

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

% Reserved on: 21st March 2023

Pronounced on: 11th April, 2023

+ BAIL APPLN. 530/2023

MUNISH GAUTAM

..... Petitioner

Through: Mr. Akshay Bhandari and
Mr. Anmol Sachdeva, Advocates.

versus

STATE GOVT OF NCT OF DELHI

..... Respondent

Through: Mr. Ritesh Kumar Bahri, APP for
the State SI Manish Kumar, PS:
Crime Branch.

CORAM:

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

1. By this bail application, the petitioner seeks regular bail in FIR No.47/2019 registered at PS Crime Branch under section 20 of the NDPS Act. The petitioner is in custody since 6th March 2019, wherein the charge-sheet has been filed and the case is pending trial for prosecution evidence. 4 out of 14 witnesses have been examined.

2. The case of the prosecution is that on 5th March 2019, upon receipt of information, the petitioner, who allegedly used to supply *charas*, was apprehended near International Guest House, Delhi University at about 5:00 p.m. Notice under section 50 of the NDPS Act was served upon him and his legal rights were explained but he refused

to avail the facility of presence of a gazetted officer. No psychotropic substance was recovered from his body search, however 2 kgs *charas* was recovered from the search of his scooter No. DL 9S AX 8053. Samples were drawn, case property was sealed and deposited in the *maalkhana*. The petitioner was arrested and later the samples were sent to FSL, Rohini. The result from the FSL was received which confirmed that the sealed substance was *charas*. The said scooter was found registered in the name of the petitioner himself.

3. Learned counsel for the petitioner states that the petitioner has been falsely framed since both the petitioner and his wife were apprehended and no incriminating article was recovered from them. A perusal of the charge-sheet would show that the petitioner was already present in the PS and was falsely framed. The prosecution had alleged that the petitioner was apprehended on 5th March 2019 and thereafter the recovered items were sent to the PS to deposit in the *maalkhana* through Ct. Rakesh Rathi. The *maalkhana* entry regarding the deposit shows the date of deposit to be 5th March 2019. Pursuant to an RTI filed regarding the date and time of arrival of Ct. Rakesh Rathi, a reply was received stating that the constable only returned to the PS at 3:30 a.m. on 6th March 2019 which falsifies the case of the prosecution that the recovery was effected and brought to the PS on 5th March, 2019. Further the *maalkhana* register itself shows that no sealed sample was ever deposited in the *maalkhana*. Despite the case of the prosecution that the personal search was conducted on 6th March 2019, the articles that were recovered were deposited in the *maalkhana* on 5th March 2019 itself. This would show that that the petitioner was already present in the PS and was not apprehended in the manner alleged by the prosecution. This

would be evident from the personal search memo dated 6th March 2019 and the *maalkhana* entry of 5th March 2019 as well as the DD Entry for 6th March, 2019. Further, it was contended that as per prosecution information regarding arrest of the petitioner was given to his wife telephonically at 3:30 a.m. on 6th March 2019 however a perusal of arrest memo shows that it was prepared at 2:00 a.m. on 6th March 2019 and bears the signatures of his wife further showing that petitioner's wife was present in the PS even before his arrest. Also, call records of the petitioner's wife indicate that she had not received any call from the police at that time. The petitioner's wife had filed an application for preserving the CCTV footage to show that no recovery was effected, but in the reply the police stated that the cameras were not working due to a fire and the same could not be preserved. Another application was filed for preserving the mobile tower location of the mobile of wife of the petitioner and the location chart would show that at about 18:53 hrs on 5th March 2019, the location of said mobile phone was at Ramesh Park, Laxmi Nagar indicating that she was already in the office of the Crime Branch, Shakarpur at that time. CDR showing the location has also been appended along with mobile tower chart. Further, while the prosecution stated the recovery was effected at the spot and was converted into *pullandas*, the DD entry made by the SHO reads that two plastic transparent boxes sealed with seals were produced before them and not cloth parcels. The petitioner has been in custody for about 4 years and only three witnesses have been examined thus far. In this regard directions of the Hon'ble Supreme Court in *Satinder Kumar Antil v. CBI* (2022) 10 SCC 51 have been relied upon. There is no other involvement of the petitioner except for a case under section 498A filed

by his estranged wife. Further, the petitioner has been released on interim bail on various occasions, which liberty granted was not misused.

4. Ld. APP countered the above submissions by stating that since there was recovery of a commercial quantity of *charas*, rigours of section 37 of the NDPS Act would apply. The recovery was from scooter and case property was deposited on 5th March, 2019 which is not disputed. The articles recovered during the search, including the voter I Card, the RC of the scooter, were also deposited on 5th March 2019. The discrepancy in the personal search memo indicating the date as 6th March, 2019 was not relevant since the deposit of the recovered articles, as noted above, was on 5th March, 2019. As regards the signature of the wife on personal search memo, it is submitted that an additional safeguard was taken by the Investigating Officer that even after obtaining the signatures, information was given over the phone to the wife and these issues, in any case, will have to be taken up in trial. The mobile locations and CDRs of the phone would provide no assistance to the petitioner since they were only approximate and, in any event would have to be taken at the stage of trial. As regards the arrival entry of Ct. Rakesh Rathi, it is stated that after recovery the writing work, sealing of *pullandas*, documentation was prepared at the spot and was then deposited at the Crime Branch, Pushp Vihar and after getting the FIR registered and deposit of the case property, the constable came to office of Crime Branch at Shakarpur. Thus, mere reliance on arrival entry and not the departure entry and any other duty roster will not give any assistance to the petitioner. As regards the counter seal of the case property, it was handed on spot by the IO to HC Lal Bahadur and was

deposited with the Reader of the office of Crime Branch at Shakarpur, as per DD entry No.16. Reliance is paid on a decision of the Hon'ble Supreme Court in *State of Orissa v. Debendra Nath Padhi* (2005) 1 SCC 568 wherein it is stated that at the stage of framing of charge the defence of the accused cannot be put forth since that is a matter of trial. It was never the intention of law that a mini trial would be conducted at the stage of charge.

