

Waheedullah vs State Govt. Of Nct Of Delhi on 27 March, 2025

Author: Sanjeev Narula

Bench: Sanjeev Narula

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 27t

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BAIL APPLN. 4297/2024

WAHEEDULLAH

Through: Ms. Malvika Kulkarni an
Pratyush Prasanna, Advo

versus

STATE GOVT. OF NCT OF DELHI

.....Respond

Through: Mr. Laksh Khanna, APP.

SI Shubhendu Sharma, Crime Branc
R.K. Puram.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The present bail application has been filed under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973,¹ and Section 483 read with Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023,² seeking grant of regular bail in the proceedings arising from FIR No. 198/2022 registered at P.S. Crime Branch, New Delhi under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985.³ Prosecution's Case

2. The case of the Prosecution is as follows:

2.1 On 2nd September, 2022, SI Imran Khan received specific intelligence "CrPC"

"BNSS"

"NDPS"

regarding an Afghani national, Waheedullah S/o Rahimullah, allegedly engaged in narcotics trafficking across Delhi-NCR. The input suggested that the said individual would be arriving near the TERI Institute in the Vasant Kunj Institutional Area, New Delhi. Acting upon the information, a raiding team was constituted and deployed at the designated location. 2.2 At about 11:30 PM, the Applicant was arrested at the instance of the informer. Prior to conducting the search, the Applicant

was informed of the allegations against him and was duly served with a notice under Section 50 of the NDPS Act. He declined the offer to be searched in the presence of a Gazetted Officer or Magistrate.

2.3 Upon search, a consignment weighing 3.005 kilograms of Heroin was recovered from the Applicant's possession. On this basis, the present FIR came to be registered. During his police custody remand, the Applicant is stated to have disclosed the location of another consignment, leading to the recovery of an additional 1 kilogram of Heroin.

2.4 In the course of custodial interrogation, the Applicant further disclosed that his father, Rahimullah, and his father's associate, one Mustafa, were the key operators of the drug syndicate. He admitted to being a participant in the trafficking operation, allegedly at their behest, and claimed to have earlier supplied narcotics on multiple occasions. Both Rahimullah and Mustafa were subsequently arrested in connection with the same case.

2.5 In compliance with the procedure laid down under Section 52A of the NDPS Act, the seized contraband was duly sampled and sent for forensic analysis. The FSL report confirmed the recovered substance to be Heroin. 2.6 Upon conclusion of the investigation, a chargesheet was filed against the Applicant and other co-accused. The Prosecution has relied upon a body of material, including CDR analysis, CCTV footage, mobile phone records, and banking transactions, to substantiate the role of each accused. 2.7 All the accused persons are currently in judicial custody. The regular bail application filed by the Applicant, Waheedullah, was rejected by the ASJ, New Delhi, Patiala House Courts, Delhi, on 15th October, 2024. Applicant's Case

3. Counsel for the Applicant seeks grant of bail on the following grounds:

3.1 The Applicant has been falsely implicated in the present matter. He was arrested on 3rd September, 2022, and has remained in custody for over two years. Although charges have been framed, the trial has not progressed meaningfully. With a total of 21 prosecution witnesses cited, the trial is likely to take considerable time for completion. 3.2 The seizure of the contraband on both 2nd September, 2022 and 4th September, 2022 was carried out in densely populated areas of Vasant Kunj and Alpha Metro Station (Greater Noida), yet the Prosecution failed to include any independent witnesses to substantiate their case. Additionally, despite the location of the alleged arrest being equipped with CCTV infrastructure, no CCTV footage has been produced to establish the Applicant's presence or apprehension at the site. 3.3 Although the alleged contraband was recovered on 2nd September, 2022, the application under Section 52A of the NDPS Act was moved only on 7th September, 2022, after a delay of more than 72 hours. This, it is submitted, is in contravention of the timeline contemplated under Section 52A, thereby affecting the procedural sanctity of the sampling process.

