



2024:DHC:5181



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 15.07.2024

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BAIL APPLN. 3312/2023

SHIVAM

..... Applicant

versus

STATE GOVT. OF NCT OF DELHI

..... Respondent

Advocates who appeared in this case:

For the Applicant

: Mr. Aditya Aggarwal, Mr. Naveen Panwar,
Mr. Manas Agarwal and Ms. Kajal Garg,
Advs.

For the Respondent

: Mr. Sanjeev Bhandari, ASC for the State
with Mr. Kunal Mittal, Mr. Arjit Sharma and
Mr. Vaibhav Vats, Advs. with SI Sudhir
Kumar, ANTF / Crime Branch Delhi.

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HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973 (**CrPC**) seeking regular bail in FIR No. 238/2021 dated 19.12.2021, registered at Police Station Crime Branch for offences under Sections 21/25 of the Narcotics Drugs and Psychotropic Substance Act, 1985 (**NDPS Act**).



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2. The brief facts of the present case are that on 18.12.2021, at around 08:10 PM, the complainant, namely, Head Constable Rupesh Kumar, while stationed at Ring Road near the ISBT Bus Stop by Kudeshiya Park, observed an individual driving a vehicle with registration number HR55-AA-2354. This individual halted at the roadside, alighted from the vehicle, but upon noticing the presence of the police, attempted to depart. During this attempt, he discarded a pink-colored polythene onto the roadway whereafter, he was apprehended by the police officials.

3. Notice under Section 50 of the NDPS Act was served to the applicant informing him about his legal right to get his search in front of the Gazetted Officer or a Magistrate. It is alleged that the applicant refused to be searched in the presence of a Magistrate or a Gazetted Officer.

4. It is alleged that on a cursory search of the polythene discarded by the applicant, it was found to be containing heroin weighing 300 gms.

5. It is alleged that 4-5 passers by were informed about the situation and asked to join the police action, however, all of them refused and left without disclosing their name and address citing the legitimate compulsion of their journey. It is stated that no notice could be given to the said individuals due to lack of time.

6. Subsequently, the applicant was arrested and upon completion of the investigation, the chargesheet in the present case was filed for offences under Sections 21/25/29 of the NDPS Act.



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7. The learned Trial Court dismissed the regular bail application moved by the applicant by order dated 25.08.2023. Hence, the present application.

8. The learned counsel for the applicant submitted that the applicant has been falsely implicated in the present case. He submitted that the present case is one where allegedly chance recovery was made from the applicant. Thus, there is more chances of false implications.

9. He submitted that the present applicant is entitled to bail on account of non-compliance with the mandatory requirements of Section 50 of the NDPS Act. He argued that the notice under Section 50 of the NDPS Act which was served upon the applicant mentioned the word 'any' instead of 'nearest' for the Gazette Officer or the Magistrate. Therefore, the mandatory provision of Section 50 was not complied with in the manner it ought to have been done. In support of his contention, learned counsel for the applicant placed reliance on the judgment passed by a coordinate bench of this Court in ***Mohd. Jabir v. State (NCT of Delhi) : 2023 SCC OnLine Del 1827.***

10. He submitted that the applicant has satisfied the bar under Section 37(1)(b)(ii) of the NDPS Act of establishing reasonable grounds for believing that he is not guilty of such an offence.

11. He submitted that the applicant has been in custody for about two years and relied upon the observations of the Hon'ble Supreme Court in ***Mohd. Muslim v. State (NCT of Delhi) : 2023 SCC OnLine SC 352.*** He submitted that the applicant has clean antecedents and deep roots in the society and there is no possibility of the applicant



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influencing the witnesses.

12. He submitted that there was no public witness at the time of the alleged recovery as mentioned in the FIR, which evidently proves that the applicant has been falsely implicated by the police. He further submitted that no endeavor was made by the prosecution to photograph or videotape the recovery either.

