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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 13th June, 2022

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BAIL APPLN. 997/2022

EJIKE JONAS ORJI

..... Applicant

Through: Mr. Adarsh Priyadarshi, Advocate.

versus

NARCOTICS CONTROL BUREAU

..... Respondents

Through: Mr. Subhash Bansal, Senior Standing
Counsel for NCB with Mr. Shashwat
Bansal, Advocate.

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CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. By way of this application under Section 439 of the Code of Criminal Procedure, 1973 [hereinafter, "CrPC"], the applicant seeks bail in connection with Sessions Case No. 9080/2016, registered by the Narcotics Control Bureau, Delhi Zonal Unit, Government of India [hereinafter, "NCB"], under Sections 8(c), 20, 21, 22 and 23 of the Narcotic Drugs and Psychotropic Substances Act, 1985 [hereinafter, "the Act"]. The applicant is facing trial in the aforesaid case before the Court of the learned Special Judge, NDPS Act, Patiala House Courts, New Delhi [hereinafter, "the Special Court"].

Factual background

2. The prosecution case against the applicant may be summarized as follows:

A. A secret information was received by the NCB on 26.05.2014 to the effect that a parcel lying at *DHL Express Pvt. India Ltd. 40 Okhla Estate, New Delhi*, was suspected to contain narcotic substances. The information revealed that the parcel had been booked from *ANS Express Services Pvt. Ltd. 413 Sant Nagar, East of Kailash, New Delhi* under AWB No. 5546780993, with Liberia (Africa) as the destination.

B. An NCB team reached the DHL office at 2:30 PM on 26.05.2014. In the presence of two independent witnesses, the parcel bearing AWB No. 5546780993 was opened, and contained ladies' clothes and accessories, including a packet of 12 "*thread piece rolls*". One of the *thread piece rolls* was found to have a cavity, which contained an off white coloured powder in a roll. A small quantity of the powder was tested with the help of field-testing kit, and gave positive result for heroin. The remaining 11 *thread piece rolls* were thereafter opened, and contained similar cavities with off white coloured powder. The off white coloured powder from each of the 11 *thread piece rolls* was tested with the field-testing kit, and it also gave positive result for heroin.

C. The powder from the 12 cavities, having the same colour, texture and properties, was thereafter mixed, and was transferred into a transparent plastic packet which was weighed on an electronic weighing machine, and came to weigh 200 grams.

D. Two samples of 5 grams each were drawn, and put in separate zip-lock pouches, which in turn, were put in separate white paper

envelopes. The packets were sealed with the NCB seal, and signed by the Investigating Officer [hereinafter, “IO”], and the independent witnesses. The remaining 190 grams of heroin was kept in a separate transparent package in a white cloth, and similarly sealed and signed. The remaining stitching material was separately wrapped. The parcel contained the name of the consignor as *Mr. Ashish Kanojia, 78, Block-C Duggal Colony, Khanpur, Delhi, 110062*, and the consignee as *Lisa Phombah, Perry Town V, O.A.A, Monrovia, Liberia, Post 1000, Liberia*.

E. Notices under Section 67 of the Act were issued to both the independent witnesses and their statements were taken on 09.06.2014. Two other witnesses, Mr. Shamsheer Singh of *ANS Express Services Pvt. Ltd.* and Mr. Arjun Pal Singh of *Balaji Courier & Cargo, B-7 Vasant Kunj, New Delhi*, were also issued notices under Section 67 of the Act, and they made their statements on 04.07.2014 and 14.08.2014 respectively.

F. Mr. Ashish Kanojia, the consignor of the parcel, was also issued a notice under Section 67 of the Act, and made a voluntary statement on 01.06.2014¹.

G. On the basis of his statement, an information was then prepared by the IO that the parcel belonged to one Mr. Jonas Orji, who is a Nigerian national, and is a resident at *House No. 363, Dhaka Johar, near Parmanand Colony, New Delhi* [hereinafter, “the property”]. It

¹ The name of the consignor appears to be wrongly noted as “Ashok Kanojia” in paragraph Nos. 20 and 21 of the chargesheet filed by the NCB, which has been placed on record.

was stated that Mr. Jonas Orji had called Mr. Ashish Kanojia again on 02.06.2014 for delivery of another parcel at his residence. An apprehension was recorded that Mr. Jonas Orji might be involved in drug trafficking, and if apprehended, huge quantity of narcotics may be recovered from him.

