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

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Decided on: 26.07.2023

+ BAIL APPLN. 850/2023

SOLETO JUSTNIANO FERNANDO TITO Petitioner

Through: Mr. Adarsh Priyadarshi, Ms.
Varnika Singh, Advocates

versus

NARCOTICS CONTROL BUREAU Respondent

Through: Mr. Subhash Bansal, Senior
Standing Counsel with Mr.
Shashwat Bansal, Advocate

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J. (ORAL)

1. By way of instant application under Section 439 of the Code of Criminal Procedure, 1973 ('Cr.P.C.'), the applicant seeks regular bail in case bearing No. VIII/19/DZU/2017 registered at Police Station Narcotics Control Bureau under Sections 21/23/29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

2. The case of the prosecution, in brief, is that based on an information received, the applicant/accused, a citizen of Bolivia, who had arrived via flight No. ET-686 STA, was intercepted on 13.05.2017 near the Gate at Terminal 3 of Indira Gandhi



International Airport. Upon enquiry, the applicant had disclosed that he had concealed capsules of cocaine inside his stomach which could be recovered with medical help. Thereafter, 50 capsules weighing 500 grams, containing white-coloured powder identified as cocaine, were recovered from the stomach of applicant at Safdurjang hospital, New Delhi from 13.05.2017 to 15.05.2017. As per prosecution, the applicant/accused in his statement under Section 67 NDPS Act had disclosed that the contraband was given to him by his cousin to deliver in India and that he had initially swallowed 80 capsules but in the middle of the journey, he had vomited about 30 capsules at Sao Paulo Airport, Brazil.

3. Learned counsel for the applicant/accused submits that applicant was arrested on 16.05.2017 and has been in judicial custody since then. It is stated that the present application is not being pressed on merits but only on the ground that since the applicant has been in judicial custody for more than 06 years, he will be entitled to bail in view in view of decision of Hon'ble Apex Court in ***Satender Kumar Antil v. Central Bureau of Investigation (2022) 10 SCC 51*** and ***Supreme Legal Aid committee (Representing undertrial prisoners) v. Union of India (1994) 6 SCC 731***, as well as several other decisions of Hon'ble Apex Court and this Court. It is thus stated that considering the duration of custody of the applicant and the fact that there is a delay in trial, the present application be allowed.

4. Learned SSC for NCB, on the other hand, opposes the present bail application and argues that present case is of recovery of commercial quantity of contraband. It is stated that applicant is a



foreign national and thus, chances of absconding cannot be ruled out. It is further stated that the contraband in the present case was recovered from the stomach of the applicant/accused and thus, there are high chances of his conviction. It is also stated that only 4 witnesses are left to be examined and therefore, at this stage, the present application be dismissed.

5. I have heard arguments addressed by both sides and have perused the case file.

6. The allegations, in a nutshell, against the applicant are that he was apprehended at Indira Gandhi International Airport and 50 capsules containing cocaine were recovered from his possession, which he had swallowed and concealed inside his stomach. The contraband which had been seized by the investigating agency was 500 grams of cocaine, which is a commercial quantity. In view thereof, the bar under Section 37 of NDPS Act would apply to grant of bail to the present applicant.

7. However, the applicant in the present case does not seek grant of regular bail on merits, rather on account of the duration of his custody and delay in trial.

8. In this regard, this Court notes that the applicant was arrested on 17.05.2017 and has been in judicial custody for more than 06 years and 01 month. Further, the applicant is facing trial in a case where he has been accused of commission of offences under Sections 21/23/29 of NDPS Act. This Court notes that the punishment prescribed under these provisions is rigorous imprisonment for a term which shall not be less than ten years but may extend to twenty years,



alongwith fine. In such category of cases, the directions of the Hon'ble Apex Court in *Supreme Court Legal Aid Committee* (supra) provide as under:

"15. ...We, therefore, direct as under:

(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 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 Section 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 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 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..."

(Emphasis supplied)

9. The aforesaid decision of Hon'ble Apex Court was reiterated and affirmed in *Thana Singh v. Central Bureau of Investigation*



(2013) 2 SCC 590 as well as in *Union of India v. K.A. Najeeb* (2021) 3 SCC 713. Further, Hon'ble Apex Court while summarizing the law on grant of bail under different circumstances, has held in *Satender Kumar Antil* (*supra*) as under regarding applicability to Section 436A of Cr.P.C. vis-à-vis Section 37 of NDPS Act:

"86. Now we shall come to category (C). We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigor imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigor as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigor, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code."

10. The Hon'ble Supreme Court in *Mohd. Muslim v. State (NCT of Delhi)* 2023 SCC OnLine SC 352 had also reiterated and affirmed the aforementioned decisions while considering grant of bail under NDPS cases. Most recently, the Hon'ble Apex Court in case of *Rabi Prakash v. State of Odisha SLP (CRL) No. 4169/2023* has again reiterated that bar under Section 37 of NDPS Act would not come in way of grant of bail to under-trials in cases of prolonged incarceration.

11. Therefore, considering the duration of custody of more than 06 years and the fact that trial has not yet been concluded, this Court is inclined to grant regular bail to the present accused/applicant on



furnishing a personal bond in sum of Rs.1,00,000/- (Rupees One Lakh) with two sureties of like amount to the satisfaction of Trial Court/ Duty Magistrate/ Link Magistrate/ Successor Court, on following terms and conditions:

- a) The applicant shall deposit his Passport with the learned Trial Court and shall not leave the country;
- b) The learned Trial Court shall ensure that the certificate of assurance from the High Commission of Bolivia duly verified is placed on record that the applicant shall not leave the country;
- c) The applicant shall not leave NCT of Delhi, except with the prior permission of learned Trial Court;
- d) The applicant shall appear before the learned Trial Court as and when the matter is taken up for hearing;
- e) The applicant shall provide his address to the learned Trial Court by way of an affidavit and in case of any change in address, he shall promptly inform the same to the concerned Court;
- f) The applicant shall provide his mobile number to the Investigating Officer concerned, which shall be kept in working condition at all times and he shall not switch off or change the mobile number without prior intimation to the IO concerned;
- g) The applicant shall report at the concerned office of NCB once in every week, on Saturday, between 10:00-11:00 am;



h) The applicant shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses, or tamper with the evidence of the case.

12. However, it was also submitted on behalf of NCB that as of now, 04 witnesses remain to be examined before the learned Trial Court. In these circumstances, the learned Trial Court is requested to expeditiously record the evidence of remaining witnesses and conclude the trial, within a period of six months from the date of receipt of this order.

13. Accordingly, the present application stands disposed of.

14. A copy of this order be forwarded to the learned Trial Court for necessary information.

15. The order be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

JULY 26, 2023/zp

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