

Edith Namirembe vs Customs on 9 September, 2024

Author: Manoj Kumar Ohri

Bench: Manoj Kumar Ohri

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IN THE HIGH COURT OF DELHI AT NEW DELHI
BAIL APPLN. 3267/2023

EDITH NAMIREMBE

Through:

CUSTOMS

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

% 09.09.2024

1. By way of present bail application, the applicant seeks regular bail in SC No. 899/2022 registered under Sections 8/21/23/28 of the NDPS Act, 1985.

2. Learned counsel for the applicant submits that the applicant is in custody since 15.05.2022 and though the charges were framed on 28.04.2023 under Sections 21(c)/23(c) NDPS Act, the prosecution has examined only one witness till date out of a total of 15 witnesses cited.

On merits, it is stated that there is a violation of procedure specified under the NDPS Act, inasmuch as, the recovery was effected from 210 buttons affixed on 5 kurtas, containing a total of 1877 grams of cocaine powder. He contends that instead of drawing of samples in terms of Standing Order 1/88, the contents of all the buttons were emptied at one 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 21/09/2024 at 05:29:49 place and one sample was drawn from it. He further submits that there is also a delay of 1 month in moving the application for drawing the said samples before the concerned Magistrate.

3. The application is resisted by the learned counsel for Customs. He submits that the applicant is a Ugandan national who was apprehended at the airport on the basis of secret information. He further

submits that the seized quantity of cocaine is commercial in nature and therefore, the embargo of Section 37 of the NDPS Act applies. Insofar as the contention on the aspect of drawing of sample is concerned, learned counsel refers to the decision of a Coordinate Bench of this Court in the case of *Quentin Decon v. Customs* reported as (2023) SCC OnLine Del 3329, the SLP against which also stands dismissed.

4. I have heard the learned counsels for the parties and perused the material on record.

5. At this stage, it is apposite for the Court to refer to a decision of the Supreme Court in *Union of India v. K.A. Najeeb* reported as (2021) 3 SCC 713, wherein it was stated 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 the grounds of violation of Fundamental Rights enshrined in Part III of the Constitution of India. While the said judgement was passed in the context of UAPA, the said observations merit mention:-

"xxx

12. Even in the case of special legislations like the Terrorist and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act") which too have somewhat rigorous conditions for grant of bail, 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 21/09/2024 at 05:29:49 this Court in *Paramjit Singh v. State (NCT of Delhi)*, *Babba v. State of Maharashtra* and *Umarmia v. State of Gujarat* enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians. xxx

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)*, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless 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 This is a digitally signed order.

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6. While considering a case where the accused had undergone custody of more than two years, the Supreme Court in *Jitendra Jain v. Narcotics Control Bureau* reported as 2022 SCC OnLine SC 2021, observed as under:-

"xxx

3. Though it is a case of commercial quantity and allegations levelled against the petitioner are serious in nature, but having regard to the fact that he is in custody for 2 years and conclusion of trial will take time, we are inclined to release the petitioner on bail.

4. The petitioner is , accordingly, ordered to be released on bail, subject to his furnishing bail bonds to the satisfaction of trial court.

xxx"

7. Again in *Rabi Prakash v. State of Odisha* reported as 2023 SCC OnLine SC 1109, where the accused had remained incarcerated for more than three and a half years, the Supreme Court, while releasing the applicant on bail, observed that:-

"xxx

4... 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.

xxx

6. Consequently, while directing that the petitioner shall be This is a digitally signed order.

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xxx"

8. More recently, in Man Mandal and Anr. v. State of West Bengal reported as 2023 SCC OnLine SC 1868, while taking into account continued custody of more than two years, the accused was granted bail. The relevant extract of observations is extracted hereunder:-

"xxx

5. Learned counsel appearing for the State submitted that in view of the statutory restrictions under Section 37 of the NDPS Act and the quantity being commercial in nature, the present special leave needs to be dismissed.

6. Taking into consideration the fact that the petitioners have been incarcerated for a period of almost two years and the trial is not likely to be taken up for hearing in the immediate near future, we are inclined to grant bail to the petitioners.

7. The petitioners are directed to be released on bail in connection with aforesaid FIR, on such terms and conditions as may be imposed by the Trial Court.

xxx"

9. Taking cue from the legal position enumerated hereinabove, Coordinate Benches of this Court, after due consideration of the facts including the fact that the trial is likely to take time, have released the accused on bail. Positive reference in this regard may be made to the decisions in Sachin Arora v. State Govt. of NCT of Delhi reported as 2023 SCC OnLine Del 4941 and Vishwajeet Singh v. State (NCT of Delhi) reported as 2024 SCC OnLine Del 1284.

On a specific query as to why there is delay in examination of witnesses and for the past one and a half year, only one witness has been This is a digitally signed order.

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10. Notably, in cases involving commercial quantity, rigors of section 37 have to be met. The Section 37 states as under:--

"37. Offences to be cognizable and non-bailable.-(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974) -

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [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 subsection (1) are in addition to the limitations under the Criminal Procedure Code, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]"

11. Considering the aforesaid legal position and especially the fact that the applicant has been in custody since 15.05.2022 and the further fact that the charges were framed as far back as on 28.04.2023 but for the last one and a half year, only one witness has been examined and that there are 14 more witnesses remaining to be examined as well as considering that the parameters of Section 37 of the NDPS Act are also being met in the present case, this Court deems it fit to release the applicant on regular bail, subject to her furnishing a personal bond in the sum of Rs.1,00,000/- with one This is a digitally signed order.

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i) The applicant shall not leave the NCR without prior permission of the concerned Court.

ii) The applicant shall provide her mobile number to the Investigating Officer on which she will remain available during the pendency of the trial.

iii) In case of change of residential address or contact details, the applicant shall promptly inform the same to the concerned Investigating Officer as well as to the

concerned Court.

iv) The applicant shall not directly/indirectly try to get in touch with the complainant or any other prosecution witnesses or tamper with the evidence.

v) The applicant shall regularly appear before the concerned Court during the pendency of the trial.

12. The bail application is disposed of in the above terms.

13. Copy of the order be communicated to the concerned Jail Superintendent for information and necessary compliance.

14. Needless to state that the observations made hereinabove are only for the purpose of disposal of present bail application and which shall not have a bearing on the trial of the case.

MANOJ KUMAR OHRI, J SEPTEMBER 9, 2024 ga This is a digitally signed order.

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