

**IN THE COURT OF MS. MONIKA SAROHA,
SPECIAL JUDGE-NDPS/ASJ (SOUTH),
SAKET COURTS, NEW DELHI**

SC No. 27/22

CNR NO. DLST01-000710-2022

STATE

VS.

1. SARVAN

S/o Late Sh. Bijli Das,
R/o Village Rustam Pur, Dahu Das Ke Tola,
PS Raghopur, Distt. Vaishali,
Anumandal, Hazipur,
Bihar.

2. EMON ALI

S/o Sh. Qutub Ali
R/o H.No. 48, Chungi No. 3,
Lal Kuan, Pul Prahladpur,
New Delhi.

3. MOHD. ALI NAWAJ @ SETHI

S/o Sh. Aji Abdul
R/o Village Kolar Khandi, Post Chilla Bazar,
Distt. Tripura, Assam.
Present Add.: H. No. 356, Nehru Market,
Badarpur, Delhi.

.....Accused Persons.

FIR No. 217/21

PS Saket

Order on application seeking bail of accused Sarvan

ORDER

Vide this order, I shall decide the bail application of applicant / accused Sarvan.

1. According to the prosecution case, the applicant / accused Sarvan was the driver of Swift Dzire car from which 76 kgs of ganja was recovered on 04.08.2021. This ganja was found hidden in the specially carved out cavities existing in the car. The recovery was made upon information being received from the secret informer in this regard. Besides, the applicant / accused, there are other accused involved in this matter. One of whom is Emon Ali who was also sitting in the same car on the seat adjacent to the driver.

2. After the chargesheet was filed, cognizance was taken and charge was framed against the applicant / accused on 11.07.2022 u/s 20(b)(ii)(C) NDPS Act. Presently, the matter is at the stage of prosecution evidence.

3. The Ld. Counsel for the accused seeks bail primarily on the following grounds:

(i) That even though the applicant was indeed driving the car from which 76 kgs of ganja was recovered, however, he had no knowledge of the ganja being kept in the special cavity made in the car.

(ii) That the applicant / accused had been hired by the co-accused Ramesh Niriki as a driver only on 21.07.2021 i.e. a few days before the recovery.

(iii) That from the disclosure statement of one of the co-accused (who is the registered owner of the car) it is revealed that only the owner of the car and Ramesh Niriki had knowledge of the special cavities in the car and the applicant / accused was an innocent driver who did not know what was in the vehicle he was driving.

(iv) That only 34 calls were exchanged between the applicant and co-accused Ramesh Niriki between 21.07.2021 to 02.08.2021, which shows that there was only limited contact between these two.

(v) That certain dates have been wrongly mentioned in the documents attached with the chargesheet which creates doubt on the foundation of the prosecution case.

(vi) That as there are 29 witnesses cited by the prosecution, the conclusion of the trial will take a long time.

(vii) That the applicant is the sole bread earner for his family and has clean antecedents.

4. On the other hand, Ld. Addl. PP has strongly opposed this bail application arguing that the accused was found in possession of huge quantity of contraband substance and at this stage, there is no reason to believe that he did not have knowledge of the substance kept in the car which he had admittedly driven all the way from Orissa. Further, Ld. Addl. PP argued that the bar u/s 37 NDPS Act is clearly applicable in this case and there are no reasonable grounds before this court for believing that the applicant is not guilty of the offence for which he has been chargesheeted and is now facing trial or that he is not likely to commit any offence while on bail.

5. Having heard the arguments as advanced by both the sides and after perusing the entire record, this does not appear to be a fit case for grant of bail to the applicant / accused at this stage.

6. Considering the material on record, this court is satisfied that the bar of Section 37 NDPS Act is indeed attracted in the present case and the accused must cross the hurdle of the twin conditions u/s 37 NDPS Act before he can be granted bail, besides satisfying the other criterion for grant of bail as provided in Cr.PC.

Now the provisions of section 37 NDPS Act read 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 offence under Section 19 or Section 24 or Section 27A 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 no likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) and sub-section (1) are in addition to the limitations under the code of Criminal Procedure, 1973 (12 of 1974), or any other law for the time being in force on granting of bail.”

The scope of Section 37 NDPS Act has been discussed at length in the celebrated judgement of ***Union of India vs. Rattan Malik @ Habul decided by the Hon'ble Supreme Court, (Crl. Appeal No. 137 of 2009 arising out of SLP (Crl.) No. 1057 of 2008)***. The relevant portion is quoted below:-

“12. It is plain from a bare reading of the non-obstante clause in the Section 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 sub-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; 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 vs. Shiv Shanker Kesari). 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 'non 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 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."

