



2024:DHC:7685



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

% **Reserved on : 23rd August, 2024**
Pronounced on : 19th September, 2024

+ **BAIL APPLN. 1814/2024**

ASHOK KUMAR @ LALAPetitioner

Through: Mr. Suraj Prakash Sharma,
Advocate through video
conferencing.

versus

THE STATE NCT OF DELHIRespondent

Through: Mr. Aman Usman, APP for State
with SI Vishan Kumar, PS: Crime
Branch.

CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. This petition has been filed by the petitioner seeking regular bail in FIR No. 162/2022 under sections 20/29 of The Narcotic Drugs and Psychotropic Substances Act, 1985 ('**NDPS Act**') P.S. Crime Branch. The petitioner claims to be a senior citizen, having been in custody since 2nd August 2022.

Factual Background

2. The case of the prosecution is that they received a secret information on 2nd August 2022 that one person named Ikram, resident of Garh Mukteshwar, U.P., runs a drug syndicate and has hired several

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people for this purpose. Further that, Ikram sent petitioner for procuring *Charas* from Himachal Pradesh, gave him a mobile number 7042259745 and that petitioner would come to Delhi by bus and go to deliver the consignment of *Charas* to one Guddu by an auto from Mukarba Chowk, Delhi. Reacting upon the said information, a raid was conducted after due process and at 9:00 AM, the raiding party was waiting near Mukarba Chowk. At about 10:40 AM, the secret informer identified a person carrying a suitcase who was overpowered by the raiding team and identified as the accused/petitioner aged about 59 years. Notice under section 50 NDPS Act was served on him. Search of the suitcase was conducted and 1.1 kg of *Charas* was recovered, being a commercial quantity (threshold being of 1 kg). Mobile phone number 7042259745 was recovered from his possession; case property was sealed.

3. As per the prosecution, petitioner disclosed he was working at the behest of Ikram, who manages his work through Guddu, who resides in Janta Majdoor Colony. Petitioner called co-accused Ikram in police presence, who directed him to deliver the contraband to Guddu. The police team went along with petitioner to Janta Majdoor colony where petitioner called Guddu at his mobile no. 9667701761 from his phone, asked him to take delivery of *Charas*; co-accused Guddu came to the spot and was apprehended at 1:15 PM. Notice under section 50 NDPS Act was served on him. Mobile was recovered from his possession. Subsequently, cash of Rs. 85,000/-, packing polythene, electronic weighing scale, one utensil and used plastic polythene were also recovered from Guddu's house.

4. Case properties were sent to PS Crime Branch for compliance under section 55 NDPS Act and accordingly the present FIR came to be registered on 2nd August 2022. Accused/petitioner and co-

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accused/Guddu were interrogated and arrested in the case, after having sufficient grounds of their arrests.

5. As per the prosecution, petitioner disclosed that he is working at the behest of Ikram, who gave him Rs.2,20,000/- in cash to get *Charas* from Himachal Pradesh. On 3rd August 2022, Ikram was apprehended from Bharatpur Railway Station, Rajasthan at 5:25AM. One mobile phone number 7428878272 was recovered from his possession. During investigation two other mobile numbers 9971847401 and 7982848909 were recovered from petitioner from which he was found to have been in frequent contact with Ikram.

6. Sampling under Section 52A NDPS was done before the MM, Rohini Courts on 17th August 2022 and was sent for FSL examination which was later, by report dated 24th January 2023, found positive for *Charas*. After conducting the investigation, chargesheet was filed against accused persons namely petitioner, Guddu and Ikram.

7. Mobile seized from petitioner being 7042259745 was found registered in name of Aslam. He did not join investigation and NBWs were issued against him on 31st July 2023. Later, on 18th August 2023, Aslam was arrested and he disclosed that he provided two SIM cards to Ikram for Rs. 10,000/-.