H. A team was thereafter constituted, which was sent to the residence of Mr. Jonas Orji on 02.06.2014 at 11:40 AM. The owner of the property, Mr. Sunil Gulati, agreed to act as an independent witness. The house was approached in his presence. A man, who identified himself as Mr. Ejike Jonas Orji [the applicant herein], and a lady, who identified herself as Ms. Ratharmi Sero [hereinafter, “Ms. Sero”], were present in the house at the time of the search. Both of them were served with notices under Section 50 of the Act, but declined to be searched before a Gazetted Officer or a Magistrate. On their personal search, nothing incriminating was recovered from the two individuals.

I. On searching the house, an “*Orange coloured lehenga*” was found on a table in the first room of the house. Some substance was found to be concealed/stitched inside the layers of the *gotta* of the *lehenga*. It was cut open, and found to contain a tube-shaped transparent polythene, which contained off white coloured powder. The powder was tested with DD kit, and gave positive result for heroin. Upon cutting all the layers of *gotta*, 70 such tubes were found, each of which contained similar off white coloured powder.

J. A small quantity of the powder was taken from each of the tubes, and was subsequently tested with the DD kit. Each of the samples gave positive results for heroin.

K. The powder from all the tubes, having the same colour, texture and properties, was thereafter mixed, and transferred into a transparent packet, which was found to weigh 265 grams.

L. Two samples of 5 grams each were drawn, and put in polythene pouches, which in turn were kept in white envelopes. They were signed by the applicant herein, the IO, and the independent witness and was subsequently sealed with the seal of NCB. The remaining quantity of the powder was kept in a transparent packet, and stitched in a white cloth, and similarly signed and sealed.

M. During the search of a bedroom, small crushed pieces of a “*dark green coloured substance*” was found wrapped in plastic tape, hidden in a wooden almirah. Testing of a small quantity of the same with the help of the DD kit gave positive result for *charas*. The substance was transferred to a transparent polythene bag, and when weighed, was found to be 170 grams.

N. Two samples of 25 grams each were drawn, kept in separate zip-lock pouches, which in turn were kept in white paper envelopes, and similarly signed and sealed. The remaining 120 grams of the substance was kept in a transparent packet, stitched in a white marking cloth, signed and sealed. *Panchnama* and test memos were prepared, which were signed by the applicant and the IO, as well as by the independent witness.

O. The applicant and Ms. Sero were thereafter issued notices under Section 67 of the Act, and were asked to appear forthwith before the NCB. Ms. Sero made a statement on the same date that she was not aware of the alleged business of drug trafficking of the applicant, who is her husband. As a result, she was not arrested. The applicant made his statement before the NCB on 03.06.2014.

P. Consequent upon the recovery of 200 grams of heroin from the parcel, 265 grams of heroin and 170 grams of *charas* from the applicant's house, and on the basis of his statement under Section 67 of the Act, the applicant was arrested on 03.06.2014.

Q. Mr. Sunil Gulati [owner of the property and the independent witness] appeared before the NCB on 09.06.2014, and made his statement under Section 67 of the Act.

R. Enquires were made regarding the applicant's mobile number 8447262566, which was found to be issued in the name of one Mr. Pradeep Kumar. Notice under Section 67 of the Act was issued to Mr. Pradeep Kumar on 07.07.2014. Mr. Pradeep Kumar stated that he had no connection with the said mobile number and does not know the applicant.

S. Samples of the substances recovered from the parcel, as well as the residence of the applicant, were sent for chemical examination to the Central Revenues Control Laboratory, New Delhi [hereinafter, "CRCL"]. On examination of the alleged contraband by the CRCL, the substance recovered from the parcel was found positive for heroin, as was one of the samples from the residence of the applicant. The

other sample which was recovered from the house of the applicant was found positive for *charas*.

