



2024:DHC:8163



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on : 6th September, 2024***

Pronounced on: 21st October 2024

+ **BAIL APPLN. 2219/2024**

SANJEEV KUMAR

.....Applicant

Through: Mr. Pritish Sabharwal & Mr.
Shashank Shekhar, Advs.

versus

THE STATE

.....Respondent

Through: Mr. Amit Ahlawat, APP for the
State with SI Dinesh Kumar,
AATS Dwarka Dist., PS Uttam
Nagar.

CORAM:

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. This is the third application preferred by the applicant under Section 439, Code of Criminal Procedure, 1973 [***“CrPC”***] seeking regular bail in case arising out of FIR no. 994/2020 dated 15th December 2020 under Section 20 of the Narcotic Drugs and Psychotropic Substances Act 1985 [***“NDPS Act”***] registered at Police Station [***“PS”***] Uttam Nagar. On 31st March 2021, chargesheet was filed under Section 20/25/29 of the NDPS Act. The applicant is in judicial custody since 15th December 2020.



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Factual Background

2. As per the case of prosecution, on 15th December 2020, on a secret information, applicant was apprehended by the Anti-Narcotics Team, Dwarka District from Jhanda Chowk, Near Power House, Kali Basti, Uttam Nagar, Delhi where he had arrived riding his motorcycle. Upon apprehension, a black/purple bag was recovered from the applicant's possession containing 5.09 kg *ganja* packed in a plastic packet.

3. Properties were seized and sealed *vide* seizure memos pursuant to which, aforesaid FIR was lodged and further investigation was carried out. During the course of investigation, applicant was interrogated and arrested on 15th December 2020 and produced before the Metropolitan Magistrate at Tihar Jail Court Complex. On the same day i.e. 15th December 2020, search was carried out at the residence of the applicant at Agwanpur, Faridabad which led to the recovery of 125 kg *ganja* packed in 8 white synthetic sacks along with cash in the amount of Rs. 28,40,000/- [*Rupees Twenty-Eight Lakhs Forty Thousand only*].

4. Upon interrogation, applicant disclosed that one Chandan is the main supplier who sends *ganja* in parcels by train from Howrah, West Bengal through one Murari; said parcels are received by one Lalit Choudhary at New Delhi Railway Station who then hands over these parcels to the applicant who supplies the same to various localities within Delhi-NCR. Pursuant to this information, co-accused Lalit Choudhary was also tracked down and arrested on 17th December 2020. With continued efforts, co-accused Murari and Chandan were also apprehended from Howrah Railway Station and interrogated; co-accused Murari Kumar Jha was arrested on 20th December 2020, produced before



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the CJM, Howrah, West Bengal and sent to judicial custody. Main supplier Chandan was also arrested and produced before the Court, pursuant to which he was sent to judicial custody.

5. In the course of investigation, proceedings under Section 52A NDPS Act were carried out before the Duty MM, Dwarka Courts, Dwarka and samples were sent to Forensic Science Laboratory, Rohini [*“FSL”*] which examined the samples and rendered the opinion that, “*on physical, microscopic, chemical & TLC examination, exhibits were found to be ‘GANJA’ (Cannabis)*”. Call detail records [*“CDR”*] of all accused persons, including the applicant, were obtained and analysed, as per which, all accused persons were stated to have been in touch through phone calls.

6. Final report *qua* all the accused has been filed by the State and the case is pending trial before the court of Additional Sessions Judge (Special Judge NDPS Act), Dwarka Courts, Dwarka, New Delhi. As of 27th April 2022, charges have been framed against all the accused, including the applicant.

7. Applicant had previously moved this Court for a similar relief – ***BAIL APPLN. 1375/2022*** was dismissed as withdrawn *vide* order dated 19th July 2023 and ***BAIL APPLN. 3704/2023*** was dismissed for want of prosecution *vide* order dated 09th May 2024.

