

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

+ **BAIL APPLN. 1812/2021**

Date of decision: 16th AUGUST, 2021

IN THE MATTER OF:

MADAN LAMA

..... Petitioner

Through: Mr. Rahul Dev Tyagi, Advocate.

versus

NARCOTICS CONTROL BUREAU

..... Respondent

Through: Mr. Subhash Bansal, SPP for NCB

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This is a petition under Section 439 CrPC for grant of regular bail in Sessions Case No. 46/2021 registered at Narcotics Control Bureau for offences under Sections 8, 20(b) and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the "NDPS Act").

2. The facts in brief leading to the bail application are as follows:

a) On 18.12.2020, a secret information was received that one Nepali national of small built wearing yellow coloured clothes will be coming near Gate No.1 Metro Station East of Kailash, New Delhi between 6:00-7:00 p.m. and that he might be carrying some narcotic drugs for the purpose of delivery to his client. The said information was reduced into writing.

b) After completing necessary formalities, a team was formed to intercept the said person who, according to the secret informer, was carrying narcotics. The team reached the place as informed by the

secret informer. It is stated that the team tried to join independent witnesses but no one joined. When the team was waiting near Gate No.1 of the metro station it was observed that one person wearing yellow coloured sweat shirt whose description was matching with the secret information was carrying a black coloured shoulder bag. He met with another person wearing a black coloured jacket. The person who was wearing the yellow coloured sweatshirt handed over a small packet to the person who was wearing the black jacket and he gave some amount of cash to the person in yellow sweatshirt. At that point, both of them were apprehended by the NCB team and they were enquired about their identity, secret information and purpose of visit.

c) During preliminary inquiry it was disclosed by Madan Lama, the petitioner herein that he is a resident of Nepal and is currently staying in Sant Nagar, East of Kailash. The second person disclosed himself as Haresh Rawal S/o Rakesh Rawal, R/o Punjabi Bagh, New Delhi.

d) The petitioner accepted that he was carrying *charas* in his bag and he used to sell the same to his clients. Haresh Rawal accepted that he came to purchase *charas* and had handed over Rs.9,500/- to the petitioner. The petitioner had given him a packet containing *charas*.

e) The bag of the petitioner was opened and it was found that he was carrying *charas* in 46 small zip lock polythene packets and Rs.12,000/- was also recovered. One packet was found in possession of Haresh Rawal. Total 47 packets were recovered from both of

them.

f) Out of 47 packets, 22 packets contained small disc circular shape substance, nine packets contained substance in small sticks shape and rest 16 packets contained substance in the shape of small stones. The substance of 22 packets was tested individually and was found positive for *charas*. The other packets which contained products of different shapes, colour and texture were also tested and all of them were found to be *charas*.

g) In all 47 packets 475 grams *charas* was recovered from the petitioner. Panchnama/seizure memo dated 18.12.2020 was prepared and complaint was registered as VIII/59/DZU/2020 and was filed before the Court of Special Judge, NDPS, Patiala House Courts, New Delhi.

h) The petitioner is in custody since 19.12.2020. The petitioner had filed bail application before learned Special Judge, NDPS, Patiala House Court which was rejected by order dated 09.03.2021. Against that order the petitioner has filed the instant bail application.

i) Notice was issued on the present bail application on 25.05.2021. Status Report has been filed.

3. Heard Mr. Rahul Dev Tyagi, learned counsel for the petitioner and Mr. Subhash Bansal, learned SPP for NCB and perused the material on record.

4. Mr. Rahul Dev Tyagi, learned counsel for the petitioner states that co-accused Haresh Rawal has been granted bail by order dated 03.06.2021 in BAIL APPLN.1177/2021. Learned counsel for the petitioner has taken this

Court through various paragraphs of the said order and contended that the petitioner is entitled to bail on the ground of parity.

5. It is stated by learned counsel for the petitioner that the one packet recovered from the petitioner therein was not separately weighed or sampled and all the samples were sent together for chemical analysis. It is further stated that the samples were drawn after 50 days of the alleged recovery which is in violation of NCB Standing Order 1/88. He further states that the case of Haresh Rawal and the petitioner stood on the same footing and that even Haresh Rawal is guilty of possessing 47 packets and both are guilty of possessing 475 grams of *charas*. He contends that now the learned SPP for NCB cannot distinguish between the petitioner and Haresh Rawal and therefore the petitioner ought to be granted bail. It is also stated that the quantity which has been seized from the petitioner is intermediate quantity and the rigour of Section 37 of the NDPS Act cannot be applied.

