

Kapil Alias Vicky vs State Nct Of Delhi on 20 April, 2023

Author: Jasmeet Singh

Bench: Jasmeet Singh

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IN THE HIGH COURT OF DELHI AT NEW DELHI
BAIL APPLN. 608/2023
KAPIL ALIAS VICKY

Through:

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Mr Rahul Sharma and Mr A
Maheshwari, Advs.

versus

STATE NCT OF DELHI

Through:

.....
Mr Ajay Vikram Singh, AP
SI Tarun Khatri, PS-Pasc

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH
ORDER

% 20.04.2023

1. This is an application seeking grant of regular bail in FIR No. 325/2017 dated 15.07.2017, under Sections 20/61/85 NDPS Act, registered at Police Station - Minawali Nagar (Outer).

2. In the present case, the applicant was arrested with 104 kgs of ganja in his possession. The applicant has been in custody since 15.07.2017.

3. It is stated by Mr Sharma, learned counsel for the applicant that the applicant is squarely covered by the judgment of the Hon'ble Supreme Court in case titled MOHD MUSLIM @ HUSSAIN v. STATE (NCT OF DELHI) passed in SPECIAL LEAVE PETITION (CRL.) NO(S). 915 OF 2023 decided on 28.03.2023. In the present case, the applicant has been in custody for more than 5 ½ years and is entitled to be released on bail on the ground of having suffered incarceration for more than half of the minimum sentence.

4. The Trial Court in the order dated 07.01.2023 has dismissed the bail application of the applicant on the basis of the following reasoning:

"7. In the present case, the present accused was arrested on 15.07.2017 and charge were framed on 07.03.2018. Thereafter, the complainant was examined substantially and two other formal witnesses were examined. The last witness was examined on 05.01.2019 and thereafter, the matter was posted for further evidence on 07.03.2019. Thereafter, application for amendment of charge was filed. Ld Presiding Officer retired on 31.08.2019 and thereafter Court remained vacant. In the meantime,

proceedings u/s 82 of Cr.P.C was undertaken against the co-accused Vivek and ultimately he was arrested and supplementary charge-sheet was filed on 21.11.2019 against the co accused Vivek and thus during this period no witness was examined. In the month of January, 2020 the Ld Predecessor Court joined and thereafter, matter was posted for arguments on the point of charge and thereafter, there was a lockdown remained for about two years from the month of March, 2020 till February 2022. In the meantime, vide order dated 20.04.2022, Ld Predecessor Court was transferred and this Court remained vacant. Against the co accused, charge was framed by this Court on 01.08.2022. Thereafter, matter was posted for PE. In the meantime, bail application filed on behalf of the present applicant/ accused Kapil on the ground of delay in trial was dismissed on 04.07.2022 with the observation that there is a Bar u/s 37 of NDPS Act applicable in the present case as the contraband recovered from the accused / applicant is of commercial quantity i.e. 104 kg of Ganja, that for about two years during the pandemic period the witnesses could not be examined during the said period because of the pandemic. Thereafter, 2 witnesses have already been examined. There is no material change in the circumstances after disposal of the bail application of present applicant on 04.07.2022 except that the charge has been framed against the co accused and two witnesses have already been examined and this change in the circumstances cannot be said to be in favour of the applicant/accused. The recovered contraband in the present case is of huge quantity of 104 kg of Ganja. The bar u/s 37 of NDPS Act is applicable qua the twin condition while granting the bail and at this stage it cannot be said that there is no possibility of accused not being held guilty in the present case. The case laws relied upon on behalf of applicant/ accused, with due respect, has no application to the facts and circumstances of present case as in the present case the delay was beyond control because of the act of the God due to COVID-19 pandemic. So far as seal impression is concerned firstly the thread bare appreciation of the evidence is not permissible under the law while deciding the bail application and moreso, in the present case, even the seal of GS was found at the time of proceedings u/s 52 A of NDPS Act and therefore, at this stage, no opinion on merit can be given regarding the seal impression which will amount pre judging of the case before the trial.

Therefore, considering the nature of allegations against the applicant/accused and that the recovered contraband is of commercial quantity, that the applicant/ accused was found in possession of contraband, therefore, without making any comment upon the merit of the case, this Court is of the opinion that no ground for bail is made out at this stage. Hence, the bail application is dismissed being without any merit."

5. Mr Singh, learned APP states that the matter is at the fag end. He states that only 9 witnesses have been cited by the prosecution out of which 7 have already been examined.

6. I have heard learned counsel for the parties.

7. The Hon'ble Supreme Court in MOHD MUSLIM @ HUSSAIN (supra) has observed as under:

"19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in *Union of India v. Rattan Malik*). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. *Satender Kumar Antil supra*). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.

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23. There is a further danger of the prisoner turning to crime, "as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal" (also see Donald Clemmer's „*The Prison Community* published in 1940). Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata: immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials - especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily.

24. For the above reasons, the appellant is directed to be enlarged on bail, subject to such conditions as the trial court may impose. The appeal is allowed, in the above terms. No costs."

