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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% ***Date of decision: 10th July, 2024***+ **BAIL APPLN. 792/2024**

TANNU RUHELA

.....Petitioner

Through: Mr. Karan Verma, Ms. Nayan Maggo
and Ms. Sushma Sharma, Advs.

versus

STATE NCT OF DELHI

.....Respondent

Through: Mr. Amit Ahlawat, APP for the State
SI Avdhesh Dixit, Crime Branch**CORAM:****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****J U D G M E N T (oral)****CRL.M.A. 6995/2024**

1. Allowed, subject to all just exceptions.
2. The application stands disposed of.

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3. Petition **under Section 439 read with Section 482 Cr.P.C** has been filed on behalf of the petitioner seeking Regular Bail.
4. It is submitted in the petition that the petitioner was arrested on 12.08.1991 and has been in judicial custody since then. As per the Charge Sheet, the Case of Prosecution is that on 11.08.2021 around 8:00 p.m. SI Dinesh Kumar received secret information that the petitioner who supplied 'Ganja', would be coming in Maruti car and it would be delivered in Jhilmil



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Industrial Area. The raid was conducted and the accused was apprehended at about 9:55 p.m. while driving his car. On search, 75 kg of 'Ganja' was recovered from the vehicle. FIR was registered. After due compliance of Section 50 of NDPS Act, the sampling of contraband was done under Section 52A of NDPS Act before the Court of learned Metropolitan Magistrate, Delhi. The investigation was conducted and on completion of the same, the Charge Sheet was filed in the Court.

5. In January, 2022 the petitioner had filed a Bail Application before the learned Trial Court which was dismissed *vide* Order dated 20.01.2024.

6. The bail is sought by the petitioner on the ground of non-compliance of Section 50 of NDPS Act for which reliance has been placed on *Vijay Chandubha Jadeja vs. State of Gujarat* decided on 29.10.2022 and also on *Satyendra Shah vs. State of Bihar*, *Sewaram vs. State*, *Bidyadhar Dolai vs. State*, *Dilkush G. Sinai vs. State of Goa*, *Sobharam vs. State of MP*.

7. It is contended that the disclosure statement made by the co-accused persons as well as the petitioner cannot be relied upon as the same are not admissible as held by the Apex Court in *Toofan Singh vs. State of Tamilnadu*. Reliance has also been placed on *State of MP vs. Makrand Singh*, AIR 2019 SC 546 p. and *Selvi vs. State of Karnataka* (2010) 7SCC 263: AIR 2010 SC 1974.

8. It is further contended that petitioner is in custody since 12.08.2021 and the trial has been delayed, which is violation of the principles of natural justice and the benefit of which must be given to the petitioner. There are more than 20 witnesses to be examined which would take considerable time.

9. It is further asserted that there was delay of 3 days in sending the samples to FSL after drawing the samples under **Section 52A of NDPS Act**.



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Reliance has been placed on *Kashif vs. Narcotics Control Bureau* Bail Appln. 253/2023. It is contended that there was tampering with samples as there was variation in the weight for which reliance has been placed on judgment *Rajesh Jagdamba Avasthi vs. State of Goa* decided on 03.11.2004.

10. It is further contended that the “**best possible evidence** i.e. photos and videos **of the car and the contraband at the time of apprehension**” have not been placed on record. In addition, no CCTV footage of the spot has been placed on record. There is violation of provisions of **Section 42 of NDPS Act** which has not been complied with as no search warrants were obtained nor any reason has been stated for not obtaining the warrant. Reliance has been placed on *State of Punjab vs. Balbir Singh* decided on 01.03.1994 and *Sukhdev Singh vs. State of Haryana* decided on 13.12.2012.

11. It is further contended that the co-accused in the disclosure has nowhere stated that he had handed over the contraband to the present petitioner. There are other investigated discrepancies like non-mentioning of the FIR on the seizure memo.

12. In the end it is submitted that the petitioner has clean antecedents and he is not involved in any other case. There is no further requirement of keeping the accused in custody. Hence the regular bail is sought by the petitioner.