6. It is further stated that one of the reasons given in the order dated 03.06.2021 granting bail to Haresh Rawal, the petitioner therein was that the petitioner therein is in custody from 19.12.2020 and charge is yet to be framed and trial will take substantial time. Learned counsel for the petitioner states that the same applies to the petitioner herein and therefore the petitioner may be granted bail.

7. *Per contra*, Mr. Subhash Bansal, learned SPP states that the petitioner is a Nepalese citizen who does not have roots in the society. It is argued that the petitioner is a supplier of drugs and therefore it cannot be ruled out that the petitioner will not indulge in same activity when granted bail. It is also submitted that the case of the petitioner and Haresh Rawal is different. The petitioner was carrying 46 packets of *charas* and Haresh Rawal was a

purchaser and not the supplier of the drugs. He therefore contends that the petitioner cannot stand on equal footing of the petitioner therein.

8. Order dated 03.06.2021 in BAIL APPLN 1177/2021, wherein the reasons have been recorded as to why the petitioner therein has been granted bail. The relevant portion of the said order reads as under:

"23. The contentions raised by both the sides were heard at length and the material placed on record has been carefully perused.

24. In the present case, 46 small zip lock polythene packets containing contraband were recovered from the bag of co-accused Madan Lama and 01 packet was recovered in possession of present petitioner. In total, 475 gm. contraband/ heroin was recovered in this case.

25. Petitioner has claimed that prior to search and seizure proceedings, he was not served with Notice under Section 50 of the NDPS Act. On the other hand, stand of NCB is that personal search of accused was not carried out, as 01 packet containing contraband recovered from petitioner was in his hands while exchanging it for money and the remaining 46 packets were recovered from the bag of co-accused and, therefore, notice under Section 50 of the Act was not required to be given. This has so been observed by the court below while dismissing petitioner's bail application. Further, the evidentiary value of petitioner's statement recorded under Section 67 of the Act cannot be prejudged at this stage. Moreover, question regarding call detail and chats, will be also tested during trial.

26. Consequently, without going into the meris of the prosecution case at this stage, what is required to be seen is whether on the face of material placed on record, a case for grant or refusal of bail is made out.

27. In the present case it is not disputed that one packet recovered in the hands of petitioner contained 10 gm. of contraband, which falls within the category of 'small quantity'. Thus, the prima facie role attributed to the petitioner in the present case appears to be that he had purchased one packet containing 10 gm. charas, which essentially is 'small quantity'.

28. A Division Bench of this Court in *Minni Khadim Ali Khun Vs. State NCT of Delhi* 2012 SCC OnLine Del 2657 has dealt with the aspect of grant of bail in case of recovery of 'small quantity' of contraband and held that where the recovered contraband is 'small quantity', the offence is bailable.

29. The substance recovered in this case is not of commercial quantity. Thus, the bar of Section 37 of NDPS Act is not applicable. Moreover, petitioner is in judicial custody since 19.12.2020. Charge sheet in this case has been filed but Charge is yet to be framed and trial will take substantial time. Accordingly, this Court is of the considered opinion that petitioner deserves to be released on bail.

30. Consequently, without commenting on the merits of the case, the petitioner is directed to be released on bail forthwith upon his furnishing personal bond in the sum of Rs.25,000/- with one surety in the like amount, to the satisfaction of the Trial Court/ Duty Magistrate, while making it clear that any observation made herein shall not influence the prosecution case during trial."

9. Para 27 of the said order is a clear pointer that the petitioner therein was apprehended with one packet which contained 10 grams of contraband which falls into the category of small quantity. In fact, this is a

distinguishing factor between the petitioner and the case of Haresh Rawal, the petitioner therein.

10. In the said order, reliance has been placed on a judgment of a Division Bench of this Court in Minni Khadim Ali Khun v. State NCT of Delhi reported as **2012 SCC OnLine Del 2657** wherein it has been observed that where the recovered contraband is a small quantity, the offence is bailable. The factor that only 10 grams of contraband was recovered from Haresh Rawal stands on entirely different footing from the case of the petitioner herein.

