



2024:DHC:5008



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on:08.07.2024

+ **BAIL APPLN. 2848/2022**

MADHURI CHAUHAN

.... Applicant

versus

STATE OF NCT OF DELHI

..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Rohit Kr. Singh, Mr. Shivam Sharma,
Mr. Akash Kumar, Advocates.

For the Respondent : Mr. Utkarsh, APP for the State.
SI Vidyakar Pathak (P.S. NDPS) & SI Vinod
Rohini Distt/ Vigilance

**CORAM
HON'BLE MR JUSTICE AMIT MAHAJAN**

JUDGMENT

1. The present application has been filed under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') seeking regular bail in FIR No. 96/2021 dated 25.12.2021, registered at Police Station New Delhi Railway Station, for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act'). The applicant was arrested on 25.12.2021, and has remained in custody since then.

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2. It is alleged that on 25.12.2021, ASI Pramod Kumar, with Head Constable Gaurav, was patrolling the area. It is alleged that at around 11:25 am, at Exit Gate No.1 in front of Coolie Hall, Pahar Ganj Side, New Delhi Railway Station, they saw a lady with a sky-blue coloured trolley bag, a black coloured tote bag, and a purple-coloured tote bag who appeared suspicious.

3. It is alleged that the woman was questioned by the police officials after she tried to leave the bags. It is alleged that upon inspecting the bags, eight packets wrapped in brown tape were found inside the bags. It is alleged that the packets contained green leaves and seeds, which appeared to be hemp by sight and smell.

4. It is alleged that the woman was identified as the applicant. It is alleged that the applicant was moved to the parking lot shed where a search was conducted. It is alleged that no additional intoxicants were found on the applicant during the search.

5. It is alleged that the applicant admitted to bringing the contraband (Ganja) from Patna, Bihar to New Delhi by train and was waiting to deliver the same at Ghoda Wala Mandir, Raghbir Nagar.

6. It is alleged that the four different sized packets recovered from the sky-blue coloured trolley bag were equally mixed by ASI. It is alleged that the green coloured seeds and husks recovered from the bag were mixed and kept in two large white coloured polythene bags, each weighing 10 kg separately. It is alleged that the green-coloured husk and seed-like substances from the black coloured tote bag were



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thoroughly mixed in a large white coloured polythene and weighed, totalling 10 kg. It is alleged that the green leaf and seed-like material from the purple-coloured tote bag were thoroughly mixed in a large white coloured polythene and weighed, totalling 10 kg. It is alleged that the total weight of the recovered contraband was found to be 40 kg after the mixing and weighing process.

7. It is alleged that during the investigation, the applicant revealed that a person, namely, Sanju, whose real name is Sanju Rai, had instructed her to deliver the Ganja to his associates. She allegedly disclosed that she was promised that she would be given ₹10,000/- for the said task.

8. Non bailable warrants were obtained from the concerned Court against the said Sanju, however, they could not be executed due to his unavailability at his native place.

9. Chargesheet and Supplementary Chargesheet has been filed in the present case against the applicant. The Status Report filed on 08.12.2022 records that the FSL Result of the samples has confirmed that the recovered substance is Ganja.

10. The learned counsel for the applicant submitted that the applicant is completely innocent and she has not committed the alleged offense as stated in the FIR.

11. He submitted that the applicant had come to Delhi for medical treatment and was supposed to be picked up by her son from the Railway Station. He submitted that while the applicant was waiting for



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her son to come, one person came to the applicant and requested her to keep a look on his bags while he went to the washroom.

12. He submitted that the applicant, being a good Samaritan, was merely keeping a look on the bags. He submitted that within a span of a few minutes, the police came and started enquiring about the bags. He further submitted that even after repeated pleadings by the applicant that the said bags did not belong to her, the police forced the applicant to state that the said bags belonged to her and she was forced to confess that the contraband belonged to her.

13. He submitted that nothing has been recovered from the possession of the applicant during her personal search. He submitted that the alleged recovery appears to have been planted upon the applicant by the actual trafficker, who seems to have got scared from the police patrolling.

14. He submitted that there was no public witness at the time of the alleged recovery as mentioned in the FIR, which evidently proves that the applicant has been falsely implicated by the police. He further submits that no endeavor was made by the prosecution to photograph or videotape the recovery either.

15. He relied on the judgment in the case of *Amani Fidel Chris v. NCB : CrI.A. 1027/2015*, where it was held that mixing of substances from different parcels without observing the proper protocol invalidates the evidence. He also relied on the case of *Gopal Das v. NCB : Bail Appln. 3491/2020* wherein the Court had granted bail to the accused



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therein in similar circumstances and observed that mixing substances compromises the recovery.

16. He submitted that the samples of the contraband were drawn after the mixing of the substances from the eight packets that were allegedly recovered from the applicant. He submitted that the same is in teeth with the judgment by this Court in the case of ***Basant Rai v. State : Crl. Appeal No. 909/2005*** and the Standing Order 1/88 dated 15.03.1988.

