

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

% **Reserved on: 17th January, 2022**
Pronounced on: 25th January, 2022

+ **BAIL APPLN. 3861/2021**

MUHSIN ALI

... Petitioner

Through: Mr. Sameer Rohatgi and Mr.
Manohar Malik, Advocates

Versus

NARCOTICS CONTROL BUREAU ... Respondent

Through: Mr. Subhash Bansal, Senior
Standing Counsel with Mr.
Shashwat Bansal, Advocate.

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The present petition has been preferred under Section 439 of the Code of Criminal Procedure, 1973 (hereafter, "Code") for seeking regular bail in FIR bearing No. VII/41/DZU/2021 registered under Sections 8(C), 21(C), 23 and 29 of Narcotics, Drugs and Psychotropic Substances Act (hereafter, "NDPS Act") registered with Narcotics Control Bureau, Delhi.

2. The factual matrix in the instant case, as submitted by the prosecution, is as under:

a) On 27th August 2020, the Narcotics Control Bureau (hereinafter “NCB”) directed Mr. Chetan Sharma, Investigating Officer, for carrying out controlled delivery operation of parcels bearing Airway Bill No. 1735174092 and PPA32016193974 lying at the Cargo Terminal, IGI Airport, New Delhi. Accordingly, on 1st September 2020, search operation was conducted, and the investigating team seized 970 grams of heroin and collected samples of substance found in parcels bearing Airway Bill No. PPA32016193974 (hereinafter “impugned parcel”);

b) The investigating team conducted a controlled delivery of subject parcel, which was received by another co-accused namely Wahid Ali. On 2nd September 2020, Wahid Ali was arrested and his statement under Section 67 of the NDPS Act was recorded. During inquiry, various incriminating documents were found in his phone including images of invoice pertaining to parcel bearing no. AWBY Y0032216496 containing drugs (hereinafter “second parcel”), which he disclosed was due to arrive on 4th September 2020;

c) On 4th September 2020, another search was conducted by the NCB team at Hotel Shalimar near IGI Airport where Petitioner was staying in room no. 301 along with three other persons namely Muhammed Haneef T, Muhammed Shajahan PP, and Munasir Ek. All the three co-accused were arrested on the recovery of five grams of Heroin from a bag in the room. Another search was conducted at the house of the Petitioner in Uttam Nagar, New Delhi. Nothing was recovered in the search, however certain

information was disclosed by the Petitioner, which was recorded and thereafter, he was arrested by the Investigating Officer;

d) On 4th September 2020, a disclosure report was prepared wherein the petitioner had disclosed that he was supposed to receive the second parcel and was required to deliver it to Frank's Girlfriend, Bethlehem *alias* Nunu at Nawada Metro Station at 5 pm on the said date. At 5:15 pm, search was conducted at Nawada Metro Station and Bethlehem came to receive the second parcel;

e) Upon being apprehended, she disclosed that a person named Emmanuel Williams who would be receiving the first parcel from Wahid Ali. Bethlehem further disclosed that she was working with Peter Chibuzor *alias* Frank and Emmanuel Williams;

f) The Investigating Officer along with Bethlehem reached the Church at Sector 9, Dwarka in Ambarahi Village where Emmanuel Williams came to collect the parcel from Bethlehem. Emmanuel Williams came near Bethlehem and enquired about the parcel, at which point the NCB Team apprehended him. Emmanuel Williams disclosed that he had come to receive the parcel at the instance of his friend Peter Chibuzor@Frank who resides in Greater Noida;

g) The Investigating Officer served the Notice under Section 67 of the NDPS Act to Emmanuel Williams to tender his voluntary statement and the statement of the co-accused Emmanuel Williams was recorded on 4th September 2020. He disclosed that he had been doing the business with Peter and also disclosed that he knew

Bethlehem who was Peter's girlfriend and was getting forged ID's for him;

h) On 5th September 2020, Bethlehem & Emmanuel were both arrested. Subsequently on 15th September 2020, Peter was arrested at the instance of Bethlehem and his disclosure statement was recorded. He disclosed his drug business relations with Bethlehem & Emmanuel. On 17th September 2020, the disclosure statement of co-accused Peter was recorded again.

3. On 1st March 2021, Intelligence Officer Mr. R.K. Maurya filed the complaint case bearing SC no. 67/2021 under Section 8(c)/21(c)/23/29 of the NDPS act before the court of Additional Sessions Judge, Patiala House Courts and subsequently on the same day cognizance was taken by the ASJ against all accused persons including the petitioner.

