

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

Reserved on : 23.03.2021

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Pronounced on : 20.04.2021

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BAIL APPLN. 1960/2020

NASTOR FARIRAI ZISO

..... Petitioner

Through: Mr. Ajay Verma, Advocate.

Versus

NCB

..... Respondent

Through: Mr. Subhash Bansal, Adv. Sr.
Standing counsel for NCB with
Mr. Sushant Bansal, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

ORDER

RAJNISH BHATNAGAR, J.

1. By way of this order, I shall dispose of the present petition filed under Section 439 Cr.P.C. on behalf of the petitioner for grant of regular bail in SC No. 411 of 2019 arising out of FIR No. VIII/27/DZU/2019 Under Section 9A/25A of the Narcotic Drugs And Psychotropic Substances Act, 1985, PS. Narcotics Control Bureau (DZU), New Delhi.

2. Brief facts of the case that on 13.07.2019, on the basis of secret information, the petitioner/accused was apprehended at IGI Airport when she was going to Zambia and 19.3 Kg. of pseudoephedrine hydrochloride was recovered from her baggage. The petitioner/accused in her statement

u/s 67 N.D.P.S. Act admitted the recovery and disclosed that she came to India on request of her friend and the bags concealing the said bags was given by her friend IKE.

3. I have heard the Ld. counsel for the petitioner, Ld. Sr. Standing Counsel for the respondent (NCB) and perused the records of this case.

4. It is submitted by the Ld. counsel for the petitioner/accused that the petitioner is in custody since her date of arrest on 13.07.2019 and the charges have already been framed and the long incarceration of the petitioner would not serve any fruitful purpose. It is also submitted that the alleged recovered substance i.e. Pseudo-Ephedrine is a controlled substance and the bar under section 37 of the NDPS Act which provides for bar for granting bail will not be attracted in the present case as the same is applicable only in offences involving commercial quantity which refers to only narcotic drug and psychotropic substance and the substance alleged to be recovered from the petitioner is neither a narcotic drug nor psychotropic substance and is a controlled substance under the NDPS Act. He further submits that NCB officials after conducting the investigation, have filed the police report before the Ld. Trial Court and the investigation has been completed, and the petitioner is no more required by the investigating agency and the present matter is at the initial stage of prosecution evidence therefore, there is very likelihood that the conclusion of the trial shall take time. He further submitted that the petitioner is a respectable foreign citizen and there is no possibility of petitioner fleeing from justice as her passport was seized at the time of investigation by the IO at NCB on the date of arrest

and therefore there is no chance of the petitioner leaving India and the petitioner does not have any criminal antecedents and is not previous convict in any case.

5. Ld. Counsel for the petitioner has relied upon following Judgments:-

- ***Gudikanti Narasimhulu and Others vs. Public Prosecutor 1978 AIR SC 429.***
- ***Rajesh Sharma v Directorate of Revenue Intelligence 2018 SCC Del 12372 Decided on 14.8.2018.***
- ***Sri. Vastavayi Siva Ramakrishna Paratna Varma vs. The State of Karnataka criminal Petition no. 200880/2017 Decided on 16.8.2017.***
- ***Madderia Shankar vs State of Karnataka Criminal Petition No. 200811 /2017 Decided on 1.08.2017.***
- ***Manoj Kumar Vs Director of Revenue Intelligence 2015 BAIL.A.257/2015 Decided on 03.03.2015 SCC 7830 (2015) 219 DLT 112.***
- ***Niranjan Jayantilal Shah v. Directorate of Revenue Intelligence Bail Appln. 1202/2013 2013 SCC Online Del 4608.***
- ***G. M. Akbar Ali V. The Intelligence Officer Crl. O.P. No. 26320 of 2010 Decided on 19.11.2010.***
- ***Rafael Palafox Garcia v The Union of India and Anr. Criminal Application no. 2015/2008.***
- ***Lambert Kroger vs. State 2000 SCC Online Del 208.***
- ***Sartori Livio vs. State 2005 (80) DRJ 482.***
- ***Nasimjon Komlov v. Customs CRLM(M) No. 2038/2000 Decided on dated 31.07.2000.***

6. On the other side, while opposing the bail of the petitioner, Ld. Sr. Standing Counsel submitted that during her voluntary statement the accused was within her knowledge and had deposed under section 67, NDPS Act and admitted that the said drugs which were recovered from her possession was given to her by IKE which had to be handed over to Jonathan at Zambia. It is also submitted by Ld. Sr. Standing Counsel that petitioner/accused is charged of offence for trafficking of Pseudo-Ephedrine which is used in production of narcotic drugs/ psychotropic substance. It is further submitted that all crucial witnesses are yet to be examined under trial and if petitioner/accused is released on bail the petitioner/accused may influence the witnesses and petitioner/accused is a foreign national and may jump the bail and abscond. Ld. Sr. Standing Counsel for the respondent (NCB) has relied upon "*Union of India Vs. Prateek Shukla*", Criminal Appeal No. 284 of 2021 decided by the Supreme Court of India on March 08, 2021.

7. The offences alleged against the petitioner are U/s 9A/25 A of the NDPS Act. First and foremost question is whether rigors U/s 37 of the NDPS Act applies to the case of the petitioner or not.

8. The present petitioner is facing prosecution for charges U/s 9A and 25 A of the NDPS Act and hence obviously her case would not be covered U/s 37 of the NDPS Act. Moreover, as far as Section 9A which deals with controlled substance is concerned, there is no categorization of small quantity or commercial quantity. Therefore, concept of commercial quantity is applicable only to narcotic drugs and psychotropic substances and not to controlled substance.

