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

Judgment delivered on: 29.11.2023

+ **BAIL APPLN. 1692/2023**

AWADHESH YADAV

..... Petitioner

Through: Mr Aditya Aggarwal, Mr Naveen Panwar, Mr Ankit Mutreja and Ms Kirtika, Advocates.

Versus

STATE GOVT. OF NCT OF DELHI

..... Respondent

Through: Ms Richa Dhawan, APP for the State with SI Jagbir, Narcotics Squad, West District.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. The present petition has been filed under Section 439 CrPC seeking regular bail in FIR No.0240/2022 under Sections 20/29 of the NDPS Act [in short "the Act"] registered at PS Naraina.
2. The case of the prosecution as borne from the chargesheet is that on the basis of a secret information received by ASI Mohan Lal on 04.05.2022, co-accused Rakesh was intercepted at around 06:08 AM along with two bags at Nariana village, New Delhi and 21.084 kg. of *ganja* was recovered from



his possession. During the investigation it was found that the real name of co-accused Rakesh Singh is Tarkeshwar Prashad Shah S/o Shiv Nath Shah, R/o VPO-Mohamadpur, PS Manjhi, Chhapra, Bihar and he has changed his identity as he had been previously involved in NDPS cases.

3. During the course of further investigation, co-accused Tarkeshwar Prashad Shah disclosed that he used to procure *ganja* from one Gagan Jha and used to sell it by making small packets i.e. *pudiya*. Later, when Gagan was caught by police, he made direct contact with Awadesh Yadav (the present petitioner) and Manish Kumar @ Prince Bharti and started purchasing *ganja* from them and he would sell the same in Delhi.

4. On the basis of the disclosure statement of co-accused, Rakesh, a raiding team went to the house of the petitioner on 08.05.2022 with the local police at his village Rasulpur, PS Rasulpur, Chhapra, Bihar. When the raiding party rang the bell of the house, the petitioner saw the raiding team and threw two bags on the road. The members of the raiding team apprehended the petitioner and also recovered the bags thrown by him. The two bags were opened and checked and they were found containing *ganja* weighing 600 gm and 228 gm, respectively. Thus, total of 828 gm *ganja* was recovered from the petitioner. The petitioner was, thereafter, arrested.

5. Learned counsel for the petitioner submits that *ganja* weighing 21.084 kg. recovered from co-accused Tarkeshwar Prashad Shah @ Rakesh Singh cannot be added to the quantity of 828 gm. of *ganja*, which has been recovered from the petitioner. He submits that the recovery of contraband from the petitioner is a small quantity and by adding the quantity recovered



from co-accused Rakesh, the rigors of section 37 of NDPS Act cannot be extended to the petitioner. In support of his submission, the learned counsel relies upon the decision of a Coordinate Bench of this Court in *Anita vs. State of NCT* [Bail Appln. 1538/2022, order dated 20.07.2022] and *Anita @ Kallo vs. The State (NCT of Delhi)* [Bail Appln. 957/2023, DOD 18.07.2023] in which another Coordinate Bench of this Court relying upon the decision of *Anita (supra)* held that the recovery made from the petitioner therein could not be clubbed with the recovery made from the co-accused and accordingly, rigors of Section 37 of the NDPS Act would not apply in the facts and circumstances of that case.

6. He submits that there is no direct recovery from the petitioner, inasmuch as, the recovery of 828 gm of *ganja* is from the street on the back side of the petitioner's house, therefore, the petitioner cannot be said to be in conscious possession of the contraband.

7. He further submits that the prosecution has based its case upon the bank transactions and call details between the petitioner and co-accused Rakesh. He places reliance on the decision of *Haresh Rawal vs. NCB: 2021 SCC OnLine DEL 3007* (decided on 03.06.2021), to contend that question regarding call detail and chats is to be tested during trial.

8. Further, relying upon the decision of *Bharat Chaudhary vs. Union of India: 2021 SCC OnLine SC 1235*, he submits that reliance on printouts of WhatsApp messages downloaded from the mobile phone cannot be treated as sufficient material to establish a live link between the accused and the co-accused.



