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

% **Date of Decision: 20.03.2023**

\+ **BAIL APPLN. 1545/2022**

ISHRAR AHMAD @ PAHADI ..... Petitioner

Through: Mr.Rakesh Khanna, Sr. Adv. wtih Mr.Sumit Kumar Sharma an Mr.Aditya Archiya, Advs.

versus

STATE (GOVT. OF NCT OF DELHI) ..... Respondent

Through: Mr. Manoj Pant, APP for the State with SI Sandeep Kumar, Special Cell/NR.

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.(ORAL)

1. The present application under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been filed by the applicant seeking regular bail in case FIR bearing no. 25/2016, registered at Police Station (PS) Special Cell, Delhi for the offences punishable under Sections 18/29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

2. Briefly stated, the facts of the present case are that on an information received by the Special Cell, Northern Range, the mobile numbers 8493733249, 8726284545, 8415016400, 970665247 and some other numbers were kept under legal interception on specific

information being received on 15.05.2016 through secret sources. Four accused persons were apprehended which resulted into recovery of 69 kg of high quality opium which is commercial quantity. During investigation, it surfaced that out of the said recovered contraband, 15 kg was to be specifically supplied to present accused/applicant Ishrar Ahmad, who is also one of the key members of inter-state drug cartel, who receives and purchases large quantity of drugs from the supplier members of the cartel and thereafter distributes the same on huge monetary gain. The applicant Ishrar Ahmad was arrested on 17.05.2016 when he had come to Delhi to receive the consignment of opium. The mobile number used by Ishrar Ahmad was 8756347097. During further investigation, the intercepted conversation was analysed and it was found that there were several calls between the present applicant and main supplier Nazir Hussain @ Nizam from mobile number 8415016400. It is also stated that the intercepted conversation revealed that present accused was demanding contraband from co-accused Nazir Hussain and was also discussing payments against the same. The intercepted calls and voice samples of applicant Ishrar Ahmad were got examined at FSL where the FSL report revealed that the voice samples matched with the intercepted conversation voice of the applicant. It was also revealed that huge suspicious transaction of more than Rs. 3 crores were found within two years from 2014 to 2016 in the bank account of co-accused Nazir Hussain and many times cash was deposed from Sahajahanpur, U.P. which is the place of residence of the present accused applicant and co-accused from where they were arrested.

3. Learned senior counsel for present accused/applicant argues that the applicant has been in judicial custody for 06 years 09 months and therefore, is covered by the guidelines laid down in para 15(iii) of decision in ***Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India*** *(1994) 6 SCC 731*. It is also argued that the applicant was not named in the FIR and has been falsely implicated in the present case. It is stated that nothing has been recovered from the applicant and he is not the main supplier of the contraband. It is also argued that except for the disclosure statement which is inadmissible in law, there is nothing on record against the applicant, and reliance in this regard is placed on the decision of Hon'ble Apex Court in ***Tofan Singh v. State of Tamil Nadu*** *(2020) SCC Online SC 882*. It is also stated that present accused/applicant retracted his statement under Section 67 NDPS Act before the learned Trial Court. It is further stated that it will take long to conclude the trial, and therefore, bail be granted to the applicant.

4. *Per contra*, learned APP for the State argues that the CDR and the FSL report are clearly indicative of the accused being involved in the present offence. It is also stated that the learned Trial Court may be directed to expedite the trial, however, the bail be rejected since there is every reason to believe that the accused is involved in the present case.

5. This Court has heard arguments addressed by both the sides and have gone through the case file.

6. In the case at hand, the present accused/applicant has been

arrested on the basis of a confessional statement and also on the basis of analysis of his mobile number 8756347097 which was recovered from him on the spot.As per the transcription of intercepted conversation and the CDR, the applicant was in regular touch with the co-accused persons. A huge amount was deposited in the bank account of the main supplier/accused Nazir Hussain in his bank i.e. Bank of Baroda, Kant, Uttar Pradesh, which is the residence of both applicant Ishrar Ahmad and co-accused Sartaj Ali, who allegedly buy contraband in huge quantity from the main accused Nazir Hussain. The FSL report also indicates that the voice in the intercepted conversation which is regarding payment of money, for which no plausible reason has been given by the applicant, had matched with the voice samples of the present applicant. The recovery in this case is of commercial quantity of opium, which would attract rigors of Section 37 of NDPS Act.