3. As evident from the above, the applicant has been accused of conscious possession of at least 265 grams of heroin (which constitutes a commercial quantity), and 175 grams of *charas* (which constitutes an intermediate quantity). Although the prosecution also attributes to him the 200 grams of heroin recovered from the parcel (which constitutes an intermediate quantity), the accused disputes the said possession. In view of the fact that, at the minimum, the case against the applicant involves conscious possession of 265 grams of heroin, which is a commercial quantity of narcotics under the Act, there is no dispute that the rigors of Section 37 of the Act are attracted to the present case.

4. The applicant has been in custody in connection with the case since 03.06.2014, and remains in custody for a period of eight years.

5. The applicant first approached the Special Court for bail, which was rejected on 11.11.2020. The applicant then filed BAIL APPL. 369/2021 before this Court, which was dismissed as withdrawn on 22.03.2021, with a direction that the Special Court shall endeavor to dispose of the matter as expeditiously as possible.

6. While issuing notice in the present application, the Nominal Roll of the applicant was also called for from the jail authorities, which reveals that, as on 12.05.2022, he had been in custody for a period of 7 years 11 months and 9 days. Although his overall conduct is characterized as unsatisfactory due to punishments awarded to him

on 09.02.2017 and 10.01.2019, his jail conduct during the last one year has been certified to be satisfactory.

7. No prior involvement of the applicant in any offence has been mentioned in the reply filed by the NCB to the present application.

8. It may be noted that Mr. Ashish Kanojia was not named as an accused in the chargesheet, but was subsequently arraigned as an accused pursuant to the orders of the Special Court. He was enlarged on bail within one year and, according to the Nominal Roll of the applicant, Mr. Ashish Kanojia was released on 18.11.2015.

9. As far as the trial is concerned, it appears that out of the 25 prosecution witnesses [hereinafter, “PW”] cited in the chargesheet, Mr. Ashish Kanojia has been made an accused, 4 PWs have been dropped, and 14 out of the remaining 20 PWs have been examined.

Submissions

10. Mr. Adarsh Priyadarshi, learned counsel for the applicant, has made the following submissions in support of the present application:-

A. Mr. Priyadarshi submitted that the applicant is entitled to be enlarged on bail on the ground of prolonged incarceration as an undertrial. In support of this argument, he relied upon the judgment of the Supreme Court in *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) vs. Union of India and Others*² [hereinafter, “SCLAC”], wherein the Supreme Court laid down

² (1994) 6 SCC 731

guidelines for release of undertrial prisoners on bail, where the accused were facing trial for offences under the Act. Mr. Priyadarshi submitted that the said judgment has been noticed by the Supreme Court more recently in *Thana Singh vs. Central Bureau of Narcotics*³. He also relied upon the interpretation of *SCLAC* judgment by a Division Bench of the High Court of Calcutta in *In Re- Sanawar Ali*⁴ and by coordinate benches of this Court in *Atul Aggarwal vs. Directorate of Revenue Intelligence*⁵ and in *Anil Kumar alias Nillu vs. State*⁶. Relying upon the aforesaid judgments, Mr. Priyadarshi submitted that the applicant, who has been in custody for eight years, is entitled to be enlarged on bail on the strength of the *SCLAC* judgment.

B. Mr. Priyadarshi relied upon an order of the Supreme Court in *Baba Fakruddin Sheikh @ Fakru vs. The State (NCT of Delhi)*⁷, wherein the applicant therein was denied bail by an order of this Court dated 25.03.2021 in Bail Application No. 334/2021, on the finding that a commercial quantity of contraband had been recovered, and Section 37 of the Act would be attracted. The Supreme Court, however, directed the accused to be enlarged on bail, noting in its order that the petitioner had suffered incarceration for a period of seven years and six months, and that there was no possibility of the trial being concluded in the near future.

³ (2013) 2 SCC 603

⁴ C.R.M. 9314/2020, decided 27.11.2020

⁵ Judgment dated 21.12.2021 in BAIL APPL. 2477/2021

⁶ Judgment dated 21.03.2022 in BAIL APPL.1724/2021

⁷ Order dated 16.02.2022, in SLP (Crl) No. 13/2022

C. Mr. Priyadarshi submitted on merits that, even taking into account the provisions of Section 37 of the Act, the applicant is entitled to be released on bail. He emphasized that, in view of the judgment of the Supreme Court in *Tofan Singh vs. State of Tamil Nadu*⁸, the statements of Mr. Ashish Kanojia and the applicant himself, recorded under Section 67 of the Act, cannot be read as evidence against the applicant.

