

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

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Reserved on : 17th January, 2022

Pronounced on: 23rd January, 2023

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BAIL APPLN. 1975/2022

PETER GRAHAM WOLLEDGE

..... Petitioner

Through: Sh. Ajay Garg, Ms. Tripti Gola,
Ms. Lhingdeihat Chongloi, Sh.
Harjot Singh and Sh. Arvind
Sardana, Advs.

versus

NARCOTIC CONTROL BUREAU

..... Respondent

Through: Sh. Subhash Bansal, Sr. Standing
Counsel for NCB with Sh.
Shashwat Bansal, Adv.

CORAM:

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

1. This petition has been filed seeking regular bail in Sessions Case No. SC/138/2017, NCB Case No. VIII/18/DZU/2016 under section 20(b)(ii)(C)/23/29 NDPS Act. The petitioner has been in custody since 6th November, 2016 and has been in incarceration for a period of about 6 years 2 months.

2. As per the case of the prosecution, on 4th November, 2016, pursuant to secret information received from IGI Airport, one lady namely Nympha De Jesus, in whose name LOC was opened at the request of NCB, was detained at the departure lounge while she was going from Delhi to Bangkok. The baggage which was checked in her

name was opened and one bag was found having suspicious material which later gave positive results for *charas* and *hashish*, the total weight of which came out to be 2.7 kg out of which samples were taken. Thereafter, the statement of Nympha was recorded under section 67 NDPS Act wherein she stated that the petitioner herein was her boyfriend and they were living together in Manali and they had come from Manali to New Delhi to go to Bangkok and that the petitioner had booked his luggage on her ticket after getting the boarding pass. Based on her interrogation, the NCB got the petitioner deported from Bangkok to IGI Airport Delhi and he was arrested on 6th November, 2016. Later on 25th March, 2021, the Ld. Trial Court framed charges under the NDPS Act against the petitioner and the co-accused Nympha to which they pleaded not guilty and claimed trial.

3. The learned counsel for the petitioner contended that the petitioner is about 66 years of age and has no previous involvement. Even as per the case of the prosecution, based on the said charge against the petitioner, the minimum imprisonment awarded would be 10 years as per the NDPS Act. However, trial has only recently commenced after 6 years of incarceration and 20 prosecution witnesses are to be examined out of which only 2 witnesses have been examined so far and PW-3 is under examination. Trial, therefore being at initial stage and not likely to be concluded in near future, continued incarceration violates the petitioner's fundamental right provided under Article 21 of the Constitution of India. It is further contended that the delay in trial is not attributable to the petitioner. It is pointed out that as per order dated 14th December, 2017 of the Ld. Trial Court, it was clear that the petitioner had conceded for settlement of charge against him, however, the matter was adjourned as the SPP of the NCB was busy and could not reply.

Further, the petitioner is a British National of Indian origin and is an OIC card holder but has been living in India for a long time and there are no chances of his absconding since his passport is already lying seized with the NCB and even otherwise he has roots in India and is well respected.

4. The critical issue which has been contended by the petitioner is that there was no recovery made from the petitioner but from the co-accused Nympha and only upon her disclosure, was he apprehended.

5. As per the learned counsel for the NCB, the contraband is commercial quantity and was found concealed in the baggage of Ms. Nympha in the personal belongings of the petitioner. As regards the delay in trial, the learned counsel for the NCB has placed the order sheets showing that the trial was delayed due to Covid pandemic and other reasons beyond control. It is further contended that detention simpliciter of more than 5 years cannot give the mechanical right to the petitioner for seeking bail specially when there is a statutory embargo under the NDPS Act. The learned counsel for the NCB has relied upon decisions of the High Court of Calcutta in *Ashok Shil @ Arun v. State of West Bengal*, CRM (NDPS) No. 248 of 2022 and *Sapan Mandal v. Narcotics Control Bureau*, CRM No. 7715 of 2021 in support of their submissions.

