

## Babli vs State Of Nct Of Delhi on 4 July, 2024

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\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ BAIL APPLN. 1708/2024  
BABLI

Through:

versus  
STATE OF NCT OF DELHI  
Through:

CORAM:  
HON'BLE MR. JUSTICE AMIT MAHAJAN  
ORDER

% 04.07.2024 CRL.M.A. 14772/2024 (for exemption)

1. Exemptions 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') seeking regular bail in FIR No. 154/2021 dated 05.08.2021, registered at Police Station Crime Branch, for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act'). Chargesheet was filed against the applicant for the offence under Sections 20/25/29 of the NDPS Act.
4. It is alleged that on 05.08.2021, at about 04:00 PM, secret information was received by the concerned police officials that a 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 19/07/2024 at 21:23:24 person named Dinesh (co-accused) would be coming to supply Ganja to an unknown person after 2-3 hours near Wazirabad Road, Delhi under the T-Point Gokulpuri Flyover. A raiding team was formed and dispatched to the spot.

5. At approximately 6:30 PM, a silver-color Swift Dzire car stopped under the T-Point Gokulpuri flyover. It is alleged that co-accused Dinesh was seated in the rear set of the car and the applicant

was driving the same. It is alleged that co-accused Dinesh got out of the car but suspecting the presence of police, attempted to flee in the same car. Upon the same, by around 6:45 PM, the police officers overpowered the accused persons and apprehended them.

6. It is alleged that around 7:30 PM, the car was thoroughly searched and two white plastic bags, containing 20 Kg Ganja and 10 Kg Ganja respectively, were recovered from the rear seat of the car. The Swift Dezire Car was also seized.

7. It is alleged that the accused persons in their respective disclosure statements disclosed that they had transported Ganja 3-4 times to Delhi previously.

8. On 11.08.2021, an application was filed under Section 52A of the NDPS Act by the prosecution for drawing the sample. The same was allowed by the learned Magistrate on 12.08.2021, whereafter the seized and sealed Exhibits of the case were submitted to FSL Rohini on 19.08.2021.

9. Chargesheet was filed against the applicant for the offences under Sections 20/25/29 of the NDPS Act.

10. The applicant's bail application was dismissed by the learned Trial Court vide order dated 04.01.2024 due to the embargo under Section 37 of the NDPS Act.

11. The learned counsel for the applicant submits that the This is a digitally signed order.

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12. He further submits that ingredients of section 25 of NDPS Act are prima facie not attracted against the applicant as the applicant did not permit the co-accused Dinesh to use the conveyance to commit the offences under NDPS Act.

13. He submits that no incriminating items were recovered from the applicant during his personal search. He submits that the alleged contraband was recovered from the car.

14. He further submits that the search and seizure has been affected at 7:30PM after a search conducted at 7:30 PM, that is, after sunset, which is in contravention of Section 42 of the NDPS Act.

15. He submits that the application under Section 52A of the NDPS Act was preferred after more than 72 hours of the seizure whereby Standing Order No.1/88 has been violated in the present case.

16. He submits that there are no documents or evidence that point towards the applicant having knowledge of the contraband. He submits that mere recovery of the contraband from the car driven by the applicant will not amount to conscious possession.

17. He also contends that the purported search was carried out in the absence of independent witnesses. He submits that the same creates a doubt regarding the credibility of the seizure.

18. He submits that the applicant is in custody since 06.08.2021 and the trial is at the stage of examination of prosecution witness. He submits only 5 witnesses have been examined so far out of the 16 prosecution witnesses. He furthermore submits that the trial is likely to take time, and in such a case, the applicant should not be allowed to suffer.

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19. Per contra, the learned Additional Public Prosecutor for the State submits that the learned Trial Court has rightly dismissed the applicant's bail application

20. He submits that the FSL Report has confirmed the authenticity of the seized Ganja.

21. He submits that the applicant was operating with the co-accused Dinesh as a part of a well-organized drug syndicate and was actively involved in procuring drugs from the state of Uttar Pradesh to neighbouring states, including Delhi.

