

Somadila Hilary vs State on 11 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. 1041/2024
SOMADILA HILARY

Through:

STATE

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

% 11.09.2024

1. By way of the present application, the petitioner/applicant, who is A Nigerian, seeks release on regular bail in FIR No. 0699/2020 registered under Sections 21/25 of NDPS Act & Section 14 of Foreigners Act & Section 468/471 IPC at P.S. Vikaspuri, Delhi.

2. Learned counsel for the applicant submits that the applicant was apprehended on 31.10.2020 and continues to be in incarceration. He submits that after investigation, the chargesheet came to be filed on 25.03.2021 and the charge was framed on 22.10.2022. He further submits that out of the total 20 witnesses cited by the prosecution, only four have been examined in the last two years. He submits that the trial is likely to take long time to conclude. Learned counsel further submits that the petitioner's renewed passport is already lying deposited with the concerned Jail Superintendent.

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3. On merits, it is contended that the mandatory provision of Section 50 of NDPS Act has been violated, inasmuch as, the acknowledgment of applicant has not been taken on the notice, but applicant's signature appears in the notice.

4. The application is resisted by learned APP for the State, who submits that the present case came to be registered when 72 gms of Amphetamine drugs was recovered from the applicant's pocket. Thereafter, notice under Section 50 of NDPS Act was also complied with. He submits that the recovered quantity is commercial in nature and therefore, embargo of Section 37 of NDPS Act is applicable. He further states that the applicant's VISA was found to be forged.

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

6. 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 Court in *Paramjit Singh v. State (NCT of Delhi)*, *Babba v.*

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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 19/09/2024 at 01:28:38 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 against the possibility of provisions like Section 43-D(5) of the 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 19/09/2024 at 01:28:39 UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial. xxx"

7. 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"

8. Further, in the case of *Rabi Prakash v. State of Odisha* reported as 2023 SCC OnLine SC 1109, 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 released on bail on his furnishing bail bonds to the satisfaction of This is a digitally signed order.

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xxx"

9. 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"

10. Taking a 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.

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

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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 19/09/2024 at 01:28:39 "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.]"

12. Considering the aforesaid legal position and the period of custody and especially the fact that the charge was framed on 22.10.2022, but only four witnesses have been examined by the prosecution in last two years and the right of speedy trial enshrined in Article 21 of the Constitution of India and upheld by Supreme Court in the aforementioned decisions, this Court is inclined to release the applicant on regular bail subject to his furnishing a personal bond in the sum of Rs.50,000/- with one surety of the like amount to the satisfaction of the concerned Jail Superintendent/concerned Court/Duty J.M. and subject to the following further conditions :-

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

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ii) The applicant shall provide his mobile number to the Investigating Officer on which he 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.

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

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

15. Copy of the order be uploaded on the website forthwith.

16. Needless to state that this Court has not expressed any opinion on the merits of the case and have made the observations only with regard to the present bail applicant and nothing observed hereinabove shall amount to an expression on the merits of the case and shall not have a bearing on the trial of the case as the same has been expressed only for the purpose of the disposal of the present bail application.

MANOJ KUMAR OHRI, J SEPTEMBER 11, 2024 akc This is a digitally signed order.

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