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

+ **BAIL APPLN. 2327/2023**

MAJHAR KHAN @ SONU

..... Petitioner

Through: **Mr. Jitendra Sethi & Mr. Hemant
Gulati & Mr. Shobit, Advs.**

versus

STATE, NCT OF DELHI

..... Respondent

Through: **Mr. Amit Ahlawat, APP for State
with Sanjeev Kumar, ANTF/Crime
Branch.**

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

ORDER

03.05.2024

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1. The present application under Section 439 of the CrPC seeks regular bail in case FIR No. 100/19 under Sections 21 and 29 of the Narcotics Drug and Psychotropic Substances Act, 1985, (for short, 'NDPS Act') and Sections 50 and 177 of the Motor Vehicle Act, 1988 (for short, 'MV Act') registered at PS Crime Branch.
2. The case of the prosecution is that on 17.04.2019, ASI Sudhir, Narcotics Cell, received a secret information that two persons, the present applicant and Shanu, co-accused, are indulged in sale and supply of 'heroin' in Delhi and they will be coming to Delhi on their *Bullet* motorcycle at around 05:00 PM and 06:00 PM to deliver a consignment of 'herion' to some person. Based on this information, ACP Narcotics Cell decided to take immediate action and in pursuance of the same DD No. 05 was recorded at 04:00 PM in Narcotics Cell in compliance of Section 42 of the NDPS.



Thereafter, a team was constituted under the supervision of ASI Sudhir Kumar, who alongwith the informer went to the spot where the applicant and co-accused were supposed to arrive. At around 05:10 PM, at the instance of the informer, two persons riding on aforesaid described Motorcycle were apprehended near C-4 Bus Stop, Yamuna Vihar at Gokalpuri flyover side on Gokalpuri- Seelampur road, Delhi. The persons were identified as Mr. Majhar Khan, the present applicant and Mr. Shanu, co-accused. After compliance of Section 50 of the NDPS Act, search was conducted. Two black coloured polythene bags containing 250 grams and 750 grams of *herion* were recovered from beneath the seat of the motorcycle. Accordingly, the present FIR was registered on 17.04.2019 for commission of offence under Sections 21 and 29 of the NDPS Act and Sections 50 and 177 of the MV Act. The applicant was arrested on 18.04.2019 and after completion of investigation, the chargesheet in the present case was filed *qua* the accused persons, including the applicant.

3. Learned counsel appearing on behalf of the applicant submits that the latter was arrested in the present case on 18.04.2019. Thereafter, after completion of the investigation, chargesheet was filed before the learned Trial Court under Sections 21 and 29 of the NDPS Act and Sections 50 and 177 of the MV Act and subsequently, the charges have been framed by the concerned Court. He further submitted that out of 14 witnesses cited by the prosecution in the chargesheet only 3 have examined so far.

4. Learned counsel further submits that the applicant has already been enlarged on bail in the other cases in which he is involved. It is also pointed out that the applicant was released on interim bail on 09.01.2020 and 12.04.2022 and he has not misused the liberty granted to him and had duly



surrendered after the expiry of the same. Therefore, it is submitted that in terms of the judgment of the Hon'ble Supreme Court in **Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, (1994) 6 SCC 731**, the applicant is entitled to bail.

5. *Per contra*, learned APP for the State opposes the present application and submits that 1 kg of 'heroin' has been recovered from the applicant alongwith the co-accused, which is a commercial quantity, and therefore, the twin conditions contained in Section 37 of the NDPS Act would have to be satisfied. It is further submitted that the applicant is also involved in other cases.

