

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 19th January, 2023

Pronounced on: 03rd February, 2023

+ BAIL APPLN. 647/2022

ASIF ALI

..... Petitioner

Through: Mr. Sunil Mehta, Mr. Kundan Kumar,
Mr. Roopam Rai, Mr. A.K. Khan,
Advocates

versus

STATE OF NCT OF DELHI

..... Respondents

Through: Mr. Utkarsh, APP for State with
SI Dharmender, P.S. Special Cell,
Rohini

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA J.

1. The present application under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') has been filed on behalf of the applicant seeking regular bail in case FIR No. 47/2015 dated 20.07.2015, registered at P.S. Special Cell, for offences under sections 21 and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 ('NDPS Act'), pending before the Court of Sh. Ajay Kumar Jain, learned Additional Sessions Judge/Special Judge (NDPS), New Delhi District, Patiala House Court, Delhi.

2. Briefly stated, the prosecution case relevant for adjudication of the present application is as under:

- i. Few mobile numbers, including 8743961588, 9899235750, 8527579437, 8860520507 and 8130524778, were under interception by the Special Cell of Delhi Police. During monitoring of the interception, it was discovered that few persons, who were later identified as Ashok, Subhash Jaiswal, Asif Ali (present applicant), etc., were allegedly involved in illegal procurement and supply of drugs, including heroin, from Bareilly, Uttar Pradesh, to various parts of Delhi.
- ii. During monitoring of the aforesaid interception, it was found that on 16.07.2015, an alleged supplier of heroin had delivered a consignment of the said substance to one Ashok and Asif Ali, the present applicant, near Madhuban Chowk, Delhi. Subsequently, their Cell IDs were also found to be in the said area. Thereafter, based on a secret information received on 20.07.2015, a raid was conducted by a team of Special Cell of the Delhi Police near Madhuban Chowk, where Ashok met with one Subhash Jaiswal, who handed over a white colour polythene bag to the former. Both of them were apprehended by the police and were informed that they have been apprehended on the basis of information regarding their involvement in supply of heroin.
- iii. Both Ashok and Subhash Jaiswal were searched. A white color polythene bag was recovered from the right hand of Ashok. The said bag was containing a pink coloured powder, which upon being tested with a field testing kit was found to be heroin. The said bag weighed 500 grams, out of which 2 samples of 5 grams each were drawn. The remaining contents of the bag were sealed in a separate parcel. No incriminating substances were recovered from the personal search of Subhash Jaiswal. Upon a search of his scooty, two transparent polythene packets were recovered from the bunk of his scooty with one of them containing a pink coloured powder and the other containing a *matiala* colored powder. Both the said powders were tested with a field-testing kit. The former tested positive

for heroin and the latter tested negative for heroin. Upon enquiry, Subhash Jaiswal revealed that the *matiala* coloured powder is a chemical which is mixed with heroin, however, he was unaware of its exact name. Both the said packets weighed 500 grams each, out of which 2 samples of 5 grams each were drawn. The remaining contents of the bag were sealed in a separate parcel.

- iv. It is further alleged that upon interrogation, Ashok admitted that the substance recovered from him was heroin and that he works as a carrier for Asif Ali (the applicant). It was further informed by him that he used to communicate with Subhash Jaiswal on his mobile phone, bearing number 7409355035 and 7669410715, through his own mobile number 8802374462. Thereafter, he was formally arrested and one mobile phone, bearing mobile number 8802374462 was recovered from him.
- v. During interrogation, Subhash Jaiswal allegedly admitted to the recovery of narcotic substances from his scooty, bearing licence number DL 8S BL 6118, and to supplying heroin to Ashok. He further admitted that he has been supplying heroin for almost 20 years and he has been involved in numerous cases of a similar nature. It was informed by him that all the communications regarding supply of heroin were made through his mobile number 7409355035 and 7669410715. Pursuant to the said disclosure, one mobile phone, bearing SIM number 7409355035 and 7669410715 was recovered and seized.
- vi. On the basis of the disclosure statement of Ashok, the team of Delhi Police apprehended Asif Ali on 21.07.2015. Upon search of his person, no incriminating substances were recovered. However, upon search of his car, an orange coloured packet, containing a pink colour substance was recovered. The said bag weighed 500 grams, out of which 2 samples of 5 grams each were drawn. The remaining contents of the bag were sealed in a separate parcel. The said car bearing licence number DL 3C AP 8464

was seized by the police and it was later confirmed from MLO Sheikh Sarai that it was owned by Asif Ali.

