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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 11th May, 2023

Pronounced on: 18th May, 2023

+ BAIL APPLN. 441/2023

MAHENDER PAL

..... Petitioner

Through: Mr. Amjad Khan, Mr. Sumit Khawal,
Mr. Amit Khawal, Mr. Vinay Kumar,
Advocates.

versus

STATE

..... Respondent

Through: Mr. Aman Usman, APP for the State
with Insp. Naveen Kumar, P.S. S.P.
Badli.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present application under Section 439 of the Cr.P.C. seeks regular bail in case FIR No. 628/2017, under Sections 15/29/61/85 of the Narcotics Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') Act, registered at P.S. Samaypur Badli.

2. The case of the prosecution as per the status report 22.03.2023, authored by Insp. Sanjay Kumar, SHO, P.S. Samaypur Badli, is as under:

“1. That on 21st July, 2017, the above cited case was registered at PS S.P Badli, Delhi. Facts of the case are that on 21.07.2017, AA TS/RD staff received a secret information that a person namely Mahender Pal, applicant herein, used to supply Poppy Straw (doda post) in his auto No. UP 14 ET 6548, will go to a Godown to collect Codeine. If raid could be conducted timely, he can be

apprehended with huge amount of Poppy Straw. The said secret information was lodged u/s 42 NDPS Act and thereafter, a raiding team was constituted accordingly.

2. That, at around 9:30PM, the above auto was seen which was going to SGT Nagar. Thereafter, the auto reached at a Godown at CW-668 SGT Nagar and the driver was loading a white carton in his auto with the help of another person from the Godown. Both the persons were apprehended by the raiding team. At that time, it revealed that many more white cartons were there in the Godown and there was a third person present in that Godown. All the three persons were apprehended by the raiding team and enquired who were identified as Mahender Pal S/o Dhani Ram Rio H.No. 282, G-Block, Gali No.7, Swaroop Nagar Delhi Age 45 yrs, Bahadur Singh S/o Rain Nath Ro H.No. 142, Village and Post Kot-Maira, PS Garb Shankar, Distt. Hoshiarpur, Punjab Age 32 yrs and Prempal@ Kukka S/o Sant Ram Rio Village Pandori Bhet Tehsil Garb Shankar, Distt. Hoshiarpur, Punjab Age 45 yrs. Thereafter, information regarding having illegal Poppy Straw was shared with them and notice u/s 50 NDPS Act was also served upon the driver/applicant Mahender Pal. Thereafter, his auto was checked and two cartons were found in his auto which were checked and 40 small packets of Poppy Straw weighing 1 kg each were recovered from both cartons. After that, notice u/s 50 NDPS Act was also served upon both the other persons and the Godown was checked from where total 95 cartons containing 20 small packets of Poppy Straw in each carton weighing 1 kg each packet, a total of 190 kg of Poppy Straw was recovered from the Godown and Bahadur Singh and Prempal were in the possession of that Poppy Straw. The seized packets along with the copy of seizure memo were sent to SHO/SPB and deposited in Malkhana. Thereafter, a Rukka was prepared u/s 15/29/61/85 NDPS Act and the above cited case was registered. 3. During the investigation, all three accused persons were arrested. Bahadur Singh and Prempal disclosed that they used to purchase Poppy Straw from Punjab and used to supply the same in various areas through Mahender Pal. The owner of the Godown was also examined who stated that he has given the said Godown to the brother of the accused Bahadur Singh and he has given the same to his brother. 4. It is further submitted that during the investigation, the seized exhibits were sent to FSL for examination. FSL result has also been received wherein it is mentioned that all the seized exhibits were found to contain Morphine, Codeine,

Thebaine, Papaverine and Narcotine which are the main constituents of "Poppy Straw".

5. It is further submitted that as per the available record, there is no any other previous involvement of the above accused/applicant Mahender Pal. Previous Conviction/Involvement report from SCRB Delhi is also annexed herewith as Annexure 'A', for the perusal of the Hon'ble Court. 6. It is further submitted that the in the present case, heavy commercial quantity i.e., 230 kg of illegal Poppy Straw has been recovered from the possession of all the accused persons, out of which 40 kg has been recovered from the possession of the accused/applicant Mahender Pal. Further, on 13.11.2017, Charge u/s 29/15(c) NDPS Act has been framed against the above accused/applicant and 8 witnesses, out of 12 have already been examined."