8. Prosecution evidence has commenced and 2 out of 22 witnesses have been examined.

Submissions on behalf of petitioner

9. Petitioner's counsel submitted that aside from the fact that petitioner is now a senior citizen aged about 61 years and has been incarcerated for 2 years, there is no possibility of trial being concluded, in the near future, considering only two witnesses have been examined

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so far. Besides, all other three co-accused have been granted bail including alleged kingpin of the syndicate, Ikram, who was granted bail by this Court on 20th September 2023 in BAIL APPLN. 1089/2023. Co-accused Aslam has also been granted bail by order dated 9th April 2024 in BAIL APPLN. 881/2024.

10. An objection was taken relating to compliance of Section 50 NDPS Act in that the word '*nearest*' had not been mentioned. To this, reliance was placed on *Mohd. Jabir v State of NCT of Delhi* 2023 SCC OnLine Del 1827 where a Coordinate Bench of this Court has held that omission to mention '*nearest*' in the notice under section 50 NDPS Act amounts to a violation of the mandatory provision and the search was in fact conducted by someone who was part of the operation i.e. the ACP.

11. The omission of mentioning '*nearest*' in Section 50 notice, has also been recognized in another decision of the Coordinate Bench of this Court in *Aabid Khan v Sate Govt. of NCT of Delhi* 2023 SCC OnLine Del 7668.

Submissions on behalf of APP

12. The APP however, countered by saying that Section 50 notice was only to be given in case the search was of his person and not from a bag carried by a person. Reliance in this regard was placed on *Ranjan Kumar Chadha v State of Himachal Pradesh* 2023 SCC OnLine SC 1262. In this case the search had been made for the suitcase being carried by the petitioner and not on his person, despite that, the notice had been given. Technical objections being taken by the petitioner were therefore, not sustainable.



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13. Besides it was a commercial quality of *Charas* being more than 1 kg and the bail by the Court to Aslam and Ikram was basis that no recoveries were effected from either of them and therefore, they were not relied upon for parity by the petitioner.

Analysis

14. Having heard the counsel for the petitioner and the APP, as well as on a bare perusal of the documents, in the opinion of this Court, the petitioner is entitled to bail *inter alia* on the following reasons.

15. As per the case of the prosecution, the petitioner was charged with offences under Sections 20 and 29 of NDPS Act, which involves punishment for both possession as well as for conspiracy. There were a total of 4 accused persons which have been arrested in the present FIR, namely the petitioner, Guddu, Ikram and Aslam and all 3 other co-accused have been released on bail.

16. As per the prosecution, the alleged kingpin of the syndicate, Ikram, at whose behest the petitioner had carried *charas* from Himachal Pradesh, as per the alleged disclosure of the petitioner, was granted bail by this Court on 20th September 2023, in BAIL APPLN. No. 1089/2023.

17. Aslam was also granted bail by order dated 09th April 2024, of this Court in BAIL APPLN. No. 881/2024.

18. Guddu was granted bail by the Trial Court by the order of Special Judge (NDPS), North, Rohini Court, dated 06th November 2023.

19. The petitioner is a senior citizen, 61 years old and has been in custody for two years now. As per the State, the previous involvement in FIR No. 6/88, PS Krishna Nagar, under section 17 of the NDPS Act, the accused had been acquitted on 22nd November 1988. There is no other case against the accused that has been reported by the State.



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20. Only two witnesses have been examined till date and there are 20 more witnesses which are yet to be examined and the trial is expected to take time.

21. Despite the fact, that the seizure was at Mukarba Chowk, which is a crowded place, the petitioner has contended that there was no independent witness who had joined in the investigation and there was no videography or photography which had been done.

22. The alleged seizure from the petitioner was 1 kilogram and 100 grams of *charas* which was just above the threshold of 1 kilogram for commercial quantity and it would have to be examined in trial whether the quantity was in fact commercial or intermediate in nature, in recovery.

