THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 26.04.2007

+ **CRL. REV. P 395/2006**

ERAN ELIAV ... Petitioner

- versus -

STATE (GOVT OF NCT OF DELHI) ... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr K.K. Sud, Sr Advocate with Mr Jayant Sud, Mr Neeraj Jain, Mr Kalyan Dutt and Mr Anupam Mishra

For the Respondent/State : Mr V.K. Malik

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in Digest? Yes

BADAR DURREZ AHMED, J

1. This revision petition is directed against the order on charge dated 23.05.2006 passed by the learned Additional Sessions Judge whereby the petitioner was charged with the offence under Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act'). The prosecution's case, as indicated in the impugned order, is that on 15.12.2005, a secret information was received by Sub-Inspector Shanti Swaroop that four *pahari* boys, whose leader was Pratap, would be coming from Manali, carrying with them *charas* in large quantities and would be

delivering the same between 6.00 p.m. to 7.00 p.m. that day itself at Thomson Road, Ajmeri Gate near the Metro Railway Station to one "Israeli youth..". It is further alleged that at 6.30 p.m., four boys were seen coming from Ajmeri Gate towards Thomson Road and that each of them was carrying a bag. One of them, whose name was later on disclosed as Pratap, handed over a bag to a foreigner who was later on found to be a national of Israel and whose name was Yaniv Kohlani. Immediately on delivery of the said bag, the four boys and Yaniv Kohlani as well as the petitioner herein (Eran Eliav) were apprehended. The petitioner is also from Israel. His name figures only towards the end of recording of the recovery proceedings and it is indicated that his role was confined to his being present on the spot. He was booked for the offence of conspiracy under Section 29 of the NDPS Act. It would be pertinent to note that the petitioner had filed an application for bail and the same was granted to him by the learned Additional Sessions Judge by an order dated 04.04.2006. The learned Additional Sessions Judge, while granting bail, referred to the material on record and indicated that this court in the case of ***Kassu Ram v. State***: **(Bail Appln No. 558/2005, decided on 13.04.2005)** had, after considering the decisions of the Supreme Court, observed that secret information was not admissible unless the informer was produced at the stage of trial. While considering the grant of bail, the learned Additional Sessions Judge came to a *prima facie* conclusion that the petitioner is not likely to be convicted inasmuch as the mere fact that the petitioner was found present at the

spot alongwith someone who was accepting delivery of the contraband would not be sufficient, *prima facie* to hold that the petitioner was also in possession of the contraband or had abetted or conspired with the co-accused. The learned Additional Sessions Judge, therefore, concluded that there are reasonable grounds to believe that the petitioner was not guilty of the offence and that, if released on bail, would not commit the offence again. Thus, the petitioner was directed to be released on bail though the provisions of Section 37 of the NDPS Act were deemed to have applied.

2. The petitioner, extending the reasoning given in the bail order, has filed this revision petition stating that once the court has already come to a *prima facie* conclusion that there are reasonable grounds to believe that the petitioner would not be convicted, the same ought to have weighed with the court while passing the order on charge. Mr K.K. Sud, the learned senior counsel appearing on behalf of the petitioner, submitted that the secret information that was received by Sub-Inspector Shanti Swaroop was only in respect of "one Israeli youth" and that happened to be Yaniv Kohlani. There was no reference to a second Israeli youth. It was further contended by him that the petitioner was merely found to be present near the scene of the alleged delivery / recovery. The petitioner was not given any notice under Section 50 nor was his person searched and nothing is alleged to have been recovered from him. Therefore, according to Mr Sud, there is nothing on record to connect the

petitioner with the co-accused and, accordingly, the charge under Section 29 of the NDPS Act would merely amount to conjectures and surmises. He submits that the purported confessional-cum-disclosure statement of the co-accused Yaniv Kohlani and followed by the purported confessional-cum-disclosure statement of the present petitioner on 16.12.2005 were not admissible in evidence and, in any event, the petitioner and the co-accused had retracted the said statements. It was also contended that the disclosure statement recorded by the police after arrest could not be used against the co-accused.

3. Mr Sud also submitted that the passport of the petitioner and the co-accused indicated that the petitioner got the visa to visit India on 27.10.2005 which was valid till 26.10.2006 and that this was his first visit to India on 11.11.2005. He further submitted that the petitioner and the co-accused had not travelled together. They did not hail from the same place in Israel, they did not stay together in India and, in Delhi, they were staying in two different hotels. The secret information has reference to four *pahari* boys and one Israeli youth and there was no reference to the sixth boy / person in the secret information, even if the secret information is admissible. Mr Sud, relied upon the following decisions:-

1. ***Malan v. State of Bombay*: AIR 1960 Bombay 393**;
2. ***Om Prakash Bakshi v. State*: 1989 CrLJ 1207**;
3. ***Bhinya Ram v. State of Rajasthan*: 1995 (2) Crimes 133**;

4. ***Kishan Singh v. State of Rajasthan*: 1995 (4) CrLJ 3947**;

5. ***Pradeep Kumar Jain v. State of Rajasthan*: 199 CrLJ 3829**;

6. ***Amarsingh Ramjibhai v. State of Gujarat*: 2005 (7) SCC 550**;

7. ***Sorabhkhan Gandhkhan v. State of Gujarat*: 2006 (1) SCC (Cri) 508**;

8. ***Manoj Kumar Gupta v. State of Delhi*: 102 (2003) DLT 675**.

