



2024:DHC:5180



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 15.07.2024

+ **BAIL APPLN. 2800/2023**

RIZWAN

..... Applicant

versus

STATE NCT OF DELHI

..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Hum Nashin Ahmed, Mr. Imran Alam,
Mr. Ahmad Darvez, Mr. Aurangzeb Khan,
Ms. Sharaf Hasan, Ms. Farkhunda Kaunain,
Mr. Md. Arif Wadood & Mr. Prakhar Singh,
Adv.

For the Respondent : Mr. Mukesh Kumar, ASC for the State with
Ms. Akshita Tyagi, Adv.

Inspector Pankaj, PS-ANTF/ Crime Branch

CORAM

HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present application is filed under section 439 of the Code of Criminal Procedure, 1973 ('CrPC') seeking regular bail in FIR No. 122/2020 dated 21.08.2020, registered at Police Station Crime Branch, Delhi for offence under Section 21 of Narcotics Drugs & Psychotropic Substances Act, 1985 ('NDPS Act').

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2. The case of the prosecution is that on 21.08.2020, secret information was received that a person, namely, Rijwan who is allegedly involved in supplying 'heroin' in Delhi would come near the bus stand at Metcalf House, Ring Road, Delhi between 5:30 PM to 6:30 PM to deliver a consignment of 'heroin' to a person namely, 'Pappu'. Thereafter, a raiding team was constituted which reached the alleged spot at around 5:00 PM and subsequently, spotted the applicant at about 5:30 PM.

3. A few passers-by were also informed about the situation and were asked to join the police action, however, all of them refused and left without disclosing their names.

4. It is alleged that when the applicant noticed the police officials, he discarded a yellow-coloured polythene bag and attempted to flee. The police, thereafter, apprehended him and secured the yellow-coloured polythene bag, and on a cursory search of the said polythene, it was found to be containing brown colour powder. Subsequent testing with a field testing kit confirmed that the substance was 'heroin', weighing approximately 500 grams.

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

6. Subsequently, the applicant was arrested on 22.08.2020 and on completion of the investigation, the chargesheet was filed under Section 21 of the NDPS Act.



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7. The learned Trial Court dismissed the regular bail application moved by the applicant by order dated 17.05.2023. Hence, the present application.

8. The learned counsel for the applicant submitted that the applicant has been falsely implicated in the present case. He submitted that there are serious infirmities in the case of the prosecution. He further submitted that even though the purported recovery happened in a public place, there were no independent witnesses.

9. He submitted that the notice issued under Section 50 of the NDPS Act, as attached to the chargesheet, was fraudulent and never signed by the applicant. He also submitted that the applicant was not informed of his legal right to have his search conducted in the presence of a gazetted officer or a magistrate, therefore, the requisite legal provision was not adhered to as mandated, rendering the notice itself invalid.

10. He submitted that the applicant has been in custody for about four years and relied upon the observations of the Hon'ble Supreme Court in *Mohd. Muslim v. State (NCT of Delhi)* :2023 SCC OnLine SC 352. He further submitted that the applicant has clean antecedents and deep roots in the society and there is no possibility of the applicant influencing the witnesses.

11. He submitted that there are no independent witnesses in the present case and thus, the story of the prosecution comes under the



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shed of suspicion. He further submitted that no endeavour was made by the prosecution to photograph or videotape the recovery either.

12. He submitted that the applicant is the sole bread earner of his family and is a married man with the responsibility on his shoulders of maintaining his family.

13. *Per contra*, the learned Additional Standing Counsel for the State opposed the bail application citing the gravity of offence as one of the main grounds. He submitted that commercial quantity of contraband 'heroin' has been recovered from the possession of the applicant and hence the embargo of Section 37 of the NDPS Act will be attracted in the present case.

14. He submitted that it is trite law that merely because there is no independent witness, it cannot be said that the accused person has been falsely implicated, and the case of the prosecution cannot be rejected solely on the said ground.

15. He submitted that the defences of the applicants in regard to any procedural anomalies would be a matter of trial.

Analysis

16. Arguments were heard in detail from the learned counsel for the parties.

17. It is settled law that the Court, while considering the application for grant of bail, has to keep certain factors in mind, such as, whether there is a prima facie case or reasonable ground to believe that the accused has committed the offence; circumstances which are peculiar to the accused; likelihood of the offence being repeated; the nature and



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gravity of the accusation; severity of the punishment in the event of conviction; the danger of the accused absconding or fleeing if released on bail; reasonable apprehension of the witnesses being threatened; etc.

18. It is unequivocally established that, to be granted bail, the accused charged with offence under the NDPS Act must fulfill the conditions stipulated in Section 37 of the NDPS Act. Section 37 of the NDPS Act reads as under:

“37. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor oppose the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force, on granting of bail.”

19. The accusation in the present case is with regard to the recovery of commercial quantity of contraband. Once the rigours of Section 37 of the NDPS Act are attracted, as provided under the Section, the



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Court can grant bail only when the twin conditions stipulated in Section 37(1)(b) of the NDPS Act are satisfied in addition to the usual requirements for the grant of bail – (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; and (2) That the person is not likely to commit any offence while on bail.