6. Heard learned counsel for the parties and perused the record.

7. It is an admitted position that the applicant was arrested on 18.04.2019. By way of the status report dated 03.02.2024, authored by Asstt. Commissioner of Police, ANTF, Crime Branch, Delhi, it has come on record that out of 14 witnesses cited by the prosecution only 3 have been examined so far. Therefore, the trial will take some time to conclude. A perusal of the nominal roll dated 01.04.2024 received from the Office of Superintendent of Prison, Central Jail No. 12, Tihar, New Delhi reflects that as on 30.04.2024, the applicant has already undergone incarceration for a period of 05 years and 02 days. Nominal roll further reflects that conduct of the applicant during incarceration is satisfactory.

8. The Hon'ble Supreme Court, in **Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, 1994 6 SCC 731**, has directed as under:

“(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.”

9. It is pertinent to note that a coordinate bench of this Court in **Anil Kumar @ Nillu v. State, 2022 SCC Online Del 778**, while following the judgment of the Hon’ble Supreme Court in **Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) (supra)** observed that while remaining cognizant of the impact that drugs have on society, Courts must also remain conscious of the fact that prolonged deprivation of one’s personal liberty, without the assurance of a speedy trial runs contrary to principles of the Constitution. It was held as under:

“14. In view of the above, this Court believes that achievement of universal equality before the law requires the tenets of personal liberty to be applicable to all similarly circumstanced individuals and must not be restricted unless according to procedure established by law. This Court does not find any weight in the submission of the learned APP that the aforementioned judgment of the Supreme Court does not apply to the instant case and that the judgment of this Court in *Atul Agarwal v. Directorate of Revenue Intelligence (supra)* must be referred to a larger Bench due to the incorrect application of the Supreme Court’s judgment. Furthermore, in *Atul Agarwal v. Directorate of Revenue Intelligence (supra)*, this Court had not solely granted bail on the footing of the inordinate delay in trial, but had also considered the twin requirements stipulated under Section 37 of the NDPS Act. Therefore, this Court is of the opinion that the Petitioner herein is squarely covered by judgment of the Supreme Court and is entitled to release on account of inordinate delay in trial and prolonged judicial custody.

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16. Therefore, fair, just and reasonable procedure is implicit in Article



21 and it creates a right in the accused to be tried speedily. This Court has consistently observed that while Courts must remain cognizant of the deleterious impact of drugs on society, it is also important to keep in mind that deprivation of personal liberty without the assurance of speedy trial contravenes the principles enshrined in our Constitution. In the instant case, the Petitioner has been incarcerated for almost eight years now, i.e. since 27.03.2014, for an offence that is punishable with a minimum imprisonment of ten years. This is an egregious violation of an accused's right to personal liberty and right to speedy trial as, in the off-chance that the Petitioner is acquitted, it would entail an irretrievable loss of eight years of his life that cannot be compensated. Whether or not the Petitioner played an active role in the commission of the offence of drug trafficking and supply is a matter of trial and cannot justify the prolonged incarceration of the Petitioner.”

10. It is pertinent to note that the decision in **Anil Kumar @ Nillu** (*supra*) was challenged in appeal before the Hon’ble Supreme Court and *vide* order dated 14.10.2022, SLP (Criminal) 25615/2022, was dismissed.

11. The Hon’ble Supreme Court, in **Union of India v. K.A. Najeeb**, (2021) 3 SCC 713 took note of the law laid down in **Supreme Court Legal Aid Committee (Representing Undertrial Prisoners)** (*supra*) and observed that if a timely trial is not possible, courts are ordinarily obligated to release the undertrial on bail and statutory restrictions do not exclude the discretion of constitutional courts to grant bail on grounds of violation of fundamental rights enshrined in Part III of the Constitution. It was held as under:

“15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India* [Supreme



Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, (1994) 6 SCC 731, para 15 : 1995 SCC (Cri) 39] , it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where 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 a 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.

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17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. 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 where 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. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

18. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the



charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected.”