D. In the absence of any other evidence, Mr. Priyadarshi argued that the sampling procedure adopted by the NCB, both with regard to the recovery from the parcel at the courier office, and at the residence of the applicant, was inconsistent with the prescribed procedures, as the substances alleged to have been recovered from different packets/tubes were mixed together before drawing samples for chemical testing. He argued that the representative character of the samples was thus vitiated. In support of this contention, he relied upon the judgments of the coordinate benches of this Court in *Amani Fidel Chris vs. Narcotics Control Bureau*⁹, *Charlse Howell @ Abel Kom vs. NCB*¹⁰, and *Mokibe MR Leepile Moses @ Patrick Umechukwu vs. Narcotics Control Bureau*¹¹.

11. Mr. Shashwat Bansal, learned counsel for the NCB, on the other hand, contested the application principally on the following grounds:

⁸ (2021) 4 SCC 1

⁹ CrI Appeal 1027/2015, decided on 13.03.2020

¹⁰ CrI Appeal 755/2016, decided on 13.08.2018

¹¹ CrI Appeal 220/2016, decided on 22.02.2021

A. Mr. Bansal submitted that the *SCLAC* judgment was expressly stated to be a one-time measure, and applicable only to the State of Maharashtra. Although the *SCLAC* judgment was thereafter extended to some other states by an order of the Supreme Court in *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) vs. Union of India and Others*¹², learned counsel emphasized that it was not extended to Delhi.

B. In any event, Mr. Bansal submitted that paragraph 16 of the *SCLAC* judgment makes it clear that the directions given therein were not intended to restrict the powers of the Special Courts under Section 37 of the Act. Having regard to the fact that the applicant is not a citizen of India, Mr. Bansal submitted that the normal considerations applicable to proceedings for bail, including the likelihood that the accused would flee from justice or would tamper with the evidence, militate against the grant of bail to the applicant in the present case.

C. Mr. Bansal relied upon the judgment of the Supreme Court in *Achint Navinbhai Patel alias Mahesh Shah vs. State of Gujarat and Anr.*¹³, to submit that prolonged incarceration is not always a sufficient ground for grant of bail in an offence alleged to have been committed under the Act.

D. Mr. Bansal cited the judgment of a coordinate bench of this Court in *Bobby Collin vs. Narcotic Control Bureau*¹⁴ to submit that, in

¹² (1995) 4 SCC 695

¹³ (2002) 10 SCC 529.

¹⁴ BAIL APPL. 812/2021, decided on 19.04.2021

a similar case under the Act, this Court had declined to release the applicant on bail, despite incarceration for a period of over six years. He pointed out that the Court considered the judgment in *Amani Fidel Chris*¹⁵, but declined to consider this argument at the stage of bail, particularly because only one prosecution witness remained to be examined. A similar contention was also considered in *Anthony Umeh vs. State*¹⁶, *Naveed Ummer Sheikh vs. Narcotic Control Bureau Through: Shri Mukesh Malik Prosecutor NCB*¹⁷ and *Bipin Bihari Lenka vs. Narcotic Control Bureau*¹⁸.

E. Mr. Bansal relied upon the judgments of this Court in *Mohd Hanif vs. NCB*¹⁹, *Emeka Charles Omuka vs. Narcotic Control Bureau*²⁰ and *Edwin Emeka Igbowke vs. Narcotics Control Bureau*²¹ to submit that this Court has refused to grant bail to accused alleged to have committed offences under the Act wherein the contraband seized was in commercial quantity, and that the rigors of Section 37 of the Act will be attracted.