8. A Coordinate Bench of this Court in *Abdul Rehman @ Dablu v. NCB* in Bail Application No. 1716/2022 decided on 30.08.2022 has held as under:

"11. Undoubtedly, the offence alleged against the applicant is grave. However, it cannot be overlooked that in view of the verdict of the Hon ble Supreme Court in "Supreme Court Legal Aid Committee representing Undertrial Prisoners Vs. Union of India" (1994) 6 Supreme Court Cases 731 as adhered to and followed by the Coordinate Bench of this Court in Atul Aggarwal vs. Directorate of Revenue Intelligence (2021) SCC OnLine Del 5489, Anil Kumar @ Nillu vs. State in Bail Appln 1724/2021 and the verdicts of this Court in Bail Appln. 3705/2020 and Bail Appln. 4187/2020 in Ebera Nwanaforo and Frank Vitus vs. Narcotics Control Bureau decided on 31.05.2022, and the verdict of this Court dated 26.08.2022 in BAIL APPLN. 1444/2022 in A. Vennugopal Reddy vs. State of NCT of Delhi, the applicant, in terms of paragraph 15(iii) of the verdict of the Hon ble Supreme Court in "Supreme Court Legal Aid Committee representing Undertrial Prisoners (Supra), which paragraph 15(iii) reads to the effect:-

"15....

(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.

....."

falls in the category of an under trial incarcerated for a period of a minimum of five years (and in relation to which the applicant herein is already incarcerated for more than six years now), and as a consequence thereof, the applicant, in terms of paragraph 15(iii) of the of the verdict of the Hon ble Supreme Court in "Supreme Court Legal Aid Committee representing Undertrial Prisoners (Supra), is entitled to be released on bail on filing a bail bond in the sum of Rs.1,00,000/- with two sureties of the like amount with further observations that the directives in paragraph 15(iii) of the said verdict of the Hon ble Supreme Court reproduced hereinabove, being subject to the general conditions, which read to the effect:-

"(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."

9. Mr Singh, learned APP states that the reasons given by the trial Court are well founded which shows that there is no delay in prosecuting the FIR. He further states that Section 436-A Cr.P.C is applicable only after having undergone one half of the maximum period of imprisonment. He states that in the present case, the FIR is under Sections 20/61/85 NDPS Act and the maximum punishment prescribed under the said section is 20 years.

10. I have heard learned counsel for the parties.

11. The Hon'ble Supreme Court in somewhat similar circumstances, has emphasised the need for speedy trial. The Hon'ble Supreme Court in MOHD MUSLIM @ HUSSAIN (supra) has in para 19 observed that a plain and literal interpretation of the conditions under Section 37 NDPS Act would effectively exclude grant of bail altogether, resulting in punitive detention.

12. The applicant has undergone more than half of the minimum sentence of 10 years as undertrial prisoner. The reliance of the applicant on the judgment of 'Mohd. Muslim (supra) and Abdul

Rehman (supra)' is well placed. There are also prima facie grounds being violation of Section 42 of NDPS Act which may result in acquittal of the applicant.

13. In the present case, the applicant has undergone more than 5 1/2 years. The applicant continues to be an under trial prisoner and the prosecution witnesses are still being examined. Thereafter, statement of the accused under Section 313 Cr.P.C is to be recorded and evidence of the defence will be lead. Even on merits, the FSL report states that there is violation of Section 42 of the NDPS Act as one of the seal of the samples is tampered. However, Mr Singh, learned APP states that the seal of the SHO in one of the samples which was opened before the learned MM was intact.

14. These are issues which are to be adjudicated upon before the trial Court. However, the applicant needs to satisfy the triple test viz. flight risk; influencing any witness and tampering with evidence. In my view, the same can be taken care of by imposing stringent bail conditions upon the applicant.

15. For the aforesaid reasons, the applicant is directed to be released on bail in FIR No. 325/2017 dated 15.07.2017, under Sections 20/61/85 NDPS Act, registered at Police Station - Minawali Nagar (Outer), subject to the bail conditions as per Supreme Court Legal Aid Committee representing Undertrial Prisoners Vs. Union of India" (1994) 6 Supreme Court Cases 731:

(a) The applicant shall furnish a personal bond in the sum of Rs. 1,00,000/-

each with 02 sureties in the like amount, to the satisfaction of the Trial Court;

(b) The applicant shall not leave the country and if the applicant has a passport, he shall surrender the same before the Trial Court;

(c) The applicant shall appear before the trial Court on every date of hearing;

(d) The applicant shall furnish to the IO/SHO concerned his cellphone number on which the applicant may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;

(e) The applicant shall drop a Google pin location from his mobile phone to the IO which shall be kept alive;

(f) The applicant shall not indulge in any act or omission that is unlawful, illegal or that would prejudice the proceedings in pending cases, if any;

(g) The applicant or his family members/relatives/friends will not tamper or influence any of the witnesses and/or evidence in anyway.

16. Nothing stated hereinabove shall tantamount to an expression of opinion on the merits of the case.

17. The application is disposed of accordingly.

Copy of this order be given dasti under the signatures of Court Master/Private Secretary.

JASMEET SINGH, J APRIL 20, 2023/sr [Click here to check corrigendum, if any](#)