4. On 9th April 2021, the Trial court vide its order granted bail to the co-accused namely Mohd. Hanif Munasir E.K. and Shahjahan who arrested along with the petitioner and who were present at time of search and recovery of 5gm of Heroin.

5. On 1st July 2021, the petitioner filed First Bail Application which was rejected on 25th September 2021 by the court of Sh. A K Jain, ASJ, Special Judge, NDPS Act.

6. Investigation in the present case is completed and supplementary chargesheet was filed on 8th April 2021 against the petitioner and other co-accused under Section 8(c)/21(c)/23/29 of the NDPS Act.

7. Mr. Sameer Rohtagi, Learned Counsel for the Petitioner made the following submissions:

a. Firstly, the bail should be granted on the ground of parity in terms of other co-accused who were arrested from the hotel room, where a recovery of 5 grams of heroin was made on 4th September 2020. The Trial Court vide its order dated 9th April 2021, has granted bail to three other accused namely Mohd. Hanif, Munaser E.K. and Shahjahan;

b. Secondly, he argued that the statement of other co-accused and the accused recorded under Section 67 of the NDPS Act is inadmissible and cannot be relied upon to implicate the Petitioner. To buttress this argument, he placed reliance on the judgement of ***Toofan Singh v. State of Tamil Nadu, AIR 2020 SC 5592;***

c. Thirdly, it was argued that the contraband of five grams was not in the “*conscious possession*” or “*constructive possession*” of the Petitioner but was recovered from a bag inside a hotel room where the Petitioner was residing along with the three other accused;

d. Fourthly, even if the recovery of five grams is taken into account, it would tantamount to small quantity and not commercial quantity for which the Petitioner can be sentenced only for a maximum period of one year, out of which he has already undergone for four months in custody;

e. Fifthly, it was argued that it is wholly wrong to contend that the impugned parcel was recovered at the instance of the Petitioner. There is no evidence against the petitioner to implicate him with the alleged offences and the prosecution's case solely rests on the disclosure statement of co-accused Wahid Ali, Mohd. Hanif, Mohd. Shahjahan, Munasir E.K and there has been no recovery of any contraband goods from the petitioner;

f. Sixthly, it was submitted that the petitioner has never avoided any investigation or court order and has not kept himself away from arrest by the NCB officer; and

g. Lastly, it was submitted that the petitioner was arrested on 4th September 2020 and since then is in Judicial custody i.e., a period of more than 12 months.

8. Mr. Subhash Bansal, Sr. Standing Counsel, appearing for the respondent department has vehemently opposed the instant bail petition. With reference to the confessional statement of the petitioner, it is submitted that the petitioner's statement was not statement *simpliciter* but led to the discovery of the impugned parcel, thus is admissible. On the ground of parity, he argued that the other co-accused who were released on bail were not implicated in other recoveries. On the other hand, the role of the Petitioner is ascribed in other recoveries. It is his argument that the sequence of events *prima facie* establishes conspiracy on the part of petitioner. It is also submitted that the Petitioner is part of a drug-syndicate indulging in illegal business of drug-trafficking and thus is not

entitled to bail on the contours of Section 37 of the NDPS Act. He also placed reliance on the following observation of the Special Judge's order dated 25th September 2021 by which the bail application of the petitioner was refused:

“Muhsin Ali, Mohd. Shahjahan, Munasir and Mohd. Haneef were apprehended and from the bag of accused Muhsin Ali 5 gm of heroin was recovered. Muhsin Ali also corroborated story alleged by the accused Wahid Ali and their dealings in drug with foreign Nigerians. Thereafter at his instance, one more parcel containing 980 gm of heroin was recovered. The parcel already seized by NCB is to be delivered to Bethlehem and when she came to take the delivery, she was also apprehended. Thereafter, at his instance, accused Emmanuel Williams was also apprehended. From both those accused also the parcels of contraband were recovered. Co-accused Frank was also apprehended later on. Entire syndicate dealing in drug supply is apprehended and found to be doing the business continuously. The knowledge of number of parcels from co-accused do not in any manner discredit the delivery of parcel to this accused at this stage, on the other hand, suggests the factum of conspiracy. The mobile phone containing whatsapp chats also connects this accused with accused Wahid Ali and Frank. There is an explicit recovery of contraband parcels from present accused thus there is statutory presumption u/s 35 and 54 NDPS Act against the accused persons. The credibility of prosecution case cannot be adjudged at this stage.

As far as parity is concerned, co-accused Mohd. Shahjahan, Munasir and Mohd. Haneef were granted bail as do not found to have been connected with other recoveries at the instance of accused Munasir or other accused persons and this fact is squarely noted in the bail orders dated 09.04.2021 and 23.04.2021 that the grant of bail to these accused is not to be considered as parity for other accused.”

