

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

+ Bail Application No. 1874 of 2007

% Reserved on : 24.01.2008
Date of decision : 31.01.2008

GOPAL SENPETITIONER
Through: Mr. Yogesh Kumar Saxena,
Advocate.

Versus

THE STATE (Govt. of NCT of Delhi)RESPONDENT
Through: Mr. Pawan Sharma,
Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

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| 1. Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be
reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

1. A secret information from an informer was received by the Narcotics Branch of the Government of NCT of Delhi on 1.10.2005 that one Sunil @ Naniya, his sister and mother are indulging in the business of supply of smack. According to the information, Sunil @ Naniya got such smack from Rajasthan and Madhya Pradesh for supply in Delhi and on that day he had to get the smack from some trader at Railway Station, Delhi. Sunil @ Naniya was expected to travel on a scooter No.DL7S-U-3191 via Avantika

Chowk, Rohini around 6:30 – 7:30 a.m. towards his house at C-1, Sector-I, Rohini, Delhi. Such information was recorded in DD entry No.4 at 5:55 a.m. on 1.10.2005 and after some inquiry, the Narcotic Department took necessary action for carrying out a raid. The scooter with two riders on it was apprehended. The scooter was being driven by Sunil @ Naniya while the petitioner was the pillion rider. The informer identified the two people and the petitioner was identified as the trader. One black rexcin bag was recovered from Sunil @ Naniya and a recovery of 8 kgs. of heroine was made, which is alleged to be commercial quantity. The petitioner and Sunil @ Naniya were thereafter arrested and since then have been in judicial custody.

2. The bail application was filed before the Special Judge (NDPS Act), which was rejected on 25.4.2007 and thus the present bail application has been filed.
3. Learned counsel for the petitioner contends that the charge sheet has been filed and three witnesses have been examined, who are informers. It is alleged that the petitioner is a victim of circumstances and has been falsely implicated and the confessional statement of the petitioner recorded in the presence of police officials is not admissible in evidence under Sections 25 & 26 of the Evidence Act, 1872. It is also submitted that there was no recovery made from the petitioner and the only thing alleged in the FIR is the identification by the informer, which is of no evidential value.
4. Learned counsel for the petitioner relied upon the judgement of

the Supreme Court in Ranjitsing Brahmajeetsing Sharma Vs. State of Maharashtra & Anr. 2005 (2) JCC 689, which dealt with a case under the Maharashtra Control of Organised Crime Act, 1999. It is submitted that Section 21 of that Act is *para materia* to Section 37 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the said Act). It was held that the restrictions on the power of the court to grant bail is not to be pushed too far but if the court is satisfied with the material placed on record that in all probability the accused may not be ultimately convicted, an order of grant of bail ought to be passed. Similarly the satisfaction of the court as regards the likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever, be it a minor or major offence. It was further observed that the wording of the Section did not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act since in that event it would be impossible for the prosecution to obtain a judgement or conviction of the applicant. This could not be the intent of the legislature and thus the provision regarding bail must be construed reasonably so that the court is able to maintain a delicate balance between a judgement of acquittal and a conviction and an order granting bail much before the commencement of trial.

5. Reliance was also placed on a judgement of the learned single Judge of this Court in Kamaljeet Singh Vs. H.K. Pandey

(Intelligence Office, NCB) 2005 (3) JCC (Narcotics) 220. The matter dealt with the question of grant of bail under the said Act. A confessional statement had been recorded under Section 67 of the said Act and recovery made. It was found that the confession of the petitioner was exculpatory and not inculpatory. One of the contentions raised by the learned counsel for the State was that once possession of narcotic drug is established, the presumption under Sections 35 & 54 of the said Act would come into play and the courts ought not to overlook the confessional statement of the petitioner and not undermine the object of Section 37 of the said Act as indicated in the case of Babua @ Tazmul Hossain Vs. State of Orissa 2001 (1) JCC 159. In this case, the bail was opposed. The argument was that once a charge was framed in view of Section 37 of the said Act, bail should not be granted. This plea was rejected by the High Court. This judgement has been relied upon by learned counsel for the petitioner to rebut the plea of the respondent that since charges have been framed no bail should be granted at this stage.

6. Learned counsel for the petitioner has also relied upon the judgement of the learned single Judge of this Court in Karan Singh Vs. State (NCT of Delhi) 130 (2006) DLT 114 to advance the proposition that merely because two persons are apprehended from the same spot and recoveries are made from them does not mean that Section 29 of the said Act would *ipso facto* be attracted. A similar view has been taken by the Supreme Court in Amarsingh Ramjibhai Barot Vs. State of Gujarat 2005 III AD (Cr.)

SC 625 where two persons were arrested but individually carrying the recovered substances. It was held that there was no evidence to suggest that there was any criminal conspiracy within the meaning of Section 29 of the said Act.

7. Learned APP, on the other hand, strongly pleaded for rejection of the bail application and relied upon the provisions of Sections 29 & 37 of the said Act, which are reproduced hereinafter:

“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 Sec. 116 of the Indian Penal Code, 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.”

....

“37. Offences to be cognizable and non-bailable. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 -

- (a) every offence punishable under this Act shall be cognizable;
- (b) no person accused of an offence

punishable for a term of imprisonment of five years or more under this Act 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 offence while on bail.

(2) The limitation on granting of bail specified in Cl (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973, or any other law for the time being in force on grant of bail.”

