



2024:DHC:1554



* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 12.01.2024

Pronounced on: 28.02.2024

+ BAIL APPLN. 3148/2021

VISHWAJEET SINGH

.... Petitioner

Through: Mr.Satya Bhushan, Adv.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr.Aman Usman, APP with SI
Mahesh, PS Badarpur, Insp.
Jagjeewan Ram.

+ BAIL APPLN. 2382/2023

DEV KUMAR @ GOLU

..... Petitioner

Through: Mr.Satya Bhushan, Adv.

versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through: Mr.Aman Usman, APP with SI
Mahesh PS Badarpur, Insp.
Jagjeewan Ram.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

1. These applications have been filed under Section 439 read with Section 482 of the Code of Criminal Procedure, 1973 (in short, 'Cr.P.C.') seeking grant of bail to the accused persons/Applicants in FIR No.564/2020 registered at Police Station: Badarpur, South-East District, New Delhi under Sections 20/61/85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, 'NDPS Act') and the consequential criminal case, being SC No.267/2021, titled *State v. Vishwajeet Singh Etc.* pending adjudication before the Court of the learned Additional Sessions Judge-04, Special Judge (NDPS Act), South-East District, Saket Courts, New Delhi (hereinafter referred to



2024:DHC:1554



as the 'Trial Court').

2. As both the Applicants have been arrayed as co-accused in the above FIR and have taken identical pleas seeking grant of Bail, these applications are being dealt with and considered by this Court by way of this common judgment.

CASE OF THE PROSECUTION:

3. It is the case of the prosecution that on 02.12.2020, at about 8:30 PM, Head Constable Man Mohan along with Sub-Inspector Virender and Head Constable Vindyachal had apprehended two persons who were coming on foot towards Badarpur from Faridabad side and were carrying bags on their back. During checking of the red-coloured bag carried by the accused Vishwajeet Singh, and the black-coloured bag carried by accused Dev Kumar, six brown-coloured packets in each of the said bags were recovered. It is stated that on checking the brown packets, a Cannabis like substance was found in all the packets, therefore, information regarding the apprehension and the recovery of the narcotic substance was given to the Police Station: Badarpur by HC Man Mohan, which was duly recorded vide DD No.64A. The same was handed over to SI Jagjeevan Ram for further necessary action.

4. The prosecution alleges that SI Jagjeevan Ram along with Constable Rajesh reached at Badarpur Picket, where the accused persons along with the recovered narcotic substances in their bags were handed over to SI Jagjeevan Ram.

5. It is alleged that the Notice under Section 50 of the NDPS Act was served on both the Applicants. Information was also given to



2024:DHC:1554



ACP/ Special Division, Badarpur who also reached the place of the incident. On the directions of the ACP, further bodily search of both apprehended persons were conducted by SI Jagjeevan Ram, but no recovery was effected from their possession.

6. It is alleged that an independent witness namely Mr. Rupesh Gupta was also involved in the seizure process.

7. The Applicants are stated to be formally arrested on 03.12.2020 at 2:20 AM and 2:30 AM respectively. Their mobile phones were also seized and taken into police custody.

8. It is alleged that the accused Vishwajeet Singh disclosed that he had started the sale/purchase of illegal Cannabis in 2017, along with his friend Sujeet Chauhan. It is stated that he also disclosed that Sujeet Chauhan has been supplying Cannabis to one person namely Manish in Delhi. It is alleged that he further disclosed that on 02.12.2020, at the instance Manish, he had met co-accused Dev Kumar @ Golu at Bhogal Bus Stand, and both had gone to Agra Cantt. Railway Station, from where they picked two bags filled with packets of *Ganja* from the railway track.

9. It is further alleged that on 07.12.2020, the recovered Cannabis was produced before the learned Duty Magistrate for sampling under Section 52A of the NDPS Act and the procedure of drawing samples and other proceedings was conducted.