4. Mr Malik, who appeared on behalf of the State, submitted that at the stage of framing of charges, mere suspicion was enough. However, before a conviction can be established, the prosecution would have to prove its case beyond reasonable doubt. That, of course, is a matter of trial and for which purpose evidence would have to be lead by the prosecution. The defence would have ample opportunity to cross-examine the witnesses which the prosecution would produce and would try to establish the innocence of the petitioner. He submitted that, at this stage, however, there is enough material to frame a charge against the petitioner. He referred to the decision of the Supreme Court in the case of ***Umar Abdul Sakoor Sorathia v. Intelligence Officer, Narcotic Control Bureau*: 2000 (1) SCC 138**, wherein the Supreme Court at page 144 held:-

> "15. It is well settled that at the stage of framing charge the court is not expected to go deep into the probative value of the materials on record. If on the basis of materials on record the court could come to the conclusion that the accused would have committed the

> offence the court is obliged to frame the charge and proceed to the trial."

He also referred to the decision of the Supreme Court in the case of ***State of Maharashtra & Others v. Som Nath Thapa & Others*****: 1996 (4) SCC 659**, wherein the Supreme Court observed:

> "[I]f on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

Mr Malik also referred to the provisions of Section 35 of the NDPS Act which relates to the presumption of the culpable mental state. He also referred to Section 10 of the The Indian Evidence Act, 1872 with regard to a co-conspirator's statement being relevant. He then referred to the Supreme Court decision in the case of ***Saju v. State of Kerala:*** **2001 (1) SCC 378**, wherein the Supreme Court observed as under:-

> "8. In a criminal case the onus lies on the prosecution to prove affirmatively that the accused was directly and personally connected with the acts or omissions attributable to the crime committed by him. It is a settled position of law that act or action of one of the accused cannot be used as evidence against another. However, an exception has been carved out under Section 10 of the Evidence Act in the case of conspiracy. To attract the

> applicability of Section 10 of the Evidence Act, the court must have reasonable ground to believe that two or more persons had conspired together for committing an offence. It is only then that the evidence of action or statement made by one of the accused could be used as evidence against the other."
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> 10. It has thus to be established that the accused charged with criminal conspiracy had agreed to pursue a course of conduct which he knew was leading to the commission of a crime by one or more persons to the agreement, of that offence. Besides the fact of agreement the necessary mens rea of the crime is also required to be established.
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> 11. In the instant case the hatching of conspiracy between the accused persons has been sought to be proved on the ground that as the deceased had declined to get the pregnancy aborted, the appellant wanted to get rid of her, suggesting the existence of circumstance of motive. Another circumstance relied upon by the prosecution is that both the accused were seen together on the date of the murder near or about the place of occurrence. Some conversation is also staged to have taken place between the accused persons, the contents of which are neither disclosed nor suggested. Accused 1 alone was found to have boarded the bus in which the deceased was travelling and alighted from it along with her."

Mr Malik then referred to the decision of the Supreme Court in the case of ***Mohd. Khalid v. State of West Bengal*: 2002 (7) SCC 334**, wherein the Supreme Court held as under:-

> "The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely

> committed to cooperate for the accomplishment of the object by the means embodies in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no over act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime, is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See American Jurisprudence, Vol. II, Sec. 23, p. 559.) For an offence punishable under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or caused to be done an illegal act; the agreement may be proved by necessary implication. The offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise, against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means."

5. In the light of these decisions of the Supreme Court, Mr Malik stated that the petitioner's presence at the alleged spot of recovery cannot be presumed to be a matter of chance. He submitted that it may well turn out that

the petitioner is innocent at the end of the trial but, at this stage, the petitioner cannot be discharged. He submitted that although the secret information, as received, referred to only one Israeli youth, it is a fact that two of them came for the purposes of delivery. He also made the submission that if the police were falsely implicating the petitioner, they could have shown a stronger connection between him and the co-accused.

6. In rejoinder, Mr Sud, the learned senior counsel appearing on behalf of the petitioner, sought to distinguish the decisions referred to by Mr Malik by showing that although the principles enunciated by the Supreme Court were unexceptionable, they apply to the facts of the cases which are different from the present case.

7. I have considered the arguments advanced by the learned counsel for the parties. First of all, I would like to point out that the considerations which are relevant for the grant of bail are entirely different from the considerations which are relevant for the purposes of framing of charges. Grant of bail to an accused does not and cannot *ipso fact* mean that the accused is liable to be discharged. So, while a good case may be made out for the grant of bail, the court may yet frame charges.

8. The second issue that has been raised with regard to the petitioner's case that he was not at all connected with the alleged crime is difficult to deal with conclusively at this stage without evidence. The petitioner has been charged under Section 29 of the NDPS Act which essentially relates to abetment and participating in a criminal conspiracy. It is well-known that both abetment and criminal conspiracy are fiendishly difficult to establish by virtue of direct evidence. However, it can be established by indirect or circumstantial evidence which is of an impeccable nature. It is true that the mere presence of a person at the scene of crime does not mean that he is a participant in the crime, but at the same time, his guilt could be established by leading evidence. If such evidence is not forthcoming, then, he would be entitled to acquittal.

9. Keeping these factors in mind, I find that the learned Additional Sessions Judge cannot be faulted in her conclusion to the following effect:-

> "9. Since accused Eran Eliav was present at the spot as per the prosecution, it can only be established by evidence as to whether or not he was part of the criminal conspiracy for supply/receiving of contraband or not and the same can be established only be detailed evidence for which the prosecution has to be given opportunity."

10. Accordingly, the impugned order does not call for any interference and this revision petition is dismissed.

BADAR DURREZ AHMED

(JUDGE)

April 26, 2007
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