12. In rejoinder, Mr. Priyadarshi submitted that the applicant's citizenship status ought not to detain this Court as the Act makes no distinction between accused on the basis of their citizenship. He contended that the *SCLAC* judgment specifically deals with foreigners accused under the Act and lays down special safeguards which may be

¹⁵ Supra (Note 9)

¹⁶ BAIL APPL. 851/2021, decided on 06.07.2021

¹⁷ BAIL APPL. 3248/2021, decided on 23.11.2021

¹⁸ BAIL APPL. 3291/2021, decided on 25.04.2022

¹⁹ BAIL APPL. 1339/2021, decided on 12.04.2022

²⁰ BAIL APPL. 3289/2020, decided on 19.04.2022

²¹ BAIL APPL. 85/2021, decided on 15.03.2021

imposed while granting bail to foreign nationals. In the present case, he submitted that the chargesheet itself reveals that the applicant is married to an Indian citizen, and is ordinarily resident within the jurisdiction of this Court. He stated that the applicant and his wife also have a young child. Mr. Priyadarshi handed up several orders to the Court in which bail was granted to foreigners, including those accused of having committed offences under the Act.

Analysis

13. At the outset, as noted above, even assuming in favour of the applicant that the recovery from the courier parcel cannot be attributed to him, the present case concerns recovery of commercial quantity of heroin (in addition to an intermediate quantity of *charas*), and Section 37 of the Act would thus be applicable. Section 37 of the Act lays down the twin tests, which must be satisfied before granting bail in such a case, in addition to the normal conditions for grant of bail under the CrPC. It provides 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 2[offences 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 not likely to commit any offence while on bail.

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

14. Turning to the question of whether or not the applicant is entitled to be released on bail on the ground of prolonged incarceration as an undertrial prisoner, the *SCLAC* judgment is of foremost significance in this regard. The petition before the Supreme Court was motivated by the delay in disposal of cases under the Act, particularly involving foreigners. During the proceedings, the scope was expanded to cover all undertrial prisoners who were in jail for offences under the Act for a period of over two years. The Court noted that, despite the provision for trial before Special Courts under the Act, the disposal of cases has taken much longer than originally envisioned. The Supreme Court found that the delay in trial, when read with the stringent provisions of Section 37 of the Act, render the fundamental rights of the accused under Articles 14, 19 and 21 of the Constitution in jeopardy. Although the Court declined to quash the charges against the accused on this basis, it accepted the alternative submission that the accused should be released on bail after a certain

period of incarceration, if the trial has been delayed beyond a reasonable time. The Court categorized the cases according to the punishment prescribed for the offence in question. In the case of persons accused of offences punishable with minimum imprisonment of ten years and a minimum fine of ₹1 lakh, the Court directed that they be released on bail if they had been in jail for not less than five years, subject to furnishing bail in the sum of ₹1 lakh, with two sureties for the like amount. It is not in dispute that this is the provision which would be applicable in the present case.

15. The Supreme Court gave further directions regarding the conditions to be imposed while granting bail, which are reproduced below:-

“15- xxxx xxxx xxxx xxxx xxxx

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those

covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.

16. We may state that the above are intended to operate as one-time directions for cases in which the accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Court's a power to grant bail under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases. The Special Court will, notwithstanding

the directions, be free to cancel bail if the accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order.”

16. The *SCLAC* judgment was cited by the Supreme Court in *Thana Singh*²² to grant bail to an accused under the Act, who was in jail for more than 12 years.

17. Three recent orders of the Supreme Court, also indicate that the period of incarceration, and the likelihood of the trial taking a long time, are factors to be considered while deciding applications for bail in cases instituted under the Act. These orders are as follows:-

a. In *Manoj Kumar Singh vs. State of West Bengal & Anr.*²³, the applicants therein were accused of transporting 9,310 kilograms of *ganja* while dressed in army uniform and were also carrying firearms. The Supreme Court noted the *SCLAC* judgment, and the fact that the proceedings before the trial court remained pending despite several directions of the Supreme Court and the High Court. The Court released the applicants therein on bail on the ground that they have served more than seven years in judicial custody.

b. In *Tapan Das vs. Union of India*²⁴, the Court granted bail to an accused noting that he had been in incarceration for around four years, and that there was no possibility of completion of the trial in the near future.

