



2024:DHC:8110

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

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Judgment delivered on: 21.10.2024

+ **BAIL APPLN. 1668/2024 & CRL.M.A. 14502/2024****VIKASH @ VICKY**

..... Applicant

versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Sachin Vats and Ms. Shefali Sharma,
Advs.

For the Respondent : Mr. Ajay Vikram Singh, APP for the State
with SI Ravinder, Spl. Staff / OD.

CORAM**HON'BLE MR JUSTICE AMIT MAHAJAN****JUDGMENT**

1. The present application is filed seeking grant of regular bail in FIR No. 1184/2021, dated 09.10.2021, registered at Police Station Sultanpuri for offence under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('**NDPS Act**').

2. Briefly stated, the FIR in the present case was registered based on secret information that on 08.10.2021, the applicant, Vikash @ Vicky, would be arriving at E-3 Block, Sultanpuri, Delhi around 9:00 PM to supply narcotic substances/smack. Acting on this information, a



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police team was constituted and a raid was conducted at the aforesaid location, and around the designated time, the applicant was allegedly seen approaching the area.

3. Thereafter, notice under Section 50 of the NDPS Act was served to the applicant informing him about his legal right to get his search done in front of the Gazetted Officer or a Magistrate. It is alleged that the applicant refused to be searched in the presence of the Gazetted Officer or a Magistrate.

4. Subsequently, a search was conducted, which led to the recovery of 313 grams of smack (heroin) from the applicant. The contraband was found in two separate packets, one weighing 198 grams and the other 115 grams, hidden in the applicant's possession. Consequently, the applicant was arrested.

5. The application under Section 52A of the NDPS Act for drawing samples was moved by the prosecution before the learned Magistrate on 11.10.2021.

6. Upon completion of the investigation, the chargesheet in the present case was filed for offence under Section 21 (c) of the NDPS Act.

7. The applicant's previous bail application was dismissed by the learned Trial Court by order dated 11.01.2024 on the grounds of the severity of the charges and the restrictions imposed by Section 37 of the NDPS Act. Hence, the present application.

8. The learned counsel for the applicant submitted that the applicant is innocent and has been falsely implicated in the present



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case. The allegations levelled by the prosecution are baseless and without any merit. He submitted that even though the purported recovery happened in a public place there were no independent witnesses.

9. He submitted that even though recovery was made on 08.10.2021, the application under Section 52A of the NDPS Act was filed belatedly on 11.10.2021 after an unexplained delay of about 3 days. He submitted that there was sufficient time for the prosecution to tamper with the samples. He relied on the order in the case of ***Kashif v. Narcotics Control Bureau : 2023 SCC OnLine Del 2881***, where it was held that the application for drawing a sample of narcotic drugs or psychotropic substances must be made within 72 hours to the Magistrate concerned under Section 52 A of the NDPS Act.

10. He further submitted that the samples were also belatedly sent to the FSL Laboratory on 18.10.2021. He referred to the Standing Order 1/88 dated 15.03.1988 to contend that it was mandatory that the samples ought to be dispatched to the FSL Laboratory within 72 hours of seizure.

11. He submitted that the applicant has been in custody for more than two years and despite the passage of a significant period, the trial is still in its initial stages. The Hon'ble Apex Court, in ***Mohd. Muslim v. State (NCT of Delhi)***, has held that prolonged incarceration without the conclusion of a trial is a violation of the fundamental rights guaranteed under Article 21 of the Constitution of India.



12. *Per Contra*, the learned Additional Public Prosecutor for the State opposed the grant of bail to the applicant. He submitted that since the recovered quantity of contraband in the present case is commercial in nature, the bar under Section 37 of the NDPS Act is attracted.

13. He submitted that the defences of the applicant in regard to any procedural anomalies would be a matter of trial, and the applicant should not be granted bail at this stage.

14. He further submitted that the applicant is a habitual offender and is involved in a number of cases. He submitted that the applicant has been convicted in FIR No. 384/2009.

