

Arjun Sharma vs The Union Of India on 1 February, 2024

Author: Manish Choudhury

Bench: Manish Choudhury

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GAHC010188392023

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Bail Appln./2974/2023

ARJUN SHARMA
S/O LT. RAMAYODHYA SHARMA
R/O CHANDIASTHAN
P.O. CHANDIASTHAN
P.S. GOVIND GANJ
EAST CHAMPARAN,
STATE-BIHAR,
PIN-845411

VERSUS

THE UNION OF INDIA
REP. BY THE NARCOTIC CONTROL BUREAU (NCB), GUWAHATI.

Advocate for the Petitioner : MR A V SINGH

Advocate for the Respondent : SC, NCB

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY

ORDER

Date : 01-02-2024 The present application under Section 439, Code of Criminal Procedure, 1973 ['the Code' and/or 'the CrPC', for short] is preferred by the accused-

Page No.# 2/20 petitioner viz. Sri Arjun Sharma seeking his release on bail in connection with NDPS Case no. 39/2021, presently pending before the Court of learned Special Judge, Kamrup [Metro] at Guwahati ['the trial court', for short]. The case, NDPS Case no. 39/2021 has arisen out of NCB Crime Case no. 01/2021, registered under Section 8[c], Narcotic Drugs and Psychotropic Substances Act, 1985 ['NDPS Act', for short] and punishable under Section 22[c] and Section 29 of the NDPS Act.

2. At the inception, it is appropriate to narrate the events, in brief, leading to the registration of NCB Crime Case no. 01/2021 :-

2.1. At about 09-55 hours on 02.01.2021, an Intelligence Officer, Narcotics Control Bureau [NCB], Guwahati received an information from a reliable source that one person, Md. Salam would be coming to a restaurant named Naga Kitchen, 3rd Floor, opposite Pantaloon Mall located at G.S. Road, Guwahati to deliver a huge quantity of Methamphetamine tablets to another person named Sri Arjun Sharma i.e. the accused-petitioner. The source further informed that Md. Salam would be coming to Naga Kitchen along with his accomplice named Sri K. Basanta Singh. The information further revealed that those persons had kept more Methamphetamine tablets at their places of stay also.

2.2. The said information was reduced into writing and submitted before the Superintendent, NCB, Guwahati at 10-00 hours on 02.01.2020 and the matter was also informed to the Zonal Director, NCB. On being directed, a team was constituted with one of them as Investigating Officer [I.O.] authorized to search, seize and arrest. It is stated that at around 12-00 hours, the team so Page No.# 3/20 constituted, proceeded to Naga Kitchen and reached there at about 12-30 hours. After reaching there, they sought the assistance of two independent witnesses in order to carry out the process of search and seizure in their presence.

2.3. Inside the restaurant, Naga Kitchen, the NCB team found two persons sitting around a table in front of each other. The team along with the independent witnesses approached the said two persons disclosing their identities and asked about the two persons' identities and the drugs. The two persons disclosed their identities as Sri Arjun Sharma i.e. the accused-petitioner and Md. Salam. Md. Salam had a bag in his lap. On being asked, he opened the bag and took out one transparent polythene packet containing tablets marked as 'R' and 'WY'. Some tablets from the packet were taken out and crushed into powder form. When checked with the help of the drug detection kit carried by the NCB team it indicated Methamphetamine. When the accused-petitioner was confronted by the NCB team, he informed that he had come there to receive about 6 KGs of Methamphetamine tablets.

2.4. The packet was weighed and on weighment, it was found to be 5.800 KGs.

The packet was then sealed and marked using the seal of the NCB.

2.5. It was informed by Md. Salam that his accomplice, Sri K. Basanta Singh was waiting outside the restaurant. By pointing towards him through the window glass pane, Md. Salam had identified him. Accordingly, the personnel from NCB team intercepted the other accused person, Sri K. Basanta Singh.

Page No.# 4/20 2.6. Apart from the Methamphetamine tablets weighing 5.800 KGs, some other materials/articles like Adhaar cards, wallets, currency notes, ATM cards, PAN cards, etc. were seized from the possessions of the persons so apprehended in presence of the independent witnesses. After such seizure of the materials/articles, those were sealed with the signatures of the seizing officer of the NCB team, the independent witnesses and the accused persons. Search and seizure lists and a panchnama were prepared on the spot. Thereafter, all the three persons were taken to the office of the NCB and the seized contraband substances were deposited to the NCB Malkhana.