7. Thus, before enlarging the applicant on bail, this court must be satisfied that there are reasonable grounds for believing that the applicant is not guilty of the offences charged with and that he is not likely to commit any offence while on bail. In *Kanwaljeet Singh Vs. HK Pandey*, decided by the Hon'ble High Court of Delhi on 04.03.2005 while deciding the bail application also it has been held that the court must examine whether there exists or do not exist reasonable ground for believing that the petitioner is guilty of the offence charged. It has been held that this consideration has to be on the basis of the material available

before the court. Unfortunately in the present facts, the applicant has failed to show that there does not exist any reasonable ground for believing that he is guilty of the offence charged. The entire material on record has been broadly seen before entering such a dissatisfaction.

8. The trial in this case is still at initial stages with the charge having been framed only in July 2022. At this stage it is sufficient to note that there is nothing to hold that the prosecution story is entirely a false one and the prosecution is likely to fail. Thus, this Court is unable to make any observation to the effect that there are reasonable ground for believing that the applicant/ accused is not guilty of the offence charged with.

9. Admittedly, applicant / accused was the driver of the vehicle from which contraband was recovered. Admittedly, he had driven the vehicle all the way from Orissa. His only defence is that he did not have any knowledge of the hidden cavities in the car or the contraband stored in these cavities. It is his defence that he was misled by Ramesh Niriki who had hired him as a driver but never told him about the contraband in the car. Now, a person who was admittedly working with the mastermind of the entire offence and had driven the vehicle cannot escape the liability by merely saying that he was not aware of the contraband articles in the car. Further, the presumption u/s 35 of the NDPS Act which may be

invoked at the relevant stage indeed also operates against the accused.

10. This Court is conscious of the fact that at this stage, it is not to record a finding of '*not guilty*', further, it is not required to weigh the entire evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. From the material on record at this stage, when the prosecution witnesses are still to be examined, this Court is unable to form a view that there are reasonable grounds for believing that the accused did not commit the offence he is charged with. The recovery witnesses are police officials and there is no reason to suspect that they will turn hostile during their deposition and will not support the prosecution case or the investigation carried out by them. Also considering the alleged manner of commission of offence and the huge quantity involved, there is nothing before this Court to even record that the accused is not likely to commit a similar offence in future.

11. During the course of arguments, Ld. Counsel for the accused relied upon several judgements passed by the Hon'ble higher courts. All the said judgements / orders have been carefully perused, However, none of them can come to the aid of the accused at this stage. One such order relied upon by the Ld. Counsel for the accused is that of *Mahesh Vs. State* as decided by our own Hon'ble High court in Bail application no.

51/22 decided on 08.02.2022. The said order is not of any help to the accused in the present facts since in this cited order, the co-accused (who has been referred to as the main accused) had already been released on bail before the order with respect to the bail of Mahesh was passed and parity was one of the factors for grant of bail (as recorded in para 17 of the said order). Also, the said order was passed considering that the applicant in that case had already been in jail for more than four years and in these four years only two witnesses had been examined, (as is recorded in paragraph 23 of the said order). Neither of these two factors are applicable in the present facts and thus, the reliance by the Ld. Counsel on this order is completely misplaced.

12. Similarly, the reliance upon the legal position as laid down by the Hon'ble Apex Court in *Bhola Singh Vs. State of Punjab, 2011 (11) SCC 653* is also not of any use to the applicant since in the said case the accused was not even present at the spot when the contraband was recovered and it was not the prosecution's case that he was in the vehicle when contraband was recovered but the only allegation against him was that he was the co-owner of the vehicle and while purchasing the vehicle had given his residential address of Rajasthan whereas he was a resident of Haryana. The applicant / accused in the present facts who was found driving the vehicle from which the contraband was recovered cannot claim any parity or benefit of any decision given with respect to the role

of someone who was only a co-owner and was never found driving the vehicle.

