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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% ***Date of decision: 9th July, 2024***

+ **BAIL APPLN. 2072/2024**

VIKAS KASHYAP

.....Petitioner

Through: Counsel for petitioner (appearance not given)

versus

STATE OF NCT OF DELHI

.....Respondent

Through: Mr. Amit Ahlawat, APP for the State.

CORAM:**HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****J U D G M E N T (oral)**

1. The present Bail application under Section 439 of the Code of Criminal Procedure (Cr.PC) has been filed on behalf of the petitioner seeking Regular Bail in relation to the FIR bearing No. 0219/2021 under Section 20(B) (II) of NDPS Act, registered at Police Station Ranhola, New Delhi.
2. It is submitted in the Bail Application that according to the Police, on 11.04.2021, the petitioner was apprehend and was found in possession of 10.400 kgs 'Ganja'. On the basis of the disclosure made in the Police Station, further recovery of 30.100 kgs 'Ganja' was made from his residence whereby a total recovery of 40.500 kg of 'Ganja' had been effected from the petitioner.
3. It is submitted that though the amount allegedly recovered is commercial, but the recovery of 30.100 kgs 'Ganja', had been made after



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sunset and is **not in accordance with Section 41 and 42 of NDPS Act.**

Reliance has been placed on the following judgements:

- a) State of Punjab v. Balbir Singh & Ors., (1994) 2 SCR 208
- b) Abdul rashid Ibrahim Mansuri vs. State of Gujrat, (2000) 2 SCC 513
- c) Asif Ali vs NCT of Delhi, in Bail Application no 647/2022
- d) Nagesh Sharma vs. The State (NCT of Delhi) in Bail Application no. 3185 of 2022
- e) Sarvothaman Guhan vs. Narcotics Control Bureau in Bail Application no. 2879 of 2022

4. Furthermore, **there is inordinate delay in trial** the accused is in custody since 11.04.2021 but only three out of 17 witnesses have been examined till date. All the witnesses are official and there is no chance of tampering with the evidence. There is long incarceration and the petitioner is being punished for an offence, for which he is yet to be tried. Reliance has been placed on the following judgements:

- a) Mohd. Muslim @Hussain vs. State (NCT of Delhi), in Special Leave Petition (Crl.) No(s). 915 OF 2023
- b) Rabi Prakash vs State of Odisha, in Special Leave to Appeal (Crl.) No(s).4169/2023
- c) Dheeraj Kumar Shukla vs. State of UP' in SLP (Crl.) No(s). 6690/2022
- d) Sunil vs State of NCT of Delhi in (Crl. Bail App. No. 1688 of 2022)
- e) Gurpreet Singh vs State of NCT of Delhi in (Crl. Bail App. No. 857 of 2023)
- f) Habibullah Nabi Zada vs. NCB in (Crl. Bail. App. No. 2645 of 2022)



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5. It is further submitted that **there is no compliance of Section 52A (2) of the NDPS Act**. When the I.O. moved the Application dated 24.04.2021 for drawing of the samples under Section 52A (2) of the NDPS Act before the learned MM, it was not supported with the Inventory mandatorily required to be prepared under Section 52A of the NDPS Act. Mere mentioning about the inventory in the Order casts a doubt on the case of the prosecution. There is thus non-compliance under Section 52A(2) of the NDPS Act which vitiates the entire case of the prosecution. Reliance has been placed on the decision in Yusuf @ Asif vs. State, CRL.APPEAL No. 3191/2023.

6. In the end, it is argued that the accused is a 34-year old innocent man without any criminal antecedents, having deep roots in the society. He is the sole bread-earner of the family and there is no other family member in the family to take care of old-aged parents who are suffering from various ailments.

7. Furthermore, the recovery has already been effected and nothing more is left to be recovered. There are sufficient material evidences to show that *“there are reasonable grounds for believing he is not guilty of such offence”* as provided under Section 37 of the Act, and there is every likelihood of the accused being acquitted after the trial. His further incarceration would not serve any purpose as the investigation is already complete and there are no independent witnesses to be examined on whom the petitioner can exert some influence.

8. Furthermore, the Interim bail had been granted to the accused for 10 days which was never misused by him. He is ready to abide by the conditions, if any, imposed by this Court. Therefore, a prayer is made that



the regular bail be granted.

9. Learned APP appearing on behalf of the State, has argued that it is a commercial quantity of 'Ganja', which has been recovered. The delay, if any, was on account of getting the report from FSL. Charges have already framed and the trial is being conducted expeditiously and is likely to be concluded in near future. The argument of whether there was non-compliance of the Section 41 and 42 of NDPS Act, is a question of trial and cannot be agitated at this stage.

10. **Submissions heard.**

11. At the outset, the objections taken on behalf of the applicant/accused is that there '**is inordinate delay**' in concluding the trial against him. Admittedly, the accused was arrested on 11.04.2021 and since then he is in Judicial Custody. The Charge sheet has been filed on 06.10.2021. Though, the charges have been framed, but only three out of seventeen witnesses have been examined till date. Even though all the witnesses remaining to be examined are official witnesses and there is no chance of tampering with the evidence, but such long incarceration for an offence of which he is yet to be held guilty, is in violation of his right to personal liberty.