9. Section 9A of the NDPS Act deals with the power to control and regulate controlled substance. "Controlled substance" means any substance which the Central Government may, having regard to the available information as to its possible use in the production manufacture of narcotic drugs or psychotropic substances or to the provisions of any international Convention, by notification be a controlled in the official Gazette, declare substance. The Ministry to of Finance Department of Revenue vide its notification dated 28th December, 1999 has declared pseudo-ephedrine a controlled substance under the Act. The Central Government being of the opinion that having regard to the use of the controlled substances in the production or manufacture of any narcotic drug or psychotropic substance, it is necessary or expedient so to do in the public interest, in exercise of powers conferred by Section 9A of the Act has made the Narcotic Drugs and Psychotropic Substances (Regulation of Controlled Substance) Order, 1993, which has come into force w.e.f. 15th April, 1993.

10. The substance alleged to have been recovered from the petitioner/accused is 19.3 Kg. of pseudoephedrine hydrochloride which is a controlled substance. It has been rightly submitted by the Ld. counsel for the petitioner/accused that it is neither a narcotic drug nor a psychotropic substance under the NDPS Act. The alleged offences are not punishable with death or imprisonment for life. The offence falling U/s 9A r/w section 25A of the NDPS Act is punishable with imprisonment which may extend to 10 years and also fine which may also extend to Rs. 1 Lakh and the bar of Section 37 is not attracted in the present case as the substance recovered is a controlled substance within the meaning of Section 2 (viid) of the Act.

11. The next point for consideration is, whether the petitioner/accused who is a foreign national is entitled to be released on bail, if she is able to make out a case in her favour. The counsel for the petitioner has placed reliance upon "***Gudikanti Narasimhulu and Others Vs. Public Prosecutor***" 1978 AIR SC 429 in which it has been held as follows:

"Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Art. 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community." It was further held that "deprivation of personal freedom, ephemeral or enduring, must be founded on the most serious considerations relevant to the welfare objectives of society, specified in the Constitution."

12. Ld. counsel for the petitioner/accused has also relied upon "***Sartori Livio vs. State***" 2005 (80) DRJ 482 in which it has been held as follows :

"It would be a shame if courts are going to keep persons incarcerated merely because they are of foreign origin even though prima facie no case is made out against them. This would be a negation of the valued principles of rule of law and violative of the constitutional mandate and principles of human rights."

13. It was further added by the Hon'ble Court that:

"In view of this judgment, with which I am in agreement, it is clear that just because a foreign national is involved, it does not mean that he is to be denied the benefit of bail. "

14. Therefore, in view of the judgments (*supra*) relied upon by the Ld. counsel for the petitioner/accused, there is no bar for releasing foreign national on bail, if the case so warrants.

15. It has also been argued by the Ld. counsel for the petitioner that in cases, where the controlled substance recovered was even much larger than that recovered from the petitioner/accused even in those cases the bail have been granted and he has placed reliance upon “*Niranjan Jayantilal Shah Vs. Directorate of Revenue Intelligence*” decided on 19.11.2013 (Bail Application No. 1202/2013), this Court granted bail to the accused where the recovery of the same controlled substances was of 100 Kg. This decision referred to had relied upon several other decisions of the Court, where the recovery of much larger quantities of controlled substances have been made. Reliance can also be placed upon the judgment of this Court “*Manoj Kumar Vs. Directorate of Revenue Intelligence*” 2015 SCC On Line Delhi 7830.

16. As far as the judgment, *Union of India Vs. Prateek Shukla (supra)* relied upon by the Ld. Sr. Standing Counsel for the respondent (NCB) is concerned, the same is not applicable to the facts of the present case as in the said case the sections involved were sections 8, 9A, 25A, 23 and 29 of the NDPS Act which is not so in the present case.

17. As already observed hereinabove, bar of section 37 of the NDPS Act is not applicable. Therefore, keeping in view the entire facts and circumstances, the petitioner/accused who is in J.C. since 13.07.2019 is admitted to bail on her furnishing personal bond in the sum of Rs.1,00,000/- with two solvent sureties each of the like amount subject to the satisfaction of the trial Court. Being released on bail, the petitioner shall inform the NCB Office, the address at which she will reside during the period she is on bail. Any change in the address shall also be communicated to the NCB

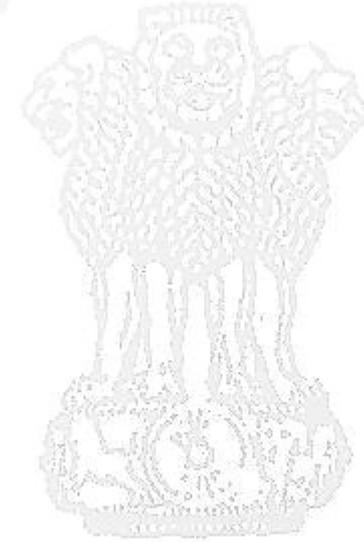
Office within 2 days. The petitioner shall report to the NCB office once in a week till the conclusion of the trial. The petitioner shall not leave the limits of NCT of Delhi without prior permission of the Trial Court. With these directions, the application stands disposed of.

18. Nothing stated hereinabove, shall tantamount to the expression of any opinion on the merits of this case.

RAJNISH BHATNAGAR, J

APRIL 20, 2021

Sumant



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