

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 11.10.2022

Date of decision: 11.11.2022

+ BAIL APPLN. 891/2022

TASAWWUR HUSSAIN@ TASAWWUR

..... Petitioner

Through: Mr. Y.R. Saxena, Mr. Priya Saxena &
Mr. Swarandeeep Singh, Advocates.

versus

DIRECTORATE OF REVENUE INTELLIGENCE Respondent

Through: Mr. Satish Aggarwala, Sr. Standing
Counsel with Mr. Gagan Vaswani,
Advocate.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J

1. The applicant, vide the present application seeks the grant of regular bail in case titled DRI vs. Tasawwur Hussain @ Tasawwur & Ors. SC No. 7550/2016 for offences punishable under Sections 22, 27(A) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 submitting to the effect that he is incarcerated for more than seven years having been arrested on 21.02.2015.

2. The applicant has further submitted that he has been falsely implicated; that he had merely boarded the truck in question in which the alleged contraband was recovered at 00:30 a.m. on 21.02.2015

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near village Pochanpur of Dwarka on the instructions of his uncle (phupha)

Sh. Deen Mohd. Khan @ Dina; that he had no knowledge where the truck bearing No. HR 55 P 7995 was being taken; and that he had no knowledge that the said truck apart from containing Papayas contained 500.18 Kg. of crystalline powder suspected to be Amphetamine which truck was driven by one Hakmuddin @ Hakka with a cleaner named Shokat Ali.

3. The applicant has submitted further that he had retracted his statement under Section 67 of the NDPS Act, 1985; that his statement is wholly exculpatory; that there is no recovery of any material fact, document or contraband from him, and that even as per the statement of Hakmuddin @ Hakka, the driver of the said truck in question, the applicant allegedly boarded the truck to guide the driver to the house of Dina, his uncle, and Dina was also there in his Innova car; and as per the statement of the driver, the truck contained some articles of Sh. Deen Mohd. Khan @ Dina which were to be dropped at his house and Papaya was to be delivered at Mangalore.

4. *Inter alia*, the applicant has submitted that there is no complaint that has been lodged against Dina nor has he been arrested; and that the statement under Section 67 of the NDPS Act, 1985 of the applicant is not admissible against him; and that there has been no material of any fact nor of any other article effective at the behest of the applicant, and thus the statement of the applicant under Section 67 of the NDPS Act, 1985 is wholly inadmissible in evidence.

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5. *Inter alia*, the applicant submits that the search of the truck in question was conducted after sunset and before sunrise without obtaining any search warrant, which seizure itself was thus illegally effected allegedly.

6. The petitioner has further submitted that he having been arrested on 21.02.2015, with the prosecution witnesses numbering 77, out of which only 47 witnesses had been examined at the stage of submission of the application for bail, the continued incarceration of the applicant was in violation of his right to life in terms of Article 21 of the Constitution of India.

7. The respondent i.e., the DRI, vide its reply dated 31.05.2022 has submitted that a specific intelligence was received from the Directorate of Revenue Intelligence, Mumbai Zonal Unit, Mumbai, that a truck bearing registration No. HR 55 P 7995 carrying contraband substances covered under the NDPS Act, 1985 would enter Delhi from the National Highway 8 via Gurgaon Toll Plaza on the night of 20.02.2015 and 21.02.2015, and that the officers of the Directorate of Revenue Intelligence, Delhi Zonal Unit, B-3 & 4, 6th Floor, Pt. Deendayal Antyodaya Bhawan, CGO Complex, Lodhi Road, New Delhi intercepted the said truck near the Pochanpur village, Dwarka, New Delhi, which was brought to office of the DRI, DZU, and after examination, was found containing 500 kgs of contraband, which was later on seized and confirmed as mephedrone, and at the time of interception, the truck was occupied by three persons, one of them being the applicant herein.

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8. The DRI further submitted through its reply that Hakmuddin and the applicant were arrested and sent to judicial custody, and in a follow-up action carried out at Solapur, Maharashtra, over 5000 kgs-ltrs mephedrone were seized, that two more persons connected with the case i.e., Babasaheb Dhavale and Vaibhav Shaha were arrested and sent to judicial custody, and it was further stated by the DRI that the relative and accomplice of the applicant, Din Mohammed Khan @ Dina is still absconding.

9. The prosecution has further submitted that there is no delay on the part of the prosecution in recording the evidence; that there is the embargo of Section 37 of NDPS Act, 1985 applicable in the instant case and that none of the co-accused are on bail.

10. *Inter alia*, reliance was placed on behalf of the respondent DRI on the order dated 27.05.2019 in Vaibhav Shah vs. DRI in Bail Appln. 1324/2019, order dated 07.08.2020 in Bail Appln. 2103/2020, in which the application was permitted to be withdrawn, order dated 27.05.2019 in in Bail Appln. 1324/2019, whereby the application was dismissed as withdrawn, order dated 07.01.2022 in Bail Appln. 659/2019, whereby the prayer made by the petitioner seeking release on bail was declined though the learned Trial Court was directed to expeditiously record the testimonies of the prosecution witnesses.

