



2024:DHC:5229



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

% Reserved on : 05th July, 2024

Pronounced on: 15th July, 2024

+ **BAIL APPLN. 1550/2024**

USHA DEVI

.....Petitioner

Through: Mr. Sanjeev Chhikara, Mr. Sumit
Gaur and Mr. Sunil Kaushik,
Advts.

versus

THE GOVT. OF NCT OF DELHI

.....Respondent

Through: Mr. Aman Usman, APP for the
State

CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. This petition is filed seeking regular bail in FIR No.473/2023 at P.S. Shahbad Dairy registered under Sections 21 & 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('**NDPS Act**').

2. The case of prosecution is that on 29th April 2023, secret information was received by SI Tej Singh that a lady named Kamla, resident of House No. D-18/4, Shahbad Dairy, Delhi was indulging in sale of *heroin* in bulk and retail. After verifying the said information, Inspector Umesh Sharma conveyed the same to senior officers who gave authorization to conduct a raid. A raiding party was constituted under the supervision of Insp. Umesh Sharma; raid was conducted at D Block,

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Shahbad Dairy and Kamla, aged 55 years, was apprehended at 1:14 P.M. Notice under Section 50 of NDPS Act was served and search was conducted inside the house of accused Kamla; 260g of *heroin* was recovered from there. FIR was registered and further investigation was handed over to ASI Narender Kumar.

3. The prosecution contends that during investigation Kamla disclosed that she had procured *heroin* from petitioner/Usha. Raid was conducted at the alleged residence of Usha but she was not found at the said address. Thereafter, notice under Section 67 of NDPS Act was served at her new address i.e. H. No. 360, Fourth Floor, H-3 Block, Sector 16, Rohini, Delhi, through post. Petitioner joined investigation on 18th August 2023 and disclosed her mobile number. During the CDR analysis, three numbers were identified i.e. one of Usha, that of her husband Ravi and of one Govinda. All these were found to be connected with Amit, son of accused Kamla. FSL was obtained and charge-sheet was filed against accused Kamla on 25th October 2023.

4. Petitioner filed an anticipatory bail application before the Trial Court which was dismissed on 1st December 2023. Later, application for anticipatory bail filed before this Court, was dismissed *vide* order dated 7th February 2024. Subsequently, petitioner was declared a Proclaimed Offender *vide* order dated 26th February 2024. However, petitioner surrendered before the Trial Court on 12th April 2024 and was formally arrested.

5. In disclosure, she stated that she had procured *heroin* from one Danish and the same was supplied to Naresh and Shakti, residents of Shahbad Dairy. As per the prosecution, during the course of



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investigation, raid was conducted at the instance of Usha at residence of accused Shakti, who was arrested and 50g of *heroin* was recovered from his house.

6. APP for the State contends that the quantity recovered from Kamla is commercial and Usha was found to be in touch with her through CDR analysis. Further, Ravi, husband of petitioner/Usha, is involved in 9 criminal cases including one NDPS case and other accused are absconding and therefore, bail must not be granted.

7. Counsel for petitioner however, contends that there was no recovery from petitioner and she was arrested only on basis of alleged disclosure of Kamla. Further, the only evidence which the prosecution has presented are the calls exchanged between petitioner and Kamla's son Amit, as per the CDR analysis. The recovery from Shakti was on alleged disclosure of petitioner.

8. It is contended that neither of these pieces of evidence with prosecution professed against petitioner can amount to her conviction in law, considering that statements in disclosure are not admissible, as per the decision *inter alia* of the Supreme Court of India in ***Tofan Singh v. State of Tamil Nadu*** (2021) 4 SCC 1, where it has been held that accused cannot be held basis merely on CDR analysis. For this, he has also relied on decisions of Coordinate Benches of this Court in ***Deepak Nagiya v. State*** (2023) SCC OnLine Del 5641 and ***Phundreimayum Yas Khan v. State (GNCT of Delhi)*** (2023) SCC OnLine Del 135.

9. He further stated that even as per prosecution, three names were disclosed by Kamla viz. Usha/ petitioner, Juggu and Meenakshi, both of whom have not been arrayed as accused. As regards Amit, Kamla's son,



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with whom allegedly petitioner was having conversation, was also not arrayed as accused and no proceedings were initiated against them. Further, 9 cases cited against petitioner's husband Ravi were all under Excise Act except for one under NDPS Act and petitioner, as wife of Ravi cannot be tarnished with the same brush. Petitioner was only implicated in subsequent charge-sheet filed on 3rd July 2024.