3.4 The case of the Prosecution is that the Applicant was out to deliver the alleged contraband. However, it is not their case that any individual came forward to receive

the consignment or made contact with the Applicant for that purpose. This omission casts doubt on the completeness of the investigation and the veracity of the Prosecution's narrative. 3.5 There is a substantial discrepancy in the weight of the contraband seized on 2nd September, 2022 and 4th September, 2022 compared to the weight of the contraband presented before the Magistrate under Section 52A of the NDPS Act. The contraband seized on 2nd September, 2022 was weighed at 980 grams, 965 grams, and 1060 grams, marked as A-1, A-2, and A-3, respectively, while A-4 seized on 4th September, 2022 weighed 1000 grams. However, during the proceedings under Section 52A of the NDPS Act before the Magistrate, the same packets were weighed at 983 grams (A-

1), 969 grams (A-2), and 1065 grams (A-3). These variances raise concerns regarding the integrity of the samples and the possibility of tampering.

3.6 At the time of sampling under Section 52A before the Magistrate, two seals were affixed to the contraband: one marked "S.K." and the other "R.S." However, the charge sheet is silent regarding the "R.S." seal, recording only the affixing of the "S.K." seal at the time of seizure. Furthermore, there is no GD entry with regard to affixing the "RS" seal. 3.7 The Applicant's phone was operational and in working condition at the time of his arrest. However, the CDR for the relevant period has not been placed on record by the Prosecution, despite its potential evidentiary significance. The withholding of this material raises questions about the fairness and completeness of the investigation.

3.8 It is further pointed out that the initial recovery of 3.005 kg of Heroin was made by SI Imran Khan. Yet, the application under Section 52A of the NDPS Act was moved by a different officer (SI Samrat Khatiyani) without explanation. This discrepancy, is in breach of Sections 52, 52A, and 53 of the NDPS Act and compromises the procedural regularity required under the law.

3.9 While the initial recovery of 3.005 kg of contraband and the Applicant's arrest were made under Section 57 of the NDPS Act, the subsequent recovery, made on 4th September, 2022 from the Applicant's bike, was not made under Section 57 of the Act.

3.10 The Applicant has clean antecedents, and no prior involvement in criminal cases. Given the protracted trial, prolonged incarceration, and procedural infirmities in the Prosecution's case, the Applicant is entitled to be released on bail.

Respondent's Case

4. On the other hand, Mr. Laksh Khanna, APP for the State, strongly opposes the bail application, and makes the following submissions:

4.1 The Applicant is implicated in the recovery of 4 kg of Heroin, which qualifies as commercial quantity under the NDPS Act. The allegations against the Applicant are grave, and point to the Applicant's involvement in a larger narcotics syndicate that

includes his father and other associates.

Photographs have been recovered from the Applicant's mobile phone, depicting the contraband concealed within shampoo bottles. 4.2 Four packets of contraband, each weighing approximately 1 kg, were recovered from the Applicant. The difference in the weight of the individual packets at the time of seizure and before the Magistrate is a mere 2-3 grams, which could be attributed to various factors such as atmospheric conditions, air pressure, and the place of storage. Such minor discrepancies do not undermine the legitimacy of the seizure, and do not entitle the accused to grant of bail in Yunus Khan v. State (NCT of Delhi).⁴ 4.3 This Court, in Somdutt T Singh Alias Shivam v. Narcotics Control Bureau,⁵ has clarified that there is no mandatory time limit for the drawing of samples under Section 52A of the NDPS Act. Hence, any delay, in the absence of prejudice or mala fides, cannot form a valid basis for grant of bail.

4.4 The search and seizure were carried out at approximately 11:20 PM on 2nd September, 2022, in an isolated area behind the TERI Institute near Vasant Kunj Mall. Given the late hour and the secluded nature of the location, there were no members of the public available to join the proceedings as independent witnesses. This absence, in the circumstances, is not unnatural.