13. **Learned Prosecutor on behalf of the State** has argued that commercial quantity of 75 Kg of ‘Ganja’ was recovered while the petitioner was in his car on 11.08.2021. It is submitted that the recovery of commercial quantity of ‘Ganja’ cannot be denied by the petitioner. There



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was due compliance of Section 42 of NDPS Act as requisite DD entry was made and the information was conveyed to the DCP. Section 52 of NDPS Act compliance was also duly made.

14. Charges have been framed and the trial is being conducted on regular basis. Admittedly, two witnesses have been examined. It is therefore submitted that considering the commercial quantity and also due compliance of all the statutory provisions made by the State, no case is made out for grant of bail.

15. **Submissions heard.**

16. Since it is a case of recovery of 75 Kgs of 'Ganja' which is the commercial quantity, the rigorous of Section 37 while granting bail need to be satisfied.

17. At the outset, the objections taken on behalf of the applicant/accused is that there is inordinate delay in concluding the trial against him. Admittedly, the accused was arrested on 12.08.2021 and since then he is in Judicial Custody. The Charge sheet has been filed on 04.02.2022. Though, the charges have been framed, but only three out of seventeen witnesses have been examined till date. All the witnesses remaining to be examined are official witnesses and there is no chance of tampering with the evidence. Such long incarceration for an offence of which he is yet to be held guilty, is in violation of his right to personal liberty.

18. The Supreme Court in the case of Union of India vs. K.A. Najeeb (2021) 3 SCC 713 observed that if the timely trial is not possible, Courts should ordinarily release the undertrials on bail and statutory restrictions do not exclude discretion of the constitutional Courts to grant bail on the ground of fundamental right enshrined in Part III of the Constitution. The



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personal liberty guaranteed by Part II of the Constitution would cover not only the protective but also bring within its ambit not only due procedure and fairness but also access to speedy trial.

19. The Supreme Court in the case of Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) vs. Union of India (1994) 6 SCC 731 had observed that undertrials cannot be indefinitely detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same has been established before a neutral arbiter. However, owing to the practicalities of real life were 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 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. It was further observed that the statutory restrictions like Section 43-D(5) of UAPA per se does not oust the ability of the constitutional courts to grant bail on the ground of violation of fundamental rights under Part III of the Constitution. The Apex Court observed that both the restrictions under the statute as well as the powers exercisable under Constitutional jurisdiction can be well harmonized. It observed “*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, when 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.*”

20. Guided by the principles as enunciated by the Apex Court in the



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aforementioned judgments, the onus rests on this Court to balance a right of the Society from protection against the crime, but this right of the Society needs to be balanced with the individual fundamental rights of the accused to speedy trial. Since, the accused in the present case been in judicial custody since 12.08.2021 and there are only two witnesses examined till date, while eighteen witnesses remained, which may take substantial time to be recorded, it is a fit case where the applicant is entitled to indulgence of this Court by way of bail.

21. The petitioner has further asserted that there is **violation of Section 41 and 42 of NDPS Act**. According to the case of the prosecution, the accused was apprehended at about 09:55 P.M while driving his car. It is claimed that because the search and consequent arrest has been made after sunset, **Second Proviso to Section 42(1) NDPS Act** provides that if any Officer has a reason to believe that a Search Warrant or Authorization cannot be obtained without affording an opportunity of concealment of evidence, or facility for the escape of the offender, he may conduct the search of the conveyance or an enclosed place at any time between sunset and sunrise after recording the grounds for the belief. Section 42(2) further provides that when such information is taken down in writing under Sub Section 1 or under the Proviso thereto, he shall within 72 hours send a copy thereof to him immediate official superior.

22. In the case of Abdul Rashid Ibrahim Mansuri vs. State of Gujrat (2000) 2 SCC 513 the Apex Court had observed that non-recording of the vital information collected by the police at the first instance can be countered as a circumstance in favour of the appellant. Likewise, in the case of State of Punjab vs. Balbir Singh & Ors. (1994) 2 SCR 208 the Apex



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Court had referred to the mandatory provisions of Section 42(1) and observed that if the empowered Officer has prior information, then it should necessarily be taken in writing, but if he has reason to believe from personal knowledge that offence under Chapter 4 has 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 sunset and sunrise and in such a situation. However, under the proviso to Section 42(1) if such person carries out the search between sunset and sunrise, he must record the reasons of his belief. To this extent Section 41 is mandatory and its contravention would affect the prosecution and vitiate the trial.