6. Perusal of the chart of the Ld. Trial Court proceedings filed by the NCB would show that only on 6-7 occasions in about 59 hearings which had been scheduled before the Ld. Trial Court since July, 2017, had the accused sought an adjournment. The other adjournments are for reasons which, the counsel for the NCB alleges as “*reasons beyond control*”. It is admitted that only 2 prosecution witnesses have been examined and PW-3 is undergoing further cross examination.

7. It is also evident that there was no direct recovery from the petitioner and he was arrested only pursuant to disclosure made by Nympha, the co-accused who stated that he had checked his bag on her boarding pass. Be that as it may, it would be apposite to advert to some of the decisions relied upon by the learned counsel for the petitioner in order to appreciate the legal position with regard to undertrials under the NDPS Act.

7.1 In *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India*, (1994) 6 SCC 73 dealing with a petition under Article 32 of the Constitution of India by the Supreme Court Legal Aid Society regarding delay in disposal of cases under the NDPS Act and its impact on undertrials, the Hon'ble Supreme Court passed the following directions for cases in which accused are in jail and trials were delayed, on the anvil of Article 21 and 14 of the Constitution of India, notwithstanding Section 37 of the NDPS Act:

“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 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.

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;*

(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 added)

7.2 In ***Thana Singh v. Central Bureau of Narcotics***, (2013) 2 SCC 590, the Hon’ble Supreme Court noted that trial in NDPS cases took exceptional time due to unavailability of prosecution witnesses which are usually officers of various different agencies:

“12. The Narcotics Control Board also pointed out that since operations for prevention of crimes related to narcotic drugs and substances demands coordination of several different agencies viz. Central Bureau of Narcotics (CBN), Narcotics Control Bureau (NCB), Department of Revenue Intelligence (DRI), Department of Customs and Central Excise, State Law Enforcement Agency, State Excise Agency to name a few, procuring attendance of different officers of these agencies becomes difficult. On the completion of investigation for instance, investigating officers return to their parent organisations and are thus, often unavailable as prosecution witnesses. In the light of the recording of such official evidence, we direct the courts concerned to make most of Section 293 of the Code of Criminal Procedure, 1973 and save time by taking evidence from official witnesses in the form of affidavits.”

(emphasis added)

The Hon'ble Supreme Court also noted that:

“4. Time and again, this Court has emphasised the need for speedy trial, particularly when the release of an undertrial on bail is restricted under the provisions of the statute, like in the present case under Section 37 of the NDPS Act. While considering the question of grant of bail to an accused facing trial under the NDPS Act in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India [(1994) 6 SCC 731 : 1995 SCC (Cri) 39] this Court had observed that though some amount of deprivation of personal liberty cannot be avoided in such cases, but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 of the Constitution would receive a jolt. It was further observed that after the accused person has suffered imprisonment, which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21. We regret to note that despite it all, there has not been visible improvement on this front.

5. Bearing in mind these observations and having regard to the fact that in the present case the appellant has been in custody for more than 12 years and seemingly there being no prospect of the conclusion of trial in the near future, we are of the opinion that it is a fit case where he deserves to be admitted to bail forthwith.”

(emphasis added)

7.3 In ***Union of India v. K.A. Najeeb***, (2021) 3 SCC 713 the Hon'ble Supreme Court affirmed the decision in ***Supreme Court Legal Aid Committee (Representing Undertrial Prisoners)*** (*supra*) and held that statutory restrictions *per se* do not oust the ability of constitutional courts to grant bail on grounds of violation of Part III of the Constitution of India.

7.4 More recently in ***Satender Kumar Antil v. CBI***, (2022) 10 SCC 51, the Hon'ble Supreme Court while dealing with issues of bail and undertrials, adverted to Section 436A CrPC stated as under:

“64. 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. We do feel that there is not even a need for a bail application in a case of this nature particularly when the reasons for delay are not attributable against the accused. We are also conscious of the fact that while taking a decision the Public Prosecutor is to be heard, and the court, if it is of the view that there is a need for continued detention longer than one-half of the said period, has to do so. However, such an exercise of power is expected to be undertaken sparingly being an exception to the general rule. Once again, we have to reiterate that “bail is the rule and jail is an exception” coupled with the principle governing the presumption of innocence. We have no doubt in our mind that this provision is a substantive one, facilitating liberty, being the core intendment of Article 21...”