Based on the aforesaid observations, it is submitted that the arguments on the ground of parity have already been dealt with by the Special Judge in detail and there is nothing illegal or erroneous in the said Order, and in light of the mandate of the NDPS Act, bail should not be granted.

9. Heard learned counsels for the parties and perused the record, specifically the averments made in the petition, the contents of the FIR, the Status Report filed by the State and the Bail Order dated 25th September 2021.

10. In light of the aforesaid, it is pertinent to refer and analyze the provisions and objective of the NDPS Act. Section 37 of the Act reads as under:

37. Offences to be cognizable and non-bailable. –

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for ¹[offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless--

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

11. In view of the gravity of the consequences of drug trafficking, the offences under the NDPS Act have been made cognizable and non-bailable. The Section does not allow granting bail for offences punishable under Section 19 or Section 24 or Section 27A and for offences involving commercial quantity unless the two-fold conditions prescribed under the Section have been met. The conditions include:

a) hearing the Public Prosecutor; and

b) Satisfaction of the court based on reasonable grounds that the accused is not guilty of the offence and that he is likely to not commit an offence of a similar nature.

12. The fetters on the power to grant bail does not end here, they are over and above the consideration of relevant factors that must be done while considering the question of granting bail. The court also needs to be satisfied before grant of bail about the scheme of Section 439 of the Code. Thus, it is evident that the present section limits the discretion of the court in matters of bail by placing certain additional factors over and above, what has been prescribed under the Code.

13. The contours of Section 37 of the Act have been analysed by the Hon'ble Supreme Court in the case of *Union of India v. Ram Samujh (1999) 9 SCC 429*. In this case, the Apex Court adjudged the validity of the order on bail granted by the High Court in a case registered under the Act. The Hon'ble Court extracted the Statement of Objects and Reasons for the introduction of amended Section 37 of the Act through Bill No. 125 of 1988. It is relevant to extract those for the present analysis, which reads as:

“6. The aforesaid section is incorporated to achieve the object as mentioned in the Statement of Objects and Reasons for introducing Bill No. 125 of 1988 thus:

“Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were

being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt.”(emphasis supplied)

7. *It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didier v. Chief Secy., Union Territory of Goa [(1990) 1 SCC 95 : 1990 SCC (Cri) 65] as under: (SCC p. 104, para 24)*

“24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the

adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.”

14. Thus, what is evident from the above is that the offences prescribed under the Act are not only a menace to a particular individual but to the entire society especially, the youth of the country. Such offences have a cascading effect and are in vogue these days, thus destroying the capabilities and lives of a substantial chunk of the population and trend has been growing over the years. Thus, to prevent the devastating impact on the people of the nation, Parliament in its wisdom deemed it fit to introduce stringent conditions for grant of bail under the Act. The Court must stay mindful of the legislative intent and mandate of the Act while considering the question bail in such matters.

15. As far as condition under Section 37(b)(i) is concerned, there is no ambiguity in its interpretation. It gives effect to the doctrine of *audi alteram partem*. Since the crime is an act against the society, the legislature has contemplated that the Public Prosecutor must be given an opportunity to oppose a bail application under the Act. Additionally, under Section 37(b)(ii) of the NDPS Act, the court is not required to be

merely satisfied about the dual conditions i.e., *prima facie* opinion of the innocence of the accused and that the accused will not commit a similar offence while on bail, but the court must have '*reasonable grounds*' for such satisfaction.

16. The term '*reasonable grounds*' under Section 37(b)(ii) has been interpreted by the Hon'ble Supreme Court in the case of ***Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798***. It was a case where an appeal was preferred against the order granting bail under the NDPS Act by the High Court. The prosecution alleged that the raiding party seized nearly 400 kgs of poppy straw from the possession of the accused therein. The special court rejected the bail while the High Court granted the bail on the ground that the recovery was not from the exclusive possession of the accused, but other family members were also involved. The Supreme Court set aside the order granting bail. In this context, it interpreted '*reasonable grounds*' under Section 37 of the Act, as under:

“7. The expression used in Section 37(1)(b)(ii) is “reasonable grounds”. The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged. The word “reasonable” has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act

reasonably, knows or ought to know. It is difficult to give an exact definition of the word “reasonable”.