10. It is further alleged that the co-accused Sujeet was found arrested in another case arising out of the FIR No.30/2021 registered at Police Station: Kotwali, Eta Dehat, Uttar Pradesh under Section 20 of the NDPS Act, while co-accused Manish has been arrested in the



2024:DHC:1554



proceedings emanating from the FIR No.05/2021 registered at the Police Station: Kotwali, Eta Dehat, Uttar Pradesh under Section 20 of the NDPS Act. The Status Report indicates that both the co-accused persons are yet to be interrogated.

11. The prosecution further alleged that the CDR of the mobile numbers of the accused persons were obtained, and during examination of CDR details, it was revealed that accused Vishwajeet Singh had talked to accused Dev Kumar @ Golu telephonically 9 times on 02.12.2020. The CDR details of accused Vishwajeet Singh revealed that he had gone to Agra Cantt. from Bhogal, New Delhi. The location of accused as per his mobile number's location, at 7:01:32 AM on 02.12.2020 was at Bhogal Jangpura, Delhi while at 01:58:07 PM, he was at Agra Cantt. Railway Station, Uttar Pradesh. The accused Vishwajeet Singh had talked telephonically 94 times to Manish on his mobile phone between 01.10.2020 to 02.12.2020 and on 02.12.2020 he is alleged to have talked to Manish 16 times. It is alleged that Manish in turn had telephonically talked with the accused Dev Kumar, 8 times on 02.12.2020 and 44 times between 01.10.2020 and 02.12.2020. It is alleged that the CDR details of the accused persons revealed that they had gone to Agra Cantt. from Delhi at the directions of Manish to bring the parcels of *Ganja*. It is further alleged that the samples of the contrabands recovered from the accused were sent to FSL, Rohini for examination and in the report, it has been opined that the same was '*Ganja*' (Cannabis).



12. The learned Trial Court, vide order dated 07.12.2021, framed charges under Section 20(c) read with Section 29 of the NDPS Act against the accused.

Submission of the Learned Counsel for the Applicants:

13. The learned counsel for the Applicants submits that it is the case of the prosecution itself that only 12 kg of *Ganja* was allegedly recovered from the possession of each one of the Applicants. The same is an intermediate quantity and, therefore, the provision of Section 37 of the NDPS Act, which applies to commercial quantities, cannot be invoked against the applicants. Placing reliance on the judgment of the Supreme Court in *Amarsingh Ramjibhai Barot v. State of Gujrat*, (2005) 7 SCC 550; of the High Court of Punjab & Haryana dated 23.03.2022 in CRM-M-35082-2021 titled *Nirmala v. State of Punjab*; and of the Bombay High Court in *Sagar Nana Borkar v. State of Maharashtra* Neutral Citation no. 2023:BHC-AS:27660, he submits that merely because two individuals were found carrying narcotic substance, Section 29 of the NDPS Act cannot be invoked against them, nor the quantity recovered from each of them clubbed to make it a commercial quantity to attract the rigours of Section 37 of the NDPS Act.

14. He further submits that the alleged CDR, on the basis of which Section 29 of the NDPS Act is being invoked by the prosecution, are not admissible in evidence. He submits that the alleged mobile phones recovered from the personal search of the Applicant, Dev Raj, had different IMEI numbers. He submits that there is also a doubt on the very recovery of the mobile phone from the said Applicant.



2024:DHC:1554



15. He further submits that the Search and Seizure was carried out between sunset and sunrise without recording the belief, as is required under Section 42(1) of the NDPS Act, thereby, making the search and seizure inadmissible in evidence. He places reliance on the judgment of Supreme Court in *Mohinder Singh v. State, Panaji, Goa*, AIR 1995 SC 1157.

16. He further submits that the packets allegedly recovered from the accused persons were opened by HC Man Mohan, who is not an empowered officer under Section 42 of the NDPS Act, thereby compromising the very recovery, making it inadmissible in evidence.

