



2024:DHC:4725



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Pronounced on: 07.06.2024*+ **BAIL APPLN. 2863/2023**

PARVEJ KHAN

..... Petitioner

Through: Mohd. Suza Faisal and Mr Meghan,
Advocates.

versus

THE STATE GOVT. OF NCT.

..... Respondent

Through: Mr.Ritesh Kumar Bahri, APP for the
State**CORAM:
HON'BLE MR. JUSTICE VIKAS MAHAJAN****JUDGMENT****VIKAS MAHAJAN, J.**

1. The present petition has been filed by the petitioner seeking regular bail in connection with FIR No. 304/2020 under Sections 21/29/61/85 NDPS Act, registered at P.S. Special Cell.
2. *Vide* order dated 28.08.2023, notice was issued in the bail application and the respondent/State was directed to file a status report. The respondent has filed a status report dated 27.09.2023, which forms part of the record.
3. The case of the prosecution as borne out from the status report is that secret information was received by the police on 20.11.2020 that one Alok resident of Banda, UP who indulged in drug supplying in connivance with



Parvej (petitioner herein) and Asif, both residents of Badayun, UP, along with his associate Anwar would come near cremation ground, Shalimar Bagh, Delhi between 11:00 AM to 12:00 noon on the same to supply huge consignment of drugs to one Munni after procuring the same from Manipur.

4. On this information, a raiding team was constituted under SI Ankul, and a raid was conducted whereby Alok Tripathi and Mohd. Anwar Ali were apprehended and 05 kgs of heroin was recovered from them i.e. 03 kgs heroin from the bag of accused Alok Tripathi and 02 kgs heroin from the bag of accused Mohd. Anwar Ali. Accordingly, they were arrested on 20.11.2020.

5. During the course of investigation, accused Alok Tripathi disclosed that he used to indulge in the supply of heroin in connivance with Asif and Parvej (petitioner herein) and further disclosed about the mobile number of the petitioner Parvej Khan and the registration number of the vehicle used by him. On 21.12.2020 at about 10.45 PM, at the instance of Accused Alok Tripathi, the present petitioner (Parvej Khan) was apprehended from red light, Hapur-Ghaziabad Road, Ghaziabad UP along with his car, whereupon 500 gms heroin was recovered from his above-said car/vehicle and the petitioner's mobile was also seized.

6. The learned counsel for the Petitioner at the outset submits that the present petitioner was intercepted and his car searched solely based on a disclosure statement of the accused Alok Tripathi between sunset and sunrise while travelling in his private car, therefore, the search could not have been conducted without obtaining warrant or authorization as referred to in the second proviso to sub-section (1) of Section 42 of the NDPS Act. Since, in the present case no such warrant or authorization was obtained,



therefore, the arresting offer ought to have recorded grounds of his belief that “a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender” in terms of second proviso to Section 42(1) of the Act and forwarded to an immediate official superior within 72 hours in accordance with Section 42(2) of the Act, which was not done.

7. He submits that the search of petitioner’s car being without warrant or authorization and there being non-compliance of Section 42(2) of the Act, the consequent alleged recovery is under cloud of doubt, therefore, the petitioner is entitled to concession of bail. In support of his contention, he places reliance on following decisions:

- (i) **State Raj vs. Jag Raj Singh** (CRL. A. 1233/2006)
- (ii) **Asif Ali vs. State** (BAIL APPLN. 647/2002)
- (iii) **Sarija Banu vs. State** (2004) 12 SCC 266 [Para 7]
- (iv) **Nagesh Sharma vs. State** (BAIL APPLN. 3185/2022)
- (v) **State of Haryana vs. Jarnail Singh** [(2004) 5 SCC 188]

8. It is further the submission of the learned counsel for the petitioner that the genesis of the case i.e. the conspiracy between co-accused Alok Tripathi and the present petitioner is not made out. He draws the attention of this court to the disclosure statement of accused Alok Tripathi annexed to the petition as Annexure A-2 to contend that it nowhere discloses the phone number or the car number of the present petitioner.

