

A.F.R.

Judgment Reserved On 31-08-2022

Judgment Delivered On 13-09-2022

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 42918 of 2021

Applicant :- Aditya Kumar

Opposite Party :- Union Of India Through Narcotic Control Bureau,
Lucknow

Counsel for Applicant :- Abrar Ahmad Siddiqui, Abhishek Kumar
Mishra, Chandrakesh Mishra, Rakesh Pati Tiwari

Counsel for Opposite Party :- Ashish Pandey

Hon'ble Subhash Vidyarthi, J.

1. Heard Sri Daya Shankar Mishra, Senior Advocate assisted by Shri Chandrakesh Mishra Advocate, the learned Counsel for the applicant and Sri Ashish Pandey Advocate, the learned counsel for the Narcotic Control Bureau.
2. The present application has been filed for release of the applicant on bail in N.C.B. Crime No. 28 of 2021, under Section 8(C)/21/29 of Narcotic Drugs and Psychotropic Substances Act, P.S. N.C.B. Lucknow.
3. The search, seizure-cum- recovery memo dated 04-07-2021 states that an information was received in the N.C.B. Office at Lucknow on 03-07-2021 at 21:30 hours that a person was carrying Heroin in Coach No. 9 of Train No. 02357 from Gaya, Bihar to Bareilly, U.P. and the train would reach Bareilly junction on 04-07-2021 between 06:00 hours to 07:00 hours. In furtherance of the aforesaid information, a team of Officers of N.C.B consisting of the Intelligence Officer Mohd. Farooq, Supervision Assistant Vivek Kumar, Hawaldar Hridesh Kumar and Driver Brijesh Kumar was constituted. The team assembled in its office at Lucknow and started its journey on 03-07-2021 at 22:30 hours from Lucknow office and reached Bareilly junction on 04-07-2021 at about 05:00 hours. No person agreed to

become a witness to the proposed seizure proceedings. The Inspector R.P.F. junction was requested to provide independent witnesses, who deputed two constables of R.P.F. to act as witnesses.

4. When the train reached Bareilly junction, the N.C.B. team apprehended the applicant and from a bag kept near him about 300 gms. brown coloured narcotic powder kept in a white transparent polythene was recovered. However, in personal search of the applicant, no objectionable substance was recovered. Upon testing the narcotic substance with a Drug Detection Kit, it was found to be Heroin. The NCB team conducted a repeat test with the kit and in that also, the substance was found to be Heroin. It is alleged that the applicant also told that the substance was Heroin. It's gross weight along with the double white transparent polythene in which it was packed, was found to be 391 gms.
5. The seizure memo contains a narration that the seizure proceedings commenced on 04-07-2021 at 07:45 hours and continued till 12:20 hours, the seizure memo consisting of four pages was prepared, read over to the applicant and it was signed by the Intelligence Officer, NCB, Lucknow, the Inspector R.P.F., the witnesses and the applicant.
6. The applicant filed an application for being released on bail before the learned Additional Sessions Judge/Special Judge, N.C.B., Bareilly, which was rejected by means of an order dated 04-09-2021 on the ground that commercial quantity of Heroin was recovered from his possession in presence of the witnesses.
7. In the affidavit filed in support of the bail application it has been stated that the applicant is innocent and he has been falsely implicated in the present case and that nothing was recovered from him. It has also been stated in the affidavit that the applicant does not have any criminal history.
8. A counter affidavit has been filed on behalf of the N.C.B. in which it has been stated that the substance found in the bag of the applicant was tested with the help of the DD Kit and as per the test report the substance was Heroin. It's net weight was found to be 358 gms and

gross weight was 391 gms and the statement of the applicant was recorded and he confessed that he was carrying Heroin to be delivered to a person as per the instruction of his cousin Manish Kumar.

9. In paragraph 15 of the counter affidavit it has been stated that a sample of the seized contraband substance was sent to the Government Laboratory and after chemical examination, the Chemical Examiner submitted a report stating that the sample under reference answered positive test for Heroin.
10. A rejoinder affidavit and a supplementary rejoinder affidavit have been filed on behalf of the applicant and a copy of the test report dated 09-11-2021 issued by the Central Revenues Control Laboratory, Hillside Road, Pusa, New Delhi, mentions that the sample did not answer positive test for Heroin (Diacetylmorphine); however, the sample under reference answers positive test for Morphine.
11. Sri Daya Shankar Mishra, the learned Senior Advocate appearing for the applicant has submitted that the conduct of the N.C.B. Officers in the present case raises suspicion against the genuineness of their allegations. He has submitted that as per the averments made in the recovery memo itself, the officers of N.C.B. had received an information at Lucknow that the applicant was carrying Heroin from Gaya, Bihar to Bareilly through Train No. 02357, which train passes through Lucknow and their conduct in not apprehending the applicant at Lucknow rather the entire team travelled the whole night from Lucknow to Bareilly to apprehend the applicant at Bareilly, is not a natural course of conduct and it raises doubts against their story. He has further submitted that although the alleged search and seizure was conducted at a Railway Station, which is a public place, filled with independent persons, there is no independent witness of the alleged recovery. The constables of Railway Police Force, who witnessed the alleged recovery, search and seizure, cannot be said to be independent witnesses.
12. Sri. Misra has further submitted that it is mentioned in the search and seizure memo that in test and re-test of the substances conducted by

the DD kit, both times it was found to be Heroin. In paragraph 15 of the counter affidavit also, the Intelligence Officer, N.C.B. Zonal Unit Lucknow, has stated on oath *“that the samples which were drawn from the seized contraband was sent to the Government Laboratory with the permission of the remand Court and after chemical examination the chemical examiner submitted the report stating there in that the samples under reference answered positive test for Heroin’*, but he has not annexed a copy of the said test report. The copy of test report filed with the rejoinder affidavit states that the substance was not found to be Heroin but it was Morphine. This contradiction in the test reports makes the prosecution case self-contradictory and doubtful. He further submitted that the test memo mentions the weight of the samples to be 5 gms. each whereas the test report mentions gross weight of sample received to be 8.4 gms and the gross weight of remnant returned with plastic pouch to be 6.5 gms and this discrepancy in the weights has not been explained, which too makes the prosecution case doubtful.