3. Learned counsel appearing on behalf of the applicant submitted that the recovery with respect to the present applicant is of 40 kg of 'poppy straw', which is an intermediate quantity. It is submitted that the applicant has been in custody for more than 5 years and the trial is likely to take further time. It is further pointed out that the applicant has been released on interim bail on 9 occasions and each time, he has duly surrendered before the Court and has not misused the liberty granted to him. It is further submitted that the applicant is an auto rickshaw driver and has a family which is dependent on him for survival.

4. *Per contra*, learned APP for the State submitted that the charges in the present case have been framed under Sections 15(c)/29 of the NDPS Act *vide* order on charge dated 13.11.2017 passed by the learned Special Judge (NDPS Act), North, Rohini. The revision petition filed against the order on charge pending before this Court has been withdrawn *vide* order dated 11.05.2023 passed by this Court, and therefore, the applicant cannot raise the issue of non-applicability of Section 15(c) of the NDPS Act to his case. It is submitted that since the charges have been framed *qua* commercial quantity, therefore,

Section 37 of the NDPS Act will be applicable. It is further argued that only 4 witnesses remain to be examined and the trial will not take further time to conclude.

5. Heard learned counsel for the parties and perused the record.

6. A perusal of the record shows that at the time of framing of charge, there was a concession on the part of the applicant that charges under Sections 15(c)/29 of the NDPS Act be framed. The revision petition challenging the aforesaid order on charge has been withdrawn. It is pertinent to note that the said revision petition was otherwise barred by limitation, by a period of 580 days.

7. A perusal of the FIR shows that on the basis of secret information, the Investigating Officer alongwith the staff followed the auto rickshaw of the present applicant to a godown, where they saw the present applicant loading a white carton in the auto rickshaw with the help of another person at the spot. It is also recorded therein that there was a third person in the godown at that time. Thereafter, for the purposes of searching the auto rickshaw of the applicant, a notice under Section 50 of the NDPS Act was given to him. The search of auto was taken and 40 kg of 'poppy straw' was recovered. It is further recorded that after the procedure of sampling and sealing of the contraband recovered from the applicant's auto, the Investigating Officer proceeded to give notice under Section 50 of the NDPS Act to the other two persons present at the spot, namely, Bahadur Singh Maddi and Prempal Singh @ Kuka. It is further recorded in the FIR that on questioning the aforesaid Bahadur Singh Maddi and Prempal Singh @ Kuka regarding the white cartons lying in the godown by the Investigating Officer, it was revealed that the said cartons contained poppy straw. Thereafter, on search of the godown

95 cartons containing 20 packets of 1 kg each and 8 cartons of 15 packets of 1 kg each were recovered (190 kg). It is also the case of the prosecution that the owner of godown upon examination stated that he had given the said godown to the brother of accused Bahadur i.e., Sohan Lal, who in turn had given to accused Bahadur Singh.

8. Perusal of the record shows that since there was one seizure memo with regard to both the recoveries therefore the recovery of 230 kg (190 kg + 40 kg) of the poppy straw from the godown is being attributed to the present applicant alongwith other two co-accused.

9. As pointed out hereinbefore, the status report filed by the prosecution before this Court records as under:

“2....After that, notice u/s 50 NDPS Act was also served upon both the other persons and the Godown was checked from where total 95 cartons containing 20 small packets of Poppy Straw in each carton weighing 1 kg each packet, **a total of 190 kg of Poppy Straw was recovered from the Godown and Bahadur Singh and Prempal were in the possession of that Poppy Straw.**”

(emphasis supplied)

10. The present applicant was arrested on 20.07.2017 by the Investigating Officer and has been in custody for more than 5 years. As per the nominal roll, it is reflected that the applicant has been released on interim bail on 7 occasions and had not misused the liberty granted.