17. He further submits that the application under Section 52A of the NDPS Act was allegedly moved by SI Vivek Gautam, that too without inventory, and not by the Officer-In-Charge of the Police Station: Badarpur. He submits that SI Vivek Gautam was neither the Officer-In-Charge nor the empowered officer as defined in Section 53 of the Act, nor the Officer who carried out the seizure proceedings on the spot. He submits that, therefore, the alleged proceedings conducted under Section 52A of the NDPS Act are illegal. Reliance in this regard is placed on the judgment of this Court in *Rohit v. Central Bureau of Narcotics* 2020 SCC OnLine Del 1584.

18. He further submits that the chargesheet itself states that, though the samples were drawn on 07.12.2020, it was only on 01.04.2021, on the refusal of the FSL to accept these samples, that they were produced before the learned Metropolitan Magistrate for the signature of the learned Metropolitan Magistrate. He submits that the chargesheet further records that the learned Metropolitan Magistrate



2024:DHC:1554



refused to sign the samples. He submits that, therefore, there is nothing on record to show as to how the samples were later deposited with FSL without the signatures of the learned Metropolitan Magistrate.

19. He submits that there is also no incriminating link with the alleged recovery of the contraband and the substance produced before the learned Metropolitan Magistrate for drawing samples. The *Malkhana* Register has not been placed on record. In support, he places reliance on the judgments of the Supreme Court in *Valsala v. State of Kerala* AIR (1994) SC 117 and *State of Rajasthan v. Gurmail Singh* (2005) 3 SCC 59.

20. He further submits that the alleged independent witness namely Mr. Rupesh Gupta (PW-1) has not supported the case of the prosecution in his evidence. PW-2 (ASI Man Mohan) has made contradictory statements including on having signed the Seizure Memo and samples having been drawn on the spot. He has further deposed that no mobile phone was recovered from the personal search of the accused.

21. The learned counsel for the Applicants, on the basis of the above, submits that the accused have been able to cast grave doubt on the case of the prosecution and are, therefore, entitled to be released on Bail.

22. He submits that the Applicants have been in custody since 03.12.2020, that is, a period of more than three years and they have, otherwise, clear antecedents with no criminal case except the present one. Placing reliance on the judgment of the Supreme Court in *Rabi*



2024:DHC:1554



Prakash v. State of Odisha 2023 SCC OnLine SC 1109, he submits that the Applicants are entitled to be released on bail.

Submission of the learned APP:

23. On the other hand, the learned APP for the State submits that in the present case, it was only a chance recovery of narcotics from the accused. He submits that, therefore, the provisions of Section 43 of the NDPS Act will not be applicable in the facts of the present case.

24. He further submits that there is material on record in the form of CDR details, which shows that the Applicants were in constant touch with each other through their mobile phones, therefore, there is evidence of them having acted in conspiracy with each other. He submits that, therefore, Section 29 of the NDPS Act has rightly been invoked against the accused persons. He places reliance on the judgment of this Court in ***Awadhesh Yadav v. State Govt of NCT of Delhi***, Neutral Citation no.2023:DHC:8529.

25. He submits that the plea of the learned counsel for the Applicants that the provisions of Section 52A of the NDPS Act have not been complied with or that there are contradictions in the statement of ASI Man Mohan, are matters which are to be considered in the trial and cannot be a ground for the release the Applicants on bail, at this stage.

26. He submits that mere delay in trial is also not a ground to release the accused persons on bail in such heinous crimes.

ANALYSIS AND FINDINGS:



27. I have considered the submissions of the learned counsels for the parties.

28. It is the case of the prosecution that the two accused persons were found travelling together and were apprehended together on 02.12.2020. They were carrying bags from which 12 kg of *Ganja* each was recovered. Though individually the quantity recovered would be intermediate, the prosecution by analysing the CDR details of the accused persons, alleges that as they were acting in conspiracy with each other, the quantity recovered from both of them have to be clubbed together making it a commercial quantity.

