



IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 19th February, 2024

+ **BAIL APPLN. 3149/2022**

VINOD NAGAR Applicant

versus

NARCOTICS CONTROL BUREAU Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Rudra Pratap and Mr. Rahul Sharma,
Adv.

For the Respondent : Mr. Subhash Bansal, Sr. Standing Counsel
with Ms. Shashwat Bansal, Adv.

CORAM
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present application has been filed under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') read with Section 482 of CrPC seeking regular bail in Crime No. VIII/32/DZU/2021 under Sections 8, 21(c) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

2. It is alleged that on 18.06.2021, at about 2:30, on the basis of secret information received by Shri Anand Kumar, IO, a recovery of 135 grams of Cocaine was made from the house of the co-accused Justin Izuchukwu Samuel. It is the prosecution's case that the said



accused in his statement revealed the name of the applicant, whose involvement in illegal trafficking of drugs was further corroborated by the CAF and CDR of the co-accused Justin, and the WhatsApp chats between them. The applicant was arrested on 25.11.2021, and has remained in custody since then.

3. The applicant's bail application was rejected by the learned Trial Court by order dated 22.02.2022, and later again by order dated 19.09.2022, due to the embargo under Section 37 of the NDPS Act.

SUBMISSIONS OF THE APPLICANT

4. The learned counsel for the applicant contends that the applicant is a poor taxi driver, and the sole bread earner in his family, who has been falsely implicated in the present case. He submitted that the applicant has clean antecedents.

5. He submitted that the investigation in respect to the applicant is complete and nothing incriminating has been recovered from the applicant. He further submitted that the applicant is in incarceration since 25.11.2021.

6. He contended that the applicant has been indicted in the present case merely on the basis of the statement of the co-accused Justin Izuchukwu Samuel.

7. He submitted that a disclosure statement of the co-accused is *per se* not substantial without being corroborated by recovery. The prosecution has thus not been able to establish any allegation against



the applicant.

8. He further submitted 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 rigors thereof.

9. He placed reliance on the judgments in the cases of *Lorik Ram vs. State of Assam: (2022) SCC Online Gau 975*, *Manoj Kumar Gupta vs. State of NCT Delhi: 2003 Cri LJ 2353* and *Sujit Tiwari vs. State of Gujarat and Another: (2020) 13 SCC 447* to endorse his submissions.

SUBMISSIONS OF NARCOTICS CONTROL BUREAU (NCB)

10. On the other hand, the learned counsel for NCB contended that the learned Trial Court has rightly dismissed the applicant's bail application by order dated 19.09.2022. He stated that all the grounds of the applicant, including his contention that no recovery has been effected from him directly, have been effectively dealt by the learned Trial Court and requires no interference.

11. He placed heavy reliance on the CDR and WhatsApp conversations between the applicant and the co-accused to impress upon this Court that both of them were in constant touch, and were actively dealing in drug trafficking.

12. He submitted that the applicant has been accused of a serious offence of conspiracy for indulging in drug-trafficking of commercial quantity of contraband-Cocaine. He contended that the matter is at the



stage of arguments on charge, and the applicant's release at this stage could adversely affect the trial.

13. He further submitted that the seized contraband involves commercial quantity of Cocaine 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.

ANALYSIS

14. The case of the prosecution is based upon the disclosure of the co-accused Justin Izuchukwu Samuel. 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 Apex Court in the case of *Tofan Singh v. State of Tamil Nadu : (2021) 4 SCC 1*. It was held that a disclosure statement made under Section 67 of the NDPS Act is impermissible as evidence without corroboration.

15. In the present case, apart from the CDR and CAF reports, and some unverified WhatsApp chats between the applicant and the co-accused, there is no evidence to show that the applicant was involved in the commission of the crime of drug trafficking. This Court, while dealing with somewhat similar facts, 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)

16. 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.

17. The statement made by the co-accused from whom the recovery of the contraband was made, is sought to be corroborated with the alleged WhatsApp chats between the co-accused and the applicant. The photocopies of the snapshots of the WhatsApp chats have been placed on record, the same relates to the period, July to August, 2020.

18. The present case relates to the recovery made from the co-accused on 18.06.2021. The WhatsApp chats, even assuming to be in



relation to the sale and purchase of contraband, at this stage, do not appear to be in relation to the recovery made, which led to filing of the complaint in the present case.

19. It is not the case of the prosecution that, at the contemporaneous time, the applicant was in contact with the co-accused in relation to the contraband which was seized from the co-accused on 18.06.2021.

20. It is also an admitted case that the applicant was not absconding. He went to the respondent, on his own, after the notice under Section 67 of the NDPS Act was issued, that is, five months after the arrest of the co-accused. The applicant, therefore, was arrested and made accused in the present case on the basis of the disclosure statement of the co-accused, which as discussed above, is not admissible without any corroborative evidence, and on the basis of the alleged WhatsApp chats, which, admittedly, were exchanged about ten months prior to the recovery of the contraband from the co-accused.

21. 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.

22. 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.”

23. 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.”

24. Another significant aspect which cannot be lost sight of is that the recovery of the contraband was made on 18.06.2021 whereas the application under Section 52A of the NDPS Act was filed belatedly on 24.09.2021. There is no explanation as to why the application was filed belatedly, however, the same, at this stage, appears to be in violation of Section 52A of the NDPS Act, thereby vitiating the



procedure for collection of sample. This Court in *Kashif v. Narcotics Control Bureau* : 2023 SCC OnLine Del 2881, had held that the application for sample collection cannot be moved at the whims and fancies of the prosecuting agency.

25. 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.

26. In the present case, the prosecution has been given an adequate opportunity to oppose the present application. In view of the facts of the case, *prima facie*, this Court is of the opinion, that at this stage there are reasonable grounds to believe that the applicant is not guilty of the alleged offences. Moreover, it is also not disputed that the applicant has clean antecedents, and is thus not likely to commit any offence whilst on bail.

27. Considering the aforesaid discussion, the applicant is 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/ Duty MM/ Link MM, on the following conditions:

- a. He 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. He shall under no circumstance leave the boundaries of the National Capital Region without the permission of the Trial Court;
- c. He shall appear before the learned Trial Court as and when directed;
- d. He 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. He 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 aforementioned terms.

AMIT MAHAJAN, J

FEBRUARY 19, 2024/ssh