2.7. On the basis of the information revealed by the accused persons, 1.860 KGs of Methamphetamine tablets were seized from the possession of Sri K. Basanta Singh at Sadananda Lodge, near Downtown Hospital, Guwahati.

2.8. The statements of all the three apprehended accused persons were recorded under Section 67 of the NDPS Act and thereafter, they were arrested. After arrest, all the three accused persons were produced before the Court of learned Chief Judicial Magistrate, Kamrup [Metro] Guwahati on 04.01.2021. The seized samples were also produced before the Court and samples for chemical examination were drawn in the presence of the learned Magistrate.

2.9. The procedure prescribed in Section 67 of the NDPS Act has been stated to be complied with.

3. As per Entry no. 159 of the Table appended to the NDPS Act, issued in exercise of powers conferred by Clauses [viiia] and [xxiia] of Section 2 of the Page No.# 5/20 NDPS Act, and as per the Notification vide no. 1893 of the Ministry of Finance [DoR], Government of India published in the Gazette of India on 18.11.2009, a quantity of Methamphetamine up to 2 gms is termed as small quantity and a quantity of Methamphetamine above 50 gms is termed as commercial quantity.

4. The case of the respondent NCB, in brief, is that 7.660 [=5.800+1.860] KGs of Methamphetamine tablets had been seized from the accused persons. The Report dated 25.03.2021 of the Forensic Science Laboratory [FSL], Assam, Guwahati has reflected that the sample gave positive test for Methamphetamine. Viewed in relation to the total quantity of Methamphetamine tablets seized in connection with NCB Crime Case no. 01/2021, the quantity of contraband substances i.e. Methamphetamine tablets seized is evidently commercial quantity.

5. After completion of investigation of NCB Crime Case no. 01/2021, the NCB submitted the Offence Report under Section 36A[1][d], NDPS Act against 3 [three] accused persons viz. [1] Md. Salam; [2] Sri Arjun Sharma [the accused- petitioner]; and [3] Konthoujam Basanta Singh; on 28.06.2021 before the learned Special Judge, Kamrup [Metro] at Guwahati. In the said Offence Report, one Md. Ayub Ali has been shown as an absconding accused and a prayer was made to issue non-bailable warrant of arrest [NBWA] as per law against him. On the basis of the said Offence Report, NDPS

Case no. 39/2021 has been registered.

6. It is to be mentioned that during the course of investigation, the accused- petitioner preferred a bail application, B.A. no. 60/2021 before the learned trial Page No.# 6/20 court. The said bail application, B.A. no. 60/2021 was rejected by the learned trial court on 26.03.2021. Later on, the accused-petitioner preferred another bail application, B.A. no. 73/2021 and the said bail application also came to be rejected by the learned trial court vide its Order dated 28.04.2021. During the pendency of investigation, the accused-petitioner preferred a bail application under Section 439, CrPC before this Court and the said bail application was registered and numbered as B.A. no. 1085/2021. This Court upon perusal of the materials and after hearing the learned counsel for the parties, rejected the prayer for bail on 11.06.2021. After submission of the Offence Report under 36A[1][d], NDPS Act, the accused-petitioner preferred another bail application, B.A. no. 170/2021 before the learned trial court but the same was also dismissed by the learned trial court by its Order dated 13.07.2021. After submission of the Offence Report and during the pendency of the trial of NDPS Case no. 39/2021, the accused-petitioner preferred another bail application, which was registered and numbered as B.A. no. 3237/2021, before this Court. The bail application, B.A. no. 3237/2021 was dismissed by an Order dated 02.08.2022 after perusal of the materials in the case records of NDPS Case no. 39/2021 and after hearing the learned counsel for the parties.

7. I have heard Mr. B. Bhagawati, learned counsel for the accused-petitioner and Ms. M. Deka, learned counsel representing Mr. S.C. Keyal, learned Standing Counsel, NCB.