- vii. During interrogation, Asif Ali allegedly disclosed that he was in constant touch with Subhash Jaiswal for supply of drugs. He used to communicate with him on his mobile numbers as mentioned above, through his own mobile phones bearing SIM number 8743961588 and 8527579437. The recovery of substances was further admitted by him. He also disclosed that Ashok used to act as his carrier for collecting drugs and he sent him on 20.07.2015 to collect a supply of heroin. Thereafter, he was formally arrested and one mobile phone, having two SIM numbers 8743961588 and 8527579437 was recovered and seized by the Police.
- viii. All the three accused, namely, Ashok, Subhash Jaiswal and Asif Ali were produced before the concerned Court and were remanded to Police Custody. Subhash Jaiswal and Asif Ali were remanded to Police Custody for 04 days and Ashok for 02 days.
- ix. During investigation, one Prateek Dabas *alias* Bobby was apprehended by a team of Delhi Police. It is alleged that during interrogation, he admitted to collecting a supply of 100 grams of heroin from Subhash Jaiswal on 20.07.2015. It was further disclosed that he gave his scooty bearing license number DL 8S BL 6118 to Subhash Jaiswal for supplying heroin to Ashok, Asif Ali (the present applicant) and others. He allegedly admitted to being involved in drug trafficking for almost 15 years and that he used to take his supply from Subhash Jaiswal. Thereafter, he was formally arrested.

3. The learned counsel appearing on behalf of the applicant submits that the investigating team failed to comply with the provision of Section 42(1) & (2) of the NDPS Act, to the extent that neither any search warrants were obtained for conducting search of the applicant's personal car between sunset and sunrise,

i.e., at around 12:15 AM, nor were any grounds, as per requirement of the second proviso to Section 42(1) of the NDPS Act, were recorded in writing prior to such search or forwarded to the concerned senior official. Thus, in view of the settled law, such non-compliance leads to vitiation of trial. In support thereof, he relied on the following judgments:

- i. State of Rajasthan v. Chhagan Lal, 2014 (4) JCC (Narcotics) 213, dated 04.02.2014
- ii. D.R.I. v. Raj Kumar Mehta & Ors. (Criminal Appeal 275 of 1998, dated 12.07.2011)
- iii. State of Punjab v. Balbir Singh & Ors., (1994) 2 SCR 208

4. The learned counsel further submits that the applicant has been in custody since 21.07.2015, i.e., for more than 6 years, and it will still take a long time for the trial to conclude, therefore, this should be considered for granting bail to him. Reliance was placed upon the judgment of the Hon'ble Supreme Court of India, in the case of Supreme Court Legal Aid Committee v. Union of India, (1994) 6 SCC 731 and the decision of this Court in Atul Aggarwal v. DRI (Bail Application no. 2477 of 2021, dated 21.12.2021), while pressing on the submission that the applicant is entitled to be released on bail in cases where the applicant/accused has been in judicial custody for more than five years.

5. It is further averred that the applicant may be granted bail in the present case since the twin conditions of Section 37 of the NDPS Act are fulfilled in view of non-compliance of Section 42 of the NDPS Act. It is further submitted that the applicant has been granted interim bail on several previous occasions, which was not misused by him. He further states that there is no chance of tampering the evidence or influencing the witnesses, since all the material evidences have been seized by the Investigating officer and the main prosecution witnesses have already been examined.



6. The learned counsel for the applicant further submits that the applicant is sixty years old and is a patient of pulmonary tuberculosis. He is also suffering from multiple lung complexities and other health issues, such as breathlessness, cough and hemoptysis. Therefore, in view of his health conditions, he should be granted bail.

7. Learned APP for the State vehemently opposes the bail application on the ground that the applicant has been arrested in connection with offences under Sections 21 and 29 of the NDPS Act and there is strong evidence, including the CDR and intercepted voice calls pointing to the involvement of the applicant in the alleged interstate narcotic syndicate. He further states that the voice samples of all the accused have matched with their respective intercepted voice calls, as per the report received from the FSL, which further confirms the nexus of the applicant with other co-accused. Therefore, in such circumstances, the embargo under Section 37 of the NDPS Act comes into play, preventing the applicant from being released on bail.

8. The learned APP for the State further submits that non-compliance of Section 42(2) of the NDPS Act is not material as the concerned senior official was apprised by the investigating officer about the alleged narcotic syndicate and disclosure statement of Ashok and Subhash Jaiswal; and accordingly, the investigating officer was duly authorised to conduct search and seizure. It is further submitted that non-compliance of Section 42(2) of the NDPS Act is a matter of trial.

