consignee. From the said parcel, 390 gms. of Amphetamine, a psychotropic substance, was recovered, which admittedly is a commercial quantity.

3. The learned counsel for the petitioner submits that the statement of co-accused Vinay Kumar Ray was recorded under Section 67 of the NDPS Act, wherein he disclosed that one lady, namely, Anjali Verma @ Dalini Singh had handed over the said parcel to him. However, as the above named lady did not have the requisite identity cards required for booking the parcel, the same was booked by him on her behalf.

4. During the course of investigation, statement of Anjali Verma @ Dalini Singh was also recorded under Section 67 of the NDPS Act and she disclosed that the parcel was given to her by Kenneth Adams @ John for being booked through courier.

5. The investigating agency called Kenneth Adams at the residence of Anjali Verma @ Dalini Singh where he was arrested. He submits that Kenneth Adams in his disclosure statement recorded under Section 67 of the NDPS Act disclosed his address as Gali No.111, Sant Nagar, Burari, New Delhi. On search of his residence, 70 gms. of heroin was recovered, which is an intermediate quantity. He submits that in his statement recorded under Section 67 of the NDPS, Kenneth Adams disclosed that the petitioner is his partner in the illegal business of contraband.

6. He submits that in the statements of Dalini Singh as well as of Kenneth Adams, mobile number of the petitioner has been mentioned as 8860989535. He submits that this mobile number could not be recovered from the petitioner.



7. He submits that on the statement made by Kenneth Adams, the petitioner was arrested and during his personal search a mobile bearing no. 9870517259 was recovered. He submits that the prosecution has not filed any CDR or voice conversation with the charge sheet to show that the petitioner was in touch with other co-accused persons.

8. He further submits that the petitioner's statement was also recorded under Section 67 of the NDPS Act and a perusal of the said statement does not show that the petitioner was in any way connected with the contraband seized, from the parcel/nebulizer booked on behalf of Dalini Singh or, at the instance of Kenneth Adams from his residence at Burari.

9. He submits that though the recovery of contraband (Amphetamine) is from the parcel allegedly booked on behalf of the co-accused Dalini Singh and the seized contraband is of commercial quantity but said Dalini Singh in her statement under section 67 of the Act has not named the petitioner. In so far as recovery of 70 gms. of heroin at the instance of Kenneth Adams from his residence is concerned, he submits that the same is of intermediate quantity. He submits that there is no material to link the said recovery to the petitioner, except the statement of co-accused Kenneth Adams under section 67 of the Act, wherein he has only stated that the petitioner is his partner.

10. The learned counsel submits that the only incriminating material against the petitioner is the statement of Kenneth Adams under section 67 of the NDPS Act which is not admissible *per se*. He



relies upon the decision of **Kingsley Ofobike v. Narcotics Control Bureau, BAIL APPLN 2468/2022** of this Court to contend that the rigours of Section 37 of the NDPS Act does not apply since there is no material to link the petitioner to the commercial quantity of contraband seized from the parcel allegedly booked on behalf of Dalini Singh.

11. He also submits that the petitioner is in custody since 06.04.2019. He points out that the prosecution has cited as many as 23 witnesses and only one witness has been examined till date and the second witness is still under examination. He submits that conclusion of trial is likely to take long time.

12. Referring to the long incarceration of the petitioner, who is also a Nigerian national like petitioner in **Kingsley Ofobike (supra)**, he submits that the following condition imposed while enlarging the said petitioner/Kingsley Ofobike on bail may not be imposed in the case of the petitioner herein:

"ii.The concerned Trial Court shall also requisition a certificate of assurance from the concerned Embassy/High Commission of the country to which the petitioner belongs that the petitioner shall not leave the country and shall appear before the Trial Court as and when required;"

13. In support of his contention, the learned counsel relies upon the decision of the Supreme Court in **Ejike Jonas Orji vs. Narcotics control Bureau: Crl. A. No.2468/2023**, in which considering the long incarceration of the petitioner therein, he was ordered to be released on bail without fulfilling an identical condition imposed by the High



Court while granting bail to him. The relevant part of the said decision reads as under:

“7. Barring the condition (D) relating to the certificate of assurance from the High Commission of Nigeria, the appellant is prepared to fulfill all the other bail conditions including deposit of his passport with the Special Court and also present himself in the office of the NCB on every Monday at 11:00 a.m.

8. The liberty of an accused who is facing prolonged trial deserves attention of the Court. Admittedly in the course of last seven years, the trial could not be concluded and we are informed that out of twenty witnesses, only thirteen have been examined so far. We are also informed that the Special Court in Delhi where the trial is being conducted is overloaded with about 400 trial cases.