²² Supra (Note 3)

²³ SLP (CrI) 4711-4712/2020, decided on 06.10.2021

²⁴ SLP (CrI) 5617/2021, decided on 07.10.2021

c. In *Baba Fakruddin Sheikh @ Fakru*²⁵, cited by Mr. Priyadarshi, this Court denied bail, coming to a finding that a commercial quantity of contraband had been recovered and Section 37 of the Act would thus be attracted. This Court rejected the applicant's contention that the recovery from the applicant alone (and not from other co-accused) should be taken into account, which was only of 200 grams of heroin, being an intermediate quantity under the Act. It, therefore, rejected the application for bail, applying Section 37 of the Act. The Supreme Court however granted bail, noting the period of incarceration, and the unlikelihood of timely conclusion of the trial.

18. In *Sanawar Ali*²⁶, a Division Bench of the Calcutta High Court, noticed that the *SCLAC* judgment has specifically been applied to the State of West Bengal. Noting the general rule in favour of grant of bail, and coming to a conclusion that the delay in the conclusion of the trial was not occasioned by the accused, the High Court granted bail in that case. The Division Bench negated the contention that *SCLAC* judgment was intended to be only a "one-time measure", which would have no applicability in the present time.

19. Although the *SCLAC* judgment has not specifically been applied to the National Capital Territory of Delhi, the following recent decisions of coordinate benches of this Court have applied the principles laid down therein by the Supreme Court:-

²⁵ Supra (Note 7)

²⁶ Supra (Note 4)

a. In *Atul Aggarwal*²⁷, the Court was considering an application for bail in a case arising under the Act. The accused had been in custody for nine years as an undertrial prisoner. The Court cited the *SCLAC* judgment to release him on bail.

b. In *Kartik Dangi vs. State of NCT of Delhi*²⁸, the Court *inter alia* noticed the decisions of the Supreme Court in *SCLAC*, *Union of India vs. K.A. Najeeb*²⁹, *Manoj Kumar Singh*³⁰ and *Tapan Das*³¹, and the judgment of the Division Bench of the Calcutta High Court in *Sanawar Ali*³². The Court released the applicant on bail despite the allegation of seizure of 12.6 kilograms of opium attracting the limitations prescribed in Section 37 of the Act.

c. In *Anil Kumar @ Nillu*³³, a similar conclusion was recorded, noticing the *SCLAC* judgment and the judgment of the Calcutta High Court in *Sanawar Ali*³⁴. The argument of the prosecution that the *SCLAC* judgment was a one-time measure, was rejected with the following observations:-

“12. A bare perusal of paragraph 16 indicates to this Court that the directions were not meant to be employed as one-time directions in the said case, but were meant to apply as a one-time measure in all cases in which the accused persons were in jail and their trials had been

²⁷ Supra (Note 5)

²⁸ BAIL APPL. No. 2872/2021, decided on 16.12.2021

²⁹ (2021) 3 SCC 713

³⁰ Supra (Note 23)

³¹ Supra (Note 24)

³² Supra (Note 4)

³³ Supra (Note 6)

³⁴ Supra (Note 4)

delayed. The intention of paragraph 16 was to convey that despite the absence or presence of delay in trial in a case, the Special Court was still free to exercise its power to grant bail under Section 37 of the NDPS Act. Furthermore, if the Special Court also retained the power to cancel bail if the accused was found to be misusing the same. The directions were certainly not, as the learned APP has submitted, meant to only apply in the case therein, but were directions that were to be followed by Courts in all cases pertaining to NDPS wherein the accused had been subjected to prolonged delay in their trials.”

d. The view taken by this Court in *Atul Aggarwal*³⁵ and *Anil Kumar @ Nillu*³⁶ has been followed in a recent judgment of this Court in *Ebera Nwanaforo vs. Narcotics Control Bureau*³⁷ and connected matter. After a detailed discussion of the judgments of the Supreme Court *inter alia* in *SCLAC*, and *Tofan Singh*³⁸, as well as the judgments of this Court *inter alia* in *Atul Aggarwal*³⁹ and *Anil Kumar @ Nillu*⁴⁰, the Bench concurred with the view taken in *Anil Kumar @ Nillu*. The Court noted that neither *Atul Aggarwal*⁴¹, nor *Anil Kumar @ Nillu*⁴² was carried in appeal by the prosecuting agencies. The applicants therein, having been incarcerated for a period of more than eight years, were therefore released on bail. This Court expressly rejected the argument of the prosecution that the applicants ought not to be released on bail as they are foreign nationals, relying upon the