Submissions on behalf of Applicant

Entire seizure is not “ganja”

8. Counsel for applicant, at the outset, submits that only flowering or fruiting tops of the cannabis plant are to be considered *ganja* and not the



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seeds, stems, and leaves in respect of the heterogenous material seized herein. Furthermore, he averred that as per the description of the search and seizure team, a pungent-smelling, moisture-laden, leaf and grasslike substance was found.

9. Referring to the definition of “*ganja*” in Section 2(iii)(b) of the NDPS Act, leaves, stems, and seeds of the cannabis plant would not amount to *ganja* and thus, to determine the quantity of the substance seized, the substance must be devoid of moisture and any morphologically and anatomically irrelevant parts like seed, stems, and leaves. The FSL Report shows that the seized material contains “*damp greenish brown fruiting and flowering vegetative material*”. Reliance, in this regard, was placed on a decision of the Bombay High Court in ***Kunal Dattu Kadu v. Union of India*** ABA 2173/2022 dated 29th August 2022.

10. It was further submitted that there is an alarming lack of evidence to prove or state that the appropriate procedure was followed before and during weighing the substance.

No public witnesses, photography or videography

11. It was submitted that there were no public witnesses in either of the recoveries made at the instance of the applicant. The raiding agency allegedly looked for public witnesses but, due to the inherent dread of the pandemic nobody was up for the task. The investigating and raiding team were aware of the fact that there were no public witnesses in the search and seizure; in spite of this, there was no photography or videography of the recovery proceedings as also seizure of the said



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recovery and seizure. Thus, there is no material to corroborate and prove the prosecution's case beyond reasonable doubt.

Material Contradictions

12. As per the charge sheet, the total recovery of contraband is 125 kg, however, the application preferred before the Trial Court for drawing of samples reflects 143 kgs of contraband. Thus, there are material contradictions in the case of the prosecution, which would not enable them to prove the guilt of the applicant-accused beyond reasonable doubt.

Seized Cash

13. The amount of Rs. 28,40,000/- from the premises of the applicant were due to the fact that he had sold a property and cash recovered was the amount received through the registered sale deed.

Prolonged Incarceration and Delay in Trial

14. It was contended that the applicant has been languishing in custody for 3 years and 9 months approximately. Reference was made to the Nominal Roll in this regard. The prosecution has enlisted total 22 witnesses, and thus, the trial is likely to take some time. In this regard, reliance was placed on the following decisions:

- i. ***Nitish Adhikari @ Bapan v. State of West Bengal*** SLP (CrI.) 5769 of 2022;
- ii. ***Rajesh Kumar v. State*** 2024 SCC OnLine Del 872;
- iii. ***Rabi Prakash v. State of Odisha*** 2023 SCC OnLine SC 1109;



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- iv. *Suraj v. State Govt. of NCT of Delhi* 2023 SCC OnLine Del 5323;
- v. *Dheeraj Kumar Shukla v. State of Uttar Pradesh* 2023 SCC OnLine SC 918;
- vi. *Mohd. Muslim alias Hussain v. State of NCT of Delhi* SLP (Cr1.) 915/2023

Triple Test Satisfied

15. Lastly it was contended that applicant herein fulfils the ‘*Triple Test*’ criterion as propounded by this Court on 30th September 2019 and by the Apex Court in *P. Chidambaram v. Central Bureau of Investigation* 2019 SCC Online SC 1380. This doctrine affords an accused person bail if it can be established that he or she is not a flight risk, will not influence witnesses and will not tamper with the evidence.

16. In the present case, it is submitted that the applicant is not a flight risk and the investigation has already been completed. Relying on *Manubhai Ratilal Patel vs. State of Gujarat* (2013) 1 SCC 314, it was lastly submitted that if police custody is not extended, judicial custody remand is not an automatic consequence. The Court must apply its mind whether there is any justification for judicial remand or there is no need for any remand at all.

Submissions on behalf of the State

17. Additional Public Prosecutor [“APP”] appearing on behalf of State countered the aforesaid submissions and opposed grant of bail in the present matter as the offence committed by the applicant and co-accused persons is serious in nature. While 5.09 kgs *ganja* was recovered



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at the instance of the applicant, 125 kgs more was recovered from the abode of the applicant. In this manner, a total of 130 kgs of contraband was seized in addition to Rs. 28.4 lacs cash.

