

(VIA VIDEO-CONFERENCING)

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 20.12.2021

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Pronounced on : 05.01.2022

+ BAIL APPLN. 2677/2020

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..... Petitioner

Through: Mr. Vijay Bishnoi, Mr. Abhishek
Gautam and Mr. Amar Phogat, Advs.

versus

THE STATE GOVT. OF NCT OF DELHI

.... Respondent

Through: Ms. Rajni Gupta, APP for the State
with SI Manish Kumar.

CORAM:

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

ORDER

RAJNISH BHATNAGAR, J.

1. The present bail application has been filed by the petitioner under Section 439 Cr.P.C. seeking regular bail in case FIR No. 33/2018 under Section 9/21/25A of NDPS Act & under Section 471 IPC & Section 14 of the Foreigners Act registered at P.S. Crime Branch, Delhi.

2. Briefly stated, the facts of the case are that on 09.02.2018, a secret information was received by ASI Anil Kumar that one person namely Vinay Sharma would come at about 4:30 PM to supply Pseudo Ephedrine to a person near Chanakya Market Bus Stand, Janakpuri, Delhi. On this information, a raid was conducted and one accused namely Vinay Sharma was apprehended and 10 Kg. Pseudo-Ephedrine was recovered from his possession. On the basis of above recovery, the present FIR was registered. During investigation, accused Vinay Sharma was arrested and he was interrogated and he disclosed that he has procured the recovered substance from one Piyush of Jirakpur near Chandigarh. It was also disclosed by the arrested accused that he can take the police to Chandigarh and Jirakpur to point out the places, where the supplier namely Piyush used to meet him to deliver the drugs to him.

3. During PC remand accused Vinay Sharma was taken to Jirakpur, Punjab to apprehend the supplier of recovered pseudo-ephedrine. On this, a call was made on the phone of source of contraband namely Piyush Srivastava by accused Vinay Sharma and he was asked to meet him near Sethi Dhaba, Jirakpur, Punjab. On this, source Piyush came near Sethi Dhaba, Ambala road, Jirakpur and he was apprehended from there. After serving notice under section 50 NDPS Act, cursory search of accused Piyush was conducted but nothing incriminating thing could be recovered from his possession. But he confessed to have delivered

the recovered substance to accused Vinay Sharma. On this, accused Piyush Srivastava was arrested in the present case and intimation regarding his arrest was conveyed to local police station. He was interrogated there but he did not co-operate and did not disclose as to from where he has procured the recovered pseudo-ephedrine. After this, he was brought to Delhi and again subjected to sustained interrogation. During interrogation he disclosed that he has procured the recovered Pseudo Ephedrine from one Praveen of Chandigarh, who is known to him as he used to purchase medicine from him. Accused Piyush also disclosed that he has kept the remaining quantity of Pseudo Ephedrine which he procured from Praveen Kumar in his office at Panchkula, Haryana. He told that he didn't know the complete address of Praveen but he can help police in tracing from their meeting points.

4. Four days PC remand of accused Piyush Srivastava was obtained and he was taken to Zirakpur, Punjab and Chandigarh at the address of the alleged source namely Parveen Gupta but Parveen Gupta was not found present there. On this, a notice was served to Mohan Lal Gupta (brother of alleged source Parveen Gupta). Search of the office of the accused situated at Phase-I, Industrial Area, Panchkula, Haryana was also made but nothing incriminating could be recovered from there. One day more PC remand of accused Piyush Srivastva was obtained and on his pointing out 1.5 Kg. Pseudo-ephedrine was recovered on 16.02.2018 from Singhu Border, Narela, Delhi.

5. Thereafter, the present petitioner was apprehended on 16.02.2018 at the instance of accused Piyush Srivastava and 3.5 Kg. Pseudoephedrine and 15 gm. Cocaine was recovered from his possession. The petitioner was arrested and his passport and Visa were got verified from the External Affairs Ministry and it was found that Visa sticker on the passport of the petitioner was fake. Therefore, Section 14 Foreigner Act and 471 IPC were added in the present case.

6. I have heard the Ld. counsel for the petitioner, Ld. APP for the State, perused the Status Report and the records of this case.

7. It is submitted by the Ld. counsel for the petitioner that the petitioner was arrested on the disclosure statement of the co-accused and has been falsely implicated. He further submitted that the petitioner is married to an Indian woman and from the said marriage he is having two kids. It is further submitted by the Ld. counsel for the petitioner that three co-accused are already on bail and the charges have been framed. He further submitted that the petitioner has got root in the society and he has family to support and rigors of Section 37 are not applicable in this case. He further submitted that the petitioner is in J.C. since 16.02.2018.

8. On the other hand, it is submitted by the Ld. APP for the State that the allegations against the petitioner/accused are grave and serious in nature and petitioner is not entitled to bail as he is dealing in drugs

and narcotics substances. She further submitted that the petitioner is not entitled to parity with other co-accused persons as the co-accused persons who have been released on bail have not been charged under the offence of forgery and cheating.

9. 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.

10. The present petitioner is facing prosecution for charges U/s 9A and 25 A of the NDPS Act and hence obviously his 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.

11. 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 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.

12. The substance alleged to have been recovered from the petitioner/accused is 3.5 Kg. of pseudoephedrine 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.

13. The next point for consideration is, whether the petitioner/accused who is a foreign national is entitled to be released on

bail, if he is able to make out a case in his 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."

14. 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."

15. 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. "

16. 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.

17. 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.

18. The other recovery from the possession of the petitioner is 15 gm. Cocaine which is also not a commercial quantity, therefore, in the instant case, bar of Section 37 of NDPS Act is not applicable. Though the petitioner is a foreigner but as already observed hereinabove and in view of the judgments "supra" there is no bar to release a foreign national on bail in the given facts and circumstances of this case. In

the present case, the petitioner is married to an Indian lady and having kids with her. The factum of his marriage and kids has been verified by the state and statements of the relatives of the wife of the petitioner have already been recorded in this regard. The petitioner is in J.C. since 16.02.2018 and the final conclusion of the trial of this case is likely to take long time. Therefore, the petitioner is admitted to bail on his 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 IO of the case, the address at which he will reside during the period he is on bail. Any change in the address shall also be communicated to the IO of the case within 2 days. The petitioner shall report to the IO of the case at police station Crime Branch, Delhi every fortnight 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 is disposed of.

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

RAJNISH BHATNAGAR, J

JANUARY 05, 2022

Sumant