29. In *Amarsingh Ramjibhai Barot* (Supra), the Supreme Court held that merely because the accused persons were found together but were individually carrying the recovered substance, in the absence of any other evidence to suggest that there was any abetment and/or criminal conspiracy within the meaning of Section 29 of the NDPS Act, said provision cannot be invoked. The said case was, however, considering the order of conviction passed by the High Court.

30. In *Nirmala* (Supra) and *Sagar Nana Borkar* (Supra), unlike the present case, the prosecution had not alleged any other material/evidence against the accused but for them being travelling together with contraband.

31. A learned Single Judge of this Court in *Awadhesh Yadav* (Supra), after referring to the various precedents on the issue of clubbing together of the quantities of contraband recovered individually, observed as under:



“49. From the provisions of law and the essence of case-laws, as discussed above, following principles can be culled out governing clubbing of the quantity of contraband recovered from two or more co-accused, at the stage of bail:

i. invocation of offence of abetment and/or conspiracy under Section 29 of the Act is must for clubbing of quantity. However, there cannot be a straight jacket formula for clubbing the quantity of contraband recovered from all the accused, merely on the basis of invocation of offence under Section 29 of the Act. It will depend on the factual backdrop of each case and the incriminating material available against the accused persons.

ii. the incriminating material relied upon to invoke the offence of abetment and/or conspiracy under Section 29 of the Act, has to be cogent and convincing against each one of the accused charged with the offence of abetment and/or conspiracy.

iii. in a case where joint recovery of contraband has been effected from two or more co-accused, the recovered contraband cannot be equally divided amongst the number of accused to determine whether the quantity of contraband recovered in “commercial quantity” or not.

iv. where accused persons are travelling together in the same private vehicle individually carrying contraband, it will not be proper to consider the alleged recovery to be an individual recovery and the contraband recovered from all persons can be clubbed.



v. if an accused is a habitual offender, it gives rise to an inference that he knows the tricks of the trade. In such a situation, previous involvement of the accused in the case(s) under the NDPS Act, is an additional factor which could be considered, besides other incriminating circumstances, for adding the quantities of contraband recovered from two or more co-accused.”

32. Applying the above test, at this stage of the proceedings, the invocation of Section 29 of the NDPS Act against the accused persons cannot be faulted. The submission made by the learned counsel for the Applicants shall have to be considered on the appreciation of evidence that is led by the prosecution before the learned Trial Court, and cannot be pre-judged by this Court at this stage.

33. Section 42 of the NDPS Act reads as under:

“42. Power of entry, search, seizure and arrest without warrant or authorisation.—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed



or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an



offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

34. For the said Provision to be invoked, the officer mentioned in the said Section should have the reason to believe from personal knowledge or because of an information given by any person and taken down in writing, that any narcotic drug, psychotropic substances, or controlled substances or any documents in relation thereto is kept or concealed in any building, conveyance or enclosed place. In the present case, the case of the prosecution is that this was a chance recovery. There was no prior information or any suspicion, otherwise, when the accused were stopped/apprehended at the police picket.

35. In ***Mohinder Singh*** (Supra), the Supreme Court has held that the NDPS Act being pre-emptive legislation, the interpretation has to be strict. However, in my opinion, the same cannot come to the assistance of the accused at this stage of the trial.

36. This, however, leaves me with the two important submissions of the learned counsel for the Applicants. The first being that the mandate of Section 52A of the NDPS Act has not been complied with, and there is no evidence as to how the samples were sent to FSL for obtaining its opinion. The second submission of the learned counsel



for the Applicants is that SI Vivek Gautam who filed the application under Section 52A of the NDPS Act before the learned Metropolitan Magistrate, was not an empowered officer under Section 53 of the NDPS Act nor the officer who carried out seizure proceedings on the spot.

37. Sections 52 and 52A of the NDPS Act are reproduced herein below:

“52. Disposal of persons arrested and articles seized.—(1) Any officer arresting a person under section 41, section 42, section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to—

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under section 53.

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article.

