



2024:DHC:5179



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on:15.07.2024

+ **BAIL APPLN. 786/2022**

RITAH KYOLABA

..... Applicant

versus

CUSTOMS

..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Shyam Sunder Aggarwal, Adv. (through VC)

For the Respondent : Mr. Pramod Bahuguna, SPP (through VC)

CORAM

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973 seeking bail in Case No. VIII(AP)(10)P&I/3190-B/Arrival/2021 for the offences under Sections 8/21/23/28 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('**NDPS Act**'). The applicant was arrested on 24.05.2021, and has remained in custody since then.

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2. It is alleged that the officers of Customs at IGI Airport, New Delhi intercepted the applicant, a Ugandan national, when she arrived from Uganda to Delhi through Doha on 24.05.2021.
3. It is alleged that the applicant was carrying one light brown cardboard box and one red coloured stroller bag. It is alleged that during routine checking at the X-ray machine in the international arrival hall at the IGI Airport, New Delhi, a suspicious image was observed in the applicant's baggage by the customs officials.
4. It is alleged that upon examining the brown-coloured rectangular cardboard box, the customs officers found hair braids and 12 transparent pouches containing a light brown powdery substance that were concealed within false cavities of the box. It is alleged that a small quantity of the substance from each pouch tested positive for Heroin using a Field Drug Test Kit. A total recovery of 2845 grams of Heroin was made from the applicant. It is alleged that upon personal search, nothing incriminating was found from the applicant.
5. It is alleged that the applicant in her disclosure statement admitted that she was attempting to import Heroin.
6. It is alleged that the applicant was arrested on 24.05.2021.
7. It is alleged that the application under Section 52A of the NDPS Act for drawing samples and disposing of the seized narcotics was disposed of by the learned Magistrate on 25.06.2021. It is alleged that samples were drawn and certified by the Magistrate, and proceedings were photographed and attested.



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8. The learned counsel for the applicant submitted that the applicant is a young lady who has clean antecedents and she has been falsely implicated in this case. He submitted that the seized contraband was planted on the applicant.

9. He submitted that the manner in which the samples were drawn was not lawful as the samples were not drawn from all the twelve transparent pouches. He relied upon the judgment passed by a Coordinate Bench of this Court in ***Basant Rai v. State : Crl. Appeal No. 909/2005***.

10. He submitted that the mandatory provisions of Section 102 of the Customs Act have not been complied in the present case.

11. He submitted that the applicant has been in custody since 24.05.2021 and no fruitful purpose will be served by keeping the applicant behind bars for an indefinite period.

12. *Per contra*, the Special Public Prosecutor for the State opposed the bail application on the ground that commercial quantity of contraband is involved in the present case as 2845 grams of Heroin was recovered from the possession of the applicant and there is an embargo of Section 37 of NDPS Act.

13. He further submitted that all the provisions of NDPS Act have been followed and samples have been drawn as per law.

14. He submitted that the defences of the applicant in regard to any procedural anomalies would be a matter of trial.



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CONCLUSION

15. Arguments were heard in detail from the learned counsel for the parties.

16. It is settled law that the Court, while considering the application for grant of bail, has to keep certain factors in mind, such as, whether there is a *prima facie* case or reasonable ground to believe that the accused has committed the offence; circumstances which are peculiar to the accused; likelihood of the offence being repeated; the nature and gravity of the accusation; severity of the punishment in the event of conviction; the danger of the accused absconding or fleeing if released on bail; reasonable apprehension of the witnesses being threatened; etc.

17. It is unequivocally established that, to be granted bail, the accused charged with offence under the NDPS Act must fulfill the conditions stipulated in Section 37 of the NDPS Act. Section 37 of the NDPS Act reads as under:

“37. Offences to be cognizable and non-bailable.—(1)
Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

- (a) every offence punishable under this Act shall be cognizable;*
- (b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—*
 - (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and*



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(ii) where the Public Prosecutor oppose the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force, on granting of bail.”

18. The accusation in the present case is with regard to the recovery of commercial quantity of contraband. Once the rigours of Section 37 of the NDPS Act are attracted, as provided under the Section, the Court can grant bail only when the twin conditions stipulated in Section 37(1)(b) of the NDPS Act are satisfied in addition to the usual requirements for the grant of bail – (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; and (2) That the person is not likely to commit any offence while on bail.

19. The learned counsel for the applicant submitted that a liberal interpretation of Section 37 of the NDPS Act must be taken by this Court on mainly the following grounds:

- a. Improper sampling by the prosecution as the substances from different parcels were mixed before the samples were drawn;
- b. Delay in trial

20. It is true that the search and seizure of the contraband so seized is a serious aspect during the investigation and if there is any violation of the mandatory requirements as prescribed under the NDPS Act as to



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the manner in which search and seizure is effectuated, the courts ought to take a serious view and the benefit, in some circumstances, could be extended to the accused.

21. It is argued that the samples were compromised as the substances found in the 12 transparent pouches (recovered from the cardboard box carried by the applicant) were mixed before the samples were drawn.