8. Learned APP relied upon the judgment of the Supreme Court in Union of India v. Ram Samujh & Anr. 1999 (4) SCC 134 (SC) for the aforesaid proposition that the jurisdiction of the Court is circumscribed by the provisions of Section 37 of the said Act and an accused should not be released on bail during trial unless the mandatory conditions provided under Section 37, i.e., reasonable ground for believing that the accused is not guilty and that he is not likely to commit any offence on bail, are satisfied. The Supreme Court held that a cryptic order of bail is not permissible. It was observed in paras 6 and 7 as under :-

“6. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered and followed. It should be borne in mind that in murder case, accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death blow to number of innocent young victims, who are vulnerable; it causes deleterious effects and deadly impact on the society; they are hazard to the society; even if they

are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court dealing with the contention with regard to punishment under NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Didier v. Chief Secretary, Union Territory of Goa*, (1990) 1 SCC 95 as under :-

“With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportion in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in the wisdom has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.”

7. To check the menace of dangerous drugs flooding the market, the Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that accused is not guilty of such offence; and

(ii) that he is not likely to commit while on bail

are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in the

dangerous drugs, the Court should implement the law in the spirit with which the Parliament, after due deliberation, has amended.”

9. Similarly in Babua @ Tazmul Hossain's case (supra), it has been held that the Court is to see whether statements made on behalf of the prosecution witnesses, if believable, would result in conviction of petitioner or not since liberty of a citizen has got to be balanced with the interest of society. In cases where Narcotic Drugs and Psychotropic Substances are involved, an accused would indulge in activities, which are lethal to society and, thus, it is in the interest of the society to keep such persons behind bars during the pendency of proceedings before the Court.

10. The last judgment relied upon is in Crl. M. (M) No. 4053/2002 titled 'Raju v. State' decided on 29.04.2003 wherein it was held that a harmonious reading of Section 36A(3) of the said Act and Section 37(2) of the said Act leaves no room for doubt that in spite of the saving power of the High Court regarding bail under Section 439 of the Cr.P.C., by incorporating Section 36A(3) of the said Act, the Legislature has put a limitation on the said powers to grant bail by introducing sub-clause (2) of Section 37 of the said Act. The provisions for grant of bail to drug traffickers had been deliberately made more stringent as their activities undermine the basic fibre of the society and is not only ruining and destroying young lives, but is also introducing huge amount of black money, which is used to carry out anti-national and subversive activities in the country. Thus, at the initial stage of trial, without giving full opportunity to the prosecution to establish its case and explain the infirmities, if any, the accused should not get bail unless the

Court finds that he is not guilty of such offence and is not likely to commit any offence while on bail. Not only that, learned Single Judge while rejecting the said application of the petitioner on account of commercial quantity of drugs seized observed that it should be clearly understood that for the offences to which Section 37(1)(b) of the said Act applies, getting bail may be difficult and getting an acquittal may be easier because at the end of the trial, the Court gets a complete picture of the case against an accused and may acquit him if it entertains a reasonable doubt about the truth of prosecution case. It cannot be said that the Court can grant bail to an accused if there is doubt about prosecution case. The Courts are under an obligation to return the findings as envisaged by Section 37 of the said Act if the accused is to be released on bail.

11.I have given deep thought to the submissions advanced by learned counsel for the parties.

12.The factual matrix is not in doubt. The secret information was that Sunil @ Naniya would get smack from Rajasthan and Madhya Pradesh for supply in Delhi from a trader at the Railway Station, Delhi. On the basis of the said secret information, Sunil @ Naniya was apprehended on a scooter. The petitioner herein was the pillion rider. The petitioner was identified by the secret informer as the trader. The recovery was made from a rexcin bag of commercial quantity of heroine of 8 kgs. from Sunil @ Naniya. These facts show that the information of the secret informer was correct to the extent of apprehending the narcotic drug being

carried by Sunil @ Naniya. The initial information was that the same would be received from a trader and the petitioner was identified as the trader sitting as a pillion on the scooter.

13. There is no doubt that the recovery has not been made from the petitioner, but it is also true that at this stage even the prosecution evidence is not complete. In fact, it was put to learned counsel for the petitioner whether he would seek leave to withdraw the bail application to renew the request after at least the prosecution evidence is complete, but learned counsel for the petitioner insisted that the bail application should be decided at this stage.

14. It has been held in a catena of judgments noted aforesaid and relied upon by the prosecution that specific provisions have been made, which are more stringent in nature for grant of bail under Section 37 of the said Act and, thus, unless and until the conditions therein are satisfied, bail ought not to be granted. The larger interest of society of preventing paddling of drugs, thus, outweighs the individual liberty of a citizen, who is alleged to be indulging in the carrying of drugs. Though the recovery has not been made from the petitioner, but the fact remains that Section 29 of the said Act provides for punishment for abatement and criminal conspiracy. It is not only a case where the narcotics have been recovered from the scooter driver, but the pillion rider being the petitioner has been identified as the trader. It is difficult to accept the plea of learned counsel for the petitioner at least at this stage that the petitioner, namely, Gopal Sen only got a lift

from Sunila @ Naniya, the driver of the scooter. The chance of a drug paddler carrying drugs just giving a lift to another person would be difficult to accept.

15.If the parameters of Section 37 are applied to the facts of the present case, it cannot be said that there is satisfaction at this stage of existence of reasonable grounds for believing that the petitioner is not guilty of such offences.

16.The present case is, thus, not a fit one for grant of bail.

17.Dismissed.

JANUARY 31, 2008
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SANJAY KISHAN KAUL, J.