13. He submitted that the prosecution has also failed to secure any CCTV Footage despite multiple CCTV cameras being installed at vital places. It is further submitted that the story of the prosecution is fabricated, false and a fictitious one made only to implicate the applicant.

14. He submitted that the co-accused persons, namely, Sakib Usmani and Shahwaj Khan were arrested on the disclosure statement of the applicant and both the co-accused persons have been granted bail by the learned Trial Court by orders dated 07.02.2022 and 09.06.2022.

15. He submitted that the applicant has clean past antecedents and no purpose would be served in keeping the applicant behind the bars. He submitted that the applicant is the sole bread earned of his family and has four minor children and ailing parents to look after.

16. He submitted that the applicant has been in judicial custody since 19.12.2021. He submitted that while charges have been framed none of the witness has been examined and the trial is likely to take long. He submitted that the matter regarding the alleged violation of



procedural safeguards contained in the NDPS Act cannot be kept in abeyance for consideration during the course of the trial.

17. He further placed reliance on the following judgments in support of his contentions:

- a) ***Emeka Emmanuel v. The State* : 2022 SCC OnLine Del 4493**
- b) ***Akhilesh Bharti v. State* : 2020:DHC:340**
- c) ***SK Raju v. State of West Bengal* : (2018) 9 SCC 708**

18. *Per contra*, the learned Additional Standing Counsel for the State opposed the bail application. He submitted that due procedure was followed as envisaged under the NDPS Act.

19. He submitted that commercial quantity of contraband is involved in the present case, whereby, the rigors of Section 37 of the NDPS Act would be attracted against the applicant.

20. It is submitted that the use of the word 'nearest Gazetted Officer' in Section 50 of the NDPS Act is directory in nature and not mandatory. The use of the word 'nearest' or the omission to write 'nearest' does not affect/ hamper the intent or alter the safeguard of Section 50 of the Act. He stated that once the applicant was informed about his rights, the mandatory requirements of Section 50 were complied with. Therefore, there was no irregularity.

21. He submitted that it is trite law that merely because there is no independent witness, it cannot be said that the accused person has been falsely implicated and the case of the prosecution cannot be



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rejected solely on the said ground. He further submitted that the absence of independent witnesses merely casts an additional duty on the Court to scrutinize the testimonies of the official witnesses, and the same would be seen during the course of the trial.

22. He submitted that there is no material change in circumstances after the dismissal of the applicant's previous bail applications, and all the grounds raised by the applicant have already been considered. He further submitted that there is enough incriminating evidence against the applicant, and his bail application ought to be dismissed.

23. He submitted that the defences of the applicant in regard to any procedural anomalies would be a matter of trial.

Analysis

24. Arguments were heard in detail from the learned counsel for the parties.

25. It is settled law that the Court, while considering the application for grant of bail, has to keep certain factors in mind, such as, whether there is a prima facie case or reasonable ground to believe that the accused has committed the offence; circumstances which are peculiar to the accused; likelihood of the offence being repeated; the nature and gravity of the accusation; severity of the punishment in the event of conviction; the danger of the accused absconding or fleeing if released on bail; reasonable apprehension of the witnesses being threatened; etc.



26. It is unequivocally established that, to be granted bail, the accused charged with offence under the NDPS Act must fulfill the conditions stipulated in Section 37 of the NDPS Act. Section 37 of the NDPS Act reads as under:

“37. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 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 27-A 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 oppose 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 sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force, on granting of bail.”

27. The accusation in the present case is with regard to the recovery of commercial quantity of contraband. Once the rigours of Section 37 of the NDPS Act are attracted, as provided under the Section, the Court can grant bail only when the twin conditions stipulated in Section 37(1)(b) of the NDPS Act are satisfied in addition to the usual requirements for the grant of bail – (1) The court must be satisfied that there are reasonable grounds for believing that



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the person is not guilty of such offence; and (2) That the person is not likely to commit any offence while on bail.

