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

+ BAIL APPLN. 2281/2024

SHIV KANT @ AAKASH

.....Petitioner

Through: Mr. Aditya Aggarwal, Mr. Naveen Panwar, Mr. Mohd. Yasir, Mr. Manas Agarwal, Advocates

versus

STATE NCT OF DELHI

.....Respondent

Through: Mr. Amit Ahlawat, APP for the State with Ms. Shehnaz Khan, Advocate with SI Vijay Chaudhary, PS Anti-Narcotics Cell

**CORAM:**

**HON'BLE MR. JUSTICE SANJEEV NARULA**

**ORDER**

**03.03.2025**

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1. The present application under Section 439 of the Code of Criminal Procedure, 1973<sup>1</sup> read with Section 36(A)(3) of the Narcotic Drugs and Psychotropic Substances Act, 1985<sup>2</sup>, seeks grant of regular bail in FIR No. 63/2023 under Section 21 of the NDPS Act, registered at P.S. Maurice Nagar. Subsequently, a chargesheet has been filed *qua* the Applicant under Sections 21, 29, 61 and 85 of the NDPS Act.

2. Briefly, the case of the prosecution is as follows:

2.1. On 27<sup>th</sup> April, 2023, HC Ravinder Dhaka of the Anti-Narcotics Cell, North District, received secret information that a person named Shiv Kant (Applicant herein), a resident of Bihar who is involved in drug trafficking,

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<sup>1</sup> "CrPC"

<sup>2</sup> "NDPS Act"



would be arriving near Shree Ram Institute, Delhi, to supply Heroin. The information suggested that a raid at the said location could lead to recovery of a significant quantity of contraband drugs. Upon receiving this intelligence, HC Ravinder Dhaka immediately apprised his superiors, who, after assessing the information, escalated the matter to the concerned ACP. The ACP, upon review, directed that necessary action be taken. Consequently, a DD entry was lodged, and a raiding team, accompanied by the informer, was dispatched to the Bus Stand near Shree Ram Institute, Shree Ram Road, Delhi.

2.2. Upon reaching the designated location, the raiding team attempted to enlist independent public witnesses to join the proceedings. However, none agreed to participate, citing personal reasons. At approximately 09:25 PM, the secret informer identified the individual who had stopped at the bus stand as Shiv Kant (Applicant) before discreetly leaving the area. The raiding team proceeded to intercept and apprehend the Applicant. He was informed of the secret intelligence regarding his alleged involvement in drug trafficking and was apprised of his legal rights under Section 50 of the NDPS Act. A formal notice under Section 50 was also served on him, and the concerned ACP was called to the spot.

2.3. In the presence of the ACP, the Applicant was searched, leading to the recovery of a black polythene bag from his possession. Inside the bag, the team discovered a white polythene bag containing a clay-coloured powder resembling Heroin based on its physical properties. To ascertain the nature of the recovered substance, it was properly mixed and subjected to testing using a Field-Testing Kit, which confirmed that the substance was Heroin. The contraband, including its packaging, was then weighed on an electronic



weighing machine, amounting to 320 grams. Subsequently, a rukka was prepared and sent to P.S. Maurice Nagar. Based on a complaint made by ASI Sanjeev, who was part of the raiding team, FIR No. 63/2023 was registered against the Applicant under Section 21 of the NDPS Act on the same day. The Applicant was thereafter placed under arrest.

2.4. During the course of the investigation, the Applicant disclosed that he had procured the contraband from one Rajeev Kumar, a resident of Bhojpur, Bihar. In light of this disclosure and to trace the source of the illegal drug trade, the investigating agency sought and obtained a 7-day police custody remand for the Applicant.