Delay in Trial

23. The Supreme Court had consistently held that the benefit of delay in trial will accrue to the accused and in this regard; the following decisions are relevant:

23.1 ***Rabi Prakash v State of Odisha*** 2023 SCC OnLine SC 1109 where a recovery of 247 kgs of *ganja* was made and the petitioner had been in custody for more than three and a half years, with no criminal antecedents, the Court 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



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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 added)

23.2 ***Dheeraj Kumar Shukla v State of U.P.*** 2023 SCC OnLine SC 918 where there was a seizure of about 65 kgs of *ganja* and the petitioner was in custody for about two and a half years, the Supreme Court while granting bail, stated 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.”

(emphasis added)

23.3 In ***Man Mandal & Anr. v State of West Bengal*** 2023 SCC OnLine SC 1868 where the seizure which was commercial in nature and the petitioner had been incarcerated for about two years and there was no hope for the trial to be concluded soon, the Supreme Court while granting bail stated as under:

“6. Taking into consideration the fact that the petitioners have been incarcerated for a period of almost two years and the trial is not likely to be taken up for hearing in the immediate near future, we are inclined to grant bail to the petitioners.”

(emphasis added)



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23.4 In ***Badsha Sk. v State of West Bengal*** 2023 SCC OnLine SC 1867 where the seizure was of 100 bottles of Phensedyl Cough Syrup (100 ml. each), containing Codeine Phosphate, the petitioner had been in custody for about 2 years 4 months and the trial was yet to commence, the Supreme Court while granting bail noted as under:

“5. The above would show that the trial is yet to commence in the matter(s) and in the meantime, petitioners have been in custody for long. The State counsel submits that there are no known criminal antecedents against the two accused.”

23.5 In ***Mohd. Muslim alias Hussain v State (NCT of Delhi)*** 2023 SCC OnLine SC 352 the Court stated that, grant of bail on ground of undue delay in trial, cannot be said to be fettered by section 37 of the NDPS Act. The Supreme Court noted as under:

“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.

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



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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. State—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.”

(emphasis added)

23.6 Coordinate benches of this Court have also considered the principles set out by the Supreme Court and granted bail in **Gurpreet Singh v State of NCT of Delhi** 2024 SCC OnLine Del 696 wherein a



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seizure of 26.790 kgs of *Ganja* was done and only 2 witnesses had been examined, having been in custody for three and a half years, the petitioner was granted bail; in ***Ramesh Kumar v D.R.I.*** 2024 SCC Online Del 5304, where recovery of 457 kgs of *Ganja*, the petitioner having been in custody for about three and a half years, the Court in relying upon these principles laid out by the Supreme Court granted bail; in ***Gopal Dangi v State*** 2024 OnLine Del 4825, a case of recovery of 260 kgs of *ganja* and only one witness having been examined and the petitioner having been in custody for about 2 years was granted bail.

23.7 In SLP (Crl) 4648/2024 titled ***Ankur Chaudhary v State of Madhya Pradesh*** order dated 28th May 2024, it was held by the Supreme Court as under:

“It is to observe that failure to conclude the trial within a reasonable time resulting in prolonged incarceration militates against the precious fundamental right guaranteed under Article 21 of the Constitution of India, and as such, conditional liberty overriding the statutory embargo created under Section 37(1)(b) of the NDPS Act may, in such circumstances, be considered.”

(emphasis added)

24. It is evident from the above, that despite stringent requirements imposed under Section 37 of the NDPS Act for grant of bail, it has been established by the Supreme Court that these requirements do not preclude grant of bail on account of undue delay in the completion of trial.

25. The Supreme Court has categorically held that long incarceration militates against the most precious fundamental right guaranteed under Article 21 of the Constitution of India and liberty must override the statutory embargo created under Section 37 of the NDPS Act.



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Non-compliance with Section 50 of NDPS Act

26. The other issue which has been raised is permission to mention the word ‘nearest’ in the Section 50 notice which was given to the accused at the time of the search, even though the search was from suitcase, from which the quantity was recovered.