9. He submits that the petitioner is shown to be implicated in another case of NDPS from which he has already been acquitted. He further submits that previous involvement cannot be a ground to deny the bail to the petitioner.

10. He also relies upon the decision of *Prabhakar Tiwari vs. State of Uttar Pradesh*: (2020) 11 SCC 648 wherein the Hon'ble Supreme Court observed that mere pendency of several criminal cases against the accused cannot by itself be the basis for refusal of bail. The same can be a factor, but cannot be the sole basis for refusal of grant of bail.

11. He contends that the petitioner is in custody since 09.05.2023, the investigation is complete and the charge-sheet has been filed. He further submits that the Hon'ble Supreme Court has time and again reiterated that the bail is the general rule and jail the exception. He, therefore, urges the Court to enlarge the petitioner on regular bail.

12. *Per contra*, learned APP for the State has argued on the lines of the status report.

13. She invites the attention of the Court to the charge-sheet filed by the prosecution, to contend that co-accused Tarkeshwar Prashad Shah @ Rakesh Singh had been purchasing *ganja* from the petitioner and there are banking transactions showing that co-accused Tarkeshwar Prashad Shah had been depositing money into the bank account of the petitioner. She submits that on 22.04.2022 and 27.04.2022 an amount of Rs.2,00,000/- each (total Rs.4,00,000/-) was deposited into the account no.467410110001063 of the



petitioner maintained with Bank of India, Rasulpur, Chhapra, Bihar in cash from Naraina Vihar, Delhi, the receipt of which was recovered from the mobile phone of Tarkeshwar Prashad Shah @ Rakesh Singh.

14. Further, from the bank account of Tarkeshwar Prashad Shah @ Rakesh Singh bearing no.0627000102494966 maintained with Punjab National Bank, Naraina Vihar, Delhi, an amount of Rs.2,50,000/- and Rs.2,00,000/-, were transferred through RTGS to the bank account of the petitioner on 30.10.2021 and 23.12.2021, respectively. Furthermore, an amount of Rs.1,00,000/- was deposited in the petitioner's account in cash from Mayapuri Industrial Area.

15. She submits that the petitioner is a main supplier who would supply *ganja* to co-accused Tarkeshwar Prashad Shah @ Rakesh Singh after procuring the same from one Manish Kumar Bharti @ Prince @ Baba, who has been declared as a proclaimed offender.

16. She submits that the location of co-accused Tarkeshwar Prashad Shah @ Rakesh Singh and that of the present petitioner on 03.05.2022, is of petitioner's village Rasulpur. Further, from 01.01.2022 till 03.05.2022, 15 times the location of the petitioner and co-accused Tarkeshwar Prashad Shah @ Rakesh Singh, is common.

17. That apart, 430 calls have been made from the mobile phone no.9708119869, which is petitioner's mobile number registered in respect of his bank account maintained with Bank of India, Rasulpur, Chhapra, to the mobile no.8595597773, which is the mobile number of co-accused



Tarkeshwar Prashad Shah @ Rakesh Singh.

18. She submits that the CDRs also reveal that the petitioner has made call to Manish Kumar Bharti @ Prince @ Baba on 07 occasions from his two different mobile numbers.

19. She submits that the petitioner has criminal record, inasmuch as, he was implicated and arrested in connection with FIR No.68/2010 registered at PS Rasulpur, Chappra, Bihar.

20. She further submits that since there is material to show a criminal conspiracy between the petitioner and co-accused Tarkeshwar Prashad Shah @ Rakesh Singh, the quantity of contraband recovered from both the accused persons can be combined for ascertaining whether the quantity of contraband recovered is of commercial quantity attracting the rigors of Section 37 of the Act. She places reliance on the decision of the Coordinate Bench of this Court in *Ridhm Rana vs. State (NCT of Delhi): 290 (2022) DLT 219*, in support of her contention. She urges that the recovery of contraband being a commercial quantity, the rigors of Section 37 will apply in the present case, and accordingly, the application of the petitioner deserves to be dismissed.