20. The learned counsel for the applicant submitted that a liberal interpretation of Section 37 of the NDPS Act must be taken into account by the Court in the present case on the following grounds :

- (a) Illegality in the notice served under Section 50 of the NDPS Act in so far as the notice is allegedly frivolous and was not signed by the applicant.
- (b) Non-joinder of independent witnesses by the prosecution and no photography and videography; and
- (c) Delay in trial.

21. One of the grounds taken by learned counsel for the applicant is that the notice under Section 50 of the NDPS Act which was attached with the chargesheet is false and frivolous and the same was never signed by the applicant. He further submitted that the applicant was also not informed that he has a legal right to get his search done before any gazetted officer or magistrate.

22. The Hon'ble Apex Court in *Vijaysinh Chandubha Jadeja v. State of Gujarat* : (2011) 1 SCC 609 observed after examining the provisions of Section 50 of the NDPS Act, that the court must determine compliance with the NDPS Act based on trial evidence, and the prosecution must be allowed to establish compliance during trial.



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23. It is the contended on behalf of the State that the notice under Section 50 of the NDPS Act was served in a manner as prescribed by the law and also bears the thumb impression of the accused. However, the learned counsel for the applicant has raised questions on the veracity of the signature and thumb impression on the notice. In the opinion of this Court, the examination of the veracity of the signature and thumb impression is a matter of trial and cannot be commented upon at this stage.

24. The learned counsel for the applicant has also raised the issue that no independent witness was joined by the prosecution even though the applicant was apprehended in a public place. This Court in the case of ***Bantu v. State Govt of NCT of Delhi: 2024:DHC:5006***, has observed that while the testimony of police witness is sufficient to secure conviction if the same inspires confidence during the trial, however, lack of independent witnesses in certain cases can cast a doubt as to the credibility of the prosecution's case.

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

26. A bald statement has been made, as stated in the chargesheet filed, that a few passers by were asked to take part in the police action, however, they refused to join the investigation and left the spot citing legitimate compulsion of their journey.

27. In the present case, no notice was served on the people under Section 100(8) of the CrPC and neither any effort was made to jot



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down the names or details of such passers-by. The secret information was received almost one hour prior to the accused being apprehended. It is peculiar that the Investigating Agency was unable to associate even a single public witness at the same time, especially since the prosecution had prior secret information and the applicant was apprehended at a public place.

28. It is also pertinent to note that the investigating agency was also unable to procure/ place on record any CCTV footage though the alleged recovery was made at a public place.

29. This Court in *Bantu vs. State Govt of NCT of Delhi* (*supra*), had noted that the Hon'ble Apex Court, way back in the year 2018 in *Shafhi Mohd. v. State of H.P. : (2018) 5 SCC 311*, after taking note of the technological advancements, had passed certain directions. The Hon'ble Apex Court emphasized the role of audio-visual technology in enhancing the efficacy and transparency in the Police investigations.

30. This Court also noted that realising the need of change in time, the Legislature has now passed the Bharatiya Nagarik Suraksha Sanhita ('BNSS'), where the practice of photography and videography has now been made mandatory as part of the investigation.

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



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32. Thus, while it is true that the effort, if any, made by the prosecution to have the search conducted in the presence of the independent witnesses would be tested during the course of trial and the same may not be fatal to the case of the prosecution, however, the benefit, at this stage, cannot be denied to the accused. Undoubtedly, the search in the present case was conducted at a busy public place. It is not the case of the prosecution that no CCTV were installed around the area where raid/search was conducted. It is also not the case that equipments were not available to videograph and photograph the search/seizure. It cannot be denied that almost every person today carries a smart phone with a camera installed in it.

33. Delay in trial and long period of incarceration is also an important factor which has to be kept in mind while considering the application for Bail.

34. In the present case, while the charges have been framed against the applicant, none of the witness has been examined yet. The applicant has been in custody since 21.08.2020. There is no likelihood of the trial being completed in the near future.

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

“21....Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these



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factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.

22. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country²⁰. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

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

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

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

(emphasis supplied)



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

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

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

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

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

"3. It appears that some of the occupants of the Honda City" Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. It is true that the quantity recovered



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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.”

40. A Coordinate Bench of this Court in ***Gurpreet Singh v State of NCT of Delhi : 2024:DHC:796***, considered the effect of delay and observed 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.”

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



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42. In such circumstances, this Court is of the opinion that the applicant has made out a *prima facie* case for grant of bail on the grounds of absence of independent witnesses and prolonged delay in the trial.

43. The applicant is also stated to be of clean antecedents. Therefore, I am satisfied that are reasonable grounds for believing that the applicant is not likely to commit any offence while on bail.

44. The applicant is, therefore, directed to be released on bail on furnishing a personal bond for a sum of ₹50,000/- with two sureties of the like amount, subject to the satisfaction of the learned Trial Court, on the following conditions :

- a. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- b. The applicant shall under no circumstance leave the country without the permission of the learned Trial Court;
- c. The applicant shall appear before the learned Trial Court as and when directed;
- d. The applicant shall provide the address where he would be residing after his release and shall not change the address without informing the concerned IO/ SHO;



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e. The applicant shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times.

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

46. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the trial and also not be taken as an expression of opinion on the merits of the case.

47. The bail application is allowed in the aforementioned terms.

AMIT MAHAJAN, J

JULY 15, 2024

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By: SANJAY KUMAR
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