17. He submitted that all the witnesses cited in the chargesheet are police officials, and therefore, there are no chances of the applicant tampering with prosecution evidence if she is enlarged on bail. He further submitted that there is no likelihood of the applicant absconding or fleeing from justice.

18. *Per contra*, the Additional Public Prosecutor for the State opposed the bail application. He submitted that due procedure was followed as envisaged under the NDPS Act.

19. He submitted that commercial quantity of contraband is involved in the present case, whereby, the rigors of Section 37 of the NDPS Act would be attracted against the applicant.

20. He submitted that all the provisions of the NDPS Act have been followed and samples had been drawn as per law, whereby, the accused persons had not been prejudiced in any manner.

21. He submitted that the statutory compliances in regard to mixing of samples are directory in nature and lack of strict adherence to the same would not render the seizure of the contraband as null and void.



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He relied on the judgment of the Hon'ble Apex Court in the case of ***State of Punjab v. Balbir Singh : (1994) 3 SCC 299.***

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

CONCLUSION

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

24. 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 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.

25. 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.”

26. 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 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.

27. 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) Improper sampling by the prosecution as the substances from different parcels were mixed before the samples were drawn;



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- b) Non-joinder of independent witnesses and no photography/videography; and
- c) Delay in trial.

28. It is true that the search and seizure of the contraband so seized is a serious aspect during the investigation and if there is any violation of the mandatory requirements as prescribed under the NDPS Act as to the manner in which search and seizure is effectuated, the courts ought to take a serious view and the benefit, in some circumstances, could be extended to the accused.

29. It is argued by the learned counsel for the applicant that the samples were compromised as the substances found in the eight packets (recovered from the three bags allegedly carried by the applicant) were mixed before the samples were drawn.

30. Insofar as the argument regarding improper procedure of sampling is concerned, this Court by a separate Judgment today in ***Sovraj v. State : 2024:DHC:5009***, advertent to a catena of judgments, has held that that the accused persons cannot be allowed to go scot free on minute irregularities in procedure of sampling especially when the prosecution has not had the opportunity to furnish an explanation. It was held that the alleged violation in manner of mixing of seized substances and whether the same has caused any prejudice to the applicant would be a matter of trial.

31. In the present case, *prima facie*, the applicant has not been able to establish any prejudice by the alleged irregular procedure of



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sampling. Prejudice caused to the applicant by the infirmities in the procedure of drawing samples, if any, will be tested during the course of the trial.

32. 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 broad daylight in front of Coolie Hall, Pahar Ganj Side, New Delhi Railway Station.

33. This Court in the case of ***Bantu v. State Govt of NCT of Delhi: 2024: DHC: 5006*** has observed that while the testimony of independent 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.

34. 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 casts a doubt to the credibility of the evidence.

35. The present case is based allegedly on a chance recovery and it is possible that the Investigating Agency did not get sufficient time to prepare. However, given the crowded nature of the place from where the recovery was made, it is peculiar that no public witness has joined the search.

36. A bald statement has been made, as stated in the chargesheet filed, that 4-5 passers-by were asked, however, they refused to join the investigation and left the spot citing legitimate compulsion related to journey. The recovery in the present case was effectuated at Exit Gate



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No.1 in front of Coolie Hall, Pahar Ganj Side, New Delhi Railway Station. It is unclear as to why the police officers only requested passers-by to join the investigation instead of the government employees or shopkeepers who must have been available at the New Delhi Railway Station. No notice under Section 100 (8) of the CrPC was given to any person on the refusal to support the Investigating Agency during the search procedure.

37. This Court in *Bantu v. 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.* (*supra*), after taking note of the technological advancements, had passed certain directions. The Hon'ble Apex Court had emphasised the role of audio-visual technology in enhancing the efficacy and transparency in the Police investigations.

38. This Court also noted that realising the need of change in time, the Legislature has now passed the Bharatiya Nagarik Suraksha Sanhita, 2023 ('BNSS'), where the practice of photography and videography has now been made mandatory as part of the investigation.

39. This Court also 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.

40. 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



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same may not be fatal to the case of the prosecution, however, the benefit, at this stage, cannot be denied to the accused.

41. In the present case, while the charges have been framed against the applicant, none of the witnesses have been examined yet. As noted above, the applicant has been in custody since 25.12.2021. There is no likelihood of the trial being completed in the near future.

42. 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 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)

43. 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.”



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44. 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.

45. Similarly, in ***Man Mandal & Anr. v. The State of West Bengal*** (order dated 14.09.2023 passed in **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.

46. 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 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.”

47. 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.”

48. 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, 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.

49. 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.

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



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51. 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 she would be residing after his release and shall not change the address without informing the concerned IO/ SHO;
- e. The applicant shall, upon her release, give her mobile number to the concerned IO/SHO and shall keep her mobile phone switched on at all times.

52. 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.

53. 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.



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54. The present application is allowed in the aforesaid terms.

AMIT MAHAJAN, J

JULY 8, 2024