22. He submits that it was found during investigation that the Swift Dezire car that was seized was bought by the applicant in the name of his brother-in-law.

23. He submits that the procedural anomalies in the seizure, if any, will be tested during the course of the trial.

## ANALYSIS

24. It is the case of the prosecution that the contraband was seized from the car in which the accused persons were travelling. It is alleged that co-accused Dinesh disclosed that he had convinced the applicant to transport Ganja by car and the applicant was given 2000/- for one round of the car. He also disclosed that he had already transported the contraband 3-4 times with the help of the applicant to Delhi.

25. It is argued by the learned counsel for the applicant that the applicant was not named in the secret information and he had no knowledge of the contraband. It is stated that there is no material on record that establishes the applicant's knowledge of the contraband apart from the disclosure of the co-accused Dinesh.

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26. It is argued that the applicant has been implicated in the present case merely because he was accompanying the co-accused in the car.

27. It is relevant to note that the applicant was admittedly driving the car while the co-accused Dinesh was sitting alone in the rear seat. The plastic bags containing the contraband were recovered from the rear seat of the car where the co-accused Dinesh was seated.

28. A Coordinate Bench of this Court in the case of Dilbagh Singh v. D.R.I. : 2009 SCC OnLine Del 1424 had discharged the accused therein by appreciating that when the contraband was delivered to the co-accused person who was seated in the rear seat of the car, it could not be said that the accused person who was seated in the front of the car had conscious possession thereof. The relevant portion of the aforesaid judgment is reproduced hereunder:

"9.... The petitioner admittedly was driving the said car but remained in the front seat while co-accused Williams was in the rear seat. The facts as narrated by the prosecution show that Rohit Goel who drove the Opel Corsa car dropped the two black coloured polythene carry bags in the rear seat of the Tata Indica car. The parcels therefore were not delivered to the petitioner who was sitting on the front seat of the Tata Indica car. It is co-accused Williams who was in the rear seat. In the circumstances, it cannot be said that the petitioner was in possession of the drug in question and clearly he was not in conscious possession thereof. Soon thereafter the team of DRI officers intercepted both cars. The Tata Indica car was stopped even before it moved. Thereafter, the petitioner could not be said to have even transported the drug.

10....Clearly, on the facts as narrated the petitioner was not in possession of the narcotic drug. The petitioner was not in any physical contact with the bags containing the drug in question. It was his co-accused passenger, Williams, who was sitting in the rear seat. The two polythene bags containing 14.871 kgs of heroin were dropped off on the rear seat. The Petitioner therefore could not have been proceeded 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 19/07/2024 at 21:23:26 against for the offences under Section 21 or Section 29 of the NDPS Act."

29. In the present case also, the applicant was not in any physical contact with the bags and the role attributed to him is of a driver. The only factor used by the prosecution to establish the applicant's knowledge of the fact that Ganja was being transported in the car is his disclosure statement and the disclosure statement of the co-accused Dinesh. While the veracity of the disclosure statements is to

be tested at the time of the trial, this Court cannot lose sight of the decision of the Hon'ble Supreme Court in Tofan Singh v. State of Tamil Nadu :

(2021) 4 SCC 1, wherein it was held that a disclosure statement made under Section 67 of the NDPS Act is impermissible as evidence without corroboration.

30. It is the case of the prosecution that the applicant was paid a sum of 2,000/- by the co-accused Dinesh for every trip the co-accused used to make for alleged delivery of the contraband. The car in which the contraband was allegedly carried belonged to the applicant. In such circumstances, whether the applicant was only ferrying the co-accused as a driver and was paid for it or has abetted in the commission of the offence would be tested during the course of the trial and cannot be assumed solely on the basis of the disclosure statement which, as noted above, may not be admissible in evidence.