4.5 The Applicant was apprehended during the night of 2nd September, 2022. Notices were issued to the relevant Telecommunication Service Providers⁶ to provide the CDRs from that time. Certified CDRs of the concerned numbers are part of the chargesheet, and there is no suppression of any such material.

4.6 As regards the handling of the seized contraband, the procedure under Section 55 of the NDPS Act was duly followed. The seized articles were deposited with the Officer-in-charge (SHO, PS-Crime Branch), who after affixing his seal, deposited the same in malkhana. The relevant DD entries, confirming this procedure, have been included in the chargesheet at Page 2024 SCC OnLine Del 3893.

Bail Appln. 2754/2022, decided on 1st December, 2023.

"TSPs"

Nos. 36 and 37. As for the alleged discrepancy regarding the seals, the Section 52A order accurately mentions the seals as "SK" and "RS." The statement of HC Ghanshyam under Section 161 CrPC, which refers to the seals as "AK" instead of "SK," is merely a typographical error. Analysis

5. The Court has considered the facts of the case and the contentions advanced by the parties. While evaluating a bail application, the Court must consider several factors, including whether there is a prima facie case or reasonable grounds to believe the accused has committed the offence, the likelihood of the accused repeating the offence, the nature and seriousness of the accusation, the severity of the potential punishment upon conviction, the risk of the accused absconding or fleeing if granted bail, and the reasonable apprehension of witnesses being intimidated by the accused.

6. In the instant matter, the contraband recovered from the Applicant comprises Heroin weighing 4 kgs which falls within the definition of 'commercial quantity'. As a result, the rigours of Section 37 of the NDPS Act are attracted, which impose stringent conditions for the grant of bail. This provision mandates a twin-layered threshold to be satisfied before bail can be granted: first, the Court must be satisfied, upon hearing the Public Prosecutor, that there are reasonable grounds for believing that the accused is not guilty of the offence; and second, that he is not likely to commit any offence while on bail. The Supreme Court has consistently held that denial of bail is the rule and its grant is an exception under Section 37(1)(b)(ii) of the NDPS Act.⁷ Hence, given the recovery of contraband is of a commercial quantity, the rigours of Section 37 must be strictly applied.

State of M.P. v. Kajda, (2001) 7 SCC 673.

Whether there are Reasonable Grounds to Believe the Accused is Not Guilty

7. In the course of investigation, the Prosecution undertook forensic analysis of the data retrieved from the Applicant's mobile phone, including WhatsApp conversations, media files, and associated metadata. Based on the chats and images retrieved, it was discovered that the Applicant and his father have been actively involved in the illicit supply of contraband drugs. Specifically, an analysis of the Applicant's phone, including the WhatsApp account, media files, and other data, revealed that on 31 st August 2022, pictures of approximately 4 kg of Heroin were taken and sent by the Applicant via his WhatsApp number to his father's account. Shortly thereafter, the father responded by sending back a photograph of a man, which suggests that this individual was to receive the contraband from the Applicant, in furtherance of instructions issued by the father.

8. This material prima facie establishes that the Applicant was knowingly and actively engaged in a coordinated drug trafficking operation, acting under the directions of his father. In this regard, the Applicant's contention that that no recipient was apprehended at the site is of limited relevance at this stage. The recovery of 3.005 kilograms of heroin from the Applicant on the night of 2nd September, 2022, followed by an additional 1 kilogram recovered at his instance on 4th September, 2022, forms a compelling body of evidence pointing to his conscious possession and active participation in the illicit trade. Thus, the Court is of the view that there are no sufficient grounds to believe that the Applicant is not guilty of the offences under the NDPS Act.

No Likelihood of Committing an Offence while on Bail

9. The Applicant seeks to bolster his claim for bail by pointing to the absence of any prior criminal antecedents. While that factor is not without weight, it cannot be viewed in isolation, especially in the context of the wider material gathered during investigation. It has emerged that the Applicant's father is not only implicated in the present case, but also has a demonstrable history of involvement in similar offences under the NDPS Act, where substantial quantities of contraband were recovered. Considering the father's prior involvement in drug trafficking and the Applicant's role in supplying drugs at his father's direction as part of a cartel, it is not plausible to assume that the Applicant would refrain from committing further offences if granted bail.

