

# Asante Pinket Owusu vs Narcotics Control Bureau on 19 February, 2024

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on : 19.02.

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BAIL APPLN. 1939/2021

ASANTE PINKET OWUSU

versus

..... Appl

NARCOTICS CONTROL BUREAU

..... Resp

Advocates who appeared in this case:

For the Applicant : Mr. S.S. Aggarwal, Adv.

For the Respondent : Mr. Subhash Bansal, Sr. Standing C  
with Mr. Shashwat Bansal, Adv.

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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') read with Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act'), seeking regular bail in Case No. VIII/35/DZU/2018 registered under Sections 9(A)/25(A) of the NDPS Act.

2. Briefly stated, the facts relevant for the adjudication of the present application are as under:

2.1 On 04.11.2018, on the basis of secret/source information, the officers of the Narcotics Control Bureau (NCB) intercepted the applicant at Hazrat Nizamuddin Railway Station, when she arrived at the Taxi Lane outside the Railway Station building Platform no.1. The applicant was seen to be carrying 3 bags with her.

2.2 Thereafter, a notice under Section 50 of the NDPS Act was served upon the applicant, and she was apprised of the content therein and was also informed that she has the right to be produced before a Magistrate or a Gazetted Officer prior to her search. The applicant, however, declined to be searched in the presence of a Magistrate or a Gazetted Officer. 2.3 The NCB team in the presence of the independent witnesses carried out a search of the applicant's violet-coloured trolley bag, and on opening the said bag 4 transparent packets were found consisting of quilts in each packet where white coloured crystalline substance was found hidden inside the folds of the quilts. On asking the applicant about the substance, she

disclosed it was Amphetamine.

2.4 The contraband recovered from the possession of the applicant was also checked by the NCB Officers with the help of a field-testing kit and it tested positive for Amphetamine, weighing 16.4 kg. It is alleged that nothing incriminating was found in the other two bags of the applicant. 2.5 The panchnama was drawn on the spot in the presence of public witnesses and notice under Section 67 of the NDPS was served upon the applicant wherein she was asked to appear at the NCB office forthwith, to tender her statement. 2.6 During the course of the investigation, on 5.11.2018, the applicant gave her statement under Section 67 of the NDPS Act admitting the recovery of contraband from her baggage and also confessed that she was involved in the trafficking of drugs. 2.7 Pursuant to the recovery made from the applicant of 16.4kgs of the contraband (which as per the CRCL report tested positive for Ephedrine Hydrochloride), and based on her voluntary statement under Section 67 of the NDPS Act, the applicant was arrested, subsequently, on 05.11.2018. 2.8 Based on the investigation conducted and the evidence gathered, the complaint was filed under Sections 9A and 25A of the NDPS Act. Charges qua the present applicant were framed vide order dated 12.07.2019 passed by the learned Trial Court. 2.9 The applicant's second application for bail moved before the learned Trial Court was rejected by the learned Special Judge - NDPS/ASJ (South), Patiala House Courts, New Delhi vide order dated 13.05.2021. Hence, the present application for bail.

3. At the outset, learned counsel appearing on behalf of the applicant submitted that rigors of Section 37 of the NDPS Act will not apply to the present case, since the recovery is that of a controlled substance.

4. The learned counsel submitted that the complaint has been filed and charges have been framed by the learned Trial Court, and till date only three witnesses have been examined. So far as, material witnesses are concerned, none have been examined till date. He stated that the way and the manner in which the trial is proceeding, it is likely to take substantial time.

5. The learned counsel submitted that the applicant is in incarceration since the date of arrest, i.e., 05.11.2018, which is more than five years.

6. He submitted that the procedural violation of collection of the samples of the controlled substance is apparent from the complaint, and the same has been conducted in a manner violating the mandate of the law under the Standard Order No.1/88 dated 15.03.1988 and rules thereunder. He asserted that the total recovery of 16.4 kg of the contraband occurred from four packets; however, the sample was drawn by combining material from all the packets, which, according to the precedent set in *Amani Fidel Chris v. Narcotics Control Bureau* :

2020 SCC OnLine Del 2080, is improper. To buttress his stance, he relied upon the decisions in the case of Union of India v. Bal Mukund &Ors. : (2009) 12 SCC 161 and the judgment dated 11.02.2021 in Bail Appl. No. 3076/2020 titled Ahmed Hassan Muhammed v. The Customs, in which the petitioners were acquitted of all charges under Sections 9A and 25A of the NDPS Act.