11. The facts reveal that the petitioner is a supplier of drugs and 46 packets of *charas* were recovered from him. The parameters of granting bail have been laid down by the Supreme Court in a number of cases. In Ram Govind Upadhyay v. Sudarshan Singh, **(2002) 3 SCC 598**, the Supreme Court laid down the factors that must guide the exercise of the power to grant bail in the following terms :

“3. Grant of bail though being a discretionary order — but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the court and facts, however, do always vary from case to case. While placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always to be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic considerations for the grant of bail — more heinous is the crime, the greater is the chance

of rejection of the bail, though, however, dependent on the factual matrix of the matter.

4. Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture, though however, the same are only illustrative and not exhaustive, neither there can be any. The considerations being:

(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”

In Prasanta Kumar Sarkar v. Ashis Chatterjee, (2010) 14 SCC 496, the Supreme Court observed as under:

“9. We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does

not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

- i. whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;*
- ii. nature and gravity of the accusation;*
- iii. severity of the punishment in the event of conviction;*
- iv. danger of the accused absconding or fleeing, if released on bail;*
- v. character, behaviour, means, position and standing of the accused;*
- vi. likelihood of the offence being repeated;*
- vii. reasonable apprehension of the witnesses being influenced; and*
- viii. danger, of course, of justice being thwarted by grant of bail.*

10. It is manifest that if the High Court does not advert to these relevant considerations and mechanically grants bail, the said order would suffer from the vice of non-application of mind, rendering it to be illegal.”

In Mahipal v. Rajesh Kumar, (2020) 2 SCC 118 the Supreme Court observed as under:

“12. The determination of whether a case is fit for the grant of bail involves the balancing of numerous factors, among which the nature of the offence, the severity of the punishment and a prima facie view of

the involvement of the accused are important. No straitjacket formula exists for courts to assess an application for the grant or rejection of bail. At the stage of assessing whether a case is fit for the grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the accused. That is a matter for trial. However, the Court is required to examine whether there is a prima facie or reasonable ground to believe that the accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused subserves the purpose of the criminal justice system. Where bail has been granted by a lower court, an appellate court must be slow to interfere and ought to be guided by the principles set out for the exercise of the power to set aside bail.”

12. The petitioner being a citizen of Nepal has no roots in society and can be considered a potential flight-risk. Thus he satisfies the factor that there exists the danger of him absconding or fleeing from justice, if released on bail. Furthermore, if the petitioner is released on bail, it cannot be ruled out that he will not indulge in such activities again. It is also to be noted that the petitioner has indulged in offences under the NDPS Act and the same cannot be equated with the offences under the IPC or other offences. The harmful effects of drugs on an individual and on the society have been researched extensively and are well known. The menace of drug abuse is also on the rise in the country and the consequences of the same can be experienced across the board from causing economic issues to societal disintegration. The purpose of enacting the NDPS Act was to curb this menace. This purpose must be kept in mind while considering the grant of bail in matter

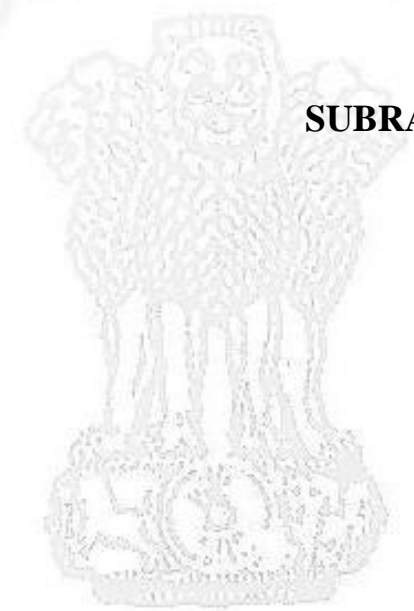
pertaining to the NDPS Act. The petitioner is also alleged to have committed an offence which is punishable up to ten years of imprisonment. Furthermore, the case herein is different from the case of Haresh Rawal, who was granted bail vide order dated 03.06.2021 as charges have are yet to be framed in the instant case and the chances of the petitioner jumping bail cannot be ruled out as he is not the resident of India.

13. In the facts and circumstances of the present case, this Court does not feel that this is a fit case for grant of bail. The application is dismissed.

SUBRAMONIUM PRASAD, J.

AUGUST 16, 2021

hsk



नान्यमेव जयते