52A. Disposal of seized narcotic drugs and psychotropic substances.— (1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic



substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs, psychotropic substances, controlled substances or conveyances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substances or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs, psychotropic substances, controlled substances or conveyances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

- (a) certifying the correctness of the inventory so prepared; or*
- (b) taking, in the presence of such magistrate, photographs of such drugs, substances or conveyances. and certifying such photographs as true; or*
- (c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and*



2024:DHC:1554



certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

38. A reading of the above Provisions would show that any article seized under Section 42, 43 and 44 of the NDPS Act shall be forwarded without unnecessary delay to the Officer-In-Charge of the nearest Police Station or the officer empowered under Section 53 of the NDPS Act. Sub-Section (2) of Section 52A of the NDPS Act further states that the Officer-In-Charge of the nearest Police Station or the officer empowered under Section 53 of the NDPS Act or under Section 52(1) of the NDPS Act, shall prepare an inventory of the narcotics drug, psychotropic substances, controlled substances or conveyances or any evidence, and shall make an application to any Magistrate for the purpose of certifying the correctness of the inventory so prepared and for taking photographs of the same and being certified by the Magistrate, and for allowing to draw representative samples of such drugs or substances in the presence of such Magistrate and certifying the correctness of any list of samples so drawn. SI Vivek Gautam is not shown to be the person before whom



the seizure was made nor, presently, it is shown that he is the Officer-In-Charge of the Police Station or the officer empowered under Section 53 or 52A(1) of the NDPS Act.

39. This apart, the charge-sheet filed in the present case *inter-alia* states as under:

“During the investigation of the case on 28/01/2021, Const Vijay No-2178/SE along with Packets of Samples of Ganja in the case vide RC No-5/21/2021, Dated-28/01/2021 was sent to FSL, Rohini to deposit the samples. The Samples could not be deposited the Chemistry Division of FSL, Rohini and officials asked to sent the samples through fresh forwarding letter. Again on 30/03/2021, samples of Ganja of present case was sent to FSL, Rohini through Const Vijay No-2178/SE, vide RC No-35/21/2021, Dated-30/03/2021. The Samples could not be deposited the Chemistry Division of FSL, Rohini and officials asked to get signed the sample packets by Magistrate who had done sampling and sealed the parcels in the present case which was not signed by the Magistrate on 07/12/2020 when sampling was done. Later, on 01/04/2021, samples were produced before Shri Bhanu Pratap Singh, Ld MM, South East Saket, Delhi, and he was requested to sign the samples so that samples can be deposited in the FSL for examination but Ld MM not signed the sample parcels of the case and due to which samples of recovered contraband in the case could not be deposited so far in FSL for examination. After depositing the samples and after getting final opinion from FSL regarding nature of recovered narcotic substance in the case, supplementary charge sheet shall be filed before Hon'ble Court.”

40. It is the case of the prosecution that the samples were drawn on 07.12.2020. The charge-sheet records that on 01.04.2021, the learned



2024:DHC:1554



Metropolitan Magistrate has refused to sign on the samples, that is, certifying the same. It is not explained as to how the samples were thereafter sent to FSL and the report was obtained. The Applicants have also alleged that the *Malkhana* Register has also not been placed on record before the learned Trial Court. The same casts a serious doubt on the case of the prosecution.

41. The learned counsel for the applicants has also stated that there are material contradictions in the statement of ASI Man Mohan (PW-2).

42. Secondly, the Applicants have been in custody since 03.12.2020. The learned Trial Court in its order dated 06.06.2023, while rejecting the application of the applicants for being released on bail, has itself recorded that the trial is at a nascent stage and the witnesses are yet to be examined and the evidences are yet to be proved.