8. Submissions have been made by the learned counsel for the petitioner on a number of grounds. Firstly, it is submitted that as the investigation of the case has been completed long back resulting into the Offence Report, there is no Page No.# 7/20 requirement for further incarceration of the accused-petitioner in custody. It is submitted that the accused-petitioner is in incarceration since 04.01.2021. It has been submitted that the only material on which the respondent NCB has submitted the Offence Report against the accused-petitioner is the statement recorded under Section 67 of the NDPS Act. It is contended that merely by implication on the basis of the statements recorded under Section 67 of the NDPS Act the accused-petitioner could not have been placed in the category of other accused persons, from whom contraband substances were seized and recovered. Reference has been made to the decision of the Hon'ble Supreme Court of India in Tofan Singh vs. State of Tamil Nadu, reported in [2021] 4 SCC 1, to submit that any statement recorded under Section 67, NDPS Act is hit by Section 25, Evidence Act, 1872 and, thus, is not admissible. It is the contention of the learned counsel for the petitioner that if the statement recorded under Section 67, NDPS Act is kept out of purview, then there is no other incriminating material against the accused-petitioner to keep him in custody. The only other material available in the case record pertains to seizure of contraband substance from the possession of the co-accused, Md. Abdul Salam, admittedly made in presence of the accused-petitioner who was sitting around the same table in the restaurant, Naga Kitchen at the point of time. Contention is, thus, made about absence of conscious possession of contraband substances by the accused- petitioner. It has been contended that the investigating authority, NCB has pressed serious charges against the accused-petitioner by bringing in the concept of joint possession. But in the given facts and circumstances, he has contended, it cannot be a case of joint possession. To buttress his such submission, reference has

been made to a decision of Mohan Lal vs. State of Rajasthan, reported in [2015] 6 SCC 222. It has been argued that the Call Detail Page No.# 8/20 Records [CDRs] relied on by the investigating agency, do not go to indicate that the accused-petitioner had conspired with the other accused persons. It is further contended that the Certificate given under Section 65B of the Evidence Act, 1872 which has been submitted by the NCB purportedly to establish link of the accused-petitioner with the other accused persons implicated in the Offence Report, do not fulfil the conditions set forth in Section 65B of the Evidence Act, 1872. Contention is made to the effect that considering the accused-petitioner's prolonged incarceration since 04.01.2021; the fact that there is no incriminating material against the accused-petitioner; and that the trial of the case, NDPS Case no. 39/2021 has not progressed in a desired manner as only a few witnesses have been examined till date, the accused-petitioner is to be released on bail on conditions.

9. Per contra, it has been submitted by the learned Standing Counsel, NCB that the case against the accused-petitioner has been considered on merits on a number of times in the earlier bail applications, preferred by the accused- petitioner. The prayer for bail on behalf of the accused-petitioner earlier came to be rejected due to presence of sufficient incriminating materials against the accused-petitioner. The earlier bail applications were rejected by the Court after perusal of the materials available in the case diary and after recording opinion that there are no reasonable grounds for believing that the accused-petitioner is not guilty of the offences he has been charged with in the Offence Report. As regards the CDRs, it has been contended that the accused-petitioner was found to be in constant touch with the other accused persons. Issue regarding admissibility or otherwise of the Certificate issued under Section 65B[4][c] of the Evidence Act, 1872 is not required to be gone into in an application for bail.

Page No.# 9/20 The question of its admissibility or otherwise is a matter to be gone into during the course of the trial. As regards the contention advanced on behalf of the accused-petitioner relating to joint possession, it has been contended that it is the conscious possession which is of relevance, not physical possession. It is contended that absence of physical possession of the contraband substance does not go to mean that the accused person was not in conscious possession as one of the requisite elements is knowledge of possession of contraband, which the accused-petitioner had at the time of seizure of contraband substance from one of the co-accused. It is submitted that the accused-petitioner is not only an accomplice but also a partner in the crime and the entire transactions of contraband substances, that is, 7.660 Kgs of Methamphetamine tablets were jointly operated by the accused persons including the accused-petitioner. Reliance has been placed in the decisions of the Hon'ble Supreme Court of India in Union of India vs. Md. Nawaz Khan, reported in [2021] 10 SCC 100, and Criminal Appeal Nos. 1001-1002 of 2022 [Narcotics Control Bureau vs. Mohit Aggarwal], decided on 19.07.2022, as relied on in the course of hearing of B.A. no. 3237/2021.

10. I have given due consideration to the submissions of the learned counsel for the parties and have also perused the materials brought on record including the materials available in the case records of NDPS Case no. 39/2021, scanned copies of which were called for by requisition. I have also gone through all the decisions cited at the Bar.

