

# Mohd. Kasim Khan vs State Govt. Of Nct Of Delhi on 1 April, 2025

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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BAIL APPLN. 4290/2024

MOHD. KASIM KHAN

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Through:

Mr. Hasim Alam, Adv.

versus

STATE GOVT. OF NCT OF DELHI

.....Respondent

Through: Mr. Aman Usman, APP for State wi

SI Naresh Kumar Crime Branch

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J

1. The present petition has been filed under Section 483 of BNSS, 2023 seeking regular bail in connection with FIR No. 70/2024 under Section 21/29 NDPS Act registered at PS Crime Branch.

2. The case of the prosecution is that on 01.04.2024 secret informer provided information to SI Rajender Dhaka that two persons namely Mohd. Kasim (petitioner) and his brother Nazim, who are residents of Bareilly, Uttar Pradesh are involved in smuggling of narcotics substances/smack (i.e. heroin) will be coming near Shamshan Ghat, Ghazipur, Delhi on the intervening night of 01/02.04.2024 at around 01:45 A.M. to sell and deliver a huge consignment of heroin (smack). If a raid is conducted they could be arrested with huge quantity of contraband.

3. On the basis of the aforesaid secret information a raiding party was constituted and the petitioner, as well as, his brother Nazim were apprehended. On bodily search of the apprehended persons, nothing was recovered from Nazim. However, 600 gms. of heroin was recovered from the backpack of the petitioner herein. Accordingly, both the petitioner, as well as, co-accused Nazim were arrested.

4. The learned counsel for the petitioner submits that there is discrepancy in the weight of the sample drawn before the learned Metropolitan Magistrate which are shown to be of 5 gms. each whereas FSL report shows the weight of one sample as 4.3 gms while that of other sample as 4.4 gms. He submits that the discrepancy in the weight of contraband shows that the seal of the samples were tampered with.

5. He further submits that during the seizure proceedings neither any independent public witness was joined nor any videography or photography was conducted. In support of his contention, he places reliance on the decision of a coordinate bench of this Court in *Bantu vs. State Govt of NCT of Delhi*, 2024 SCC OnLine Del 4671.

6. He further contends that the petitioner does not have any criminal record and he has been incarcerated for a period of approximately 10 months. He further contends that the jail conduct of the petitioner is satisfactory.

7. Per contra, the learned APP has argued on the lines of the status report. He submits that the recovery from the petitioner is of commercial quantity. Therefore, the rigors of Section 37 of NDPS are attracted.

8. He submits that at the time of the offence, the Code of Criminal Procedure was applicable and the same does not provide for photography or videography.

9. He further contends that the law is well settled that conviction can be based even on the testimonies of the official witnesses. He, therefore, urges the Court that the petitioner's bail application be rejected.

10. I have heard the learned counsel for the petitioner, as well as, learned APP for the State and have perused the record.

11. Insofar as the first contention of the petitioner as regards the discrepancy in the weight of the sample is concerned, to be noted that the variation is miniscule which could be for the reason of moisture being present at the time of sampling. Further, it is not the case of the petitioner that the FSL report indicates that the samples were received by the FSL in tampered condition nor any material has been pointed out which suggests the tampering of sample. Thus, the benefit of minor deficiency in weight of the sample will not enure to the benefit of the petitioner while considering his bail plea.

12. In this regard, reference may be to the decision of this Court in *Yunus Khan v State(NCT of Delhi)*, 2024 SCC OnLine Del 3893 wherein it was observed as under that:

"33. ... In that case, the quantity of the sample seemed to be under the significant cloud as the weight of the sample was found to be deficient by 0.92 grams, whereas, in the present case, the sample has been found to be deficient by 0.30 grams. This minor discrepancy could even be attributed to the presence of moisture content in the contraband when the sample was taken, however, that is an aspect which will be considered during the trial. At this stage suffice it to say that no material has been pointed out which suggests the tampering of sample. This being the position, no benefit of minor deficiency in weight of the sample when weighted by the FSL, will enure to the benefit of the petitioner while considering the present bail application."

13. It may be noted that the non-joinder of independent witnesses may be justified since the raid was conducted during midnight but insofar as absence of videography and photography is concerned, no justification for the same is forthcoming. No doubt a coordinate bench of this Court in Bantu (supra) has observed that though, sufficiency of explanation as regards lack of videography and photography is to be tested during the course of trial, however, in the absence of any independent witnesses in support of recovery, lack of videography and photography is a relevant factor while considering applications for grant of bail as the same cast a doubt over the very fulcrum of the case, however, the additional factor which weighed with the Court in Bantu (supra) was long incarceration of 4 years and 8 months (custody was from 28.12.2019 to 08.07.2024) and the delay in the conclusion of trial. The relevant paragraph from the said decision is as under:

"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."

14. No doubt the petitioner does not have criminal antecedents and trial has not yet commenced as the case is still at the stage of framing of charge, but custody of the petitioner is just about one year as the petitioner was arrested on 12.04.2024. The cases<sup>1</sup> in which the Hon'ble Supreme Court had relaxed the rigours of Section 37 of NDPS Act on account of delay in trial, the custody period varied from 1½ years to 31/2 years.

15. Having regard to the aforesaid circumstances, this Court is of the view that the petitioner is not entitled to regular bail at this stage on account of delay in trial. Accordingly, the petition is dismissed. However liberty is granted to the petitioner to approach this Court with fresh application for bail after six months in case there is no substantial progress in the trial.

16. The petition is disposed of.

17. Copy of the order be forwarded to the concerned Jail Superintendent for necessary compliance.

18. Order dasti under signatures of the Court Master.

VIKAS MAHAJAN, J APRIL 01, 2025/N.S.ASWAL

1. Naeem Ahmed Alias Naim Ahmad v. Govt. of NCT of Delhi, 2024 SCC OnLine SC 220 (Custody period was 1 year 11 months) Bantu v. State Govt. of NCT of Delhi, 2024 SCC OnLine Del 4671 (Custody period 4 years 8 months) Rabi Prakash v. State of Orissa, 2023 SCC OnLine SC 1109 (Custody period 3 years 6 months) Man Mandal & Anr. v. State of West Bengal, 2023 SCC OnLine SC 1868 (Custody period almost 2 years) Dheeraj Kumar Shukla v. State of Uttar Pradesh, SLP (Crl.) 6690 /2022 (Custody period almost 2 years 6 months) Nitish Adhikary @ Bapan v. State of West Bengal, SLP (Crl.) 5769/2022 (Custody period 1 year 7 months) Shariful Islam v. State of West Bengal, SLP (Crl.) 4173/2022 (Custody period 1 year 6 months)