21. I have heard the learned counsel for the petitioner, as well as, the learned APP for the State and have perused the record.

22. The fundamental question to be decided in the present bail application is that whether at the stage of bail the quantity of contraband recovered from the co-accused Tarkeshwar Prashad Shah @ Rakesh Singh can be combined



with the quantity of contraband recovered from the petitioner for ascertaining whether the recovered contraband is of commercial quantity.

Background and Relevance of Commercial Quantity

23. The NDPS (Amendment) Act, 2001 introduced the concept of commercial quantity for the first time and the quantum of punishment for the offence under Act was made dependent upon the quantity of the contraband recovered. This rationalization of sentence was explained by the Supreme Court in *E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau: (2008) 5 SCC 161*¹ in the following terms:

12. As a consequence of the Amending Act, the sentence structure underwent a drastic change. The Amending Act for the first time introduced the concept of commercial quantity in relation to narcotic drugs or psychotropic substances by adding clause (viiia) in Section 2, which defines this term as any quantity greater than a quantity specified by the Central Government by notification in the Official Gazette. Further, the term 'small quantity' is defined in Section 2, clause (xxiiia), as any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette. Under the rationalised sentence structure, the punishment would vary depending upon whether the quantity of offending material is 'small quantity', 'commercial quantity or something in-between.

13. It appears from the Statement of Objects and Reasons of the Amending Act of 2001 that the intention of the legislature was to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentence, the addicts and those who

¹ *Overruled in Hira Singh v. UOI, (2020) 20 SCC 37 on a different point that actual content by weight of offending drug, excluding neutral substance, is to be considered for the purpose of determining whether it would constitute small quantity or commercial quantity.*



commit less serious offences are sentenced to less severe punishment. Under the rationalised sentence structure, the punishment would vary depending upon the quantity of offending material.”

(emphasis supplied)

24. The quantity of contraband recovered is relevant for deciding the quantum of punishment to be awarded for the offences under Sections 17, 18, 20, 21 and 22 of the Act. All these Sections, *inter-alia*, makes possession, sale, purchase, transport etc. of contraband articles an offence. Likewise, quantity of contraband is also relevant for deciding the quantum of punishment for illegal import into India, export from India or transshipment of narcotic drugs and psychotropic substances under Section 23 of the Act.

25. The quantity of contraband recovered also assumes relevance at the stage of considering the bail application of the accused after Section 37 of the Act was also amended by the Amending Act of 2001. Section 37 of the Act, now, *inter alia*, provides that no person accused of an offence involving commercial quantity shall be released on bail unless the conditions laid down therein are satisfied.

26. For the sake of convenience Section 37(1) is reproduced hereinbelow:

“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 [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity]² 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.”

(emphasis supplied)

27. In view of the above provision, it is implicit that no person accused of an offence involving commercial quantity of narcotics shall be released on bail unless the twin conditions, namely, (i) the public prosecutor has been given an opportunity to oppose the bail application; and (ii) the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any such offence while on bail, are satisfied.

28. The punishment part in drug trafficking is an important one but its preventive part is more important.³ The conditions provided under section 37(1)(b)(ii) have an attribute of a preventive provision. In the backdrop of the penal and preventive scheme of the Act discussed above, the question which, however, looms large in the present petition is that under what

² Substituted by NDPS (Amendment) Act, 2001

³ *Hira Singh v. UOI*, (2020) 20 SCC 37



circumstances the quantity of contraband separately recovered from two or more accused persons could be clubbed at the stage of bail.

29. To find an answer to the above question, reference to Section 29 of the Act is apposite, which 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 India;
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.”

(emphasis supplied)

30. Abetment has been defined under section 107 IPC, which reads as under:



“107. Abetment of a thing.- A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration

A, a public officer, is authorised by a warrant from a Court of Justice to apprehend Z, B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

31. Thus, a person abets the doing of a thing when (1) he instigates any person to do that thing or (2) engages with one or more other persons in any conspiracy for the doing of that thing or (3) intentionally aids by act or illegal omission, the doing of that thing. These things are essential to complete abetment as crime. Therefore, abetment may be by instigation, conspiracy or intentional, by any act or illegal omission.