11. In *Anil Kumar v. Directorate of Revenue Intelligence (D.R.I.), 2022 SCC OnLine Del 4546*, this Court has held as under:

“14. It is pertinent to note that a coordinate bench of this Court in *Anil Kumar @ Nillu v. State, 2022 SCC OnLine Del 778*, while following the judgment of the Hon'ble Supreme Court in *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India* (supra) observed that while remaining cognizant of the impact that drugs have on society, Courts must

also remain conscious of the fact that prolonged deprivation of one's personal liberty, without the assurance of a speedy trial runs contrary to principles of the Constitution. It was held as under:

“14. In view of the above, this Court believes that achievement of universal equality before the law requires the tenets of personal liberty to be applicable to all similarly circumstanced individuals and must not be restricted unless according to procedure established by law. This Court does not find any weight in the submission of the learned APP that the aforementioned judgment of the Supreme Court does not apply to the instant case and that the judgment of this Court in *Atul Agarwal v. Directorate of Revenue Intelligence* (supra) must be referred to a larger Bench due to the incorrect application of the Supreme Court's judgment. Furthermore, in *Atul Agarwal v. Directorate of Revenue Intelligence* (supra), this Court had not solely granted bail on the footing of the inordinate delay in trial, but had also considered the twin requirements stipulated under Section 37 of the NDPS Act. Therefore, this Court is of the opinion that the Petitioner herein is squarely covered by judgment of the Supreme Court and is entitled to release on account of inordinate delay in trial and prolonged judicial custody.

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16. Therefore, fair, just and reasonable procedure is implicit in Article 21 and it creates a right in the accused to be tried speedily. This Court has consistently observed that while Courts must remain cognizant of the deleterious impact of drugs on society, it is also important to keep in mind that deprivation of personal liberty without the assurance of speedy trial contravenes the principles enshrined in our Constitution. In the instant case, the Petitioner has been incarcerated for almost eight years now, i.e. since 27.03.2014, for an offence that is punishable with a minimum imprisonment of ten years. This is an egregious violation of an accused's right to personal liberty and right to speedy trial as, in the off-chance that the Petitioner is acquitted, it would entail an irretrievable loss of eight years of his life that cannot be compensated. Whether or not the Petitioner played an active role in the commission of the offence of drug trafficking and supply is a matter of trial and cannot justify the prolonged incarceration of the Petitioner.”

15. It is pertinent to note that the decision in *Anil Kumar @ Nillu* (supra) was challenged in appeal before the Hon'ble Supreme

Court and *vide* order dated 14.10.2022, SLP (Criminal) 25615/2022, was dismissed.

16. Similarly, another coordinate bench of this Court, in *Sarvan Kumar v. State (NCT of Delhi)*, 2022 SCC OnLine Del 2079 reiterated the aforesaid position of law as laid down in *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners)* (supra) and observed that the rigors of Section 37 of NDPS Act would not come in the way while dealing with an application for bail moved on behalf of an undertrial who has remained in custody for a prolonged time period.

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18. The Hon'ble Supreme Court, in *Union of India v. K.A. Najeeb*, (2021) 3 SCC 713 took note of the law laid down in *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners)* (supra) and observed that if a timely trial is not possible, courts are ordinarily obligated to release the undertrial on bail and statutory restrictions do not exclude the discretion of constitutional courts to grant bail on grounds of violation of fundamental rights enshrined in Part III of the Constitution. It was held as under:

“15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India* [*Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India*, (1994) 6 SCC 731, para 15 : 1995 SCC (Cri) 39], it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.

17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the Constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a

statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

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18. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected.”

12. The recovery from the present applicant is of 40 kg of poppy straw which is an intermediate quantity which is punishable up to ten years. Section 37 of the NDPS Act would not be attracted *qua* the present applicant. As per the nominal roll dated, 29.04.2023, the applicant has already undergone 05 years of judicial custody.

13. In view of the facts and circumstances of the present case, the application is allowed and the applicant is admitted to bail upon his furnishing a personal bond in the sum of Rs. 50,000/- alongwith one surety of like amount to the satisfaction of the learned trial Court/Duty Magistrate, further subject to the following conditions:

- i. The memo of parties shows that the applicant is residing at H.No. 282, F-Block, Gali No. 7, Near Shiv Mandir Road, Swaroop Nagar, Delhi. In case of any change of address, the applicant is directed to inform the same to the Investigating Officer.
 - ii. The applicant shall not leave India without the prior permission of the Trial Court.
 - iii. The applicant is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
 - iv. The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witness in any manner.
 - v. In case it is established that the applicant has indulged in similar kind of offences or tried to tamper with the evidence, the bail granted to the applicant shall stand cancelled *forthwith*.
14. Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case pending before the learned Trial Court.
15. The application stands disposed of along with all the pending application(s), if any.
16. Let a copy of this judgment be communicated to the concerned Jail Superintendent.
17. Order be uploaded on the website of this Court, *forthwith*.

AMIT SHARMA
JUDGE

MAY 18, 2023/sn