9. He submits that no link between the present petitioner with any of the accused persons is reflected by the CDRs of accused Alok Tripathi and the present petitioner. He further submits that the prosecution has not filed any CDR or voice conversation with the charge sheet to show that the petitioner



was in touch with other co-accused persons. He places reliance on the ***Sarvothamanan Guhan @ Sarvo v NCB [DHC] Bail Appl. 2879/2022*** wherein a co-ordinate bench of this Court in Para 40 with respect to conspiracy has held "*There is no communication, or any prima-facie material presented before this Court linking the Applicant and other co-accused persons except Accused No. 2/Rahul Mishra.*"

10. He submits that if the recovery is excluded, then the only incriminating material against the petitioner is the disclosure statement of co-accused Alok Tripathi which is *per se* not admissible.

11. He has further drawn the attention of the court to the impugned order passed by the Special Judge, NDPS Act dismissing the bail application of the present petitioner to contend that the involvement of the present petitioner being in the knowledge of senior police officials or PC remand cannot be equated to authorisation or warrant under the law, rather it needs to be strictly in accordance with Section 41 NDPS Act. He places reliance on the law laid down by the coordinate benches of this court in ***Asif Ali v. State NCT of Delhi: 2023 SCC OnLine Del 580*** Para No. 10 & 11 and also ***Sarvothaman Guhan @ Sarvo v NCB: 2023 SCC OnLine Del 5643.***

12. It is the submission of the learned counsel for the Petitioner that the alleged search of the petitioner's car was conducted on 22.12.2020 after his apprehension at 11.10 PM and case property was deposited in Malkana at PS Special Cell Lodhi Colony at 12.16 AM which shows that either these documents were not prepared at the spot or that the recovery is suspect. He further submits that the site plan has not been prepared at all which also renders the case of the prosecution highly doubtful.

13. He submits that the applicant has been behind bars for more than 03



years since 21.12.2020, the prosecution has cited 29 witnesses and till date only an order on charge has been passed thus, the trial is going to take long time, which infringes the fundamental right of the petitioner of speedy justice. He places reliance on the ***Biswajit Mondal @ Biswajit Mandal v State of West Bengal: SLP (Crl) 11731/2022*** in this regard. He, therefore, urges that the petitioner may be enlarged on regular bail.

14. *Per contra* the bail is opposed by learned APP for the State, who argued on the lines of the status report. He submits that the offence is of serious nature and the quantity of the contraband recovered from the co-accused is commercial, therefore, the petitioner has to satisfy the twin conditions mentioned in Section 37 of the NDPS Act before he is released on bail. A previous involvement report has also been filed by the State wherein it has been stated that the petitioner has been involved in 13 criminal cases during the period from 2011- 2020.

15. He places heavy reliance on the voice samples of accused persons which were taken in FSL Rohini. The FSL expert has opined that the voice of the petitioner has matched with the intercepted voice calls regarding drug trafficking activities. This reveals that the accused persons and present petitioner were in constant touch, and were actively dealing in drug trafficking.

16. With regard to the recovery effected from the private car of the Accused/ present petitioner, the learned APP for the State relies on ***Girish Raghunath Mehta vs Inspector Of Customs & Anr.: 2016 (16) SCC 200*** to contend that the prosecution version is based on not only the disclosure statement but also the recovery of the contraband from the private car of the petitioner.



17. In rejoinder, the learned counsel for the petitioner also relies upon the decision of ***Prabhakar Tiwari vs. State of Uttar Pradesh: (2020) 11 SCC 648*** wherein the Hon'ble Supreme Court observed that mere pendency of several criminal cases against the accused cannot by itself be the basis for refusal of bail. The same can be a factor, but cannot be the sole basis for refusal of grant of bail.

18. I have heard the learned counsel for the petitioner as well as, the learned APP for the State/respondent and have perused the record.

19. In the present case, apprehension of the petitioner was on the basis of the disclosure statement, and thereby during the search of his private car a commercial quantity of heroin was effected. This makes the confessional statement of the accused Alok Tripathi admissible and thus, the petitioner has to satisfy the twin conditions envisaged under Section 37 of the NDPS Act as held by the co-ordinate bench of Hon'ble Delhi High Court in ***Vinod Nagar vs. Narcotics Control Bureau: 2024: SCC OnLine DEL 1067***.