32. The term “criminal conspiracy” has been defined in section 120A IPC, which reads as under:

*“120A. Definition of criminal conspiracy.—When two or more persons agree to do, or cause to be done,—
(1) an illegal act, or
(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:*

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.”

33. Reference to Section 120A IPC and Section 29 of the Act makes it clear that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is the very quintessence of the offence of conspiracy.⁴

34. In **State through Superintendent of Police, CBI/SIT v. Nalini & Ors., (1999) 5 SCC 253**, the Hon’ble Supreme Court culled out principles governing the law of conspiracy, and summarized the same as under:

⁴ *Kehar Singh & Ors. v. State (Delhi Administration)*, (1988)3 SCC 609



“583. Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles.

*1. Under Section 120-A IPC offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is a legal act by illegal means overt act is necessary. **Offence of criminal conspiracy is an exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence.** The question for consideration in a case is did all the accused have the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever horrendous it may be, that offence be committed.*

2. Acts subsequent to the achieving of the object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.

3. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

4. Conspirators may for example, be enrolled in a chain – A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella-spoke enrolment, where a single person at



*the centre does the enrolling and all the other members are unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell which conspiracy in a particular case falls into which category. It may however, even overlap. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse roles to play. **It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.***

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.

*7. **A charge of conspiracy may prejudice the accused because it forces them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of the object of conspiracy but also of the agreement. In the charge of conspiracy the court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence***



*in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. **There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy.** As observed by Judge Learned Hand "this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders".*

8. As stated above it is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement which is the gravamen of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

*9. **It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the***



original agreement but also to collateral acts incidental to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co-conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.

10. A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.

(emphasis supplied)

CASE LAW ON CLUBBING OF QUANTITY

35. At this stage, a survey of case law on the issue at hand is also apposite. In *Amar Singh Ramji Bhai Barot vs. State of Gujarat*: (2005) 7 SCC 550, the High Court had taken a view that since the appellant had also been convicted under 21(c) read with section 29 of the Act, for being in conspiracy with the co-accused, the total amount of prohibited substance recovered (personally from the appellant and also from the joint possession of two accused) were more than “commercial quantity”, therefore, the appellant was liable to be visited with the minimum punishment of 10 years’ rigorous imprisonment plus fine of Rs. 1 lakh. The Hon’ble Supreme Court observed that there was no warrant for the said conclusion by the High Court



at all as there is no evidence to suggest that there was any such abetment and/or criminal conspiracy within the meaning of Section 29 of the NDPS Act. What follows from the observations of the Hon'ble Supreme Court is that where there is evidence to suggest the abetment/or criminal conspiracy, the quantity of contraband recovered individually could be combined for determining as to whether it is a "commercial quantity".

36. In *Bhupinder Singh @ Bhinda v. State of Punjab*: 2004 SCC OnLine P&H 1011, recovery of 56 Kgs of poppy husk was made from the petitioner therein and his co-accused Harmeet Singh. An argument was advanced that the recovery of contraband jointly effected from both of them should be divided equally for determining whether quantity was small, intermediate or commercial. Negating the submission, it was held that at the stage of bail, it would not be permissible for the Court to accept the request of the accused that recovery of a narcotic substance, jointly effected should be equally divided amongst two co-accused. Notably, this was not a case where individual recovery had been made from more than one accused and the prosecution sought to club the said recovery. The situation was rather converse, as joint recovery was effected and the accused sought equal division of the same between two of them.

37. In "*Muthu Kumar & Ors. v. Station House Officer, Kottakkal Police Station*" [(2008) SCC OnLine Ker 100], three accused persons were carrying *ganja* of varying quantity, the Division Bench of Kerala High Court observed that even though the total quantity carried by all three accused was commercial in nature, however, each of the accused is in possession of only a lesser than the commercial quantity, therefore, the punishment applicable



for commercial quantity Section 20(b)(ii)(C) will not apply.