9. Prolonged incarceration of undertrial prisoners violates the constitutional principles of dignity and liberty. In this case, even though Bail was granted, the accused could not be released due to an onerous condition. In this regard, it would be apposite to refer to the judgment of this Court in Hussainara Khatoon v Home Secy., State of Bihar (1980) 1 SCC 81 where it was held that Article 21 includes within its ambit the right to speedy trial. It was further held that the procedure under which a person is deprived of personal liberty should be “reasonable, fair and just”.

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10. Considering the above, having regard to the other conditions imposed in the bail order dated 13.6.2022, we are of the view that even without satisfying the condition (D), bail can be considered for the appellant who is in custody since 02.6.2014. Accordingly subject



to the bail conditions as mentioned in the High Court's order (except the condition (D), the appellant be released on bail as directed vide order dated 13.6.2022."

14. On a query put by the Court, the learned counsel for the petitioner states that the petitioner does not have a valid visa in his favour.

15. *Per contra*, Mr Bains, learned SPP for the NCB/respondent submits that from the mobile of the petitioner certain chats have been retrieved, which show that the petitioner was in touch with one girl, namely, Lina and in the said chats there is discussion with regard to narcotic substance. However, he fairly concedes that in the said chats there is no reference to the contraband seized from the co-accused.

16. On a query put by the Court, he also fairly concedes that there is no other case against the petitioner nor any recovery has been made from him.

17. I have heard the learned counsel for the petitioner as well as the learned SPP for the NCB/respondent and have perused the record.

18. Insofar as the incriminating material in the form of WhatsApp chats between the petitioner and aforesaid girl Lina which have allegedly been retrieved from the petitioner's mobile are concerned, the probative value of the same shall be tested during the trial. At this stage of considering the bail application of the petitioner, the same cannot be treated as sufficient material to establish a link between the petitioner and other co-accused from whom the contraband was recovered, when concededly, in the said chats there is no reference to



the co-accused or to the contraband seized at the instance of said co-accused.

19. Incidentally, the alleged chats, as submitted by the learned counsel for the petitioner and not disputed by the learned SPP, on instructions from the IO, are not part of the charge-sheet and the same were filed subsequently by the IO at the time of arguments on the bail application of the petitioner. Therefore, the said chats cannot be used as an incriminating material by prosecution against the petitioner.

20. It is also not in dispute that no recovery of the contraband has been made from the petitioner. Co-accused Dalini Singh has not named the present petitioner in her statement under section 67 of the Act.

21. The petitioner has been implicated only on the basis of the statement of Kenneth Adams, which was recorded under Section 67 of the NDPS Act, which has been held to be inadmissible in evidence by the Hon'ble Supreme Court in ***Toofan Singh vs. State of Tamilnadu: (2021) 4 SCC 1***. The relevant paragraphs of the judgment reads 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 or 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)

22. A Coordinate Bench of this Court in *Phundreimayum Yas Khan Vs. State (GNCT of Delhi)*, 2023 SCC OnLine Del 135, has held that when there is no material to the link the applicant with the recovery of the commercial quantity from the co-accused, 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. The relevant part of the decision reads as under:-



“23. In the present case, there are no monetary transactions, bank statement or finances which shows the sale/purchase of prohibited narcotic substance or psychotropic substance between the applicant, Sayed Javed Hussain and/or Amarjit Singh Sandhu. Except the statement of Sayed Javed Hussain who stated that he used to purchase contraband in Delhi through the applicant, there is nothing which shows the sale and purchase of prohibited narcotic substance or psychotropic substance between the applicant, Sayed Javed Hussain and Amarjit Singh Sandhu.

Existence of any conspiracy between the applicant and Sayed Javed Hussain based on the CDRs

a. It is stated by learned counsel for the Respondent that the call record details show that the applicant was in frequent contact with one Amarjit Singh Sandhu on 26.01.2021, i.e., the date when the Tramadol tablets were collected by the co-accused Sayed Javed Hussain. He further states that according to the CAF/CDR details, location of the co-accused Sayed Javed Hussain and the applicant is also found to be in Rajouri Garden on 26.01.2021.

b. In my view, in the absence of any financial dealings, any recovery of narcotic substance or psychotropic substance from the applicant or from the premises of the applicant and/or at the behest of the applicant, the fact that the CAF/CDR details show calls between the applicant and Amarjit Singh Sandhu and the applicant and Sayed Javed Hussain, cannot be a ground to deny him the bail in the present matter.

c. It is for the prosecution to establish the guilt, abetment, conspiracy of the applicant beyond a reasonable doubt which is not borne out from the CAF/CDR details.