Non-compliance of Section 52A of the NDPS Act

10. The Applicant has sought to rely on the alleged non-compliance of the Prosecution with procedural requirements under the NDPS Act, arguing that the recovery and seizure process suffered from procedural deficiencies. Specifically, the Applicant contends that the contraband recovered from him was sent for sampling after a delay of two days, contrary to the timeline prescribed under Section 52A of the NDPS Act. Additionally, the Applicant argues that the officer who seized the contraband was different from the officer who submitted the application for sampling under Section 52A. The Applicant places reliance on the decision in *Union of India v. Mohan Lal & Anr.*,⁸ which held that the procedure under Section 52A of the NDPS Act is mandatory and not directory in nature.

11. Section 52A outlines the mandatory procedure for the disposal of seized narcotic and psychotropic substances. While the procedural integrity (2016) 3 SCC 379.

of a seizure is undoubtedly important under the NDPS Act, given the serious penal consequences of conviction, it is equally well established that every procedural lapse cannot, without more, form the basis for the grant of bail. This Court, in *Somdutt T Singh Alias Shivam v. Narcotics Control Bureau*, observed that no mandatory time duration is prescribed for compliance with Section 52A of the NDPS Act. While it is preferable to follow the seizure procedure at the earliest, any delay in compliance cannot be a sole ground for granting bail. The Applicant must demonstrate how the procedural irregularities under Section 52A have caused prejudice to his case. At this stage, they do not, in the opinion of this Court, constitute valid grounds to undermine the prima facie case established against the Applicant, or to justify the grant of bail in a case involving commercial quantity of Heroin. Discrepancy in the weight of the seized samples

12. The Applicant seeks to rely on the minor discrepancies in the weight of the samples seized, alleging that the variance between the weights noted at the time of seizure and those recorded before the Magistrate casts doubt on the integrity of the evidence. In this regard, it is noted that the contraband seized on 2nd September, 2022 was weighed at 980 grams, 965 grams, and 1060 grams, marked as A-1, A-2, and A-3, respectively, while A-4 seized on 4th September, 2022 weighed 1000 grams. During the proceedings under Section 52A NDPS, the recorded weights of these packets were: A-1 at 983 grams, A-2 at 969 grams, and A-3 at 1065 grams. Accordingly, the difference in the weight of the individual packets was merely 4-5 grams.

13. These variations, in the range of 4 to 5 grams, are too insignificant to suggest any tampering or procedural impropriety. The Prosecution has rightly pointed out that such differences in weight could be attributed to factors such as air conditions, pressure, and other environmental factors. In this context, it would be profitable to refer to the judgment in *Yunus Khan v. State (NCT of Delhi)*, where this Court addressed a similar situation concerning discrepancies in the weight of recovered contraband. The Court clarified that unless there is credible material to suggest interference with the integrity of the samples, such marginal discrepancies cannot, by themselves, undermine the Prosecution's case or furnish a ground for bail. In the absence of any evidence indicating tampering or substitution, this Court finds no merit in the Applicant's contention. That said, it remains open to

the Applicant to raise this argument at the stage of trial, where this defence can be tested through cross-examination and appreciation of evidence. Concealment of CDR

14. As for the claim that the CDRs of the Applicant were withheld, the record belies such a contention. A bare perusal of Page No. 90 of the chargesheet reveals that pursuant to the letter of the Investigating Officer, the certified copies of CAF and Call details as well as Cell IDs of certain mobile numbers from 1st August, 2022 to 2nd September, 2022, were furnished by the TSP, Bharti Airtel Ltd., along with the certificate under Section 65B of the Indian Evidence Act, 1872. In this regard, the reply documents from Airtel, Jio and Vodafone regarding CDR/ CAF have duly been filed in the chargesheet, appearing at Page Nos. 90-171. Therefore, the Applicant's contention regarding concealed CDR is misplaced. Non-compliance of Section 57

15. The Applicant has also contended that while the recovery made on 2 nd September, 2022 was conducted under Section 57, the subsequent recovery on 4th September, 2022 was not made under the said provision, indicating that the same did not comply with the requisite procedure under the NDPS Act.