5. A perusal of the FIR would reveal that pursuant to recovery from the scooter of the petitioner, a white colour polythene was recovered, it was checked through the field testing-kit and was found to be of *charas* and weighed 2 kilos. Samples were taken, *pullandas* were prepared while remaining polythene bag was sealed with doctor's tape. The *pullandas* were sealed with the official seal of "A STARS-II CRIME". These sealed *pullandas* were then taken by SI Vikram Singh. Ct. Rakesh Rathi was instructed to handover the written complaint to the DO, Crime Branch and the case property to SHO, Crime. *Maalkhana* register shows the deposit on 5th March, 2019 itself and notes that there was one small plastic box parcel with doctor's tape bearing the seal "A STARS-II CRIME" and other similar boxes which were deposited. As regards the RTI reply, it is noted that it is of 5th - 8th March 2020 and not the year 2019. Even assuming that it was incorrectly noted and it was the year 2019, the arrival at 3:30 a.m. in the PS Crime Branch may be explained since the deposit would have been at PS Crime Branch, Pushp Vihar and not at the office of PS Crime Branch, Shakarpur. As regards the personal search memo, the recovery of the articles from his person was on 6th March 2019 which must have been in the intervening night of 5th and 6th March 2019. With regard to the itemised bill of the mobile on which the

petitioner has relied upon, it has listed calls from petitioner's wife to other mobiles none of which were received and therefore, will not be of any relevance. The location chart showing the location of petitioner's wife around the Shakarpur area cannot be used to conclusively to state that she was already at the PS, as alleged by the petitioner. In any event, these will be disputed questions of facts which will be ascertained and assessed during the course of trial.

6. As per a recent judgment of the Hon'ble Supreme Court in ***Mohd. Muslim @ Hussain v. State NCT of Delhi*** (2023) SCC OnLine SC 352 it was held that if *prima facie* the evidence adduced by the prosecution does not implicate the accused and the accused in an NDPS matter is undertrial having been incarcerated for some period of time, bail would be considered. The Hon'ble Supreme Court has held, relying upon its decisions in ***Satinder Kumar Antil, UOI v. K A Nazeeb and Supreme Court Legal Aid Committee (representing undertrial prisoners) v. UOI***, that rigors of section 37 of the NDPS Act should be reasonably satisfied on a *prima facie* look at the material on record that the accused is not guilty. The standard to be considered is therefore where the Court would look at the material in a broad manner and reasonably see whether the guilt of the accused may be proved. The satisfaction which the Courts are expected to record of the accused may not being guilty, is only *prima facie*, based on a reasonable reading, and does not call for a meticulous examination of the materials. The twin conditions of section 37 therefore, have to be read reasonably and that long periods of incarceration would also invite the imperative of section 436A Cr.P.C. which is applicable to offences under NDPS Act as well.

7. However, since the petitioner herein has undergone less than half of the minimum sentence prescribed i.e. 10 years for such on offence (maximum being 20 years), he may not come within the rubric of what has been prescribed as guidelines/directives by the Apex Court. In ***Supreme Court Legal Aid Committee (representing undertrial prisoners) v. UOI*** (1994) 6 SCC 73 it was directed as under:

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

(emphasis added)

8. Even after advertng to the provisions of Section 436A the Hon'ble Supreme Court directed in ***Satinder Kumar Antil v. CBI*** (2022) 10 SCC 51:

Under this provision, when a person has undergone detention for a period extending 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. The word "shall" clearly denotes the mandatory compliance of this provision.

(emphasis added)

9. As noted above, the issues raised by the petitioner are of a technical nature relating to facts of recording in registers etc and mobile records which would have to be proved by evidence during trial through examination of witnesses. However, notwithstanding the same, even the period of incarceration of less than half of even the minimum prescribed

(4 years out of a minimum of 10 years) would not fall within the rubric of directives in *Satinder Kumar Antil (supra)* or of *Supreme Court Legal Aid Committee (representing undertrial prisoners) (supra)*, as now embellished in *Mohd. Muslim (supra)*. Even in *Mohd Muslim (supra)* the period of incarceration was over 7 years 4 months when the decision was passed. Also considering there are only 10 more witnesses to be examined, it is hoped and expected that the trial of the petitioner would be completed preferably in the next 6 months by the Ld. Trial Court and Ld. Trial Court will take all possible steps to endeavour to complete the trial. If for any reason this is not achieved, then the petitioner would in any event, be at liberty to seek bail on completion of a more substantial period of sentence, in accordance with law and directives of the Hon'ble Supreme Court.

10. At this stage, the petition is disposed of, in light of the above observations. Pending applications (if any) are disposed of as infructuous.

11. Judgment be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

APRIL 11, 2023/sm