18. CDR connectivity reveals that applicant was in frequent touch with co-accused persons Lalit, Murari, as well as the allegedly main supplier Chandan. Mobile phone used to contact the co-accused persons was also recovered from the possession of the applicant.

19. During the course of the investigation, as alleged by APP for the State, activities of applicant as well as those of the co-accused persons point towards running of a drug syndicate wherein *ganja* was purchased by Chandan and handed over to Murari in Kolkata. Murari then transported the same through trains and Lalit received it in Delhi. Lalit further handed over packets containing said contraband to applicant herein for further distribution within Delhi-NCR.

20. APP for State submitted that due to this intricate chain of activities and huge contraband seized, chances are that applicant, if enlarged on bail, will not only abscond, but also engage in the illegal business of drugs as the main supplier Chandan still remains absconding.

21. In support of his arguments, APP for State placed reliance upon the following decisions:

- a) *Masibur Khan v. State of NCT of Delhi* BAIL APPLN. 2894/2022;
- b) *NCB v. Mohit Agarwal* CrI. A. 1001-1002/2022;
- c) *Jagwinder Singh v. State of Punjab* CrI. A. 816/2011;
- d) *State of Punjab v. Baldev Singh* CrI. A. 396/1990;



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- e) *Yunus Khan v. State of NCT of Delhi* BAIL APPLN. 441/2024;
f) *Surinder Kumar v. State of Punjab* CrI. A. 512/2009.

Analysis

22. Heard counsel on behalf of parties and perused the material placed on record. As per the Nominal Roll dated 19th August 2024, the applicant has been in judicial custody since 22nd December 2020 and has undergone about 3 years 6 months of custody. Applicant was granted interim bail on 3 occasions with effect from 22nd January 2022 to 27th January 2022; from 10th September 2022 to 1st October 2022; and from 11th September 2022 to 26th September 2022. It has not been stated by the prosecution that he has misused his liberty. His jail conduct is satisfactory and he also has no previous involvements.

23. The principal contention asserted by applicant counsel is regarding quantity of contraband alleged to have been seized. Two recoveries were made, as per the prosecution, on 15th December 2020 from a bag carried by applicant which was found to contain 5.09 kgs of *ganja* and thereafter, recovery of 125 kgs of *ganja* from his house along with cash in the amount of Rs.28,40,000/-.

24. Though the search was conducted of the bag in presence of the ACP, Dwarka Operations, there is no contention by applicant for non-compliance of Section 50, NDPS Act. Seizure of 125 kgs *ganja* from the applicant's house was, however, not in the presence of any independent witness, or captured by any videography or photography. This assumes certain importance since the seizure was done during the COVID-19 pandemic, and it is quite possible that individuals were not willing to join as independent witnesses. However, the seizure being from inside



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the premises of applicant, there is no reason why photography or videography could not have been done for apparent lack of independent witnesses.

25. As per the chargesheet, seizure from the house of applicant was on pointing out by the applicant, but was done at 7:30 pm in the presence of ACP, Dwarka Operations. Considering that seizure was done after sunset from a premises, there is also nothing on record to state that procure under *proviso* to Section 42, NDPS Act had been complied with. However, this aspect has not been asserted by applicant's counsel.

26. What has been focused on is the nature of substance recovered and seized. As regards 5.09 kg seizure from the bag, it is stated that it was "*badbudar seelandar patti aur ghasnuma beej yukt saman*" which was found on smelling, as *ganja*. As regards seizure from home of the applicant, the description given of 8 bags seized is of "*seelandar badbudar beej yukt wa pattidar ghasnuma saman*" which was also found on smelling, as *ganja*.

27. Counsel for applicant claims that this was obviously a heterogenous material which contained leaves and seeds, material seized cannot be counted as '*ganja*' in its entirety for the purpose of determining quantity seized. For this, reference was made to the definition of *ganja* under Section 2(iii)(b), NDPS Act which reads as under:

"(iii) "*cannabis (hemp)*" means—

...