38. However, a learned Single Judge of the same High Court in “*Muhammed Sadath vs. State of Kerala*”, 2023 SCC OnLine Ker 1913, distinguished the view taken in Muthu Kumar (supra) observing that in the said decision the Kerala High Court did not consider the impact of Section 29 of the Act, since in the said case, the prosecution did not allege the commission of an offence under Section 29 of the Act. In this case, the facts were that there was a prior information that four accused persons were transporting the contraband in three vehicles and they were apprehended for commission of offences punishable under Sections 22(c) and 29 of the Act. In this factual backdrop, the learned Judge observed that the involvement of the petitioner therein cannot be confined to the possession of intermediate quantity recovered from him so as to dilute the rigors under Section 37 of the NDPS Act.

39. In “*Rafiq vs State (Govt. of NCT of Delhi)*” [Bail Appln. 3901/2020], a Coordinate Bench of this Court negated the contention of the petitioner therein that 555 gms of charas recovered from him is less than commercial quantity therefore, rigors of Section 37 of the Act would not be applicable. The Court observed that the petitioner was arrested alongwith his co accused who is involved in other two cases and no doubt the petitioner therein was carrying only intermediate quantity but his co-accused was carrying 955gms of contraband and further since they were travelling in the same vehicle, therefore, at the stage of considering the bail application it would not be proper to consider the alleged recovery to be an individual recovery. The



Court also noticed that co-accused was a habitual offender and he knew the trick of the trade and the factum of conspiracy can only be looked into at the time when evidence is led.

40. In “*Ishika vs. State*”, 2021 SCC OnLine Del 3131, the facts were that the petitioner therein was arrested and heroin weighing 112 grams (an intermediate quantity) was recovered and 152 grams was recovered from the co-accused. Referring to the CDRs of mobile numbers of both the accused which revealed that both the accused persons had come from Punjab to Delhi together to buy drugs and were in regular touch, it was observed that they had conspired together to procure and transport to another State. The Coordinate Bench while relying upon the dictum of the Supreme Court in *UOI vs. Ram Samujh: (1999) 9 SCC 429*, dismissed the bail application of the petitioner therein.

41. In “*Aakash Mehra vs. Narcotics Control Bureau*” 2023 SCC OnLine Del 5597, the petitioner therein was arrested on the basis of the disclosure statement of co-accused Pankaj Gupta and no recovery was effected from the petitioner, but having regard to the overwhelming incriminating material in the form of numerous, frequent and bulk money transactions through Paytm or bank account, the mobile data extraction report, many photographs of narcotics drugs, parcel receipts, drug trafficking, WhatsApp chat and other incriminating documents, it was observed that there was no ground for believing that the petitioner is not guilty of the offence of recovery of contraband of commercial quantity from co-accused Pankaj Gupta and accordingly, applying the rigours of the Section 37 of the Act, the bail



application of the petitioner was dismissed.

42. In *Anita vs. State of NCT* [Bail Appln. 1538/2022, DOD 20.07.2022], a Coordinate Bench of this Court relying upon the decision of Punjab and Haryana High Court in *Vicky Kaur vs. State of Punjab, 2018 SCC OnLine P&H 6949*, took the view that the recovery made from the co-accused cannot be added to the quantity recovered from the applicant.

43. In *Vicky Kaur vs. State of Punjab (supra)*, the High Court of Punjab & Haryana observed that in *Amar Singh Ramji Bhai Barot (supra)* the Supreme Court has held that “*Quantity of contraband carried by both the accused could not be added to bring it within meaning of commercial quantity and Section 29 will not be attracted*”. I have examined the decision of *Amar Singh Ramji Bhai Barot (supra)* and find that the observation quoted in *Vicky Kaur (supra)* is not from the said decision of the Supreme Court nor any such ratio has been laid down in the said decision. In my opinion, the correct position borne out from the decision in *Amar Singh Ramji Bhai Barot (supra)* has already been noted in para 35 above.

44. In “*Anita @ Kallo vs State*”, 2023 SCC OnLine Del 4178, this Court relying upon an earlier order in *Anita v. State (NCT of Delhi)*, BAIL APPL 1538/2022 dated 20.07.2022 observed that the recovery made from the petitioner cannot be clubbed with the recovery made from the co-accused and thus the rigours of Section 37 of the NDPS Act would not apply.