28. The learned counsel for the applicant submitted that a liberal interpretation of Section 37 of the NDPS Act must be taken into account by the Court in the present case on the following grounds :

- a) Illegality in the notice served under Section 50 of the NDPS Act in so far as it did not stipulate that the accused has a right to be searched in the presence of the ‘nearest’ Gazetted Officer or Magistrate.
- b) Non-joinder of independent witnesses and no photography/videography; and
- c) Delay in trial.

29. Section 50 of the NDPS Act outlines the conditions under which a search of a person is to be conducted, specifying that such a search must be performed in the presence of a Gazetted Officer or a Magistrate if the individual so requests. This provision is intended to safeguard the rights of individuals and ensure the fairness and integrity of the search process. This Court in the case of ***Bantu vs. State Govt of NCT of Delhi: 2024: DHC: 5006***, while noting that the judgment passed by a coordinate bench of this Court in the case of ***Mohd. Jabir v. State (NCT of Delhi)*** (*supra*), is under consideration before the Hon’ble Apex Court, held that the essence of Section 50 of the NDPS Act— to inform the suspect of his right to be searched before the Gazetted Officer or a Magistrate — was communicated to the accused person, and any failure in strictly adhering to the precise language in



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the notice should not undermine the overall compliance if no prejudice is shown. Hence, while the wording is important, the ultimate focus remains on whether the suspect's rights were adequately protected, a question to be resolved during trial.

30. It was observed that prejudice to the applicant is to be seen by the procedural lapse in such a case. In the present case, prima facie, the applicant has not been able to establish any prejudice caused to him. Infirmities in the procedure, if any, will be tested during the course of the trial.

31. It was held that not mentioning the word 'nearest' does not constitute non-compliance with Section 50 of the NDPS Act.

32. In the present case, the accused was duly informed of his statutory right to be searched before the Gazetted Officer or a Magistrate, as stipulated under Section 50 of the NDPS Act. However, the accused voluntarily declined to exercise this right. The issue whether this refusal, following the police officials intimating him of his rights, leads to non-compliance with Section 50 of the NDPS Act or affects the legality of the subsequent search and seizure is a nuanced question and the same is a matter of trial and cannot be looked into at this stage.

33. It is also contended by the learned counsel for the applicant that though the recovery was allegedly made at ISBT Delhi Bus Stop which is the oldest and one of the biggest Inter- State bus terminals in India, the same is not supported by any public witness. This Court in the case of *Bantu v. State Govt of NCT of Delhi* (*supra*) has observed



that while the testimony of police witness is sufficient to secure conviction if the same inspires confidence during the trial, however, lack of independent witnesses in certain cases can cast a doubt as to the credibility of the prosecution's case.

34. It was held that when the Investigating Agency had sufficient time to prepare before the raid was conducted, not finding the public witness and lack of photography and videography in today's time casts a doubt to the credibility of the evidence.

35. The present case is based allegedly on a chance recovery and it is possible that the Investigating Agency did not get sufficient time to prepare. However, given the crowded nature of the place from where the recovery was made, it is peculiar that no public witness has joined the search.

36. A bald statement has been made, as stated in the chargesheet filed, that 4-5 passers-by were asked to take part in the police action, however, they refused to join the investigation and left the spot citing legitimate compulsion of their journey. Furthermore, no notice under Section 100 (8) of the CrPC was given to any person on the refusal to support the Investigating Agency during the search procedure.

37. This Court in *Bantu v. State Govt of NCT of Delhi* (*supra*), noted that the Hon'ble Apex Court, way back in the year 2018 in *Shafhi Mohd. v. State of H.P. : (2018) 5 SCC 311*, after taking note of the technological advancements, had passed certain directions. The Hon'ble Apex Court had emphasised the role of audio-visual



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technology in enhancing the efficacy and transparency in the Police investigations.

38. This Court also noted that realising the need of change in time, the Legislature has now passed the Bharatiya Nagarik Suraksha Sanhita, 2023 ('**BNSS**'), where the practice of photography and videography has now been made mandatory as part of the investigation.