“14. The case of the prosecution is based upon the disclosure of the co-accused Justin Izuchukwu Samuel. It is relevant to note that while the veracity of the disclosure statement of the co-accused is to be tested at the time of the trial, however, this Court cannot lose sight of the decision of the Hon'ble Apex Court in the case of Tofan Singh v. State of Tamil Nadu, (2021) 4 SCC 1. It was held that a disclosure statement made under Section 67 of the NDPS Act is impermissible as evidence without corroboration.”

(Emphasis Supplied)

20. There is no dispute that the petitioner is involved in a case relating to the possession of a commercial quantity of drugs and there is also no dispute to the fact that the petitioner can be granted bail on merits only if he is able



to carve out a case after fulfilling the conditions laid down in Section 37 of the NDPS Act. Under Section 37 of the NDPS Act, an accused person indicted for the commission of offences under Sections 21/29 for commercial quantity shall not be enlarged on bail unless the public prosecutor is given an opportunity of being heard and the court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and he is not likely to commit any offence while on bail. No doubt, 500 grams of heroin was recovered from the bag of the petitioner which is a commercial quantity, therefore, rigours of Section 37 of the NDPS Act are attracted.

21. The Supreme Court of India in ***Union of India v. Ajay Kumar Singh: 2023 SCC OnLine SC 346*** observed that:

“No person involved in trade of commercial quantities of narcotics is liable to be released on bail, unless there are satisfactory and reasonable grounds for believing that such person is not guilty of the said offence and is not likely to commit any offence while on bail. The Bench said that the prima facie guilt of the accused was not recorded while granting bail, and the High Court had manifestly erred in enlarging the accused on bail, knowing the quantity of “ganja” recovered is admittedly of commercial quantity.”

22. Since considerable arguments have been led by the learned counsel for the petitioner on the aspects of non-compliance of section 42 of the Act, apposite would it be to ascertain whether the provisions of section 42 are applicable in the present case. Section 42 contemplates the entry and search of any building of conveyance of any closed place by the officers of the State, whereas section 43 contemplates procedure made in any public place or in transit. Reference in this regard may be had to the judgment of the



Supreme Court in *State, NCT of Delhi vs Malwinder Singh: (2007) 11 SCC 314*, the relevant part of which reads as under:

“8. It appears that no effort was made by the accused to call for the records of information, if any, sent. The further question is whether in a case of this nature while the police officer on patrol duty stops the vehicle in transit in a public place and conducts search and seizure, Section 42 has no application?”

9. In State of Haryana v. Jarnail Singh [(2004) 5 SCC 188 : 2004 SCC (Cri) 1571] it was held as follows : (SCC pp. 191-92, paras 7-10)

“7. The next question is whether Section 42 of the NDPS Act applies to the facts of this case. In our view Section 42 of the NDPS Act has no application to the facts of this case. Section 42 authorises an officer of the Departments enumerated therein, who are duly empowered in this behalf, to enter into and search any such building, conveyance or place, 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, etc. is kept or concealed in any building, conveyance or enclosed place. This power can be exercised freely between sunrise and sunset but between sunset and sunrise if such an officer proposes to enter and search such building, conveyance or enclosed place, he must record the grounds for his belief 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.

8. Section 43 of the NDPS Act provides that any officer of any of the Departments mentioned in Section 42 may seize in any public place or in transit any narcotic drug or psychotropic substance, etc. in respect of which he has reason to believe that an



offence punishable under the Act has been committed. He is also authorised to detain and search any person whom he has reason to believe to have committed an offence punishable under the Act. Explanation to Section 43 lays down that for the purposes of this section, the expression 'public place' includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

9. Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the NDPS Act for searching the vehicle between sunset and sunrise.

10. In the instant case there is no dispute that the tanker was moving on the public highway when it was stopped and searched. Section 43 therefore clearly applied to the facts of this case. Such being the factual position there was no requirement of the officer conducting the search to record the grounds of his belief as contemplated by the proviso to Section 42. Moreover it cannot be lost sight of that the Superintendent of Police was also a member of the searching party. It has been held by this Court in M. Prabhulal v. Asstt. Director, Directorate of Revenue Intelligence [(2003) 8 SCC 449 : 2003 SCC (Cri) 2024] that where a search is conducted by a gazetted officer himself acting under Section 41 of the NDPS Act, it was not necessary to comply with the



requirement of Section 42. For this reason also, in the facts of this case, it was not necessary to comply with the requirement of the proviso to Section 42 of the NDPS Act.”