11. As the submissions made in this round on behalf of the accused-petitioner are more or less similar to the submissions, except one, made in the earlier Page No.# 10/20 rounds and the same were considered and duly deliberated in the previous rounds, more particularly, while considering the previous bail application, B.A. no. 3237/2021, the observations and findings recorded therein can be referred to in verbatim in the instant application also.

12. It is settled law that the powers of this Court to grant bail under Section 439, CrPC are subject to the limitations contained in Section 37 of the NDPS Act and the restrictions placed on the powers of the Court under Section 37, NDPS Act are applicable to this Court also in the matter of granting bail.

13. For ready reference, Section 37 of the NDPS Act is quoted hereunder :-

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 1 [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--

[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.

14. Section 37 of the NDPS Act starts with a non-obstante clause. Keeping the non-obstante clause in mind, a reading of sub-section [2] of Section 37 of the NDPS Act makes it clear that the power to grant bail to a person accused of having committed an offence either under Section 19 or Section 24 or Section 27A and also offences involving commercial quantity under the NDPS Act is not Page No.# 11/20 only subject to the limitations imposed under Section 439, CrPC, it is also subject to the restrictions placed by sub-clause [b] of sub-section [1] of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other two conditions viz. [i] the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and [ii] that he is not likely to commit any offence while on bail, have to be satisfied. In other words, these limitations are in addition to those prescribed under the Code or any other law in force on the grant of bail. The operative part of Section 37, NDPS Act is in the negative form. Such stringent restrictions have been put on the discretion of the Court for considering application for release of a person accused of offences prescribed therein by the Legislature consciously in view of the seriousness of the offences. The conditions mentioned in Section 37 of the NDPS Act are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on 'reasonable grounds'.

15. In *Satpal Singh vs. State of Punjab*, reported in [2018] 13 SCC 813, the restrictions placed on the discretion to be exercised by the Court while considering an application for bail, in the context of Section 37, NDPS Act have been reiterated. It has been observed that before allowing a bail application, the Court must be satisfied that there are reasonable grounds for believing that the person is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused is to be examined to enter such a satisfaction. The Court has held that these limitations are in addition to those prescribed under the Code or any other law in force on the grant of bail.

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16. The expression 'reasonable grounds' means something more than *prima facie* grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence [*Collector of Customs, New Delhi vs. Ahmadalieva Nodira*, [[2004] 3 SCC 579; and *State of Kerala etc. vs. Rajesh etc.*, [2020] 12 SCC 122]. The Court while considering an application for bail with reference to Section 37 of the NDPS Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and to record its satisfaction about the existence of such grounds. Thus, recording of satisfaction on both the aspects, quoted above, is *sine qua non* for granting of bail under the NDPS Act.

17. The Hon'ble Supreme Court of India in *Mohit Aggarwal* [supra] after considering the decisions in *Ahmadalieva Nodira* [supra] and *Rajesh* [supra], has summed up the legal position regarding the expression 'reasonable grounds' in the following words :-

To sum up, the expression 'reasonable grounds' used in clause [b] of subsection [1] of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.

18. The Hon'ble Supreme Court in *Mohit Aggarwal* [supra] has also clarified Page No.# 13/20 about the manner of consideration of an application for bail. In the context of Section 37 of the NDPS Act, it has been clarified therein to the effect that at the stage of examining an application for bail involving commercial quantity of a contraband, the Court is not required to record a finding that the accused person is not guilty. At the time of such consideration, the Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the Court is expected to undertake at that stage is for the limited purpose of releasing the accused-petitioner on bail. Thus, the focus is on the

availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the NDPS Act while on bail.

19. Reverting back to the facts of the case in hand, it is noticed from the materials on record that the team from the NCB after entering into the restaurant, Naga Kitchen found two persons sitting in the corner seats at wall side at the western part of the restaurant. They were identified as Md. Salam and Sri Arjun Sharma i.e. the accused-petitioner and they were found sitting in front of each other around a table. On being asked, Md. Salam opened the black-red bag marked Tycoon kept in his lap and took out one transparent polythene packet containing pinkish colour tablets which were marked either as 'R' or as 'WY'. Those pinkish colour tablets when crushed into powder form and checked through the drug detection kit, gave positive results for Methamphetamine. The quantity, seized from inside the bag, weighed 5.800 KG, which is evidently commercial quantity under the NDPS Act.