9. Heard the learned counsels and perused the records.

10. At the outset, it is pertinent to refer to Section 42 of the NDPS Act, which reads as under:

"42. Power of entry, search, seizure and arrest without warrant or authorisation. - (1) Any such officer (being an officer superior in rank to

a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and
- (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

(emphasis supplied)

10. It is necessary to refer to the law laid down by the Hon'ble Supreme Court of India in the case of *State of Punjab v. Balbir Singh & Ors.*, (1994) 2 SCR 208, with regard to non-compliance of Section 42 of the NDPS Act. The following proposition was laid down by the Hon'ble Supreme Court:

"25. ... (2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. **But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.**

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate

official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case..."

(emphasis supplied)

In the present case, the applicant's car was searched between sunset and sunrise. It is also admitted that the concerned official gave a notice under Section 50 of the NDPS Act before conducting the search of the applicant and his car. This demonstrates that the concerned officer had reason to believe from personal knowledge or information given that an offence punishable under the NDPS Act has been committed. In these circumstances, the mandatory requirements of Section 42(1) & (2) of the NDPS Act would be attracted. In the status report dated 05.11.2022 authored by Inspector Kuldeep Singh, Special Cell/NR, Rohini, Delhi, it has been recorded as under:

" SI Jitender Tiwari submitted photo copy of disclosure statements of Ashok and Subhash Jaiswal before ACP/Special Cell/NR through SO branch as compliance of section 42 NDPS Act on 21/07/2015."

11. It is pertinent to note that the alleged search of the applicant's car was conducted around 12:15 AM on 21.07.2015 and admittedly, no grounds of belief were recorded as per the second proviso to Section 42(1) of the NDPS Act. Since the grounds of belief were not recorded, the same could not have been forwarded under Section 42(2) of the NDPS Act.

12. As far as the ground of long period of incarceration is concerned, 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:

Signature Not Verified

Digitally Signed
By: ANITA B. ANIL
Signing Date: 03.02.2023
15:51:14

APPLN. 647/2022

“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.

xxx

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.”

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.

13. 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.

xxx

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.

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.”

14. The present applicant was arrested on 21.07.2015 by the Special Cell of the Delhi Police and was remanded to police custody. Thereafter, he was sent to Judicial Custody on 25.07.2015. As per the nominal roll dated 17.01.2023 received by this Court, the applicant has been in custody for a total period of 05 years 04 months 14 days. The applicant has been chargesheeted for offences related to commercial quantity and will therefore be covered under direction (iii) in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) (*supra*), which is as under:

“(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.”

Since, in the present case, the applicant has been in custody for more than 05 years, his case is squarely covered by the aforesaid judgment of the Hon’ble Supreme Court. A perusal of the medical records of the applicant dated 10.01.2023, shows that he suffers from post pulmonary tuberculosis sequelae with bronchiectasis causing cough, shortness of breath and hemoptysis (on and off). Even otherwise, this Court is of the opinion that *prima facie* non-compliance of second proviso to Section 42(1) of the NDPS Act is made out and therefore, conditions of Section 37 of the NDPS Act are satisfied in the present case.

15. In totality 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. 1,00,000/- alongwith two sureties of like amount to the satisfaction of the learned trial Court/link Court, further subject to the following conditions:

- i. The memo of parties shows that the applicant is residing at House No. G/2/5, DDA Red Quarters, Sector-4, Vijay Vihar, Delhi. The applicant is directed to reside at the same address. In case of any change of address, the applicant is directed to inform the same to the Investigating Officer.
 - ii. The applicant shall report to the office of Special Cell, Rohini, twice in a week, i.e., on every Wednesday and Friday at 10.30 AM and the Special Cell, Rohini is directed to release him by 11.00 AM after recording his presence and completion of all the necessary formalities.
 - iii. The applicant shall not leave the NCT of Delhi without the prior permission of the trial Court.
 - iv. The applicant is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
 - v. The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witness in any manner.
 - vi. 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.
- 16.** Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case.
- 17.** The application stands disposed of along with all the pending application(s), if any.
- 18.** Let a copy of this order be communicated to the concerned Jail Superintendent.

**AMIT SHARMA
JUDGE**

03rd February, 2023/ab

Signature Not Verified

Digitally Signed
By: ANITA B. APPLN. 647/2022
Signing Date: 03.02.2023
15:51:14