2.5. On 3<sup>rd</sup> May, 2023, based on the information provided by the Applicant, the investigating team apprehended Rajeev Kumar, a resident of Village Salempur, District Bhojpur, Bihar. Upon his detention, a notice under Section 50 of the NDPS Act was served on him, informing him of his right to have the search conducted in the presence of a Magistrate or a Gazetted Officer. However, he declined this right in writing. A subsequent personal search of Rajeev Kumar led to the recovery of 100 grams of Heroin from his possession. Consequently, he was placed under arrest and made a co-accused in the present FIR.

2.6. Samples of the recovered contraband were then collected under Section 52A of the NDPS Act before a Magistrate and the same were sent to the Forensic Science Laboratory<sup>3</sup> for examination. The FSL report confirmed that the recovered substance was diacetylmorphine, commonly known as Heroin. Upon completion of the investigation, a chargesheet was filed against both the Applicant and co-accused Rajeev Kumar.



2.7. The co-accused Rajeev Kumar was granted bail by this Court *vide* order dated 27<sup>th</sup> February, 2024 in Bail Application No. 2411/2023. The Applicant, however, withdrew the earlier application seeking regular bail filed by him, through his counsel.

3. In light of the above, counsel for the Applicant presses the following grounds for seeking bail:

3.1. The prosecution has selectively implicated the accused persons in the present case. As per the Applicant's disclosure statement, he named four individuals - Ashish Paswan, Surender, Lalit, and Manoj Yadav @ Mahatam Yadav - along with Rajeev Kumar as co-accused. However, the prosecution has only proceeded against Rajeev Kumar, leaving out the other individuals allegedly involved. Furthermore, the Applicant seeks parity since the co-accused Rajeev Kumar has already been granted regular bail by this Court *vide* order dated 27<sup>th</sup> February, 2024, in Bail Application No. 2411/2024.

3.2. The investigation conducted by the prosecution lacks clarity regarding the alleged trafficking network. The chargesheet does not specify the intended recipient(s) of the alleged contraband or the supply chain involved. Despite the prosecution's claim that the Applicant was part of a drug trafficking operation, no concrete evidence has been presented to establish to whom the contraband was being supplied. Additionally, there is no record of any effort by the investigating agency to trace the end recipients or intermediaries involved in the alleged transactions.

3.3. The Applicant was apprehended in a public place—near the Bus Stand at Shree Ram Institute, Delhi, at approximately 9:30 PM. However, no independent public witnesses were joined in the proceedings. It is well-

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<sup>3</sup> "FSL"



settled that, in cases where arrests are made in public places, the non-joining of independent witnesses casts serious doubt on the prosecution's case. In this regard, reliance is placed on judgments rendered by Co-ordinate Benches of of this Court in *Thomas Karketta v. State thr. Narcotics Control Bureau*<sup>4</sup>, *Krishan @Babu v. State Govt of NCT of Delhi*<sup>5</sup>, *State of NCT of Delhi v. Palgiri Siddique & Anr.*<sup>6</sup> and *Prithvi Pal Singh @ Munna v. State*<sup>7</sup>

3.4. Moreover, despite the presence of CCTV cameras near the site of apprehension, the prosecution has not produced any video footage to substantiate its claims. The investigating agency has neither collected nor relied upon CCTV recordings, even though such evidence could have independently corroborated the prosecution's version of events. Further, members of the raiding team had mobile phones in their possession at the time of the alleged incident, yet no video or photographic evidence of the recovery has been placed on record.

3.5. The prosecution has also failed to gather corroborative evidence against the Applicant in any form, being physical or electronic linking the Applicant to the alleged offence. The recovery made by the Applicant was planted onto him and the prosecution has falsely implicated the Applicant who is a young college graduate, having no past criminal antecedents.