22. Insofar as the argument regarding improper procedure of sampling is concerned, this Court by a separate Judgment today in ***Sovraj v. State : 2024:DHC:5009***, advertent to a catena of judgments, has held that the accused persons cannot be allowed to go scot free on minute irregularities in procedure of sampling especially when the prosecution has not had the opportunity to furnish an explanation. It was held that the alleged violation in manner of mixing of seized substances and whether the same has caused any prejudice to the applicant would be a matter of trial.

23. In the present case, *prima facie*, the applicant has not been able to establish any prejudice by the alleged irregular procedure of sampling. Prejudice caused to the applicant by the infirmities in the procedure of drawing samples, if any, will be tested during the course of the trial.

24. It is relevant to note that a pinch of the substance recovered from all the transparent pouches was tested with the help of the Field Drug Test Kit and the substances were mixed only after the same tested positive for Heroin. The prosecution has vehemently contested that the



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sampling was done in accordance with law. It is argued that the applicant will have ample opportunity to contest during trial

25. While it is open to the applicant to press the aforesaid defence at the time of trial and contest that that the drawn samples were not true representatives of the seized substance, however, at this stage, the applicant has failed to establish a *prima facie* case as to how she has been prejudiced on account of the delayed compliance or the alleged irregular procedure of sampling. Prejudice caused to the applicant by any infirmity in the procedure of drawing samples will be tested during the course of the trial.

26. The applicant has made a vague contention regarding non-compliance of the mandatory procedure under Section 102 of the Customs Act. It is not elaborated in the pleadings as to how the said provision has not been complied with.

27. It is also relevant to note that two independent witnesses have been associated by the prosecution.

28. The bar under Section 37 of the NDPS Act is attracted against the applicant as commercial quantity of contraband is involved in the present case.

29. It was argued by the learned counsel for the applicant that the applicant is in custody since 24.05.2021 and the Fundamental Rights as guaranteed under Article 21 of the Constitution of India will override the statutory embargo created under Section of the 37 of the NDPS Act.

30. The applicant relied upon the judgments passed by the Hon'ble Apex Court in the case of ***Rabi Prakash v. State of Odisha : 2023 SCC***



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OnLine SC 1109 and of **Mohd. Muslim v. State (NCT of Delhi) : 2023 SCC OnLine SC 352**. The Hon'ble Apex Court in the said cases, after noting the arguments advanced on behalf of the accused, granted bail on the ground that the accused persons therein had been incarcerated for a long period of time and the trial was likely going to take a considerable amount of time. There is no quarrel as far as the law laid down by the Hon'ble Apex Court is concerned. However, in the present case, the sole ground taken by the applicant to contend that no case is made out, is the alleged improper procedure of sampling.

31. As noted above, the issue in regard to improper sampling and any alleged non-compliance of the Standing Order No. 1/88 would be a matter of trial. No benefit can be given to the accused for the alleged non-compliance, at this stage, while considering the application for bail.

32. The substance recovered in the present case was tested with the help of Field Test Kit and found to be positive for Heroin. The applicant, thus, in the opinion of this Court, has failed to satisfy that no reasonable ground exists for believing that he is guilty of the offence. It is trite law that long period of incarceration is a relevant factor for considering the application for bail. However, the same cannot be the sole ground for grant of bail unless the accused person falls within the parameters of Section 436A of the CrPC.

33. Section 436A of the CrPC reads as under:

“436A. Maximum period for which an undertrial prisoner can be detained. –Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone

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detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.”

34. The Hon’ble Apex Court in the case of ***Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India : (1994) 6 SCC 731*** had observed 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



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an undertrial shall not be entitled to be released on bail by virtue of this order.”

(emphasis supplied)

35. The Hon’ble Apex Court in the case of **Satender Kumar Antil v. CBI : (2022) 10 SCC 51** also observed that Section 436A of the CrPC will also apply in cases where the rigours of Section 37 of the NDPS Act are applicable:

“Special Acts (Category C)

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 supplied)

36. In the present case, the charges have been framed against the applicant for the offences under Sections 21(c) and 23(c) of the NDPS Act, which are both punishable with a minimum punishment of 10 years and a minimum fine of ₹1,00,000/-. Admittedly, the applicant has spent a little more than three years in custody, however, she has not undergone a minimum of five years of incarceration in the present case to be entitled to bail solely on the ground of delay in trial. It does not seem entirely implausible at this stage that the trial will not conclude within the next two years.



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37. However, considering that the case is pending since the year 2021, this Court considers it apposite to request the learned Trial Court to expedite the trial.

38. In such circumstances, this Court is of the opinion that the applicant has not made out a *prima facie case* for grant of bail.

39. In such circumstances, this Court is of the opinion that the applicant has not made out a *prima facie case* for grant of bail.

40. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the Trial and also not be taken as an expression of opinion on the merits of the case.

41. The bail application is dismissed in the aforementioned terms.

AMIT MAHAJAN, J

JULY 15, 2024

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