17. Thus, the term ‘reasonable grounds’ is not capable of any rigid definition, but its meaning and scope will be determined based on the surrounding facts and circumstances of each case. Thus, what may be reasonable in one set of facts may not be reasonable in another set of facts. However, the standard of satisfaction in such cases is more than mere satisfaction on a *prima facie* opinion. Thus, the court before exercising its discretion for granting the bail must record the reasonable grounds before granting bail to the accused.

18. The Supreme Court recently in the case of ***Union of India v. Md. Nawaz Khan (2021) 10 SCC 100*** has reiterated the position of law with respect to Section 37 of the Act. After analysing the previous decisions of the Hon’ble Supreme Court, the court prescribed the following test for granting bail under Section 37 of the NDPS Act:

“20. Based on the above precedent, the test which the High Court and this Court are required to apply while granting bail is whether there are reasonable grounds to believe that the accused has not committed an offence and whether he is likely to commit any offence while on bail. Given the seriousness of offences punishable under the NDPS Act and in order to curb the menace of drug-trafficking in the country, stringent parameters for the grant of bail under the NDPS Act have been prescribed.”

19. Thus, the court must be conscious about the mischief that is sought to be curbed by the Act and the consequences that might ensue if the

person accused of the offence under the Act is released on bail. The court ought to be satisfied on the basis of *reasonable grounds* discernible from the facts and circumstances that the Petitioner is not guilty of offences that the accused is charged with. Additionally, the court also needs to be satisfied that the person so released will not commit the offence while being on bail. Both the conditions are interlinked because the legislature intends that in cases where there is a possibility of commission of this grave offence under the Act, the person need not be released. It is so because if the person is released, he is most likely to repeat the offence, thus impacting the society at large. Thus, to not give any leeway to the accused, the court has to be satisfied about the dual conditions on reasonable grounds.

20. In the instant case, the case of the Petitioner and his role in the entire sequence of events is not as simple as has been projected during the entire course of arguments by learned counsel for the petitioner. He is not merely arrested for the small quantity of contraband weighing five grams but has been implicated for his role as being a part of a larger drug syndicate. However, the co-accused who have been released on bail were charged with offences of smaller quantity, to which the rigors of Section 37 did not apply. However, the Petitioner is charged for commercial quantity and his bail application needs to be decided as per Section 37 of the Act. Thus, the ground of parity for seeking bail is erroneous and is rejected at the very outset.

21. Further, the statement of the Petitioner was not a mere statement but led to the discovery of the first parcel containing 980 grams of Heroin

which is a commercial quantity. Thus, the statement of the accused can be made admissible in accordance with Section 27 of the Indian Evidence Act, 1872. The judgement of *Toofan Singh (Supra)* will not apply in the instant case because it was a case where the Hon'ble Supreme Court held that the confessional statement of an accused to the officers under Section 53 of the Indian Evidence Act will not be admissible as evidence. However, Section 27 serves as a proviso to Section 25 of the Indian Evidence Act and states that the statement can be made admissible, if such statement leads to a discovery of fact. In the present case, the statement of the Petitioner led to the discovery of the parcel. Thus, Section 25 and the case of *Toofan Singh (Supra)* will not be applicable in the present case. If the argument of the Petitioner is accepted, it would render the provisions of Section 27 of the Indian Evidence Act otiose, which can never be allowed.

22. Other co-accused have also ascribed the role of the petitioner, where he was responsible to deliver the packages containing Heroin to several persons including certain Nigerian citizens. Thus, the accused in these circumstances and at this stage cannot be presumed to be 'not guilty' of the offence that he is charged with. Additionally, as the Special Judge has rightly observed the presumption under Section 35 and 54 of the NDPS Act are against the Petitioner's innocence.

23. Proceeding to the application of Section 37 in the instant matter, the Public Prosecutor has been heard who has vehemently opposed the bail petition with reasons. With respect to the second condition prescribed thereunder, this Court is satisfied that there are no reasonable grounds,

based on the analysis of the provision in the foregoing paragraphs and its application to the facts of the case, for this Court to believe that the Petitioner is not guilty of the offence that he has been charged with. Since this court is not satisfied on this ground, there is no question to consider that the accused will not commit the offence while on bail.

24. In view of the aforementioned facts, circumstances, analysis and reasoning, keeping in mind the legal provisions and the underlying intent as well as the mischief that is sought to be curbed by the NDPS Act, this Court is of the considered view that the conditions stipulated under Section 37 of the Act are not satisfied and there are no 'reasonable grounds' to presume the accused as not being guilty of the offence. Thus, this Court is not inclined to allow the instant Bail Application as being devoid of any merit and hence, liable to be dismissed.

25. Accordingly, the instant Bail Application stands dismissed.

26. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

January 25, 2022
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