11. The DRI has further placed reliance on the following verdicts:-

- ***“Union of India Vs. Rattan Malik @Habul-Criminal Appeal No. 137 of 2009 decided on 23.01.2009,***

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submitting to the effect that the Hon'ble Supreme Court inter-alia held therein that the satisfaction contemplated regarding accused being not guilty, has to be based on 'reasonable grounds', and that the expression 'reasonable grounds' implies something more than prima facie ground, and that the mandatory requirements under Section 37 of the NDPS Act cannot be ignored and that the circumstance like, "nothing had been found from the possession of accused", cannot waive the requirement of Section 37 of the NDPS Act."

- **Satpal Singh v. State of Punjab** (2018),
- **N.R. Mon Vs. MD. Nasimuddin**-2008 (3) JCC (Narcotics) 170
- **UOI Vs. Shiv Shanker Kesari** (2007) Supreme Court Cases 798
- **NCB Vs. Karma Phustak & Ors.** (2005) 12 Supreme Court Cases 480
- **UOI Vs. Ram Samuajh** 1999 (3) CC Cases (SC) 22 - SC,
- **UOI Vs. Abdulia** (2004) 13 SCC 504,
- **UOI Vs. Gurucharan** 2003
- **State of Kerala vs. Rajesh**-Crl. A. 154-157/2020 decided on 24.1.2020, wherein it was observed to the effect:-

"We may further like to observe that the learned Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a sine qua non for granting bail to the accused under the NDPS Act."

- **Customs Vs. Ahmadalieva Nodira**-Criminal Appeal No. 312 of 2004 decided on 11.03.2004, with observations therein to the effect:-

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"In the case in hand, the High Court seems to have completely overlooked the underlying object of Section 37. It did not take note of the confessional statement recorded under Section 67 of the Act.... In the aforesaid background, this does not appear to be a case, where it would be reasonably believed that the accused was not guilty of the alleged offence. Therefore, the grant of bail to the accused was not called for".

- ***UOI Vs. Mahaboob Alam 2004(1) JCC 614 (SC)***, with observations therein to the effect:-

"Following the above dangerous trend arising out of narcotics trade, this Court in the said case held though the Court has the power of granting bail inspite of the language of Section 32-A that the same should be done only and strictly subject to the conditions spelt out in Section 37 of the Act"

- ***Babua alias Tazmul Hossain 2001 SCC (Crl) 351***, with observations therein to the effect:-

"The reasons given by the petitioner for claiming grant of bail become insignificant if one bears in mind the scope of Section 37(1)(b) of the Act. At this stage of the case, all that could be seen was whether the statements made on behalf of the prosecution witnesses, if believable, would result in conviction of the petitioner or not. At this juncture, one cannot say that the accused is not guilty of the offence if the allegations made in the charge are established. Moreover, the evidence having not been completely adduced before the Court one cannot say that there were no grounds to hold that he was not guilty of such an offence. Further, the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotics drugs and psychotropic substances are involved, the

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accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the Court".

- **Intelligence Officer, Narcotics C. Bureau Vs. Sambhu Sonkar & Anr.-2001 SCC (CrI) 346**, with observations therein to the effect:-

"The contention that the liberal interpretation given by the High Court to Section 37 is justified as it affects personal liberty of a citizen who is yet to be tried is not acceptable. Considering the legislative intent of curbing the practice of giving bail on technical ground is a crime which adversely affects the entire society including the lives of a number of persons and the object of making stringent provisions for control of illicit traffic in narcotics drugs and psychotropic substances, there is no reason to accept the construction of the Section which its language can hardly bear.

- **Sanjay Kumar Vs. State - 2012 (3) JCC (Delhi) (Narcotics) 143**, Delhi High Court, with observations therein to the effect:-

"For the grant of bail, very stringent conditions have been put by the statute in case of NDPS and unless and until the same are not satisfied, the bail cannot be granted".

- **Satish Kumar Vs. State 1989 (2) Crimes 109 at p. 110 (Delhi)**, with observations therein to the effect:-

" the offences under NDPS Act, are very serious and grave and the people including in such offences are really causing havoc to the health of the inhabitants of this world. The legislature has thought fit to prescribe very

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deterrent punishment for such offences. The offences which have such delirious effect on the health of the people are always to be dealt with a heavy hand and a person committing such offences normally does not deserve to be released on bail".

- **State of M.P. v. Kajad**, (2001) 7 SCC 673, with observations therein to the effect:-

"A perusal of Section 37 of the Act leaves no doubt in the mind of the court that a person accused of an offence, punishable for a term of imprisonment of five years or more, shall generally be not released on bail. Negation of bail is the rule and its grant an exception under sub-clause (i) of clause (b) of Section 37(1). For granting the bail the court must, on the basis of the record produced be foreit, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub section (1) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for",

to contend to the effect that in view of the embargo under Section 37 of the NDPS Act, 1985, negation of bail is a rule and its grant is an exception under sub-clause (ii) of clause (b) of Section 37 (1) of NDPS Act, 1985, and for grant of bail, the Court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail, and that a liberal approach in the matter of

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bail under NDPS Act, 1985 is not called for. The DRI has thus sought the dismissal of the bail application of the applicant.