43. In *Mohd. Muslim v. State (NCT of Delhi)*, 2023 SCC OnLine SC 352, the Supreme Court, considering the application filed by the accused therein for being released on bail, observed as under:-

“12. This court has to, therefore, consider the appellant's claim for bail, within the framework of the NDPS Act, especially Section 37. In Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, this court made certain crucial observations, which have a bearing on the present case while dealing with denial of bail to those accused of offences under the NDPS Act:

“On account of the strict language of the said provision very few persons accused of certain offences under the Act could secure bail. Now



to refuse bail on the one hand and to delay trial of cases on the other is clearly unfair and unreasonable and contrary to the spirit of Section 36(1) of the Act, Section 309 of the Code and Articles 14, 19 and 21 of the Constitution. We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this section in the earlier part of the judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in Kartar Singh v. State of Punjab [(1994) 3 SCC 569]. Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a Constitution Bench of this Court in A.R. Antulay v. R.S. Nayak [(1992) 1 SCC 225], release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases be the demand of Article 21. As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be



telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters.”

13. When provisions of law curtail the right of an accused to secure bail, and correspondingly fetter judicial discretion (like Section 37 of the NDPS Act, in the present case), this court has upheld them for conflating two competing values, i.e., the right of the accused to enjoy freedom, based on the presumption of innocence, and societal interest - as observed in Vaman Narain Ghiya v. State of Rajasthan (“the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal....”). They are, at the same time, upheld on the condition that the trial is concluded expeditiously. The Constitution Bench in Kartar Singh v. State of Punjab made observations to this effect. In Shaheen Welfare Association v. Union of India again, this court expressed the same sentiment, namely that when stringent provisions are enacted, curtailing the provisions of bail, and restricting judicial discretion, it is on the basis that investigation and trials would be concluded swiftly. The court said that Parliamentary intervention is based on:

“a conscious decision has been taken by the legislature to sacrifice to some extent, the personal liberty of an undertrial accused for the sake of protecting the community and the nation against terrorist and disruptive activities or other activities harmful to society, it is all the more necessary that investigation of such crimes is done efficiently and an adequate number of Designated Courts are set up to bring to book persons accused of such serious crimes. This is the only way in which society can be protected against harmful activities. This would also ensure that persons ultimately found innocent are not unnecessarily kept in jail for long periods.”



xxxx

19. The conditions which courts have to be cognizant of are that there are reasonable grounds for believing that the accused is “not guilty of such offence” and that he is not likely to commit any offence while on bail. What is meant by “not guilty” when all the evidence is not before the court? It can only be a prima facie determination. That places the court's discretion within a very narrow margin. Given the mandate of the general law on bails (Sections 436, 437 and 439, CrPC) which classify offences based on their gravity, and instruct that certain serious crimes have to be dealt with differently while considering bail applications, the additional condition that the court should be satisfied that the accused (who is in law presumed to be innocent) is not guilty, has to be interpreted reasonably. Further the classification of offences under Special Acts (NDPS Act, etc.), which apply over and above the ordinary bail conditions required to be assessed by courts, require that the court records its satisfaction that the accused might not be guilty of the offence and that upon release, they are not likely to commit any offence. These two conditions have the effect of overshadowing other conditions. In cases where bail is sought, the court assesses the material on record such as the nature of the offence, likelihood of the accused co-operating with the investigation, not fleeing from justice : even in serious offences like murder, kidnapping, rape, etc. On the other hand, the court in these cases under such special Acts, have to address itself principally on two facts: likely guilt of the accused and the likelihood of them not committing any offence upon release. This court has generally upheld such conditions on the ground that liberty of such citizens have to - in cases when accused of offences enacted under special laws - be balanced against the public interest.

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 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 Malik). 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 country. 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. Staten 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"(also see Donald Clemmer's 'The Prison Community' published in 1940). 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."

44. In ***Rabi Prakash*** (Supra), the Supreme Court reiterated the above principles, 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.”

45. In ***Badsha SK. v. The State of West Bengal*** (order dated 13.09.2023 passed in Special Leave Petition (Crl.) 9715/2023), the accused therein had been in custody for more than two years and four months with the trial yet to begin. The Court therefore, released the accused on bail.