10. As regards alleged disclosure by petitioner/Usha of Shakti, it had been submitted by her before the Trial Court that on 12th April 2024, at the stage of remand, that she has not made any disclosure statement and her signatures were obtained on a blank paper.

11. Moreover, it is stated that investigation is complete and matter is listed for framing of charges on 8th October 2024.

12. Counsel for petitioner further states that petitioner is a mother of two children, one boy aged 15 years and a girl aged 12 years and considering that her husband is in custody, plea for bail be favourably considered by this Court.

13. What appears to this Court after hearing submissions of the parties and after assessment of material on record, is that there is absolutely no recovery from petitioner in the first place. Petitioner was arrested merely on disclosure of Kamla, which cannot be relied upon *per se* in view of decision of Supreme Court in **Tofan Singh** (*supra*). Relevant paragraphs of the said judgment are extracted hereunder for ease of reference:

“158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the



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Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.

(emphasis added)

14. The Coordinate Bench of this Court in ***Phundreimayum Yas Khan*** (*supra*), in para 22 also stated as under:

“22. In the present case there is no narcotic substance or psychotropic substance recovered from the applicant or from his premises. There is no recovery. The disclosure statement made by the applicant, according to me cannot be read against the applicant. The fact that the anticipatory bail moved by Amarjit Singh Sandhu has been rejected by this Court or that Amarjit Singh Sandhu is absconding, cannot be a ground to deny bail to the present applicant.”

(emphasis added)

15. It has been repeatedly held by various Benches of this Court that mere reliance on CDR analysis and that there were calls which were exchanged between some parties, cannot form a basis for conviction. There is no evidence at hand to state that there were conversations between petitioner and Amit, son of Kamla, relatable to supply of narcotics and therefore, it would be difficult to simpliciter rely on mere CDR analysis showing calls between petitioner and son of Kamla.

16. Further, the submission of counsel for petitioner that son of Kamla *viz.* Amit has not been made an accused in the case, has some merit. Moreover, the other two names in disclosure of Kamla namely Juggu and Meenakshi have also not been made accused.



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17. Reliance on **Tofan Singh** (*supra*) has been made by various Benches of this Court *inter alia* by Coordinate Bench in **Suliaman Agha Saihoon v. Narcotics Control Bureau**, 2024 SCC OnLine Del 3309, the relevant paragraph of which is extracted as under:

“13. It is relevant to note that the case of the prosecution is essentially based upon the disclosure statement of the accused Ahmad and some unverified chats that allegedly establish that the applicant was involved in illegal drug trafficking. It is relevant to note that while the veracity of the disclosure statement of the co-accused and the chats is to be tested at the time of the trial. This Court cannot lose sight of the decision in the case of Tofan Singh v. State of Tamil Nadu, (2021) 4 SCC 1, where the Hon'ble Apex Court held that a disclosure statement made under Section 67 of the NDPS Act is impermissible as evidence without corroboration.”

(emphasis added)

18. It is also noted that charges are yet to be framed. The object of jail is to secure the appearance of persons during trial and is neither punitive not preventive and deprivation of liberty has been considered as punishment without being proved. It would be instructive to extract the observations of Supreme Court in **Mohd. Muslim v. State (NCT of Delhi)**, 2023 SCC OnLine SC 352, which are as under:

“20. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the



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accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

21. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India v. Rattan Malik¹⁹). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.

(emphasis added)

19. This aspect has been even more recently reiterated by the Supreme Court in CRL.A 2787/2024 titled **Javed Gulam Nabi Shaikh v State of Maharashtra & Anr.** in decision dated 3rd July 2024 where the Supreme Court has usefully traversed the principles of law relating to bail, extracted as under:

“9. Over a period of time, the trial courts and the High Courts have forgotten a very well settled principle of law that bail is not to be withheld as a punishment.

*10. In the aforesaid context, we may remind the trial courts and the High Courts of what came to be observed by this Court in **Gudikanti Narasimhulu & Ors. v. Public Prosecutor**, High Court reported in (1978) 1 SCC 240. We quote:*



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“What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal. Lord Russel, C.J., said [R v. Rose, (1898) 18 Cox] :

“I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the, magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial.”

*11. The same principle has been reiterated by this Court in **Gurbaksh Singh Sibba v. State of Punjab** reported in (1980) 2 SCC 565 that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment.*

*12. Long back, in **Hussainara Khatoon v. Home Secy., State of Bihar** reported in (1980) 1 SCC 81, this court had declared that the right to speedy trial of offenders facing criminal charges is “implicit in the broad sweep and content of Article 21 as interpreted by this Court”. Remarking that a valid procedure under Article 21 is one which contains a procedure that is “reasonable, fair and just” it was held that:*

“Now obviously procedure prescribed by law for depriving a person of liberty cannot be “reasonable, fair or just” unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as “reasonable, fair or just” and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and



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essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21.”