13. Per contra, Sri Ashish Pandey, the learned counsel for the N.C.B. has submitted that the search was conducted in the presence of a Gazetted Officer. He has further submitted that the difference in test results of the DD Kit and that of the Government Laboratory are insignificant because Heroin and Morphine, both are narcotic substances and irrespective of the fact whether the substances being found with the applicant was Heroin or Morphine, he would be liable to be prosecuted under the NDPS Act.
14. Sri. Pandey has further submitted that the search has been conducted in presence of a Gazetted Officer and, therefore, there is no reasonable ground for doubting the genuineness of the search and deizure.
15. The applicant is charged with offences under Sections 8 (c) / 21 / 29 of the Narcotic Drugs and Psychotropic Substances Act, which carry a rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may

extend to two lakh rupees and in which bail can be granted only after the stringent conditions of Section 37 of the Act are fulfilled.

16. In *Makhan Singh v. State of Haryana*, (2015) 12 SCC 247 while dealing with a case under the Narcotic Drugs and Psychotropic Substances Act, the Supreme Court reiterated that “...*It is a well-settled principle of the criminal jurisprudence that more stringent the punishment, the more heavy is the burden upon the prosecution to prove the offence.*”
17. In **Union of India v. Rattan Mallik**, (2009) 2 SCC 624, the Hon’ble Supreme Court explained the principles applicable in grant of Bail in offences under the NDPS Act as follows: -

“11. Section 37 of the NDPS Act, as substituted by Act 2 of 1989 with effect from 29-5-1989 with further amendment by Act 9 of 2001 reads as follows:

“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 27-A 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.”

12. It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence;

and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on “reasonable grounds”.

13. The expression “reasonable grounds” has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence (vide Union of India v. Shiv Shanker Kesari. (2007) 7 SCC 798). Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the court is not called upon to record a finding of “not guilty”. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.”

18. Analyzing the facts of the present case for the purpose of deciding the applicants claim for bail in light of the aforesaid law, I find the following facts to be relevant at this stage: -

- (i) Although the search and seizure was conducted at Bareilly Railway Station there is no independent witness of the alleged recovery.
- (ii) The constables of Railway Police Force cannot be said to be independent witnesses.
- (iii) Although it is mentioned in the recovery memo that search was conducted in presence of a Gazetted Officer Sri. Harjeet Singh ‘ADEN / BE’, but the recovery memo does not bear signatures of the Gazetted Officer.

- (iv) The recovery memo claims that in test and re-test of the substances conducted by the DD kit, both times it was found to be Heroin.
 - (v) The Intelligence Officer, N.C.B. Zonal Unit Lucknow, has stated on oath that the sample was tested by the Government Laboratory and the report states that the samples under reference answered positive test for Heroin. However, a copy of the said test report has not been filed by the NCB.
 - (vi) The test report filed by the applicant categorically states that the substance was not found to be Heroin but it was Morphine.
 - (vii) Heroin and Morphine are different and distinct substances. Heroine ((Diacetylmorphine)) is mentioned at Serial No. 56 of the Notification dated 16-07-1996 specifying small quantity and commercial quantity issued under Section 2 (vii) (a) and 2 (xxiii) (a) of the Act and Morphine is mentioned at Serial No. 77 thereof.
19. The aforesaid facts raise doubts against the prosecution case and it gives rise to a reasonable ground for prima facie believing at this stage that the applicant may not be held guilty of the alleged offences.
20. Moreover, the applicant has no criminal history and, therefore, there is no ground to believe that in case the applicant is released on bail, he would again indulge in committing similar offences.
21. All the witnesses in the present case are officers and officials of Narcotic Control Bureau and personnel belonging to Railway Protection Force, therefore, there appears to be no reasonable apprehension that in case the applicant is released on bail, he would influence the witnesses.
22. No other material has been placed by the respondent-Narcotic Control Bureau, which may indicate that the applicant is not entitled to be released on bail.

23. Keeping in view the aforesaid facts and without making any observations on merits of the case, I am of the view that the applicant is entitled to be released on bail pending conclusion of the trial. The bail application is accordingly allowed.
24. Let the applicant – **Aditya Kumar**, be released on bail in N.C.B. Crime No. 28 of 2021, under Section 8(C)/21/29 of Narcotic Drugs and Psychotropic Substances Act, P.S. N.C.B. Lucknow, on his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court concerned subject to following conditions:-
- (i) The applicant will not tamper with the evidence during the trial.
 - (ii) The applicant will not influence any witness.
 - (iii) The applicant will appear before the trial court on the dates fixed, unless personal presence is exempted.
 - (iv) The applicant shall not directly or indirectly make inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court to any police officer or tamper with the evidence.
25. In case of breach of any of the above conditions, the prosecution shall be at liberty to move an application before this Court seeking cancellation of bail.

Order Date - 13-09-2022

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