4. On the other hand, Mr. Amit Ahlawat, APP for State, strongly opposes the present bail application and submits as follows:

4.1. The Applicant's contention that no meaningful investigation has been

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<sup>4</sup> CrI. A. 1555/2011, judgement dated 1<sup>st</sup> September, 2015

<sup>5</sup> Bail Application No. 2804/2023, order dated 16<sup>th</sup> November, 2023

<sup>6</sup> CrI. A. 30/2020, judgement dated 27<sup>th</sup> January, 2020

<sup>7</sup> 84 (2000) DLT 464



conducted to trace the supplier and customers of the contraband is wholly unfounded. During the course of investigation, two mobile phones were recovered from the Applicant's possession. The CDR analysis of these devices reveals that the Applicant was in frequent contact with other co-accused individuals suspected of being part of a larger narcotics syndicate. Further, the disclosure statements of the Applicant and co-accused provides additional material implicating the Applicant in the illicit drug trade.

4.2. The argument regarding the absence of CCTV or camera footage of the Applicant's arrest, despite it occurring in a public place, is legally untenable. It is a well-settled principle that the credibility of the prosecution's case cannot be undermined solely on the basis of the non-availability of video footage, particularly when the arrest was made pursuant to a covert operation based on secret intelligence. In this regard, reliance is placed on *Chidi Berr Nwayoga@ James v. State*<sup>8</sup>, wherein this Court has held that the absence of video evidence does not, by itself, render the prosecution's case unreliable.

4.3. Likewise, the assertion that no independent public witnesses were present at the time of search and seizure is misconceived. The absence of independent witnesses does not automatically vitiate the case of the prosecution. It is a settled proposition that if public witnesses are unavailable or unwilling to participate in such operations, the testimony of the official witnesses, who are performing their statutory duties, cannot be disregarded without cogent reasons.

4.4. The Applicant has also sought to challenge the procedural aspects of the recovery operation, including the alleged non-compliance with the



Narcotics Control Bureau (NCB) handbook. However, this Court in *Sagar v. State (NCT of Delhi)*<sup>9</sup> has categorically held that such contentions pertain to matters of trial and cannot be a ground for granting bail at the pre-trial stage. The prosecution must be afforded a fair opportunity to establish its case beyond reasonable doubt before such procedural lapses, if any, can be deliberated upon.

4.5. The present case involves huge commercial quantities of Heroin. 320 grams of Heroin was recovered from the conscious possession of the Applicant and therefore, the rigours of Section 37 of the NDPS Act are attracted. It is also important to note that the Applicant is a resident of Bihar and he has no permanent address in Delhi, therefore, in case he is granted bail, he may abscond and evade trial, which could hinder the proceedings of the case.

5. The Court has considered the submissions advanced by both sides. The Applicant was arrested in the present FIR on 27<sup>th</sup> April, 2023 and till now, he has spent approximately a period of 1 year and 9 months in jail as an under trial. The recovery of the narcotic substance from the Applicant is 320 grams of Heroin which is above the commercial quantity threshold of 250 grams, thereby attracting the stringent conditions under Section 37. Consequently, for the grant of bail, the Applicant must satisfy the twin requirements under Section 37(1)(b) of the Act: (i) the Court must be satisfied that there are reasonable grounds to believe the accused is not guilty of the alleged offence, and (ii) the accused is not likely to commit any offence while on bail.

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<sup>8</sup> CrI. A. 1087/2017, judgement dated 24<sup>th</sup> August, 2022

<sup>9</sup> Bail Appln. 2396/2023, judgment dated 1<sup>st</sup> March, 2024



6. In this regard, the circumstances surrounding the Applicant's arrest and the recovery of contraband assume significance. The prosecution alleges that the Applicant was apprehended at a public place - Bus Stand near Shree Ram Institute, Shree Ram Road, Delhi, at around 9:30 PM, where the raiding team conducted the search and seizure. However, despite the location being a busy area, no independent public witnesses were secured to witness the search, seizure, and subsequent arrest of the Applicant.

7. The raiding team, having acted on secret information received earlier that day, had sufficient time to secure the presence of an independent witness before conducting the operation. While the prosecution contends that public persons were requested to join the investigation but declined due to *genuine reasons*, the record does not disclose what these reasons were, nor does it reflect any attempt by the raiding team to document the identities or contact details of those who refused. Although the absence of independent witnesses does not necessarily vitiate the search and seizure, the Court is of the *prima facie* view that, given the arrest took place in a public setting, the lack of independent corroboration raises concerns regarding the transparency and credibility of the process.