12. The Supreme Court in the case of Union of India vs. K.A. Najeeb (2021) 3 SCC 713 observed that if the timely trial is not possible, Courts should ordinarily release the undertrials on bail and statutory restrictions do not exclude discretion of the constitutional Courts to grant bail on the ground of fundamental right enshrined in Part III of the Constitution. The Personal Liberty guaranteed by Part II of the Constitution, would cover not only the protective but also bring within its ambit not only due procedure and fairness but also access to speedy trial.



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13. The Supreme Court in the case of Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) vs. Union of India (1994) 6 SCC 731 had observed that undertrials cannot be indefinitely detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same has been established before a neutral arbiter. However, owing to the practicalities of real life were to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.

14. It was further observed that the statutory restrictions like Section 43-D(5) of UAPA per se does not oust the ability of the constitutional courts to grant bail on the ground of violation of fundamental rights under Part III of the Constitution.

15. The Apex Court observed that both the restrictions under the statute as well as the powers exercisable under Constitutional jurisdiction can be well harmonized. It observed “*whereas at commencement of proceedings the courts are expected to appreciate the legislative policy against grant of bail, but the rigours of such provisions will melt down, when there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence.*”

16. Guided by the principles as enunciated by the Apex Court in the aforementioned judgments, the onus rests on this Court to balance a right of



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the Society of protection against the crime, but this right of the Society needs to be balanced with the individual fundamental rights of the accused to speedy trial. Since the accused in the present case been in judicial custody since 11.04.2021 and there are only three witnesses examined till date, while fourteen witnesses remained, which may take substantial time to be recorded, it is a fit case where the applicant is entitled to indulgence of this Court by way of bail.

17. The second ground on which the bail is sought is non-compliance of **Section 41 and 42 of NDPS Act**. It has been observed that the arrest has been made on 11.04.2021 at about 07:30 P.M. He was found to be allegedly carrying contraband weighing 10.4 Kgs on his person. Subsequently on his Disclosure Statement, he led to recovery of 30.100 Kg of additional 'Ganja' from his house at _____ (time). It is claimed that since the recovery was effected after sunset, mandatory provisions of Section 41 and 42 have not been complied with. It is claimed that no Search Warrants were obtained in the manner stated under Section 41 of the Act. In case there was no sufficient time to get the Search Warrants, the reasons should have been recorded in terms of Proviso to Section 42(1) by the I.O.

18. None of these provisions have been complied with. Further, the Report under Section 42(2) should have been sent within 72 hours to the immediate superior by the I.O. Prima facie, there is violation of Section 41 and 42 NDPS Act which are mandatory in nature. Prima facie, the petitioner has crossed the bar of Section 37 NDPS Act as has been held in the case of State of Punjab vs. Balbir Singh, Mohd. Muslim @Hussain vs. State (NCT of Delhi), Rabi Prakash vs State of Odisha, Dheeraj Kumar Shukla vs. State of



UP, Sunil vs State of NCT of Delhi, Gurpreet Singh vs State of NCT of Delhi and Habibullah Nabi Zada vs. NCB.

19. Prima facie, there is violation of mandatory provision of Section 41 and 42 NDPS Act. There is no previous conviction of the applicant under the NDPS Act and, therefore, there are reasonable grounds to conclude that the applicant may not have committed the offence and is also not likely to commit the offence in future.

20. The petitioner has also claimed non-compliance of **Section 52A(2) of the NDPC Act.** It is submitted that an inventory was required to be prepared by the SHO after the seizure of 30.100 Kgs of 'Ganja' was made from the residence of the accused. Further, this inventory has to be annexed along with the application to be moved by the I.O before the learned Metropolitan Magistrate for taking of samples. Though, there is mention of an inventory annexed, but from the record the Inventory list was apparently not annexed with the application. There is, therefore, violation of Section 52 A of the Act.

21. The perusal of Charge Sheet as well as the documents on record prima facie makes a mention of an Inventory being prepared, but it is a matter of trial whether in fact, the Inventory was prepared and whether it was produced before the learned M.M. at the time of sampling. Such moot points, therefore, can be adjudicated only after the trial.

22. In the light of the above discussion, the petitioner is hereby admitted to bail on furnishing a personal bond in the sum of Rs.50,000/- along with two sureties of the like amount to the satisfaction of the learned trial Court/Duty Magistrate, subject to following conditions:

(i) The memo of parties shows that the applicant is residing at House



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No.A-156, JJ Colony, Phase-3, Sector-3, Dwarka, New Delhi. In case of any change of address, the applicant is directed to inform the same to the Investigating Officer.

- (ii) The applicant shall report at P.S. Crime Branch twice in a weeks, i.e. on every Wednesday and Friday at 10:30 AM and the concerned Officer is directed to release him by 11:00 A.M after recording his presence and completion of all the necessary formalities.
- (iii) The applicant shall not leave India without the prior permission of the Trial Court.
- (iv) The applicant is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
- (v) The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witness in any manner.
- (vi) In case it is established that the applicant has indulged in similar kind of offences or tried to tamper with the evidence, the bail granted to the applicant shall stand cancelled *forthwith*.

23. Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case pending before the learned Trial Court.

24. The application stands disposed of along with all the pending application(s), if any.

25. Let a copy of this judgment be communicated to the concerned Jail Superintendent and to the learned Trial Court.

(NEENA BANSAL KRISHNA)
JUDGE

JULY, 09, 2024

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