(b) *ganja*, that is, the flowering or fruiting tops of the *cannabis* plant (excluding the seeds and leaves



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when not accompanied by the tops), by whatever name they may be known or designated;”

(emphasis added)

28. It is, therefore, claimed that material can be considered *ganja* if it is accompanied with flowering or fruiting tops; if not accompanied with flowering or fruiting tops, then seeds and leaves have to be excluded. *Ex facie*, as per the chargesheet, applicant claims that material seized was described as seedy and leafy substance and, therefore, the material seized in its entirety would not constitute as *ganja* for the purpose of determining the quantity of contraband seized, and benefit of bail ought to be given to the applicant.

29. The FSL report dated 14th January 2021 describes exhibits/ parcels received as containing “*dried greenish brown fruiting and flowering vegetative material*” which were found to be “*ganja*”. Reliance of applicant’s counsel on decision of Bombay High Court in ***Kunal Dattu Kadu*** (*supra*) may not come to his rescue since it is stated in said decision that in para 17 that whether substance is *ganja* would have to be determined on the facts of the case. That case involved anticipatory bail and the issue on which the opinion of Court went in favour of accused was discrepancy in what was seized and what was analysed.

30. Though the decision in ***Kunal Dattu Kadu*** (*supra*) is restricted to its own facts, reference may be made to another recent decision by the Nagpur Bench of Bombay High Court in ***Mohammad Jakir Nawab Ali v. The State of Maharashtra thr. P.S.O., P.S. Sonala, Dist. Buldhana*** decision dated 20th September 2024 in Criminal Application (BA) No.602/2024. It was noted, in a seizure of 50 kgs of *ganja*, that there was nothing on record to show that before taking weight of material the IO



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had segregated the seeds or other parts of the plant in order to ascertain the exact quantity of the contraband – *ganja*. The contraband seized was not mentioned as including flowering or fruiting tops of cannabis plant; since the material seized was leaves, seeds, stems, and stalks and separation had not been carried out, the Court noted that it was difficult to ascertain whether the quantity could be commercial. Court, therefore, granted bail to the applicant in that case. Relevant portions of the decision read as follows:

“5. There is no dispute that commercial quantity in relation to NDPS Act for ‘ganja’ means any quantity greater than 20 kg. The Section 2(iii) (b) and (c) defines ‘Ganja’ as the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever, name they may be known or designated, and any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom.

6. Thus the definition of term ‘ganja’ defines and clarifies that ‘ganja’ is the flowering or fruiting tops of the cannabis plant excluding the seeds and leaves when not accompanied by the tops. In the case in hand, as seen from the FIR and the investigation papers, the quantity of 50 kg. of ganja was seized from the vehicle. However, the inventory certificate as well as the recitals of the FIR, the panchnama shows that the seized articles were leaves, seeds, stems and stalks. It appears that when the gunny bag was measured with the help of weighing machine produced by the Measurer, the contraband articles containing leaves, seeds, stems and stalks. Admittedly, none of the investigating papers shows that either these materials were segregated and thereafter weighed.



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7. *The above state of affairs would make it clear that there is nothing on record to prima facie show that before carrying weight of the seized plant of ganja, the investigating officer had segregated the seeds or the other parts of the plant in order to ascertain the exact quantity of ganja. In fact, none of the paper mentions that the said contraband articles which were seized includes the flowering or fruiting tops of cannabis plant. This fact becomes further clear from the panchanama also. The seizure panchanama also nowhere shows that the flowering or fruiting tops of cannabis plant were, in any other manner, were along with the contraband articles seized from the possession of the present applicant. Thus, on perusal of the material on record shows that what was seized was plant i.e. leaves, seeds, stems and stalks and without separating the same, the ganja was weighed. As the seized material was not weighed and after separating the leaves and the other parts and moreover it is not along with the flowering or fruiting tops. Therefore, it is difficult to ascertain whether quantity can be said to be commercial.*