8. This Court in *Bantu v. State Government of NCT of Delhi*,<sup>10</sup> examined the recurring and mechanical explanations offered by prosecuting agencies for the non-joinder of independent witnesses in cases involving the seizure of contraband under the NDPS Act. It was observed that the failure to associate public witnesses, particularly in seizures conducted at busy public places, raises concerns regarding the transparency of the recovery process and weakens the evidentiary value of the seizure. In the present



case, despite the raid occurring at a public location, no effort was made to document the identities of those who allegedly refused to join the proceedings, nor has the prosecution furnished any cogent explanation for this omission. While such procedural lapses may not, by themselves, vitiate the prosecution's case, they diminish the reliability of the recovery and become relevant at the bail stage to ensure that the accused's right to a fair trial is not unduly prejudiced.

9. Pertinently, it must be noted that in the present case, the prosecution has also failed to produce any videographic or photographic evidence of the alleged recovery. The Supreme Court, in the case of *Shafhi Mohd. v. State of H.P.*<sup>11</sup> emphasised that the video or photographic documentation of a crime scene, serves as a critical safeguard, ensuring transparency and accountability in the handling of evidence.

10. Further, in *Bantu*, this Court observed that in instances where videography or photography has not been undertaken, the prosecution can provide clear and valid justifications for such omissions. In this regard, the prosecution has relied upon the case of *Chidi Berr Nwayoga@ James v. State*, to contend that since the raid was conducted covertly based on secret information, videography of the operation would have alerted the Applicant, potentially allowing him to flee. However, in the opinion of this Court, this argument does not hold in the present case, where the recovery was affected at a *public bus stand*, a location under routine surveillance. Unlike a secluded or controlled setting, a bus stand, being a busy public place, provides ample opportunity for the investigating agency to document the

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<sup>10</sup> 2024 SCC OnLine Del 4671

<sup>11</sup> (2018) 5 SCC 311



search and seizure without compromising the operation. Moreover, the Applicant has pointed out that the Delhi Government has installed CCTV cameras in the area for surveillance. The prosecution has neither made any attempt to retrieve such footage nor provided any explanation for its omission. Accordingly, this Court finds that these deficiencies, on a *prima facie* basis, satisfy the first condition under Section 37(1)(b) of the NDPS Act in favour of the Applicant.

11. As regards the second condition of Section 37(1)(b), the Applicant in the present case does not have past criminal antecedents and is a young college graduate. He has already spent a period of over 1 year and 9 months in custody as an under-trial and as per the nominal roll, his behaviour in jail has been found to be satisfactory. Considering these factors, the Court is *prima facie* satisfied as to the second condition under Section 37(1)(b) of the NDPS Act.

12. In light of the above, the Applicant is directed to be released on bail on furnishing a personal bond for a sum of ₹50,000/- with one surety of the like amount, subject to the satisfaction of the Trial Court/Duty Metropolitan Magistrate and on the following conditions:

- a. The Applicant shall cooperate in any further investigation as and when directed by the concerned Investigating Officer<sup>12</sup>;
- b. The Applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- c. The Applicant shall under no circumstance leave the country without the prior permission of the Trial Court;



- d. The Applicant shall appear before the Trial Court as and when directed;
- e. The Applicant shall provide the address where he would be residing after his release and shall not change the address without informing the concerned IO/ SHO;
- f. The Applicant shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times.
13. In the event of there being any FIR/DD entry/complaint lodged against the Applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.
14. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the trial and should not be taken as an expression of opinion on the merits of the case.
15. The bail application is allowed in the afore-mentioned terms.

**SANJEEV NARULA, J**

**MARCH 3, 2025/ab**

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<sup>12</sup> “IO”