16. This argument is misconceived. The legal position is well settled that Section 57 is directory and not mandatory in nature. In Mohd. Jabir v. State of NCT of Delhi,⁹ this Court has held that non-compliance with Section 57 does not entitle the accused to bail, as Section 57 does not outline a "mandatory condition". Moreover, the initial recovery of 3.005 kg of Heroin on 2nd September, 2022, which falls within the commercial quantity category, is undisputed and fully compliant with procedural requirements. The alleged irregularity concerning the recovery made two days later does not dilute the gravity or evidentiary sufficiency of the initial seizure, which by itself attracts the stringent provisions of Section 37 of the NDPS Act. Thus, the plea based on Section 57 is untenable, and does not merit consideration for the purposes of bail.

Discrepancy in seals

17. The Applicant has further contended that although two seals, "S.K." and "R.S.", were affixed to the contraband, there is no General Diary (GD) entry pertaining to the affixing of the "R.S." seal. However, this contention is not borne out from the record. A perusal of the GD entries at Pages 36-37 of the chargesheet reveals a clear reference by the Investigating Officer to both the "S.K." and "R.S." seals in the context of the seizure of the contraband recovered from the Applicant. The relevant portion of the GD is reproduced as follows:

2023 SCC OnLine Del 1827.

By:NITIN KAIN Signing Date:29.03.2025 17:26:05 Independent witness and absence of videography

18. The Applicant has also argued that the Prosecution failed to associate any independent witnesses during the seizure process and did not provide any videography of the said process. It is true that courts have, in appropriate cases, underscored the importance of associating independent witnesses

during seizures, particularly in cases involving recovery of contraband from public places. Indeed in *Bantu v. State Government of NCT of Delhi*,¹⁰ this Court had the occasion to express concern over the frequent invocation of mechanical explanations for the absence of public witnesses, and the potential impact such lapses may have on the transparency and credibility of the seizure process. That said, the legal position remains well settled that the non-availability of independent witnesses or the absence of videography, while relevant for appreciation at the stage of trial, does not by itself vitiate an otherwise lawful recovery, particularly when supported by other compelling material.

19. In the present case, the recovery of four packets of Heroin, collectively weighing 4 kg, is not only supported by the testimonies of official witnesses, but is further reinforced by digital evidence, including photographs retrieved from the Applicant's mobile phone, which reveal attempts to conceal contraband within shampoo bottles. The forensic reports corroborate the presence of heroin in the seized samples, and the data from the Applicant's phone demonstrates coordination with co-accused persons. In this backdrop, the absence of public witnesses or videography cannot by itself be considered a decisive factor for the grant of bail, especially where, as here, the record discloses prima facie evidence of the Applicant's active involvement in the trafficking of commercial quantities of narcotic substances.

Conclusion

20. In view of the foregoing discussion, this Court finds that the material on record prima facie implicatesp the Applicant in the trafficking of a commercial quantity of narcotic substances. The rigours of Section 37 of the NDPS Act are fully attracted in the present case, and the Applicant has 2024 SCC OnLine Del 4671.

failed to satisfy the twin conditions required for the grant of bail thereunder. Accordingly, the Court finds no merit in the present application, and the same is dismissed.

21. Needless to state, any observations concerning the merits of the case are solely for the purpose of deciding the question of grant of bail and shall not be construed as an expression of opinion on the merits of the case.

22. Dismissed.

SANJEEV NARULA, J MARCH 27, 2025 as