8. *In view of Section 37 of the NDPS Act, the power to release an accused on bail subject to the limitation contained in Section 439 of the Cr.P.C. coupled with the limitation contemplated in view of Section 37 itself, mainly (1) there are reasonable ground for releasing that accused is not guilty of such offence, (2) that he is not likely to commit such offence while on bail. The expression reasonable ground means something more than prima facie ground it contemplates substantial probable cause for believing that the accused is not guilty of the offence.*

9. *It is significant to note that the definition of 'ganja' under NDPS Act takes in its ambit only the flowering or fruiting tops of cannabis plant and excludes the seeds and leaves when not*



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accompanied by the tops. Thus, the definition of 'ganja' is restricted and it does not include the seeds and leaves of ganja plant. The panchanama and seizure do not reflect presence of flowering or fruiting tops on the plant. Another aspects of the matter is whether applicants could be said to have been charged for dealing in commercial quantity of the contraband articles. The inventory certificate mentions of the plant of ganja, which is of greenish colour and it nowhere shows that it includes the flowering or fruiting tops. If at all the seeds and other parts were to be counted as fruiting part, it ought to have been excluded and weighed separately to measure the quantity of ganja."

(emphasis added)

31. There is no clarity in the seizure memo as to whether the seized heterogenous material contained flowering or fruiting tops; the only reference to something of that nature comes on record from the FSL Report which mentions "*dried greenish brown fruiting & flowering vegetative material*". Even though the FSL report mentions it as *ganja*, the accused would obviously have an opportunity to argue this aspect at the stage of trial depending on the evidence that is led.

32. Counsel for applicant has, additionally, pointed out the issue of discrepancy in weight of contraband seized. While, as per the chargesheet, 125 kgs was seized from the house of the applicant while 5.09 kgs was seized from applicant's bag, totalling to 130.09 kgs, what was submitted along with the application under Section 52A(2), NDPS Act application before the Magistrate was '*143 kgs*' of *ganja*, even though the application itself stated that there was recovery of 130.09 kgs of *ganja*. Counsel for applicant, therefore, points to some reasonable



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doubt in the issue of what exactly was the amount of contraband seized and how 13 kgs could be added at the stage when material was submitted before the Magistrate.

33. APP for State has countered the same by stating that due to moisture the weight must have increased, however, increase of 13 kgs between seizure on 15th December 2020 and Magistrate noting on 18th December 2020 is an issue of concern. The note of the Magistrate further has an endorsement that the main IO was not available on that day.

34. Counsel for applicant highlighted that seizure of cash from house of applicant was in relation to a property which had been recently sold by applicant, agreement to sell for which has been attached. A perusal of the agreement to sell would show that it is dated 29th October 2020 and was executed by the wife of applicant. Even though nothing substantial can be ascertained from the terms of the agreement to sell, the fact that money recovered was from sale of contraband cannot be readily ascertained.

35. Counsel for applicant further contended that lack of photography or videography despite being aware that no public witness would be available would raises serious doubts about the search and seizure conducted by the respondent authorities. In this regard, various views have been taken by Courts in India. A coordinate Bench of this Court in ***Bantu v. State Govt of NCT of Delhi*** 2024:DHC:5006 dealt with the issue of lack of photography or videography in the absence of public witness and took note of observations by the Apex Court in ***Shafhi Mohammad v. State of Himachal Pradesh*** (2018) 5 SCC 311 emphasising role of audio-visual technology in enhancing the efficacy



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and transparency in the Police investigations. Further, in *Bantu* (*supra*) Court noted the need of changing times as incorporated by the Bharatiya Nagarik Suraksha Sanhita, 2023 [*“BNSS”*], where the practice of photography and videography has now been made mandatory as part of the investigation.