³⁵ Supra (Note 5)

³⁶ Supra (Note 6)

³⁷ Judgment dated 31.05.2022 in BAIL APPL. 3705/2020 and BAIL APPL. 4187/2020

³⁸ Supra (Note 8)

³⁹ Supra (Note 5)

⁴⁰ Supra (Note 6)

⁴¹ Supra (Note 5)

⁴² Supra (Note 6)

judgment of this Court in *Lambert Kroger vs. Enforcement Directorate*⁴³.

20. The judgments on this point which have been cited by Mr. Bansal do not deal with the *SCLAC* judgment. In *Bobby Collin*⁴⁴, the principal ground of rejection of bail was that the trial was at its final stage, with only one prosecution witness remaining to be examined. In *Anthony Umeh*⁴⁵, although the accused had been in custody for more than five years, the Court found that the case of improper sampling was required to be tested during trial and not at the stage of bail. The bail application was, therefore, rejected. In *Mohd. Hanif*⁴⁶, this Court rejected the bail application of the accused, who had been in custody for about 4 years 9 months on the ground that a previous application for bail had already been rejected by this Court. The case of *Emeka Charles Omuka*⁴⁷ is also not a case of incarceration for the period as laid down in the *SCLAC* judgment, as the applicant was in judicial custody since 27.12.2019, and the judgment was pronounced on 19.04.2022. In *Edwin Emeka Igbowke*⁴⁸ also, the period of incarceration was of just over four years. In any event, as none of the judgments cited by Mr. Bansal deal with the *SCLAC* judgment, I am of the view that the recent judgments of coordinate benches of this

⁴³ (2000) 53 DRJ 288

⁴⁴ Supra (Note 14)

⁴⁵ Supra (Note 16)

⁴⁶ Supra (Note 19)

⁴⁷ Supra (Note 20)

⁴⁸ Supra (Note 21)

Court, particularly in *Anil Kumar @ Nillu*⁴⁹, and *Ebera Nwanaforo*⁵⁰, squarely cover the present case.

21. The judgment in *Achint Navinbhai Patel*⁵¹, cited by Mr. Bansal, proceeds on the basis that the petitioners therein were themselves responsible, at least partially, for the delay in completion of the trial. Although the trial had been pending for eight years, the reasons noted by the Supreme Court⁵² included the actions of the accused by filing repeated petitions on interim matters, including bail applications, hearing of such applications at length, and deciding the same by elaborate judgments while staying further prosecution by the High Court, which contributed to the delay in conclusion of the trial. The Supreme Court noted its earlier judgments in *Special Courts Bill, 1978*, *In Re*⁵³, and in *Ganesh Narayan Hegde vs. S. Bangarappa*⁵⁴, and the facts of the case to come to the conclusion that dilatory tactics were being adopted by the accused. The bail application was, therefore, dismissed. In the present case, in contrast, there is no assertion or indication in the Status Report that the accused has delayed the proceedings of the trial. Therefore, no case is made out of dilatory tactics on the part of the applicant, which would furnish a ground to make an exception from the principles laid down in the *SCLAC* judgment, and followed by this Court *inter alia* in *Atul*

⁴⁹ Supra (Note 6)

⁵⁰ Supra (Note 37)

⁵¹ Supra (Note 13)

⁵² See paragraph 1.

⁵³ (1979) 1 SCC 380

⁵⁴ (1995) 4 SCC 41

*Aggarwal*⁵⁵, *Kartik Dangi*⁵⁶, *Anil Kumar alias Nillu*⁵⁷ and *Ebera Nwanaforo*⁵⁸.