46. Similarly, in ***Man Mandal & Anr. v. The State of West Bengal*** (Special Leave Petition (Crl.) 8658/2023 decided on 14.09.2023), the accused therein had been in custody for almost two years and the Court found that the trial is not likely to be taken up for hearing in the immediate near future. The accused was, therefore, released on bail.

47. In ***Dheeraj Kumar Shukla v. State of U.P.***, 2023 SCC OnLine SC 918, the Supreme Court again released the accused therein on bail, observing 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.”

48. In **Gurpreet Singh v State of NCT of Delhi**, Neutral Citation No.2024:DHC:796, this Court has considered the effect of delay in trial, observing as under:-

“16. In addition to the above, only 2 (two) out of 22 witnesses have been examined by the prosecution, and that too partially, though more than three and a half years have passed since the arrest of the applicant. It may be true that the reason for the delay in the conclusion of the trial may be for various factors, may be not even attributable to the prosecution, like Covid 19 pandemic and restricted function of the Courts, however, as long as they are not attributable to the applicant/accused, in my view, the applicant would be entitled to protection of his liberty under Article 21 of the Constitution of India. Delay in trial would, therefore, be one of the consideration that would weigh with the Court while considering as application filed by the accused for being released on bail.”

49. From the above, it is apparent that in spite of the stringent test to be met by the accused under Section 37 of the NDPS for being released on bail, it has been held that the same does not fetter grant of Bail to the accused on the ground of undue delay in the completion of trial. It has been held that prolonged incarceration generally militates against the right to life and liberty guaranteed under Article 21 of the



2024:DHC:1554



Constitution of India and therefore, the conditional liberty must override the statutory embargo under Section 37 of the NDPS Act.

50. In the present case, therefore, the Applicants are also entitled to be released on bail on the ground that the trial is not likely to conclude anytime soon, while the Applicants have been in custody for a long period.

51. I also notice that it is not the case of the prosecution that the Applicants are involved in any other case of similar nature or other criminal cases. The Applicants are stated to be young boys and their prolonged incarceration may itself result in the denial of their fundamental right to life and liberty guaranteed under Article 21 of the Constitution of India.

52. Keeping in view the overall circumstances of the case, therefore, it is directed that the Applicants, that is, Vishwajeet Singh and Dev Kumar @ Golu be released on Bail in FIR No.564/2020 registered at Police Station: Badarpur, South-East District, New Delhi under Sections 20/61/85 of the NDPS Act, on furnishing a personal bond in the sum of Rs.50,000/- each, with one local surety each, of the like amount to the satisfaction of the learned Trial Court, and further subject to the following conditions:

- i. The Applicant(s) will not leave the country without the prior permission of the learned Trial Court.
- ii. The Applicant(s) shall provide his permanent address to the learned Trial Court. The Applicant(s) shall also intimate the Court, by way of an affidavit, and to the IO regarding any change in his residential address.



2024:DHC:1554



- iii. The Applicant(s) shall appear before the learned Trial Court as and when the matter is taken up for hearing.
- iv. The Applicant(s) shall provide all/latest/fresh mobile numbers to the IO concerned, which shall be kept by the applicant(s) in a working condition at all times and shall not be switched off or changed by him without prior intimation to the learned Trial Court and the IO concerned. The mobile location be kept on at all times.
- v. Applicant shall report before the concerned IO every 15 days.
- vi. The Applicant(s) shall not indulge in any criminal activity and shall not communicate with or come in contact, directly or indirectly, with any of the prosecution witnesses. In case the Applicant(s) is found involved in any case relating to the NDPS Act, it will be open to the prosecution to file an appropriate application seeking cancellation of his bail in the present case as well.

53. Needless to state, any observation touching upon the merits of the case is purely for the purposes of deciding the question of grant of Bail and shall not be construed as an expression on merits of the matter.

54. The Bail applications are disposed of in the above terms.

55. Copy of this judgment be sent to the Jail Superintendent for information and necessary compliance.

NAVIN CHAWLA, J.

FEBRUARY 28, 2024/Arya/AS