27. A Coordinate Bench of this Court in ***Bantu v State Govt. of NCT of Delhi*** 2024 SCC online Del 4671 has taken the view that section 50 NDPS Act compliance was not required when the search was made of the bag carried by the accused person and further that, the question of whether the procedure prescribed has been followed or not and whether the same has any effect on relief to the accused, is a matter of trial. The relevant paragraphs are extracted as under:

*“47. Considering the law laid down by the Apex Court in ***Ranjan Kumar Chadha v. State of Himachal Pradesh*** (supra), this Court is of the opinion that the compliance with Section 50 of the NDPS Act was not required when the search was made of the bag carried by the accused person.*

48. Under these circumstances, even if there were some discrepancies in complying with Section 50 of the NDPS Act, it would not adversely affect the prosecution's case.

49. Moreover, the question whether or not the procedure prescribed has been followed and whether the same has any effect on relief to the accused is a matter of trial...”

(emphasis added)

28. The Court is also of the view that omission of the word ‘nearest’ in the notice under Section given under Section 50 of NDPS Act will not have an impact in this matter, since the recovery in any event was made from the suitcase of the accused and as per decision in ***Ranjan Kumar***

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Chadha (*supra*), the Supreme Court has categorically held that the Section 50 requirement is not necessary, if the recovery is made from a bag which is carried by the accused and if the search is not from the person.

Non-Joinder of Independent Witnesses

29. In the present case, despite the fact, that the seizure was done at Mukarba Chowk, which is a crowded place, and that it was done in broad daylight, there were no independent witnesses who had joined the investigation.

30. In **Bantu** (*supra*) it was held that it is open to the prosecution to justify the non-association of independent witnesses during the course of the trial, however, no explanation was provided to tilt the balance in favour of the prosecution on this aspect, the relevant portion of which, is extracted as under:

61. In the present case as well, the raiding party was successfully able to reach the spot and lay a trap to apprehend the applicant in the intervening time after receipt of information. It is peculiar that the Investigating Agency was unable to associate even a single public witness in the same time, especially since the applicant was apprehended at a crowded place. No effort to serve any notice under Section 100 of the CrPC has been pointed out to have been made either. In such circumstances, prima facie, the non-joinder of independent witnesses by the prosecution is a frailty in the prosecution's case.

62. A Coordinate Bench of this Court in the case of Krishan @ Babu v. State : BAIL APPLN. 2804/2023 had observed that nonjoinder of a public witness when the recovery is made in public in broad daylight is a factor that ought to be considered while considering the question of grant of bail to



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the accused person. This Court is in agreement with the said observation.

63. As held by the Hon'ble Apex Court in the case of Raveen Kumar v. State of Himachal Pradesh (supra) and State of Punjab v. Balbir Singh (supra), absence of independent witnesses does not vitiate the trial, however, in such circumstances, an additional duty is cast on the Court to consider whether any prejudice is caused to the accused person while testing the credibility of the testimonies of the official witnesses. The same is to be tested over the course of a trial. Any observation to this effect without affording an opportunity to the prosecution over the course of the trial to establish its case beyond reasonable doubt would be premature.

64. As noted above, it is open to the prosecution to justify the non-association of independent witnesses during the course of the trial, however, at this stage, prima facie, no cogent explanation has been adduced to tilt the balance in favour of the prosecution on this aspect.

(emphasis added)

Conclusion

31. In the opinion of this Court, after a holistic assessment of all the facts and circumstances in the said matter, it is deemed fit that that petitioner be entitled to bail.

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



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- 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.
 - vi. Petitioner will report to the concerned IO every second and fourth Friday of every month, at 4:00 PM, and will not be kept waiting for more than an hour.
 - vii. Petitioner shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses, or tamper with the evidence of the case.
33. Needless to state, but any observation touching 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.
34. Copy of the order be sent to the Jail Superintendent for information and necessary compliance.
35. Accordingly, the petition is disposed of. Pending applications (if any) are disposed of as infructuous.



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36. Judgment be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

SEPTEMBER 19, 2024/SM/na

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