



2024:DHC:1070



* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 16.01.2024
Pronounced on: 14.02.2024

+ **BAIL APPLN. 2531/2022**

RAJESH KUMAR

..... Applicant

Through: Mr.Abhishek Kumar,
Ms.Deeksha Saggi,
Mr.Rituparn Uniyal, Advs.

versus

STATE

..... Respondent

Through: Ms.Priyanka Dalal, APP with
SI Sanjeev Gupta.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

1. This application has been filed by the applicant under Section 439 of the Code of Criminal Procedure, 1973 (in short, 'Cr.P.C.') praying for release on bail in FIR No.0063/2021, registered with Police Station: Crime Branch, Delhi, under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, 'NDPS Act'), and the consequential Sessions Case No. 519/2021 titled as *State v. Rajesh Kumar*, pending adjudication before the Court of the learned Additional Sessions Judge (Special Judge NDPS), North District, Rohini Courts, Delhi.

Case of the Prosecution:

2. In short, it is the case of the prosecution that on 13.04.2021, a secret information was received by the police that a person, namely,

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Rajesh would come to the service road near a garbage pile towards Bhalswa Dairy in golden colour Honda City car to sell charas. Accordingly, a trap was set. At around 00:55 AM, One golden Honda City car was seen approaching. On the gesture from the informant, the car was stopped and the applicant was apprehended. During the search of the applicant, nothing was found on him, however, during the search of the car, two brown colour packets were recovered from the conductor side. On checking their content through the Field Testing Kit, it was found to be charas. On weighing the two packets, they were found to be 1.560 kg and 1.600 kg respectively, totalling 3.160 kg. The contents (contraband) were seized. Two drug peddlers, namely, Gobind Bahadur Thapa @ Ravi Sharma, and Bhim Bahadur Budhathokis, were arrested at instance of the applicant. They disclosed that they were working as drug peddlers on a commission basis for one Bahadur @ Dhair. Bahadur @ Dhair, however, could not be arrested and is absconding.

3. It is alleged that during the investigation, CDRs of mobile numbers used by the accused persons were obtained, and they were found to be in touch with each other. Supplementary charge-sheet was filed on 12.01.2024.

Submissions of the learned counsel for the applicant

4. The learned counsel for the applicant submits that the applicant has been in custody since 14.04.2021; charge-sheet was filed on 08.10.2021, however, the trial has not at all progressed. He submits that there are a total of 26 witnesses cited by the prosecution and

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therefore, the trial is not likely to be concluded anytime soon. He submits that the applicant has no criminal antecedents and, therefore, only on the grounds of delay, he is entitled to be released on bail. In support of his submission, he places reliance on the judgments of the Supreme Court in *Mohd. Muslim v. State (NCT of Delhi)*, 2023 SCC OnLine SC 352; *Badsha SK. v. The State of West Bengal* (order dated 13.09.2023 passed in Special Leave Petition (Crl.) 9715/2023; *Dheeraj Kumar Shukla v. State of U.P.*, 2023 SCC OnLine SC 918; *Rabi Prakash v. State of Odisha*, 2023 SCC OnLine SC 1109; *Man Mandal & Anr. v. The State of West Bengal* (Special Leave Petition (Crl.) 8658/2023 decided on 14.09.2023); and of this Court in *Suraj v. State (NCT of Delhi)*, 2023 SCC OnLine Del 5323.

5. He further submits that the mobile phones recovered from the accused were sent for retrieving data only after 10 months. The same, therefore, cannot be relied upon.

6. He submits that the co-accused, namely, Bhim Bahadur Budhathokis, has been granted bail by the learned Trial Court vide order dated 29.03.2022, while Gobind Bahadur Thapa was granted bail vide order dated 07.05.2022.

Submissions of the learned APP

7. On the other hand, the learned APP submits that Section 37 of the NDPS Act is an exception to the general principle of law, and where the offence is in relation to a commercial quantity, the accused can be released on bail only if the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence

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and he is not likely to commit any offence while being released on bail. He submits that the offence under the NDPS Act is very serious and affects the entire society, including the lives of a number of persons. Stringent provisions have, therefore, been made for releasing the accused on bail. He submits that Section 37 of the NDPS Act cannot be given a liberal interpretation on the justification that it affects the personal liberty of a citizen who is yet to be tried. In support, he places reliance on the judgments of the Supreme Court in *Narcotics Control Bureau v. Kishan Lal*, (1991) 1 SCC 705; *Intelligence Officer, Narcotics C. Bureau v. Sambhu Sonkar*, (2001) 2 SCC 562; *Bipin Shantilal Panchal v. State of Gujarat*, (2001) 3 SCC 1; *Union of India v. Rattan Mallik*, (2009) 2 SCC 624; and *Babua v. State of Orissa*, (2001) 2 SCC 566.