45. In “*Ridhm Rana vs. State (NCT of Delhi)*”, 2022 SCC OnLine Del 771, the petitioner had challenged the order on charge by filing a criminal



revision. One of the contentions urged was that there was no evidence to connect the revisionist to co-accused Sarvesh, therefore, the quantity of contraband recovered from them separately could not have been combined. The Court referred to the CDRs and observed that at the stage of framing of charge, CDR analysis is sufficient to point out a criminal conspiracy between the accused persons. There were 67 calls between them at the relevant period, besides the petitioner being in regular touch with the supplier of the contraband. In this backdrop, the Court observed that the material available was sufficient to support the submission of the prosecution that there was criminal conspiracy amongst all the accused persons and it was held Section 29 and Section 20 (c) of the NDPS Act were rightly invoked by the learned Trial Court.

46. In *“Sheela vs. State Govt of Delhi: 2023 SCC OnLine Del 6391*, three co-accused were travelling together in the same vehicle and *ganja* weighing 14.13 Kgs and 24.20 Kgs was recovered from two separate bags and further there were 287 telephonic calls made between the one co-accused and second co-accused and 19 calls between second co-accused and third co-accused. In this background, the court observed that all the co-accused were acting together and were in constructive and conscious possession of the total quantity of *ganja* amounting to 38.33 Kgs.

Analysis and conclusion

47. To evade enforcement authorities, drug traffickers take recourse to the most ingenious and devious ways of trading illicitly in narcotic drugs and psychotropic substances. Investigations are often half-hearted, for various



reasons including underhanded deals. Illicit business in and consumption of narcotic drugs and psychotropic substances is endangering the social and economic stability of India as well as that of developing countries, adversely affecting the health of people.⁵ Therefore, the provisions of the NDPS have to be effectively implemented.

48. At the same time, the twin conditions which need to be satisfied under Section 37 of the Act for the offences involving commercial quantity are very stringent and have the effect of curtailing the liberty of an accused, therefore, the Court before combining the quantities of the contraband recovered from all the accused has to guard itself against the danger of unfairness to the accused.

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. 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.

⁵ *Tofan Singh V. State of Tamil Nadu*, (2021) 4 SCC 1



- 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.

51. Now reverting back to the facts of the present case, there is



overwhelming material to show that there exists a conspiracy between the petitioner and co-accused Tarkeshwar Prashad Shah @ Rakesh Singh from whose possession 21.084 kg. of *ganja* was recovered. There are money transactions in the form of RTGS and cash deposits made by co-accused Tarkeshwar Prashad Shah @ Rakesh Singh into the bank account of the present petitioner for which no legitimate justification has been given by the petitioner.

52. Further, there are as many as 430 calls between the petitioner and the co-accused Tarkeshwar Prashad Shah @ Rakesh Singh, as is borne out from the CDRs. Furthermore, from 01.01.2022 till 03.05.2022, 15 times the location of the petitioner and the said co-accused is common.

53. This being the position, there is ample material on record to establish conspiracy between them and it is a fit case where the quantity of contraband recovered from the present petitioner as well as the co-accused Tarkeshwar Prashad Shah @ Rakesh Singh can be clubbed and accordingly, the rigors of Section 37(1)(b)(ii) of the NDPS Act will apply.

54. In view of the overwhelming incriminating material on record, which cannot be negated at this stage, there is no reasonable ground for believing that the petitioner is not guilty of the alleged offence. Further, in view of the petitioner having criminal record and other circumstances noted above, it cannot be said that the petitioner is not likely to commit any offence while on bail. Thus, no ground is made out for grant of regular bail to the petitioner. The petition is accordingly, dismissed.



55. It is made clear that the observations made herein are only for the purpose of considering the bail application and the same shall not be deemed to be an expression of opinion on the merits of the case.

56. Order be uploaded on the website of this Court.

VIKAS MAHAJAN, J.

NOVEMBER 29, 2023/MK