(emphasis added)

Further dealing with various categories of cases, the Hon'ble Supreme Court dealt with *inter alia* cases under special acts including NDPS as Category C and stated as under:

“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 rigour imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436-A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigour 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 rigour, 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 added)

8. What can be culled out and is evident from these decisions listed above is that the Hon’ble Supreme Court has in 1994 in ***Supreme Court Legal Aid Committee*** (*supra*) enunciated certain principles/directives which *inter alia* provide that if an undertrial is charged for an offence under the NDPS Act punishable and the trial is delayed and the accused has already undergone almost half of the sentence prescribed (or the minimum if there is a range provided) then he should be entitled for being released on bail subject to conditions. Directive (iii), for example, provides that where minimum imprisonment of ten years and a minimum fine of Rupees one lakh is prescribed, such an undertrial shall be released on bail if he has been in jail for not less than five years on the condition that he furnishes bail in the sum of Rupees one lakh with two sureties for like amount. This principle is further buttressed by another decision of the Hon’ble Supreme Court in ***Satender Kumar Antil*** (*supra*) where it was held dealing with cases of category ‘C’ (Special Acts) that provisions contained in Sections 436A Cr.P.C. would apply to Special Acts as well in the absence of any specific provision. It was specifically stated by the Hon’ble Supreme Court that “*the rigor as provided under section 37 NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person*”. The jurisprudential crux of this principle being enunciated by the Hon’ble

Supreme Court is that “*bail is the rule and jail is an exception*” and that there is a principle of presumption of innocence and the core intendment being Article 21 of the Constitution of India which guarantees right to personal liberty and right to speedy trial. In this light the principles enunciated in *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners)* (*supra*) and endorsed in *Satender Kumar Antil* (*supra*) would hold ground. These principles have also been followed *inter alia* by this Court in *Anil Kumar v. State*, 2022 SCC OnLine Del 778; *Sarvan Kumar v. State (NCT of Delhi)*, 2022 SCC OnLine Del 2079 and *Ejike Jonas Orji v. Narcotics Control Bureau*, 2022 SCC OnLine Del 1770.

9. It is evident that the petitioner was not found in possession of 2.7 kg of *charas* whereas the recovery was effected from the baggage of Nympha, the co-accused. Even taking the case of the prosecution that the baggage was checked in by the co-accused at the behest of the petitioner, the sentence if convicted, for the petitioner would be for a period extending from a minimum of 10 years up to 20 years. Therefore, aside adverting to the merits of the matter, it is evident that the petitioner has spent more than half period of the minimum sentence of 10 years and that the trial is expected to be prolonged and will not conclude in near future. Therefore, the principles enunciated by the Hon’ble Supreme Court would directly apply to the facts of this case and would entitle the petitioner to bail subject to certain conditions.

10. Consequently, the petitioner is directed to be released on bail on his furnishing a personal bond in the sum of Rs. 1,00,000/- with two sureties of the like amount subject to the satisfaction of the Learned Trial Court, further subject to the following conditions:

- i) Petitioner will not leave the country without prior permission of the Learned Trial Court and will deposit his passport with the Learned Trial Court.
- ii) Petitioner shall provide his address to the Learned Trial Court by way of an affidavit and revise the same in the event of any change in residential address.
- iii) Petitioner shall appear before the Learned Trial Court as and when the matter is taken up for hearing.
- iv) Petitioner shall provide all his mobile numbers to the IO concerned which shall be kept in working condition at all times and shall not switch off or change the mobile number without prior intimation to the IO concerned. The mobile location shall be kept on at all times.
- v) Petitioner shall report through video call to the IO between 10:00-11:00 a.m. every week on a Monday.
- vi) Petitioner 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.

Needless to state, but any observation touching the merits of the case is purely for the purposes of deciding the question of grant of bail and shall not be construed as an expression on merits of the matter.

11. Copy of the order be sent to the Jail Superintendent for information and necessary compliance.

12. Accordingly, the petition is disposed of. Pending applications, if any, are rendered infructuous.

13. Order be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

JANUARY 23, 2023/sm