

Ude Okpani Ukegbu vs Narcotic Control Bureau on 21 March, 2024

Author: Amit Sharma

Bench: Amit Sharma

\$~7

*

+

IN THE HIGH COURT OF DELHI AT NEW DELHI
BAIL APPLN. 369/2022
UDE OKPANI UKEGBU

NARCOTIC CONTROL BUREAU

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

% 21.03.2024

1. The present application under Section 439 of the CrPC seeks regular bail in case No. VIII/10/DZU/2016 under Section 21/22/25A/29 of the NDPS Act registered by NCB .

2. Briefly stated, the case of the prosecution is that on 16.06.2016 information was received regarding involvement of the applicant and the other co-accused persons in drug dealing. Based on the said information, a raid was conducted at the house where the accused persons were staying. Two polythene packets were found from the room of co-accused Martins Akurasi. The said packets contained heroine weighing 421 grams. Thereafter, 560 grams of methaqualone was recovered from the applicant's room. Nothing incriminating was recovered from the room of co-accused This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 12:31:47 Nnamdi Valentine. Statement of the applicant was recorded under Section 67 of the NDPS Act, wherein he admitted the recovery.

3. Learned counsel appearing on behalf of the applicant submits that the latter has been in judicial custody for more than seven years, i.e., for more than half the minimum sentence provided for under Sections 21/22/25A/29 of the NDPS Act. Therefore, it is submitted that in terms of the judgment of the Hon'ble Supreme Court in Supreme Court Legal Aid Committee (Representing

Undertrial Prisoners) v. Union of India, 1994 6 SCC 731, the applicant is entitled to bail. It is further pointed out that based on the said judgment, co-accused Martins Akurasi has been granted bail by the learned Special Judge, vide order dated 21.07.2023.

4. Per contra, learned APP for the State opposes the present application and submits that contraband of a commercial quantity has been recovered from the applicant, and therefore, the twin conditions contained in Section 37 of the NDPS Act would have to be satisfied. It is further submitted that the applicant has been previously convicted in another case as well.

5. Heard learned counsel for the parties and perused the record.

6. It is an admitted position that the applicant was arrested on 17.06.2016. A perusal of the nominal roll dated 30.11.2023 received from the concerned Jail Superintendent reflects that the applicant has been in custody for 07 years 05 months and 11 days.

7. The Hon'ble Supreme Court, in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, 1994 6 SCC 731, has directed as under:

"(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount."

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 12:31:47 lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount."

8. It is pertinent to note that a coordinate bench of this Court in Anil Kumar @ Nillu v. State, 2022 SCC Online Del 778, while following the judgment of the Hon'ble Supreme Court in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) (supra) observed that while remaining cognizant of the impact that drugs have on society, Courts must also remain conscious of the fact that prolonged deprivation of one's personal liberty, without the assurance of a speedy trial runs contrary to principles of the Constitution. It was held as under:

"14. In view of the above, this Court believes that achievement of universal equality before the law requires the tenets of personal liberty to be applicable to all similarly circumstanced individuals and must not be restricted unless according to procedure established by law. This Court does not find any weight in the submission of the learned APP that the aforementioned judgment of the Supreme Court does not apply to the instant case and that the judgment of this Court in Atul Agarwal v. Directorate of Revenue Intelligence (supra) must be referred to a larger Bench due to the incorrect application of the Supreme Court's judgment. Furthermore, in Atul Agarwal v. Directorate of Revenue Intelligence (supra), this Court had not solely granted bail on the footing of the inordinate delay in trial, but had also considered the twin

requirements stipulated under Section 37 of the NDPS Act. Therefore, this Court is of the opinion that the Petitioner herein is squarely covered by judgment of the Supreme Court and is entitled to release on account of inordinate delay in trial and prolonged judicial custody.

xxx

16. Therefore, fair, just and reasonable procedure is implicit in Article 21 and it creates a right in the accused to be tried speedily. This Court has consistently observed that while Courts must remain cognizant of the deleterious impact of drugs on This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 12:31:48 society, it is also important to keep in mind that deprivation of personal liberty without the assurance of speedy trial contravenes the principles enshrined in our Constitution. In the instant case, the Petitioner has been incarcerated for almost eight years now, i.e. since 27.03.2014, for an offence that is punishable with a minimum imprisonment of ten years. This is an egregious violation of an accused's right to personal liberty and right to speedy trial as, in the off-chance that the Petitioner is acquitted, it would entail an irretrievable loss of eight years of his life that cannot be compensated. Whether or not the Petitioner played an active role in the commission of the offence of drug trafficking and supply is a matter of trial and cannot justify the prolonged incarceration of the Petitioner."

9. It is pertinent to note that the decision in Anil Kumar @ Nillu (supra) was challenged in appeal before the Hon'ble Supreme Court and vide order dated 14.10.2022, SLP (Criminal) 25615/2022, was dismissed.