20. The concepts of possession and conscious possession have come to be Page No.# 14/20 deliberated in Mohan Lal [supra]. It has been observed therein that whether there was conscious possession has to be determined with reference to the factual backdrop. The expression 'possession' is a polymorphous term which assumes different colours in different contexts and it may carry different meanings in contextually different backgrounds. It is, therefore, impossible to work out a completely logical and precise definition of 'possession' uniformly applicable to all situations in the context of all statutes. Ordinarily, the word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended. Possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the possession to whom physical possession is given holds it subject to that power or control. 'Possession' is meant to be the legal right to possess. Thus, the decision has observed that the term 'possession' would mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on this knowledge.

20.1. The decision in Md. Nawaz Khan [supra] has referred to the decision in Mohan Lal [supra] and has gone on to observe that a finding of the absence of possession of the contraband on the person of the accused does not absolve one from the scrutiny required under Section 37[1][b][ii] of the NDPS Act.

21. The accused-petitioner in his voluntary statement had disclosed two mobile numbers. According to the respondent NCB, after analysis of the CDRs of the said two mobile numbers, it was found that while one of them was registered in his name the other mobile number [88373 95833] was registered in the name Page No.# 15/20 of one Md. Taj Khan. After detailed analysis and investigation in relation to the mobile numbers, the accused-petitioner was found to have provided a wrong mobile number [88373 95833], instead of another mobile number [88373 92833], which was registered in his name. The investigating authority has claimed to have analysed the call details of the accused-petitioner and the other accused persons/suspects. The accused person, Md. Salam was found to have made 13 nos. of calls to the accused-petitioner; 232 nos. of calls to the other accused person, K. Basanta Singh; and 21 nos. of calls to the absconding accused, Md. Ayub Ali. The

accused-petitioner was found to have made 23 nos. of calls through his two mobile numbers to the absconding accused, Md. Ayub Ali and 13 nos. of calls to the accused, Md. Salam. The aforesaid CDRs go to show that there were frequent mobile calls amongst the arrested accused persons/absconding accused person. The frequent mobile calls are clearly suggestive of existence of relationships amongst them.

22. It has been urged on behalf of the accused-petitioner that the Certificate given under Section 65B[4][c] of the Evidence Act, 1872 is not to be relied upon and the CDRs of the accused persons should not be considered, in view of the observations made in Pallulabid Ahmad Arimutta [supra]. But, this Court is not persuaded to accept such submissions. The Certificate under Section 65B[4][c] of the Evidence Act, 1872 is found to have been given by the Service Provider by getting it generated from the Service Provider's computer system with further certification that the contents conform to the records and are true to knowledge. The Certificate has further stated that the conditions laid down in Section 65B regarding the admissibility of computer output in relation to the information and the computer in question are fully satisfied in all aspects. The issue regarding validity or admissibility or otherwise of the said Certificate is not Page No.# 16/20 required to be gone into at the time of consideration of the bail application. It has not been argued that there were no mobile calls amongst the accused persons/absconding accused or that the accused persons were unknown to one another. At the stage of consideration of a bail application qua the parameters laid down in Section 37 of the NDPS Act, this Court is not required to evaluate the evidence in the manner sought for on behalf of the accused-petitioner. It is for the accused-petitioner to establish in the course of the trial that he was not in conversation or contact with the other arrested accused persons/absconding accused through the mobile phones registered in his name which the respondent NCB has relied upon to claim nexus/conspiracy between the accused person and the other charge-sheeted accused persons/absconding accused person or they were not known to him.

23. From the materials available on record, it has emerged that 7.660 KGs of Methamphetamine tablets, admittedly commercial quantity, were recovered from the possession of the two arrested co-accused persons - Md. Salam and Sri K. Basanta Singh. At the time of search, recovery and seizure of 5.800 KGs of Methamphetamine tablets from the possession of Md. Salam, the accused-petitioner was found in his close company and was sitting in front of him around the same table inside a restaurant, Naga Kitchen. The CDRs of the accused persons, as discussed hereinabove, are clearly suggestive of frequent contacts amongst them. Though there was no physical possession of the contraband substances on the person of the accused-petitioner at the time of search, recovery and seizure but by considering the facts and circumstances obtaining in the case in its entirety, this Court is not in a position to hold, at this stage, that the element of conscious possession of the contraband substances on the part of the accused-petitioner was completely absent and is, therefore, not Page No.# 17/20 convinced that the accused-petitioner is not guilty of the offence for which he has been charge-sheeted by the Offence Report under reference, even if the statements of the accused persons including that of the accused-petitioner, under Section 67 of the NDPS Act are kept aside from consideration.