22. As far as the legality of the sampling procedure is concerned, having regard to the judgment of this Court in *Anthony Umeh*⁵⁹, and the other judgments cited by Mr. Bansal on this point, I accept his contention that this question cannot be adjudicated at this stage, and it has to be determined at the end of the trial. However, to the extent that the prosecution relies upon the extra judicial confessions of the accused and of another co-accused, recorded under Section 67 of the Act, the judgment of the Supreme Court in *Tofan Singh*⁶⁰ holds that such confessions are inadmissible in evidence. This point has been considered in several judgments of this Court while granting bail in cases under the Act. Reference by way of example may be made to the order of this Court in *Amans Osaretin vs. Narcotics Control Bureau*⁶¹, and the judgment in *Ebera Nwanaforo*⁶².

23. The argument of Mr. Bansal that a different consideration would apply in the case of foreigners also does not commend to me. The judgments noted above in *Lambert Kroger*⁶³ and *Ebera Nwanaforo*⁶⁴ conclude this issue against the prosecution. In the

⁵⁵ Supra (Note 5)

⁵⁶ Supra (Note 28)

⁵⁷ Supra (Note 6)

⁵⁸ Supra (Note 37)

⁵⁹ Supra (Note 16)

⁶⁰ Supra (Note 8)

⁶¹ BAIL APPL. 1069/2021, decided 24.09.2021.

⁶² Supra (Note 37)

⁶³ Supra (Note 43)

⁶⁴ Supra (Note 37)

SCLAC judgment also, the Supreme Court expressly dealt with the question of grant of bail to foreigners accused under the Act. In any event, in the present case, the undisputed position is that, although the applicant himself is a foreign citizen, he is married to a citizen of India, and has a child who is also resident in New Delhi. I was informed during the course of hearing that his address in Delhi has also been verified by the IO. The applicant can, therefore, be seen to have roots in the society, despite his citizenship status.

24. For the reasons aforesaid, as the applicant has been in custody for eight years already, six PWs are yet to be examined, and on the consideration of the various factors noted above, including the provision of Section 37 of the Act, as interpreted in the above judgments of the Supreme Court and this Court, I am of the view that the applicant is entitled to be released on bail.

Conclusion

25. It is, therefore, directed that the applicant herein be admitted to bail in relation to Sessions Case No. 9080/2016, registered by the NCB under Sections 8(c), 20, 21, 22 and 23 of the Act, subject to the following conditions:-

A. The applicant will furnish a personal bond in the sum of ₹1 lakh, with two sureties in the like amount, to the satisfaction of the Special Court/Duty Magistrate.

B. The applicant's passport will be deposited with the Special Court.

C. The applicant will present himself at the office of the NCB every Monday at 11:00 am, and will be released within one hour after completion of the formalities. Exemption from this requirement may be granted by the Special Court in exceptional circumstances.

D. The Special Court will seek a certificate of assurance from the High Commission of Nigeria, New Delhi, that the accused shall not leave the country till the trial is concluded, and shall appear before the Special Court on each and every date, unless exempted by the Special Court in exceptional circumstances. The applicant will not be released on bail in the absence of such a certificate of assurance.

E. The applicant will reside at the address mentioned in the chargesheet which has been verified by the IO. In the event of any change in his address, the applicant will give prior information of the same to the IO and the Special Court.

F. The applicant will give his mobile number to the IO, and ensure that the mobile number is kept in working condition, and is operational at all times.

G. The applicant will drop a pin on Google Maps to ensure that his exact location is available with the IO at all times.

H. The applicant will not tamper with the evidence, directly or indirectly, in any manner.

I. The applicant will not contact any of the prosecution witnesses or act in any other manner prejudicial to the trial.

J. In the event any further offence is registered against the applicant during the period he is out on bail, the NCB is at liberty to apply to the Special Court for cancellation of the bail granted to the applicant.

K. The Special Court will also be at liberty to cancel the bail of the applicant on account of any violation of the conditions laid down in this order.

26. The Special Court is directed to conclude the trial as expeditiously as possible and practicable, and preferably by 31.12.2022.

27. It is made clear that the observations made hereinabove are only for the purposes of disposal of the present bail application, and will not prejudice the parties at trial.

28. The application stands disposed of with the aforesaid directions.

29. A copy of this order be communicated electronically forthwith to the concerned Jail Superintendent for information.

PRATEEK JALAN, J

JUNE 13, 2022
'Bhupi/Faisal'