Analysis

15. 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.

16. When the accused is charged with offence under the NDPS Act for possession of commercial quantity of contraband, the Act further prescribes the conditions as 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

(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.”

17. 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.

18. It is argued that there is a delay in sending of samples to the FSL. In the present case, it is the case of the applicant that the application under Section 52A of the NDPS Act was filed after a delay of 17 days and the samples were sent for FSL after a further delay of



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16 days. It is argued that the samples should have been dispatched to the FSL within 72 hours after seizure.

19. This Court, in the case of ***Sovraj v. State : 2024:DHC:5009***, advertent to a number of judgments, has concurred with the view of a Coordinate Bench of this Court in ***Somdutt Singh @ Shivam : Narcotics Control Bureau : 2023:DHC:8550***, and held that irregularity in procedure or belated compliance of the procedure under Section 52A of the NDPS Act or Standing Order No.1/88 is not a ground for grant of bail.

20. It is open to the applicant to press the defence of delay in sampling procedure at the time of the trial. However, at this stage, the applicant has failed to establish a *prima facie* case as to how he has been prejudiced on account of the delayed compliance. In the opinion of this Court, any observation as to the veracity of the recovery on account of delay to grant bail to the applicant would be premature.

21. The learned counsel for the applicant has also raised the issue that no independent witness was joined by the prosecution even though the applicant was apprehended on the basis of secret information. It is argued that no independent witnesses were associated by the prosecution and no photography or videography was done by the prosecution in the present case despite the applicant being apprehended in a public place.

22. This Court in the case of ***Bantu v. State Govt of NCT of Delhi: 2024: DHC: 5006*** has observed that while the testimony of independent witness is sufficient to secure conviction if the same



inspires confidence during the trial, however, lack of independent witnesses in certain cases can cast a doubt as to the credibility of the prosecution's case.

23. It was held that when the Investigating Agency had sufficient time to prepare before the raid was conducted, not finding the public witness and lack of photography and videography in today's time casts a doubt to the credibility of the evidence.

24. In the present case, no notice under Section 100 (8) of the CrPC was given to any person on the refusal to support the Investigating Agency during the search procedure. It is peculiar that the Investigating Agency was unable to associate even a single public witness in the same time, especially since the prosecution had prior secret information and the applicant was apprehended at a public place.

25. This Court in *Bantu v. State Govt of NCT of Delhi* (*supra*), noted that the Hon'ble Apex Court, way back in the year 2018 in *Shafhi Mohd. v. State of H.P.* (*supra*), after taking note of the technological advancements, had passed certain directions. The Hon'ble Apex Court had emphasised the role of audio-visual technology in enhancing the efficacy and transparency in the Police investigations.

26. This Court also noted that realising the need of change in time, the Legislature has now passed the Bharatiya Nagarik Suraksha Sanhita, 2023 ('BNSS'), where the practice of photography and



videography has now been made mandatory as part of the investigation.

27. This Court also noted that the procedure prescribed in NCB Handbook which has been adopted by the Delhi Police may be argued to be not binding, however, it cannot be denied that the same has been prescribed as the best and crucial practice for obtaining evidence in order to avoid the allegation in regard to foul play.

28. Thus, while it is true that the effort, if any, made by the prosecution to have the search conducted in the presence of the independent witnesses would be tested during the course of trial and the same may not be fatal to the case of the prosecution, however, the benefit, at this stage, cannot be denied to the accused.

29. In the present case, the matter is at the stage of prosecution evidence. As noted above, the applicant has been in custody since 08.10.2021. There is no likelihood of the trial being completed in the near future.

30. It is trite law that grant of bail on account of delay in trial cannot be said to be fettered by the embargo under Section 37 of the NDPS Act. The Hon'ble Apex Court, in the case of ***Mohd. Muslim v. State (NCT of Delhi)*** (*supra*) has observed as under:

“21....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.

22. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in



time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country²⁰. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

23. The danger of unjust imprisonment, is that inmates are at risk of "prisonisation" a term described by the Kerala High Court in A Convict Prisoner v. State²¹ as "a radical transformation" whereby the prisoner:

"loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes."

24. There is a further danger of the prisoner turning to crime, "as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal"²² (also see Donald Clemmer's 'The Prison Community' published in 1940²³). Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata : immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials - especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily."

(emphasis supplied)

31. The Hon'ble Apex Court in ***Rabi Prakash v. State of Odisha*** : **2023 SCC OnLine SC 1109**, while granting bail to the petitioner therein held as under :

"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.”

32. The Hon’ble Apex Court in ***Badsha SK. v. The State of West Bengal*** (order dated 13.09.2023 passed in **Special Leave Petition (Crl.) 9715/2023**), granted bail to the petitioner therein who had been in custody for more than two years with the trial yet to begin.

33. Similarly, in ***Man Mandal & Anr. v. The State of West Bengal*** (order dated 14.09.2023 passed in **Special Leave Petition (Crl.) 8656/2023** decided on 14.09.2023), the petitioner therein had been in custody for almost two years and the Hon’ble Apex Court found that the trial is not likely to be completed in the immediate near future. The petitioner was, therefore, released on bail.

34. In ***Dheeraj Kumar Shukla v. State of U.P. : 2023 SCC OnLine SC 918***, the Hon’ble Apex Court released the petitioner therein on bail, and observed as under:

“3. It appears that some of the occupants of the Honda City” Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. It is true that the quantity recovered from the petitioner is commercial in nature and the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the petitioner is in custody for the last two and a half years, we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed.”

35. From the foregoing, it is evident that despite the stringent



requirements imposed on the accused under Section 37 of the NDPS Act for the grant of bail, it has been established that these requirements do not preclude the grant of bail on the grounds of undue delay in the completion of the trial. Various courts have recognized that prolonged incarceration undermines the right to life, liberty, guaranteed under Article 21 of the Constitution of India, and therefore, conditional liberty must take precedents over the statutory restrictions under Section 37 of the NDPS Act.

36. The learned APP for the State also contended that the antecedents of the applicant does not entitle him to any relief. Insofar as the antecedents of the applicant are concerned, it is relevant to note that the FIR No. 384/2009 was registered for offences under Sections 302/201/34 of the IPC and under Section 25 of the Arms Act, 1959 and not for any offence under the NDPS Act.

37. It is also settled law that criminal antecedents of an accused cannot be a sole reason for refusal of bail [*Prabhakar Tewari v. State of U.P. : (2020) 11 SCC 648*].

38. Appropriate conditions can be put to allay any apprehension of the applicant committing another offence of a similar nature while on bail.

39. In such circumstances, this Court is of the opinion that the applicant has made out a *prima facie* case for grant of bail on the grounds of absence of independent witnesses and prolonged delay in the trial. The applicant is stated to be belonging to a poor strata of society and is the sole bread earner for his family.



40. The applicant is, therefore, directed to be released on bail (if not in custody in any other case) on furnishing a personal bond for a sum of ₹50,000/- with two sureties of the like amount, subject to the satisfaction of the learned Trial Court, on the following conditions:

- a. The applicant shall not directly or indirectly make any inducement, threat, or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- b. The applicant shall under no circumstance leave the boundaries of Delhi without informing the concerned SHO;
- c. The applicant shall appear before the learned Trial Court as and when directed;
- d. The applicant shall provide the details of his permanent address where he would be residing after his release to the learned Trial Court and intimate the Court, by way of an affidavit, as well as to the IO about any change in his residential address;
- e. The applicant shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times.

41. In the event of there being any FIR/DD entry / complaint lodged against the applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

42. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not



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influence the outcome of the trial and also not be taken as an expression of opinion on the merits of the case.

43. The bail application is allowed in the aforementioned terms. Pending application is also disposed of.

AMIT MAHAJAN, J

OCTOBER 21, 2024