12. More recently, *vide* order dated 13.07.2023 passed in **Special Leave to Appeal (Crl.) 4169/2023** titled **Rabi Prakash v. The State of Orissa**, the Hon’ble Supreme Court held that prolonged incarceration of a person overrides the statutory restriction contained in Section 37(1)(b)(ii) of the NDPS Act. It was held as under:

“2. The prosecution case appears to be that the police party while on patrolling duty on 02.10.2019 at about 12.30 p.m. on Nandapur-Semiliguda road MDR-55, spotted one full body twelve wheeler Truck (Eicher) bearing No.EB-13-BD-5753 coming from Nandapur side at a high speed and accordingly they chased and detained the truck at Bodenga Chhak and found three persons boarded in the said truck including the driver. Eventually, 247 kg. Ganja was recovered from the truck. The petitioner was one of the occupants of the truck and was arrested at the spot. He has been in custody for more than three and a half years. There are no criminal antecedents against the petitioner.

3. We are informed that the trial has commenced but only 1 out of the 19 witnesses has been examined. The conclusion of trial will, thus, take some more time.

4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent – State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. **The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.”**

(emphasis supplied)



A coordinate bench of this Court, in **Soletto Justniano Fernando Tito v. Narcotics Control Bureau, 2023:DHC:5191**, while placing reliance on the aforesaid judgment of the Hon'ble Supreme Court in **Rabi Prakash (supra)**, granted bail to the applicant therein, in a case under Sections 21/23/29 of the NDPS Act, involving recovery of a commercial quantity on the ground that the said applicant has been in custody for a duration of more than 06 years.

13. The present applicant was arrested on 18.04.2019. A perusal of the nominal roll dated 01.04.2024 reflects that the applicant has been in custody for 05 years and 02 days. The applicant has been chargesheeted for offence related to commercial quantity under Section 21(c) of the NDPS Act, and will therefore be covered under **direction (iii) in Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) (supra)**, which is as under:

“(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.”

Section 21(c) of the NDPS Act provides for a punishment of rigorous imprisonment for a term which **shall not be less than 10 years** but which may extend to twenty years and a **fine which shall not be less than one lakh rupees** but which may extend to two lakh rupees. Since, in the present case, the applicant has been in custody for more than 05 years, his case is squarely covered by the aforesaid judgment of the Hon'ble Supreme Court.



As per the nominal roll, the applicant is involved in one other case, however, the same is not related to the NDPS Act. The applicant has been released on interim bail on two prior occasions. Upon expiry of the interim bail, he duly surrendered each time and did not misuse the liberty granted to him.

14. In view of the facts and circumstances of the present case, the application is allowed and the applicant is admitted to bail upon his furnishing a personal bond in the sum of Rs. 1,00,000/- alongwith two sureties of like amount to the satisfaction of the learned Trial Court/Link Court, further subject to the following conditions:

- i. The applicant shall appear before the ACP, ANTF, Crime Branch, Delhi, once in a week, on every Friday at 11:00 AM, unless leave of absence is obtained in advance from the learned Special Judge concerned.
- ii. The applicant shall not leave India without prior permission of the learned Trial Court.
- iii. The applicant shall intimate the learned Trial Court by way of an affidavit and to the Investigating Officer regarding any change in residential address.
- iv. The applicant shall appear before the learned Trial Court as and when the matter is taken up for hearing.
- v. The applicant is directed to give his mobile number to the Investigating Officer and keep it operational at all times. He shall not switch off or change the mobile number without prior information to the Investigating Officer.
- vi. The applicant shall not, directly or indirectly, The bail granted to the applicant shall be cancelled *forthwith* if any of the above conditions



are violated or a case for cancellation of bail is otherwise made out.

15. The application is allowed and disposed of accordingly.
16. Pending applications, if any, also stand disposed of.
17. Needless to state that nothing stated hereinabove is an opinion on the merits of the case.
18. Copy of the order be sent to the concerned Jail Superintendent for necessary information and compliance.
19. Order be uploaded on the website of this court *forthwith*.

AMIT SHARMA, J

MAY 3, 2024/nk

Click here to check corrigendum, if any