23. In the case of Sukhdev Singh vs. State of Haryana decided by the Apex Court on 13.12.2012, while considering the purpose and effectiveness of Section 42 NDPS Act, it was observed that this Section is for the purpose of providing fairness in the process of recovery and investigation which is one of the basic feature of the criminal jurisprudence. It is a kind of prevention of false implication of innocent persons; the legislature in its wisdom has made the provision of Section 42 NDPS Act mandatory and not optional but if there is a delay whether it is undue or whether the same has been explained or not, would be a question of fact in each case, as has also been stated in the case of Karnail Singh vs. State of Haryana Crl. Appeal 36/2003 decided on 29.07.2009.

24. In the case of Karnail Singh (supra), it was further observed that while there is mandatory enforcement of provisions of Section 42 of the Act, non-compliance of which may vitiate a trial, has been restricted only to the provision of sending the copy of the information written down by the



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empowered Officer to immediate superior official and not to any other condition in the Section. It was thus, concluded that the compliance with the requirements of Section 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior Officer should normally proceed the entry search and seizure by the Officer but in special circumstances involving emergent situations, the recording of the information in writing and sending a copy may get postponed by a reasonable period i.e. after the search entry and seizure. The question is of **“urgency and expediency”**; only in the case of total non-compliance of requirements of Section 42(1) and (2) would the trial be vitiated. However, **“delayed compliance with satisfactory explanation about the delay would be acceptable compliance of Section 42.”** In the Charge Sheet the prosecution has sought to explain that because of the passage of time, the Search Warrant could not be obtained.

25. Various other issues have been raised in regard to the delay in sending the samples and drawing of the samples in accordance with Section 52A of NDPS Act and with tampering of the samples. In regard to this aspect the Coordinate Bench of this Court in **Kashif vs. NCB in Bail APPL.253/2023** has observed that due delay in sampling procedure and further delay in sending the samples to FSL for testing can impact fair investigation and fair trial.

26. In the present case, six samples were taken out i.e. 250 gm. Each, but the samples sent to FSL were found to be 228.5 gm., 228.6 gm. and 228.5 gm. which creates a doubt about the correctness of the samples taken out before the Magistrate and those sent to the FSL.

27. The Supreme Court in the case of Rajesh Jagdamba vs. State of Goa



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(2005) 9 SCC 773 had observed that it is only after trial after appreciation of the entire evidence that the Court can correctly assess if there are minor discrepancies which have been explained or the discrepancies of the kind which would vitiate the whole process of sample taking. Similar were the observations made in the case of Salagh Ram vs. State of Rajasthan decided by the Rajasthan High Court, wherein after trial the Court found discrepancies in the samples taken and those sent to the FSL. Also, similar were the observations made in Russamma vs. State of Kerala (2000) CrI.L.J. 344.

28. The issues which have been raised by the accused, need to be adjudicated on trial and can possibly be a reason for acquittal.

29. In the light of the aforesaid discussion, it is held that the bar of Section 37 is met out the accused is admitted to bail on furnishing a personal bond in the sum of Rs.50,000/- along with two sureties of the like amount to the satisfaction of the learned trial Court/Duty Magistrate, subject to following conditions:

- (i) The Memo of Parties shows that the applicant is residing at Baraut, Baghpat, U.P. In case of any change of address, the applicant is directed to inform the same to the Investigating Officer.
- (ii) The applicant shall not leave India without the prior permission of the Trial Court.
- (iii) The applicant is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
- (iv) The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witness in any manner.
- (v) In case it is established that the applicant has indulged in similar



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kind of offences or tried to tamper with the evidence, the bail granted to the applicant shall stand cancelled *forthwith*.

30. Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case pending before the learned Trial Court.

31. The application stands disposed of along with all the pending application(s), if any.

32. Let a copy of this judgment be communicated to the concerned Jail Superintendent.

(NEENA BANSAL KRISHNA)
JUDGE

JULY 10, 2024

Ns/va