Applicability of the rigours of section 37 of NDPS Act

a. In the present case, there is no recovery of commercial quantity from the applicant, at the



applicant's behest or from the applicant's premises. This court in “Shravan Kumar v. State of NCT of Delhi” in Bail Application No. 175/2018 has held that:—

“Undisputedly, the case of the prosecution qua the petitioner is based upon circumstantial evidence. No recovery of any contraband was affected from the petitioner. Allegations against him are that he conspired with co-accused persons for committing the aforesaid offences. The petitioner was arrested after about twenty days of the arrest of the co-accused Jagdish on 05.09.2017. The prosecution has placed reliance only on call detail record between the petitioner and co-accused Saroj Subudhi. It is alleged that accused sent Mobile No. 8860594548 or the accused Jagdish to co-accused Saroj from Mobile No. 9650310668 through SMS, This circumstance alone at this stage is not enough to deny bail to the petitioner despite bar under section 37 of the NDPS Act.”

b. In the present case there is no recovery from the applicant, Amarjit Singh Sandhu has not been arrested, nothing has been recovered at the instance of the applicant and there is no material to link the applicant with the recovery of the commercial quantity from Sayed Javed Hussain, except Sayed Javed Hussain's own statement. In this view of the matter, the rigours of section 37 of the NDPS Act do not apply to the applicant.

24. The case of the prosecution, in so far as the applicant is concerned, is circumstantial, i.e. based solely on disclosure statement of the co-accused Sayed Javed Hussain which is per se not admissible without there being any corroboration. The prosecution has not been able to establish any connection between the subject offence and the location/CDRs of the accused persons,



where the applicant is alleged to be present at the time when the contraband was collected by Sayed Javed Hussain. Merely because the applicant had been having frequent calls with the co-accused, would not be sufficient to hold that applicant is guilty of the subject offence.”

(emphasis supplied)

23. Though the contraband seized from the parcel allegedly booked on behalf of Dalini Singh is of commercial quantity but there is no material to link the petitioner with the said recovery or with Dalini Singh, therefore, the rigors of Section 37 will not apply in the present case.

24. Insofar as the recovery of 70 gms of heroin from the residence of Kenneth Adams is concerned, needless to reiterate that it is an intermediate quantity, which will also not attract the rigors of Section 37 of the Act. That apart, there is nothing on record to connect the petitioner with Kenneth Adams except for the statement of Kenneth Adams recorded under Section 67 of the Act, which *per se* is not admissible in evidence.

25. In view of the aforesaid discussion, there is also a reasonable ground for believing that the accused is not guilty of the alleged offence. Further, it is also not in dispute that the petitioner does not have any criminal record. The antecedents of the petitioner being clean, he is not likely to commit any offence while on bail.

26. Admittedly, the petitioner is in custody since 06.04.2019 and 23 witnesses have been cited by the prosecution in the charge-sheet out of which only one witness has been examined and the second witness is



under examination. In the given circumstances, needless to say that conclusion of trial is likely to take long time.

27. On an overall conspectus of facts and circumstances, this Court is of the opinion that the petitioner has made out a case for grant of regular bail. Accordingly, the petitioner is admitted to regular bail, subject to his furnishing Personal Bond in the sum of Rs.1,00,000/- and a Surety Bond of the like amount subject to the satisfaction of the learned Special Judge. Considering that the petitioner is a foreign national and does not have a valid visa and further regard being had to the observations of the Supreme Court in *Ejike Jonas Orji (supra)*, the grant of bail to the petitioner shall be further subject to the following conditions:-

- i. The petitioner shall furnish a valid visa in his favour. In case, the petitioner does not have a valid visa, he shall be at liberty to apply for the visa and till the time he gets the visa, he shall be kept in the detention/deportation center.
- ii. The petitioner will not leave the country without prior permission of the concerned Trial court and within two weeks of his getting visa, he will deposit his passport with the Trial Court.
- iii. The petitioner shall provide his mobile phone number to the Investigating Officer (IO) concerned - at the time of release, which shall be kept in working condition at all times, the petitioner shall not switch-off, or change the same without prior intimation to the IO concerned, during the period of bail.
- iv. The petitioner shall provide his residential address to the



Investigating Officer (IO) concerned - at the time of release. The petitioner shall not change the same without prior intimation to the IO concerned, during the period of bail. The IO shall provide his number to the learned counsel for the petitioner for being shared with the petitioner;

- v. The petitioner shall mark his attendance with the SHO/IO concerned every Friday between 11:00 A.M. to 12 noon and between 5:00 P.M. to 6:00 P.M. through video call and if video call is not possible, he may send SMS *apropos* his whereabouts thus, keep them informed of his whereabouts;
 - vi. The petitioner shall remain present before the Trial Court on the dates fixed for the hearing of the case. The petitioner shall not leave the NCT of Delhi without prior permission of the concerned Trial Court;
 - vii. The petitioner shall not indulge in any criminal activity during bail period.
28. The petition stands disposed of.
 29. Copy of the order be forwarded to the concerned Jail Superintendent for necessary information and compliance.
 30. Order be uploaded on the website of this Court.
 31. Order *dasti* under signatures of the Court Master.

VIKAS MAHAJAN, J

SEPTEMBER 4, 2023
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