7. Per Contra, the learned Senior Standing counsel for NCB submitted that the applicant is alleged to be involved in illegal trafficking of controlled substance, i.e. 16.4 kgs Ephedrine Hydrochloride, which is used in manufacturing of narcotic drugs/psychotropic substances, hence it is a serious offence. He submitted that since the applicant is a foreign national, she has no roots in the society and there is every likelihood of jumping the bail and impeding the trial proceedings in the present case.

8. He submitted that public witnesses are yet to be examined and there are all possibilities of the applicant influencing the witnesses, and absconding from the trial.

9. Heard learned counsel for the parties and perused the record. ANALYSIS

10. The first and foremost question to be addressed in the present case is whether the rigours of Section 37 of the NDPS Act would apply when the recovery made is that of a "controlled substance".

11. Section 9A of the NDPS Act deals with the power to control and regulate controlled substance. "Controlled substance" as defined under Section 2 [(viid)] of the NDPS Act means "any substance which the Central Government may, having regard to the available information as to its possible use in the production or manufacture of narcotic drugs or psychotropic substances or to the provisions of any international Convention, by notification be a controlled in the official Gazette, declare to be a controlled substance." The Ministry of Finance (Department of Revenue) vide its notification dated 26th March, 2013 has declared "Ephedrine" a "controlled substance" under the Act.

12. It is pertinent to note that the rigors of Section 37 of the NDPS Act are applicable where the accused is alleged to have committed the offences under Section 19, or Section 24 or Section 27A and for offences involving "commercial quantity". Section 37 of the NDPS Act provides 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 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 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.]"

13. "Ephedrine" is not included in the schedule of the NDPS Act. Section 2(vii)(a) of the NDPS Act explains "commercial quantity" in relation to only Narcotic Drugs and Psychotropic Substance. The seized commodity (Ephedrine) is admittedly a "Controlled Substance." It is neither a Narcotic Drug nor a Psychotropic Substance. Hence, it cannot come within the purview of "commercial quantity" under Section 37 of the Act.

14. In light of these considerations, it is my considered opinion that the provisions delineated under Section 37 of the NDPS Act do not apply to the circumstances of the present case.

15. The aforesaid legal stance has been elucidated by way of various decisions rendered by coordinate benches of this Court, including *Niranjan Jayantilal Shah v. Directorate of Revenue Intelligence* : 2013 SCC OnLine Del 4608 wherein it was held as under:

"6. During the course of arguments, it was fairly conceded by learned counsel for the respondent that bar of Section 37 of the NDPS Act is not attracted in the present case since as per the prosecution 100 kgs. of Pseudoephedrine was recovered which is a controlled substance within the meaning of Section 2 (vii)(b) of the Act. Pseudoephedrine is not a narcotics drug as envisaged under Section 2 (vii)(a) of the Act. In *N.C. Chellathambi* (supra) one tonne of ephedrine was recovered, in *Ajay Aggarwal* (supra) recovery was of 1600 liters of Acctic Anhydride, in *Rajiv Kumar @Sukha* (supra) recovery was of 25 kgs powder ephedrine hydrochloride, in *Faiyaz Ahmed Rasool Shaikh* (supra) and another recovery was of 290 kgs of pseudoephedrine, in *Chakrapani Dutt* (supra) recovery was of 100 liters of Acctic Anhydride, and in all these cases since the accused had remained in custody for certain period, they were released on bail"

16. In *TinimoEfereWowo v. State Govt. of NCT of Delhi* : 2022 SCC OnLine Del 46, a coordinate bench of this Court, in a case involving recovery of Pseudoephedrine (controlled substance), granted bail to the applicant and observed as under:

"9. The offences alleged against the petitioner are U/s 9A/25 A of the NDPS Act. First and foremost question is whether rigors U/s 37 of the NDPS Act applies to the case of the petitioner or not. 10. The present petitioner is facing prosecution for charges U/s 9A and 25 A of the NDPS Act and hence obviously his case would not be covered U/s 37 of the NDPS Act. Moreover, as far as Section 9A which deals with controlled substance is concerned, there is no categorization of small quantity or commercial quantity. Therefore, concept of commercial quantity is applicable only to narcotic drugs and psychotropic substances and not to controlled substance.

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12. The substance alleged to have been recovered from the petitioner/accused is 3.5 Kg. of pseudoephedrine which is a controlled substance. It has been rightly submitted by the Ld. counsel for the petitioner/accused that it is neither a narcotic drug nor a psychotropic substance under the NDPS Act. The alleged offences are not punishable with death or imprisonment for life. The offence falling U/s 9A r/w section 25A of the NDPS Act is punishable with imprisonment which may extend to 10 years and also fine which may also extend to Rs. 1 Lakh and the bar of Section 37 is not attracted in the present case as the substance recovered is a controlled substance within the meaning of Section 2 (viid) of the Act.