31. The learned counsel for the applicant has also contended that the process of search and seizure in the present case was carried out in the absence of any public witnesses. It is not in doubt that while the testimony of the police witnesses in absence of independent witnesses is sufficient to secure conviction, the same inspires confidence during the trial. However, lack of 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 19/07/2024 at 21:23:27 independent witness in certain cases can cast a duty as to the credibility of the prosecution's case. It is not disputed that the investigating agency had sufficient time to prepare before the raid was conducted.

32. Thus, not finding the public witness and lack of photography and videography of the alleged recovery in today's time and age casts a doubt on the credibility of the evidence. It is also not the case of the prosecution that notice was served under Section 100(8) of the CrPC on the persons who refused to join the raiding party in the process of seizure.

33. It is, however, relevant to note that procedure has been prescribed in the NCB Handbook which has been adopted by the Delhi Police, though may not binding, prescribes the photography and videography as crucial practice for obtaining evidence in order to avoid allegation in regard to the foul play.

34. Thus, while it is true that the effort, if any, made by the prosecution to have the search conducted in the presence of the independent witnesses would be tested during the course of trial and the same may not be fatal to the case of the prosecution, however, the benefit, at this stage, cannot be denied to the accused.

35. It is pertinent to note that the applicant has been in custody since 06.08.2021. Only five out of the sixteen witnesses have been examined till now. Speedy trial in such circumstances does not seem to be a possibility. The object of jail is to secure the appearance of the accused persons during the

trial. The object is neither punitive nor preventive and the deprivation of liberty has been considered as a punishment without the guilt being proved. The applicant cannot be made to spend the entire period of trial 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 19/07/2024 at 21:23:27 in custody especially when the trial is likely to take considerable time.

36. It is trite law that grant of bail on account of delay in trial cannot be said to be fettered by the embargo under Section 37 of the NDPS Act. The Hon'ble Apex Court, in the case of Mohd. Muslim v. State (NCT of Delhi) : 2023 SCC OnLine SC 352 has observed as under:

"21....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.

22. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country<sup>20</sup>. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

23. The danger of unjust imprisonment, is that inmates are at risk of "prisonisation" a term described by the Kerala High Court in A Convict Prisoner v. State<sup>21</sup> as "a radical transformation" whereby the prisoner:

"loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes."

24. 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"<sup>22</sup> (also see Donald Clemmer's 'The Prison Community' published in 1940<sup>23</sup>). Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata : immediate loss of livelihood, and in several 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 19/07/2024 at 21:23:27 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."

(emphasis supplied)

37. The Hon'ble Apex Court in the case of Man Mandal & Anr. v. The State of West Bengal : SLP(CRL.) No. 8656/2023 had granted bail to the petitioner therein, in an FIR for offences under the NDPS Act, on the ground that the accused had been incarcerated for a period of almost two years and the trial was likely going to take considerable amount of time.

38. The Hon'ble Apex Court in Rabi Prakash v. State of Odisha : 2023 SCC OnLine SC 1109, while granting bail to the petitioner therein held as under :

"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."

39. The applicant is also stated to be of clean antecedents. Therefore, I am satisfied that are reasonable grounds for believing that the applicant is not likely to commit any offence while on bail.

40. In view of the above, this Court is of the opinion that the applicant has made out a prima facie case for grant of bail.

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41. The applicant is, therefore, directed to be released on bail on furnishing a personal bond for a sum of 50,000/- with two sureties of the like amount, subject to the satisfaction of the learned Trial Court, on the following conditions:

a. The applicant shall 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;

b. The applicants shall under no circumstance leave the boundaries of Delhi without the permission of the learned Trial Court;

c. The applicant shall appear before the learned Trial Court as and when directed;

d. The applicant shall, after his release, appear before the concerned Investigating Officer once in every week; e. The applicant shall provide the address where he would be residing after his release to the concerned IO/SHO and shall not change the address without informing the concerned IO/ SHO;

f. 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.

42. 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.

43. 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.

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

AMIT MAHAJAN, J JULY 4, 2024 This is a digitally signed order.

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