10. Above being the position of law, the order of the High Court is clearly unsustainable. Section 42 has no application to the facts of the case. The order of the High Court is set aside and that of the trial court is restored. The respondent-accused shall surrender forthwith to custody to serve remainder of sentence.”

(emphasis supplied)

23. Similarly the Hon’ble Punjab & Haryana High Court has held in ***Mandeep Kaur vs State Of Punjab*** has held as under:-

“19. Another material distinction between search of a building, conveyance or enclosed place conducted under provisions of Section 42 of the Act and a search of a vehicle in 'transit' in terms of Section 43 of the Act is that in case of a search of vehicle in transit there is no requirement of obtaining any search warrant even if search is conducted after sunset by a non-gazetted officer unlike a case of search of a building, conveyance or an enclosed place. Boota Singh's case (Supra) has only interpreted the word 'public place' as existing in Section 43 of the Act and not the word 'transit' which is used alternatively with word public place as 'public place or transit'. As already stated above in Boota Singh's case, vehicle was 'parked' and contraband was being sold and vehicle was not on the move i.e. not in transit. The distinction between the word 'conveyance' as existing in Section 42 of the Act and conveyance in 'transit' as existing in Section 43 of the Act has been well highlighted in Dharminder Kumar's case.

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24. In view of the discussion made above, particularly bearing in mind the factual position where the vehicle was



in 'transit' in a public place and was not stationary or parked anywhere and search was conducted in presence of a Gazetted Officer, it is provisions of Section 43 and not Section 42 of the Act which would get attracted. A Gazetted Officer, in any case, draws powers from Section 41(2) of the Act. This Court is unable to accept the contentions raised on behalf of the petitioners as regards his right to be released on bail on account of non-compliance of Section 42 of the Act. As such, submission no.(i) and (ii) are found to be devoid of merit.”

(emphasis supplied)

24. Profitable would it be to refer to the observations of the Guwahati High Court in ***Mayank Sharma vs. State of Assam: 2024 SCC OnLine Gau 265***, which read as under:

“17. There is no quarrel at the bar about the proposition of law as pointed out by Ms. Mandla. But, having adjudged the submission of learned counsel of both the parties, in the light of fact and circumstance on the record, I find sufficient force in the submission of Mr. Baruah, the learned Addl. P.P. Indisputably, herein this case there was no prior information about transportation of contraband substances in the Truck. During Naka Checking the Truck was checked and contraband substances were recovered. It is well settled in catena of decision of Hon'ble Supreme Court that private vehicle is not a “public place”. And here in this case, the Truck, where the contrabands substances were recovered and seized is not a public conveyance. But, the fact remains that the contrabands were recovered and seized while in transit and as revealed from the FIR the informant was authorized by the Government of Assam vide Notification No. EX.145/85/301 dated 15.05.1995 under the provision of section 42(1) NDPS Act to enter, search and seizure. As the contraband substances were recovered and seized during transit in the Truck, as contemplated in section 43 (a) i.e. “seize in any public place or in transit,” this court is of the considered opinion that herein this case instead of



section 42 of NDPS Act, section 43 of the said Act is attracted. And as such, recording of reasons for belief and for taking down of information received in writing with regards to the commission of an offence before conducting search and seizure, is not required to be complied with under section 43 of NDPS Act.”

(emphasis supplied)

25. The principle that emerges from the above judgments is that a distinction has been carved between a vehicle that is parked and a vehicle that is in transit, inasmuch as, section 42 applies in the former scenario whereas section 43 applies in the latter. Bearing the aforesaid principle in mind, this court shall now proceed to examine the factual matrix of the present case. It has been mentioned in the Status report that the petitioner was apprehended near Red light, Hapur-Ghaziabad Road, Ghaziabad, Uttar Pradesh while he was travelling in his vehicle, the same has also been not denied by he learned counsel for the petitioner. Thus, there is no dispute that the vehicle of the petitioner was “in transit” and the provisions of section 42 do not apply to the present case.