XXXX XXXX XXXX

17. It has also been argued by the Ld. counsel for the petitioner that in cases, where the controlled substance recovered was even much larger then that recovered from the petitioner/accused even in those cases the bail have been granted and he has placed reliance upon "Niranjan Jayantilal Shah v. Directorate of Revenue Intelligence"

decided on 19.11.2013 (Bail Application No. 1202/2013), this Court granted bail to the accused where the recovery of the same controlled substances was of 100 Kg. This decision referred to had relied upon several other decisions of the Court, where the recovery of much larger quantities of controlled substances have been made. Reliance can also be placed upon the judgment of this Court "Manoj Kumar v. Directorate of Revenue Intelligence" 2015 SCC OnLine Del 7830."

17. Section 25A of the NDPS Act provides as under:

"[25A. Punishment for contravention of orders made under section 9A.--If any person contravenes an order made under section 9A, he shall be punishable with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine which may extend to one lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding one lakh rupees.]"

18. The aforesaid section provides for punishment for violation of Section 9A of the NDPS Act, which relates to the 'power to control and regulate controlled substance'. As far as Section 9A which deals with controlled substance is concerned, there is no categorization of small quantity or commercial quantity.

19. It is contended by the learned counsel for the applicant that even otherwise, the prosecution had mixed the contents of the 4 packets allegedly recovered from the applicant during the search and seizure proceedings, into one homogenous whole, which is in violation of the Standing Order No.1/88 dated 15.03.1988, which makes the proceedings amenable to challenge. A coordinate Bench of this Court in, Ram Bharose v. State (Govt. of NCT of Delhi) : Bail Application No.1623/2022, where all the contents of the recovered contraband were mixed together before samples were drawn, while relying on Amani Fidel Chris v. Narcotics Control Bureau (supra), observed that the procedure adopted was not in consonance with standing order 1/88. It was held as under:

"Prima facie, the said drawing of the samples as per the contents of the FIR does not appear to be in consonance with the Standing Operating Procedure in Standing Order 1/88 dated 15.3.1988 issued by the NCB.....In the facts and circumstances of the instant case, the applicant is allowed to be released on bail..."

20. It is also crucial to note that maximum punishment, without any minimum, provided for in Section 25A of the NDPS Act is imprisonment for a term which may extend to 10 years with fine which may extend to 1,00,000/-.

21. The Hon'ble Supreme Court, while taking note of the delay in disposal of cases under the NDPS Act, had issued certain directions, subject to general conditions, in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India: (1994) 6 SCC 731 which are reproduced as under :

"15.....

(i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs. 50,000 with two sureties for like amount.

(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial accused is charged for the commission of an offence punishable under Sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order."

22. Section 436A of the CrPC provides that if an accused has undergone detention for a period extending up to one half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties. Section 436A of the CrPC reads as follows :

"[436-A. Maximum period for which an undertrial prisoner can be detained.-- Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under the law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties: Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under the law.

Explanation.--In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding cause by the accused shall be excluded.]"

23. Undisputedly, the applicant in the present case has undergone detention for a period in excess of one-half of the maximum period of imprisonment specified for the offence under Section 25A of the NDPS Act.

24. The Hon'ble Supreme Court in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India (supra), in cases related to undertrial accused who are foreigners had issued the following directions in relation to the conditions to be imposed while granting bail:

"15....."

(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code."

(Emphasis supplied)

25. In view of the facts and circumstances of the present case, the application is allowed and the applicant is directed directed to be released on bail on furnishing a personal bond for a sum of 1,00,000/- with two sureties of the like amount, subject to the satisfaction of the learned Trial



Court, on the following conditions:

- a. The applicant shall join and cooperate with the investigation as and when directed by the IO;
- b. The applicant will not leave the boundaries of the National Capital Region without prior permission of the Court, and will deposit her passport with the learned Trial Court; c. The applicant shall provide the details of her permanent address to the learned Trial Court and intimate the Court, by way of an affidavit, as well as the IO about any change in her residential address;
- d. The applicant shall, upon her release, give her mobile number to the concerned IO/SHO and shall keep her mobile phone switched on at all times;
- e. The applicant shall appear before the learned Trial Court on every date of hearing;
- f. The applicant shall, after her release, report to the local Police Station once in every week;
- g. 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.

26. The learned Trial Court is directed to ensure that the certificate of assurance, from the Embassy/ High Commission of the applicant's native country that the applicant shall not leave the country and shall appear before the learned Trial Court as and when required, is placed on record.

27. 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.

28. 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.

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

AMIT MAHAJAN, J FEBRUARY 19, 2024 UG