8. He further submits that, in any case, this Court must take into account the reasons for the delay in completion of the trial. It could also be for reasons attributed to the Court itself. He submits that in the present case, Covid-19 also intervened, and with there being restricted functioning of the Courts due to the same, some delay has been caused in the conclusion of the trial. He submits that therefore, delay in completion of the trial cannot be a reason to release the applicant on bail. In support, he places reliance on the judgments of this Court in *Anil Kumar Gandhi v. N.C.B.*, 1991 SCC OnLine Del 344; *Gurbux Bhiryani v. J.K. Handa*, 1991 SCC OnLine Del 421, and of the High Court of Kerala in *Jaseer S.M. v. State of Kerala & Anr.*, in Bail Appl. No.7238/2023 decided on 08.01.2024.

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Analysis and Conclusion

9. In *Mohd. Muslim @ Hussain* (Supra), 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."

8. 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."

10. In **Badsha SK** (Supra), 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.

11. Similarly, in **Manmandal** (Supra), the accused therein had been in custody for almost two years and the Court found that the trial is



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not likely to be taken up for hearing in the immediate near future. The accused was, therefore, released on bail.

12. In ***Dheeraj Kumar Shukla*** (Supra), 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.”

13. A learned Single Judge of this Court in ***Anil Kumar Gandhi*** (supra) has held that merely because the trial has not been concluded, in view of Section 37 of the NDPS Act, it would not be a ground for release of the accused on bail.

14. In ***Jaseer S.M.*** (supra), the accused had been in custody for eighteen months. The Court held that there is no rule of thumb or principle of universal application laying down the time period within which the trial is to commence and to be concluded. The Court considering the prosecution’s concern regarding the element of flight risk of the accused, declined to release him on bail.

15. 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:-

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“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.”

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

17. The accused has been in custody for more than two and a half years. The trial is yet to begin, with the supplementary charge sheet having been filed only on 12.01.2024. There is no likelihood of the trial coming to a conclusion any time soon. The Nominal Roll of the applicant also shows that he does not have any criminal antecedents and his conduct in jail has been ‘good’.

18. Keeping in view the above referred judgments, in my opinion,

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the applicant has been able to make out a case for being released on bail.

19. Accordingly, it is directed that the applicant be released on bail in FIR No.0063/2021 registered with Police Station: Crime Branch, Delhi under Section 20 of the NDPS Act; Sessions Case No. 519/2021 titled *State v. Rajesh Kumar*, pending adjudication before the Court of the learned Additional Sessions Judge (Special Judge NDPS), North District, Rohini Courts, Delhi, on furnishing a personal bond in the sum of Rs.50,000/- with one local surety of the like amount to the satisfaction of the Ld. Trial Court, and further subject to the following conditions:

- i. The Applicant will not leave the country without the prior permission of the Ld. Trial Court.
- ii. The Applicant shall provide his permanent address to the Ld. Trial Court. The applicant shall also intimate the Court, by way of an affidavit, and to the IO regarding any change in his residential address.
- iii. The Applicant shall appear before the Ld. Trial Court as and when the matter is taken up for hearing.
- iv. The Applicant shall provide all/latest/fresh mobile numbers to the IO concerned, which shall be kept by the applicant in a working condition at all times and shall not be switched off or changed by him without prior intimation to the Ld. Trial Court and the IO concerned. The mobile location be kept on at all times.
- v. The Applicant shall not indulge in any criminal activity

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and shall not communicate with or come in contact, directly or indirectly, with any of the prosecution witnesses. In case the Applicant is found involved in another case, it will be open to the prosecution to file an appropriate application seeking cancellation of his bail in the present case as well.

20. Needless to state, 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 the merits of the matter.

21. The Bail Application is disposed of in the above terms.

22. A copy of this judgment be sent to the Jail Superintendent for information and necessary compliance.

NAVIN CHAWLA, J.

FEBRUARY 14, 2024/rv/ss

Click here to check corrigendum, if any

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