10. The Hon'ble Supreme Court, in Union of India v. K.A. Najeeb, (2021) 3 SCC 713 took note of the law laid down in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) (supra) and observed that if a timely trial is not possible, courts are ordinarily obligated to release the undertrial on bail and statutory restrictions do not exclude the discretion of constitutional courts to grant bail on grounds of violation of fundamental rights enshrined in Part III of the Constitution. It was held as under:

"15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India [Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, (1994) 6 SCC 731, para 15 : 1995 SCC (Cri) 39] , it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 12:31:49 the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.

xxx

17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

18. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected."

11. More recently, vide order dated 13.07.2023 passed in Special Leave to Appeal (Crl.) 4169/2023 titled Rabi Prakash v. The State of Orissa, This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 12:31:50 the Hon'ble Supreme Court held that prolonged incarceration of a person overrides the statutory restriction contained in Section 37(1)(b)(ii) of the NDPS Act. It was held as under:

"2. The prosecution case appears to be that the police party while on patrolling duty on 02.10.2019 at about 12.30 p.m. on Nandapur- Semiliguda road MDR-55, spotted one full body twelve wheeler Truck (Eicher) bearing No.EB-13-BD-5753 coming from Nandapur side at a high speed and accordingly they chased and detained the truck at Bodenga Chhak and found three persons boarded in the said truck including the driver. Eventually, 247 kg. Ganja was recovered from the truck. The petitioner was one of the occupants of the truck and was arrested at the spot. He has been in custody for more than three and a half years. There are no criminal antecedents against the petitioner.

3. We are informed that the trial has commenced but only 1 out of the 19 witnesses has been examined. The conclusion of trial will, thus, take some more time.

4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent - State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act."

(emphasis supplied) A coordinate bench of this Court, in *Soletto Justniano Fernando Tito v. Narcotics Control Bureau*, 2023:DHC:5191, while placing reliance on the aforesaid judgment of the Hon'ble Supreme Court in *Rabi Prakash* (supra), granted bail to the applicant therein, in a case under Sections 21/23/29 of the NDPS Act, involving recovery of a commercial quantity on This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 12:31:51 the ground that the said applicant has been in custody for a duration of more than 06 years.

12. The present applicant was arrested on 17.06.2016. A perusal of the nominal roll dated 30.11.2023 reflects that the applicant has been in custody for 07 years 05 months and 11 days. The applicant has been chargesheeted for offences related to commercial quantity for which the minimum sentence provided by the NDPS Act is ten years, and will therefore be covered under direction (iii) in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) (supra), which is as under:

"(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two

sureties for like amount."

Sections 21 and 22 of the NDPS Act provide for a punishment of rigorous imprisonment for a term which shall not be less than 10 years but which may extend to twenty years and a fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. Since, in the present case, the applicant has been in custody for more than 05 years, his case is squarely covered by the aforesaid judgment of the Hon'ble Supreme Court. As per the nominal roll, the applicant has been involved in a previous case in which he was convicted. However, the said case was not in relation to the NDPS Act. Co-accused martins Akurasi has also been released on bail by the learned Special Court on similar grounds.

13. In view of the facts and circumstances of the present case, the application is allowed and the applicant is admitted to bail upon his This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 12:31:53 furnishing a personal bond in the sum of Rs. 1,00,000/- alongwith two sureties of like amount to the satisfaction of the learned Trial Court/Link Court, further subject to the following conditions:

- i. The applicant shall deposit his passport (if not already seized) with the Court of the learned Special Judge, NDPS, New Delhi.
- ii. The applicant, shall on being released on bail present himself at the office of the NCB, once in a week, on every Friday at 11:00 AM, unless leave of absence is obtained in advance from the learned Special Judge concerned;
- iii. The applicant shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;
- iv. The applicant shall not leave India without prior permission of the learned Trial Court.
- v. The applicant shall intimate the learned Trial Court by way of an affidavit and to the Investigating Officer regarding any change in residential address.
- vi. The applicant shall appear before the learned Trial Court as and when the matter is taken up for hearing.
- vii. The applicant is directed to give his mobile number to the Investigating Officer and keep it operational at all times. He shall not switch off or change the mobile number without prior information to the Investigating Officer.
- viii. The bail granted to the applicant shall be cancelled forthwith if any of the above conditions are violated or a case for cancellation of bail is otherwise made out.

This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 12:31:56

14. The application is allowed and disposed of accordingly.
15. Pending application(s), if any, also stand disposed of.
16. Needless to state that nothing stated hereinabove is an opinion on the merits of the case.
17. Copy of the order be sent to the concerned Jail Superintendent for necessary information and compliance.
18. Order be uploaded on the website of this court forthwith.

AMIT SHARMA, J MARCH 21, 2024/bsr This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 22/03/2024 at 12:31:56