12. On a consideration of the submissions that have been made on behalf of either side, it is essential to observe that the date of arrest of the applicant is 21.02.2015 and that a period of more than seven years from the date of arrest of the applicant has since elapsed, the offence allegedly committed by the applicant punishable under Sections 22, 27(A) and 29 of the NDPS Act, 1985 in relation to the commercial quantity of 500 kgs of mephedrone allegedly seized from the truck, in which the applicant was also allegedly present, is punishable with Rigorous Imprisonment for a term which shall not be less than ten years but which may extend to twenty years and to a fine which shall not be less than Rs.1 Lakh but which may extend to Rs.2 Lakhs.

13. In terms of the verdict of the Hon'ble Supreme Court in ***“Supreme Court Legal Aid Committee representing Undertrial Prisoners Vs. Union of India” (1994) 6 Supreme Court Cases 731***, it has been directed vide directions in para 15 thereof to the effect:-

“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

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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.

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(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

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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.”

14. The applicant as observed elsewhere hereinabove is incarcerated since 21.02.2015 and more than a period of five years in terms of the verdict of the Hon’ble Supreme Court in “***Supreme Court***

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Legal Aid Committee representing Undertrial Prisoners Vs. Union of India” (Supra) has elapsed.

15. The alleged disclosure statement made by the applicant in terms of Section 67 of the NDPS Act, 1985, in terms of the verdict of the Hon’ble Supreme Court in ***Tofan Singh vs. Sate of Tamil Nadu (2021) 4 SCC 1*** and of this Court in ***Ebera Nwanaforo and Frank Vitus vs. NCB in Bail Appl. 3705/2020 and Bail Appln. 4187/2020*** dated 31.05.2022, is not admissible in evidence.

16. The verdict of the Hon’ble Supreme Court in ***“Supreme Court Legal Aid Committee representing Undertrial Prisoners Vs. Union of India” (Supra)*** has been adhered to by Coordinate Bench of this Court in ***Atul Aggarwal vs. Directorate of Revenue Intelligence (2021) SCC OnLine Del 5489, Anil Kumar @ Nillu vs. State*** in Bail Appln. 1724/2021, a verdict dated 21.03.2022, and the verdict of the Hon’ble High Court of Calcutta in ***“In Re: Sanawar Ali” 2021 Crl.LJ. 403*** and the verdicts of this Court in Bail Appln. 3705/2020 and Bail Appln. 4187/2020 in ***Ebera Nwanaforo and Frank Vitus vs. Narcotics Control Bureau*** decided on 31.05.2022. None of these judgments has been assailed by the prosecution. Only the judgment in ***State (NCT of Delhi) vs. Anil Kumar @ Nillu*** has been assailed by the State and the SLP (Crl) Diary No(s). 25615/2022 against the same has been dismissed vide order dated 14.10.2022 of the Hon’ble Supreme Court.

17. In view thereof in terms of the verdict of the Hon’ble Supreme Court in ***“Supreme Court Legal Aid Committee representing Undertrial Prisoners Vs. Union of India” (Supra)***, the applicant who

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is charged with the offences punishable under NDPS Act, 1985 with the minimum imprisonment of ten years and the minimum fine of Rs.1 Lakh and who has been in jail for more than five years, is entitled to be release on bail, and is thus, subject to terms and conditions and directives as laid down in para 15 of the verdict of the Hon'ble Supreme Court in *“Supreme Court Legal Aid Committee representing Undertrial Prisoners Vs. Union of India” (Supra)* reproduced elsewhere hereinabove, the applicant is thus allowed to be released on bail on filing a bail bond in the sum of Rs.1,00,000/- with two sureties of the like amount to the satisfaction of the learned Special Judge NDPS, Delhi concerned, where the trial is in progress, with the direction that the passport of the applicant be impounded, with directions that the applicant shall present himself at the office of the DRI, Delhi Zonal Unit, CGO Complex, New Delhi once a week commencing from the date of his release, unless leave of absence is obtained in advance from the Special Judge, NDPS concerned, and shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge concerned, and furthermore, shall keep his mobile phone on at all times, and shall drop a PIN on the google map to ensure that his location is available to the Investigating Officer of the case.

18. Furthermore, the applicant during the period that he is on bail shall not commit any offence whatsoever and in the event of there being any FIR/ DD Entry/ Complaint lodged against the applicant, it would be open to the DRI to seek cancellation of bail of the applicant.

19. The BAIL APPLN. 891/2022 is disposed of accordingly.

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20. Nothing stated hereinabove would amount to any expression on the merits or demerits of the trial that is in progress.

ANU MALHOTRA, J.

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