39. This Court further noted that the procedure prescribed in NCB Handbook which has been adopted by the Delhi Police may be argued to be not binding, however, it cannot be denied that the same has been prescribed as the best and crucial practice for obtaining evidence in order to avoid the allegation in regard to foul play.

40. 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. Undoubtedly, the search in the present case was conducted at a busy public place. It is not the case of the prosecution that no CCTV were installed around the area where raid/search was conducted. It is also not the case that equipments were not available to videograph and photograph the search/seizure. It cannot be denied that almost every person today carries a smart phone with a camera installed in it.



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41. Delay in trial and long period of incarceration is also an important factor which has to be kept in mind while considering the application for bail.

42. In the present case, the matter is at the stage of prosecution evidence. It is stated that only two witnesses have been partly examined out of the thirteen listed prosecution witnesses. The applicant has been in custody since 19.12.2021. There is no likelihood of the trial being completed in the near future.

43. 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 country²⁰. 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



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*Convict Prisoner v. State*²¹ 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”²² (also see Donald Clemmer’s ‘The Prison Community’ published in 1940²³). 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.”

(emphasis supplied)

44. 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.”



45. The Hon'ble Apex Court in ***Badsha SK. v. The State of West Bengal*** (order dated 13.09.2023 passed in **Special Leave Petition (Crl.) 9715/2023**), granted bail to the petitioner wherein who had been in custody for more than two years with the trial yet to begin.

46. Similarly, in ***Man Mandal & Anr. v. The State of West Bengal*** (order dated 14.09.2023 passed in **Special Leave Petition (Crl.) 8656/2023** decided on 14.09.2023), the petitioner therein had been in custody for almost two years and the Hon'ble Apex Court found that the trial is not likely to be completed in the immediate near future. The petitioner was, therefore, released on bail.

47. In ***Dheeraj Kumar Shukla v. State of U.P. : 2023 SCC OnLine SC 918***, the Hon'ble Apex Court released the petitioner therein on bail, and observed as under:

“3. It appears that some of the occupants of the Honda City” Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. It is true that the quantity recovered from the petitioner is commercial in nature and the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the petitioner is in custody for the last two and a half years, we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed.”

48. A Coordinate Bench of this Court in ***Gurpreet Singh v State of NCT of Delhi : 2024:DHC:796***, considered the effect of delay and observed as under:

“16. In addition to the above, only 2 (two) out of 22 witnesses have been examined by the prosecution, and that too partially, though more than three and a half years have passed since the arrest of



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the applicant. It may be true that the reason for the delay in the conclusion of the trial may be for various factors, may be not even attributable to the prosecution, like Covid 19 pandemic and restricted function of the Courts, however, as long as they are not attributable to the applicant/accused, in my view, the applicant would be entitled to protection of his liberty under Article 21 of the Constitution of India. Delay in trial would, therefore, be one of the consideration that would weigh with the Court while considering as application filed by the accused for being released on bail.”

49. From the foregoing, it is evident that despite the stringent requirements imposed on the accused under Section 37 of the NDPS Act for the grant of bail, it has been established that these requirements do not preclude the grant of bail on the grounds of undue delay in the completion of the trial. Various courts have recognized that prolonged incarceration undermines the right to life, liberty, guaranteed under Article 21 of the Constitution of India, and therefore, conditional liberty must take precedents over the statutory restrictions under Section 37 of the NDPS Act.

50. In such circumstances, this Court is of the opinion that the applicant has made out a *prima facie* case for grant of bail on the grounds of absence of independent witnesses and prolonged delay in the trial.

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

52. 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



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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 applicant shall under no circumstance leave the country 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 provide the address where he would be residing after his release and shall not change the address without informing the concerned IO/ SHO;
- e. 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.

53. 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.

54. 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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55. The bail application is allowed in the aforementioned terms.
56. The pending applications are also disposed of.

AMIT MAHAJAN, J

JULY 15, 2024