13. The aforesaid observations have resonated, time and again, in several judgments, such as **Kadra Pahadiya & Ors. v. State of Bihar** reported in (1981) 3 SCC 671 and **Abdul Rehman Antulay v. R.S. Nayak** reported in (1992) 1 SCC 225. In the latter the court re-emphasized the right to speedy trial, and further held that an accused, facing prolonged trial, has no option:

“The State or complainant prosecutes him. It is, thus, the obligation of the State or the complainant, as the case may be, to proceed with the case with reasonable promptitude. Particularly, in this country, where the large majority of accused come from poorer and weaker sections of the society, not versed in the ways of law, where they do not often get competent legal advice, the application of the said rule is wholly inadvisable. Of course, in a given case, if an accused demands speedy trial and yet he is not given one, may be a relevant factor in his favour. But we cannot disentitle an accused from complaining of infringement of his right to speedy trial on the ground that he did not ask for or insist upon a speedy trial.”

....

17. In the recent decision, **Satender Kumar Antil v. Central Bureau of Investigation** reported in (2022) 10 SCC 51, prolonged incarceration and inordinate delay engaged the attention of the court, which considered the correct approach towards bail, with respect to several enactments, including Section 37 NDPS Act. The court expressed the opinion that Section 436A (which requires inter alia the



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accused to be enlarged on bail if the trial is not concluded within specified periods) of the Criminal Procedure Code, 1973 would apply:

“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.”

18. Criminals are not born out but made. The human potential in everyone is good and so, never write off any criminal as beyond redemption. This humanist fundamental is often missed when dealing with delinquents, juvenile and adult. Indeed, every saint has a past and every sinner a future. When a crime is committed, a variety of factors is responsible for making the offender commit the crime. Those factors may be social and economic, may be, the result of value erosion or parental neglect; may be, because of the stress of circumstances, or the manifestation of temptations in a milieu of affluence contrasted with indigence or other privations.

19. If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the



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State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime.

20. We may hasten to add that the petitioner is still an accused; not a convict. The over-arching postulate of criminal jurisprudence that an accused is presumed to be innocent until proven guilty cannot be brushed aside lightly, howsoever stringent the penal law may be."

(emphasis added)

20. In the circumstance that petitioner's husband has been involved in nine cases, also cannot work to the disadvantage of petitioner, considering that no seizure was made from her; there are no previous involvements recorded as yet; and that she has been apprehended merely on disclosure. In any event as stated, out of nine cases against petitioner's husband, 8 are excise cases and only one case is under NDPS Act.

21. Petitioner herself is a mother of two children who will need her love and care and there is no reason why should she continue to be incarcerated.

22. In view of the above *prima facie* assessment, this court is of the considered opinion that there are reasonable grounds to believe that the petitioner's guilt may not be proved and further there is no material on record to show that she is likely to commit any offence while on bail and there is no other involvement which has been brought to the notice of this Court.

23. In light of the above, and that the trial in the matter is likely to take some time, and it would not be prudent to keep the petitioner behind



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bars for an indefinite period, this Court finds it to be a fit case for grant of bail to the petitioner. Consequently, the petitioner is directed to be released on bail on furnishing a personal bond in the sum of Rs. 50,000/- with one surety of the like amount subject to the satisfaction of the Trial Court, further subject to the following conditions:

- i. Petitioner will not leave the country without prior permission of the Court.
- ii. Petitioner shall provide permanent address to the Trial Court. The petitioner shall intimate the Court by way of an affidavit and to the IO regarding any change in residential address.
- iii. Petitioner shall appear before the Court as and when the matter is taken up for hearing.
- iv. Petitioner shall join investigation as and when called by the IO concerned.
- v. Petitioner shall provide all 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 be kept on at all times.
- vi. Petitioner shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses, the complainant/victim or any member of the complainant/victim's family or tamper with the evidence of the case.

24. Needless to state, but any observation touching the merits of the case is purely for the purposes of deciding the question of suspension of



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sentence and shall not be construed as an expression on merits of the matter.

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

26. Accordingly, the application is disposed of. Pending applications (if any) are disposed of as infructuous.

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

(ANISH DAYAL)
JUDGE

JULY 15, 2024/SM/na