13. Further, Id. Counsel for the accused also relied upon the Drug Law Enforcement Officer's handbook prepared by the Narcotics Control Bureau, MHA, GOI to argue that the entire recovery proceedings should have been video recorded and not doing so vitiates the entire prosecution case. This court finds no merit in this averment. The contents of this internal handbook have limited applicability at this stage and merely because it contains that wherever possible recovery should be videographed, it cannot be said that in cases where no videography of the recovery is done, the prosecution will fail or that the investigation is bad in law *per se*. Similarly, Id. Counsel also relied upon the observations as made in *Shafhi Mohd. Vs. State of Himachal Pradesh, SLP CrI. No. 2308 of 2017* dated 30.01.2018, 03.04.2018 and 18.11.2021. Whereas in all these orders, the use of technology in investigation has been harped upon (particularly in order dated 03.04.2018), however, none of these orders lay down any law regarding the mandatory video recording or the effect of such non recording. Nowhere, in these orders has the Hon'ble Apex Court held that if the recovery proceedings like those in the present case are not videographed, the benefit of the same goes to the accused even at the stage of consideration of his bail or at any later stage. Further during his arguments, Id. Counsel also relied upon the judgement of the Hon'ble

High Court in *Amit Ranjan Vs. NCB* decided on 23.05.2022 in *Bail Appln. No. 1189/20*. However, again in this case also even as per the prosecution's own case, no narcotic substance was recovered from the applicant nor from his premises and the only material relied upon by the prosecution was the disclosure statements made by the co-accused (the same is clear from paragraph 17 of this order) whereas in the present facts, the entire recovery is from the vehicle being driven by the applicant/ accused only. Yet another judgement relied by the applicant is that of *Ram Prakash Vs. State* decided by our own Hon'ble High Court on 10.12.2014 in *CrI. Appeal No. 1363 of 2014*, however, in this judgment the entire trial was over and after appreciating the entire evidence, the Hon'ble High Court found the evidence against the appellant not sufficient for conviction. Thus, the findings in the said judgment are of little help to the applicant in this case where the trial has only started and the merits of the prosecution case is yet to be tested.

14. Also *Ld. Counsel* relied upon order dated 05.07.2022 passed by the Hon'ble High Court of Himachal Pradesh in *CrI. Misc. Petition (Main) No. 952 of 2022*. As this order was also passed after the key public witness had been examined during trial and had turned hostile denying that any contraband was recovered in his presence, the applicant in the present facts where examination of witnesses is yet to start cannot rely upon the findings in this order.

15. During the course of arguments, Ld. Counsel for the accused vehemently argued that since the applicant / accused did not know about the hidden cavities in the car, therefore, there is no ground to believe that he was in conscious possession of any contraband substance. The law regarding possession as far as the NDPS Act is concerned has been well laid down by Hon'ble higher courts and is pretty well settled. Recently, again in *NCB, Lucknow Vs. Mohd. Nawaz Khan* decided by Hon'ble Supreme Court on 22.09.2021 (Crl. Appeal No. 1043 of 2021 arising out of SLP Criminal No. 1771 of 2021), the same has been clarified. The Hon'ble Supreme Court has again reiterated the meaning of *conscious possession* holding that conscious possession cannot be very narrowly construed and it is a polymorphous term which assumes different colour in different context. Whether or not, the accused was exactly aware of the substance being carried in the car driven by him, can be conclusively determined only after a complete trial and at this stage, there is nothing to hold that despite admittedly driving the car, the accused was not aware of the contraband being carried in it.

16. Coming now to the averment that as there are twenty nine witnesses cited by the prosecution, the conclusion of the trial would take a long time and therefore, the applicant must be enlarged on bail. It is sufficient to note here that at this stage, when the charge has been framed only last month it is a little pre-mature to suppose that the trial will take a

long time to conclude. Even otherwise, the mere likelihood of the trial being a long one, cannot be a ground for grant of bail.

17. Ld. Counsel also argued that the applicant is the sole bread earner and his being behind the bar is causing great hardships to his family members who have no other source of income. Indeed, the earning male member being behind the bars must be causing difficulties to the family. However, the allegations against the accused are under the NDPS Act. The offence of carrying commercial quantity of contraband is a very serious one having implications on the society as a whole. Thus, while mere seriousness of an offence can be no ground for denying bail, similarly, mere hardships caused to the dependents of the applicant can be no ground for grant of bail.

Accordingly, in view of the discussion above, considering the specific facts of this case and the law as discussed above, this bail application is **dismissed**.

Copy of the order be given dasti.

Announced in open court on
20.08.2022

(Monika Saroha)
Special Judge-NDPS/ASJ (South)
Saket Courts/20.08.2022