7. However, the present accused/applicant has been in judicial custody since 17.05.2016. As informed to this Court by learned APP for State, out of 26 witnesses, only 10 witnesses have been examined before the learned Trial Court as of now. In this regard, a reference can be made to the decision of ***Supreme Court Legal Aid Committee*** *(supra)* whereby the Hon'ble Apex Court, while dealing with prolonged incarceration of undertrial prisoners under NDPS cases in State of Maharashtra, had issued certain directions for grant of bail in those cases where trial was delayed and the accused had already undergone more than half of the sentence prescribed, subject to certain conditions. The relevant observations are reproduced as

under:

> "15. ...We, therefore, direct as under:
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> (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 bailamount 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.
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> (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.
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> (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**.
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> (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.
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> 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 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;
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> (vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violatedor a case for cancellation of bail is otherwise made out; and
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> (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..."
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> (Emphasis supplied)

8. Further, in ***Union of India v. K.A. Najeeb*** *(2021) 3 SCC 713* the Hon'ble Apex Court referred to its decision in ***Supreme Court Legal Aid Committee*** *(supra)* and held that in cases where delay in trial is evident and the same is unlikely to be concluded soon, and where accused has suffered incarceration for a considerable period of time, the statutory restrictions *per se* would not oust the ability of constitutional courts to grant bail. The Hon'ble Apex Court in ***Manoj Kumar Singh v. The State of West Bengal & Anr.*** *SLP(Crl.) Nos. 4711-4712/2020* had granted bail to an accused who had suffered more than 7 years of incarceration on the ground of delay in trial.

9. Recently, Hon'ble Apex Court in ***Satender Kumar Antil v. Central Bureau of Investigation*** *(2022) 10 SCC 51* has held as underwith regard to applicability to Section 436A of Cr.P.C. *viz. a viz.* 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."

(Emphasis supplied)

10. The applicant herein has been charged for commission of offence punishable under Section 18 and 29 of NDPS Act, which *inter alia* provide as under:

"**18. Punishment for contravention in relation to opium poppy and opium**.—Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses opium shall be punishable,—

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(b) **where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years**, and shall also be liable to fine which shall not be less than one lakh rupees which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees;

> "**29. Punishment for abetment and criminal conspiracy**.—
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> (1) Whoever abets, or is a party to a criminal conspiracy to commit, an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence.
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> (2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India, abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which—
> (a) would constitute an offence if committed within India; or
> (b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India."
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> (Emphasis supplied)

11. The minimum imprisonment in present case, if applicant is convicted would be 10 years whereas maximum would be 20 years. In such category of cases, the Hon'ble Apex Court in ***Supreme Court Legal Aid Committee*** *(supra) vide* direction (iii) had ordered the release of those undertrial prisoners who had been in jail for more than 5 years in cases where minimum imprisonment was of 10 years. These directions were then extended to 10 other states, though not to NCT of Delhi,in decision reported as ***Supreme Court Legal Aid***

Committee (Representing Undertrial Prisoners) v. Union of India and Anr. *(1995) 4 SCC 695*.Thus, in light of the decisions of Hon'ble Apex Court discussed in preceding paragraphs, the essential principles that emerge are that even in cases where rigors of Section 37 NDPS Act are attracted, but the trial is delayed, and where the accused has remained in custody for more than half of maximum imprisonment (or half of minimum imprisonment in case where minimum imprisonment in 10 years)the accused can be enlarged on bail. The said principle has also been followed in several judgments passed by Co-ordinate benches of this Court, including, but not limited to, ***Anil Kumar v. State*** *2022 SCC OnLine Del 778,* appeal against which also stands dismissed by Hon'ble Apex Court *vide* order dated 14.10.2022 in SLP (Crl.) Diary No. 25615/2022; ***Jumah Khan v. State (NCT of Delhi)*** *2023 SCC OnLine Del 12*; **Gurmito v. *Central Bureau of Investigation*** *2022 SCC OnLine Del 2316;* ***Sarvan Kumar v. State (NCT of Delhi)*** *2022 SCC OnLine Del 2079.*

12. This Court also takes note of the fact that the main accused in the present case namely Nazir Hussain has already been enlarged on bail by Hon'ble Supreme Court *vide* order dated 02.01.2023 passed in *SLP (Crl.) No. 5653/2022*.

13. Thus, considering the overall facts and circumstances of the case, and taking into account the fact that 16 more witnesses are yet to be examined before the learned Trial Court, but without going into the merits of the case and the material against applicant herein, this Court is inclined to grant bail to the present 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. Applicant shall not leave NCT of Delhi, except with the prior permission of learned Trial Court;
c. Applicant shall appear before the learned Trial Court as and when the matter is taken up for hearing;
d. 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;
e. 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;
f. Applicant shall report to the SHO of concerned Police Station once in every week, on Wednesday, between 10:00-11:00 am;
g. 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.

14. Accordingly, the present application stands disposed of in

above terms.

15. The judgment be uploaded on the website forthwith.

16. Copy of this judgment be given *dasti* under the signature of Court Master.

SWARANA KANTA SHARMA, J

MARCH 20, 2023/zp