

## Moussa Zie vs State Nct Of Delhi on 7 February, 2024

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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BAIL APPLN. 3533/2022

MOUSSA ZIE

Thr

versus

STATE NCT OF DELHI

Through:

CORAM:

HON'BLE MR. JUSTICE AMIT MAHAJAN  
ORDER

% 07.02.2024 CRL.M.A. 24634/2022 (exemption from filing certified copy of the annexures)

1. Exemption allowed, subject to all just exceptions.

2. The application stands disposed of.

3. The present application is filed under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973 ('CrPC') and Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act'), seeking grant of regular bail in FIR No. 0005/2019 dated 08.01.2019, for offence under Section 21 of the NDPS Act, registered at Police Station Special Cell (SB). Charge sheet has been filed against the applicant under Sections 21/29 of the NDPS Act, Section 14 of the Foreigners Act, 1946 and Section 468 of the Indian Penal Code, 1860.

4. It is alleged that on 08.01.2019, on the basis of secret information, one Afghani National, namely Asadullah, was 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 07/02/2024 at 23:17:30 apprehended and 6 kg Heroin was recovered from him. During interrogation, the co-accused Asadullah disclosed that he had supplied a consignment of Heroin to the applicant, who would be coming to return the same on the next day, since he did not find the quality of the contraband to be satisfactory. The applicant was thereafter apprehended on 09.01.2019, and was found to be carrying a bag containing 2 kg of Heroin.

5. The learned counsel for the applicant submits that the applicant is a foreign national and has been in incarceration for a period of more than five years. He submits that only five out of the sixteen witnesses have been examined till now.

6. He submits that the applicant has been falsely implicated on the disclosure statement of the co-accused person, and the recovery of the contraband. He states that the contraband was planted on the applicant.

7. He further submits that there is a violation of the principles of Section 50 as well as Section 52A of the NDPS Act. He submits that the search of the applicant was not carried out in the presence of the Magistrate, and the samples were also drawn at the spot itself.

8. He relies upon the judgment of the Hon'ble Apex Court in the case of Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India and Others : (1994) 6 SCC 731.

9. He further submits that in such circumstances, the bar of Section 37 of the NDPS Act, is not applicable. In this regard, he places reliance upon the judgment in the case of Rabi Prakash v. State of Odisha : 2023 SCC OnLine SC 1109, where the Hon'ble Apex Court had held as under:

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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."

10. It is important to note that the Hon'ble Apex Court, in the case of Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India and Others (supra), has specifically observed that where the minimum sentence is prescribed as ten years, the accused is entitled to be released on bail if they have spent more than five years in jail. The relevant excerpt of the said judgment is reproduced hereunder:

"(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."

11. It is also not disputed that the petitioner has no antecedents, however, keeping in mind the fact that the applicant is a foreigner, the appropriate conditions have to be imposed while granting bail, as stipulated by the Hon'ble Apex Court in the case of Supreme Court Legal Aid Committee (Representing This is a digitally signed order.

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12. The applicant is, therefore, directed to be released on bail on furnishing a personal bond for a sum of 1,00,000/- with two sureties of the like amount, subject to the satisfaction of the learned Trial Court, on the following conditions:

a. The applicant shall join and cooperate with the investigation as and when directed by the IO; b. The applicant will not leave the boundaries of the National Capital Region without prior permission of the Court, and will deposit his passport with the learned Trial Court; c. The applicant shall provide the details of his permanent address to the learned Trial Court and intimate the Court, by way of an affidavit, as well as the IO about any change in his residential address;

d. The applicant shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times;

e. The applicant shall appear before the learned Trial Court on every date of hearing;

f. The applicant shall, after his release, appear before the concerned SHO on every Friday at 5 PM.

g. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;

13. The learned Trial Court is directed to ensure that the certificate of assurance, from the Embassy/ High Commission of the applicant's native country, that is, Côte d'Ivoire, that the applicant shall not leave the country and shall appear before the learned Trial Court as and when required, is placed on record.

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14. In the event of there being any FIR/DD entry / complaint lodged against the applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

15. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the Trial and also not be taken as an expression of opinion on the merits of the case.

16. The bail application is allowed in the aforementioned terms.

AMIT MAHAJAN, J FEBRUARY 7, 2024 'KDK' This is a digitally signed order.

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