24. The previous application of the accused-petitioner for bail, B.A. no. 1085/2021 was considered by this Court on 11.06.2021 on the basis of the materials made available including the case diary,

before the Court on that day. Finding presence of incriminating materials including the positive results in the FSL report, found available in the case diary against the accused-petitioner and considering the rigours of Section 37, NDPS Act, the Court rejected the said application by order dated 11.06.2021. As the next bail application was filed after submission of the Offence Report under Section 36A[1][d], NDPS Act by the NCB before the jurisdictional court on 28.06.2021 the Court had considered the same on the basis of the materials placed before it and the case records of NDPS Case no. 39/2021 and having gone through the materials, this Court did not find any good and sufficient ground to depart from the view which was taken earlier, wherein it was held to the effect that the Court was not persuaded to hold that there are reasonable grounds to reach a finding that the accused petitioner was not guilty of the offences for which he had been implicated. In an application for bail involving contraband of commercial quantity which brings in the limitations prescribed in Section 37 of the NDPS Act, it is not the period of detention but the merits qua the twin conditions laid down in Section 37 of the NDPS Act which are required to be considered. It has also been held in Mohit Aggarwal [supra] that the length of the period of custody of the accused person or the fact that the charge-sheet has been filed and the trial has commenced by themselves not considerations that can be treated as persuasive grounds for Page No.# 18/20 granting relief to an accused person under Section 37 of the NDPS Act.

25. As the same grounds are urged in this bail application also, this Court has not found any good and sufficient ground to depart from the views which were taken earlier. It was held therein that there were reasonable ground to reach a finding that the accused-petitioner was not guilty of the offences for which he had been implicated.

26. The last ground which has been urged on behalf of the accused-petitioner is for consideration of the case in the backdrop of Section 436A, CrPC. Section 436A has been brought in the Code with effect from 23.06.2006. For purpose of easy reference, Section 436A, CrPC is quoted herein below :-

436A. 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 that 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 that law.

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

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27. The matter of prolonged custody during the course of the trial as an undertrial has a relation with the personal liberty under Article 21 of the Constitution of India. Personal liberty is an important aspect of the constitutional mandate. The provisions contained in Section 436A of the Code have mentioned about the maximum period for which an undertrial can be detained. The period has to be reckoned with the custody of the accused- petitioner during the investigation, enquiry and trial. To consider a prayer for bail under Section 436A, CrPC, the period of incarceration in all forms are to be reckoned. The Hon'ble Supreme Court of India in Satender Kumar Antil vs. Central Bureau of Investigation and another, reported in [2022] 10 SCC 51, has considered the aspect of personal liberty, prolonged incarceration as an undertrial, the provisions of Section 436A, CrPC and rigours provided under Section 37 of the NDPS Act and has observed that the provision contained in Section 436A, CrPC must imply to special cases also like the NDPS Act in the absence of any specific provision.

28. The offence under Section 22[c], NDPS Act, which involves commercial quantity, is punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees. As have been mentioned above, the accused-petitioner is in custody since 04.01.2021, which is about 3 [three] years. Section 436A, CrPC has provided that when a person has undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence, he shall be released by the Court on his personal bond with or without sureties. Considering the case of the petitioner vis-à-vis Section 436A, Page No.# 20/20 CrPC, it can be seen that the petitioner is not found entitled to the benefits provided under Section 436A, CrPC.

29. In view of the discussion made and reasons assigned herein-above, this Court finds that the present bail application is bereft of merit and, thus, the prayer for bail is liable to be rejected. It is accordingly rejected.

30. It is, however, observed that the observations made herein above are only for the purpose of consideration of the prayer for bail made on behalf of the accused-petitioner and therefore, none of such observations shall be construed as observations made on any aspect of the trial and the observations shall not have any bearing on the trial of the accused-petitioner, pending presently before the learned trial court.

JUDGE Comparing Assistant