26. Eve otherwise, the contention of the learned counsel for the petitioner with respect to non-compliance of section 42 cannot be appreciated at this stage as has been held by the Hon'ble Supreme Court in ***Union of India v. Md. Nawaz Khan: (2021) 10 SCC 100***, the relevant of which reads as under:

“In the complaint that was filed on 16 October 2019 it is alleged that at about 1400 hours on 26 March 2019, information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. The complaint states that the information was immediately reduced to writing. Therefore, the contention



that Section 42 of the NDPS Act was not complied with is prima facie misplaced. The question is one that should be raised in the course of the trial.

(emphasis supplied)

27. Insofar as the incriminating material in the form of WhatsApp chats between the petitioner and accused Alok Tripathi which has allegedly been retrieved from the petitioner's mobile are concerned, relevant would it be to note that incriminating material in the form of WhatsApp chat cannot establish a live link between the petitioner and co-accused. Reference in this regard may be had to the judgment of Supreme Court in ***Bharat Chaudhary v. Union of India: (2021) 20 SCC 50***, the relevant para of which reads as under:

“10...Reliance on printouts of Whatsapp messages downloaded from the mobile phone and devices seized from the office premises of A-4 cannot be treated at this stage as sufficient material to establish a live link between him and A-1 to A-3, when even as per the prosecution, scientific reports in respect of the said devices is still awaited.”

28. However, it cannot be lost sight of that the petitioner has been incarcerated from 21.12.2020 and as on date has spent about 3½ years in custody. The trial of the petitioner is at a nascent stage and many witnesses are left to be examined. Accordingly, the trial is going to be a protracted one and the petitioner cannot be kept in custody till the conclusion of the trial. Reference in this regard may be had to the judgment of the Supreme Court in ***Mohd. Muslim vs. State (NCT of Delhi): 2023 SCC OnLine SC 352***, wherein the Supreme Court after taking into account the decision of a Three Bench in ***KA Najeeb vs. UOI: (2021) 3 SCC 713*** has held that the



right of an accused person to a speedy trial cannot be circumscribed by the rigors of Section 37 of the Act. The relevant paragraphs of the judgment read as under:-

“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.

29. Similarly, the Supreme Court in ***Rabi Prakash vs. State of Odisha***: SLP (Crl.) No.4169/2023 has held as under:-

“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.”

(emphasis supplied)

30. As far as the contention of the learned APP that the petitioner cannot be granted the concession of regular bail in view of his past antecedents, the same cannot be accepted as the Supreme Court ***Prabhakar Tiwari (supra)*** has observed that mere pendency of several criminal cases against the accused cannot by itself be the basis for refusal of bail. The same can be a factor, but cannot be the sole basis for refusal of grant of bail, the relevant paragraph of which reads as under:-

“73.The offence alleged no doubt is grave and serious and there are several criminal cases pending against the accused. These factors by themselves cannot be the basis for refusal of



prayer for bail. *The High Court has exercised its discretion in granting bail to the accused Vikram Singh upon considering relevant materials. No ex facie error in the order has been shown by the appellant which would establish exercise of such discretion to be improper. We accordingly sustain the order [Vikram Singh v. State of U.P., 2019 SCC OnLine All 5566] of the High Court granting bail. This appeal is dismissed.”*

(emphasis supplied)

31. To be noted that none of the cases in which petitioner's involvement is alleged are under the NDPS Act.

32. Considering the aforesaid circumstances in entirety, this Court is of the opinion that the present petitioner has made out a *prima facie* case for grant of regular bail. Accordingly, the petitioner is enlarged on regular bail subject to his furnishing a Personal Bond in the sum of Rs.50,000/- and one Surety Bond of the like amount to the satisfaction of the Trial Court/CMM/Duty Magistrate, further subject to the following conditions:-

- a) Petitioner shall appear before the learned Trial Court as and when the matter is taken up for hearing.
- b) The petitioner shall not contact, nor visit, nor offer any inducement, threat or promise to the complainant or any of the prosecution witnesses or other persons acquainted with the facts of the case. The petitioner shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial.
- c) He 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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d) He shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times.

33. The petition stands disposed of.

34. It is clarified that any observation made herein-in-above is only for the purpose of deciding the present bail application and same shall not be construed as an expression of opinion on the merits of the case.

35. Copy of the order be forwarded to the concerned Jail Superintendent for necessary compliance and information.

36. Order *dasti* under signatures of the Court Master.

37. Order be uploaded on the website of this Court.

VIKAS MAHAJAN, J.

JUNE 07, 2024
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