36. While the legitimacy of the search and seizure conducted by respondent authorities will be tested during trial, absence of public witnesses and photography/videography raises concern at this stage

37. What is of greater relevance in this case is the prolonged incarceration of applicant – for more than 3.5 years and only 2 or 3 witnesses having been examined out of arrayed 23 witnesses. As noted above, there is no previous involvement of applicant and he has been granted interim bail on 3 occasions where he surrendered on time. In this regard the Supreme Court has, in the cases noted as under, has taken a view in certain cases that accused under NDPS Act case can be released merely on issue of prolong custody. While there cannot be any formulaic application of such a principle, the surrounding facts and circumstances, aspects of seizure, and nature of contraband have to be considered. Relevant portions of decisions of the Supreme Court in this aspect are reproduced as under:

- i. *Rabi Prakash v. State of Odisha* 2023 SCC OnLine SC 1109 where a recovery of 247 kgs of *ganja* was made and the applicant had been in custody for more than three and a half years, with no criminal antecedents, the Court 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,



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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.”

- ii. ***Dheeraj Kumar Shukla v. State of U.P.*** 2023 SCC OnLine SC 918 where there was a seizure of about 65 kgs of *ganja* from the car driven by accused therein (*and 92 kgs ganja recovered from the car of the co-accused*) and the applicant was in custody for about two and a half years, the Supreme Court while granting bail, stated 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.”

- iii. In ***Man Mandal & Anr. v. State of West Bengal*** 2023 SCC OnLine SC 1868 where the seizure was commercial in nature and the applicant had been incarcerated for about two



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years and there was no hope of the trial concluding soon, the Supreme Court while granting bail stated as under:

“6. Taking into consideration the fact that the petitioners have been incarcerated for a period of almost two years and the trial is not likely to be taken up for hearing in the immediate near future, we are inclined to grant bail to the petitioners.”

- iv. In ***Badsha Sk. v. State of West Bengal*** 2023 SCC OnLine SC 1867 where the seizure was of 100 bottles of Phensedyl Cough Syrup (100 ml. each), containing Codeine Phosphate, the applicant had been in custody for about 2 years 4 months and the trial was yet to commence, the Supreme Court while granting bail noted as under:

“5. The above would show that the trial is yet to commence in the matter(s) and in the meantime, petitioners have been in custody for long. The State counsel submits that there are no known criminal antecedents against the two accused.”

38. Aside from this, reliance has also been made by counsel for applicant on ***Rajesh Kumar*** (*supra*) which involved recovery of 3.16 kgs of *charas* and custody was more than 2.5 years and trial was yet to begin; accused having no previous involvements was granted bail by a coordinate Bench of this Court. Relevant portions of the decision are as follows:

“17. 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



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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.

18. 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'.

19. Keeping in view the above referred judgments, in my opinion, the applicant has been able to make out a case for being released on bail."

39. In *Suraj* (*supra*), this Court considered custody of 3 years 8 months approximately in a seizure of 10 kgs of *charas* and granted bail.

40. Counsel for applicant relied on order dated 23rd August 2024 in W.P.(Civil) 406/2013 titled ***In Re-Inhuman Conditions In 1382 Prisons*** whereby the Supreme Court has directed that Section 479, BNSS shall retrospectively apply even to accused who are undergoing trial prior to the BNSS coming into force. Essentially Section 479, BNSS allows first-time offenders who have been incarcerated for about 1/3rd of the period for which he may be sentenced, to be released on bail. Relevant portions of the aforesaid decision are reproduced as under:

"1. This order is in continuation of the order passed on 13th August, 2024. On the last date of hearing, Mr. Gaurav Agrawal, learned Amicus Curiae had submitted that the Bharatiya Nagarik Suraksha Sanhita, 2023, which has replaced the



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Code of Criminal Procedure, 1973 w.e.f. 01st July, 2024, contains a provision under Section 479 relating to the 'Maximum period for which an undertrial prisoner can be detained'. The attention of this Court was drawn to the first proviso to Section 479 to urge that a first-time offender (who has never been convicted for any offence in the past) is required to be released on bond by the Court, if he has undergone detention for the period extending up to one-third of the maximum period of imprisonment specified for such an offence under a particular law.

2. Having regard to the fact that the substituted provision under the BNSS is more beneficial vis-a-vis Section 436A of the Code of Criminal Procedure, 1973, wherein the period undergone by the first time offender was prescribed as up to half of the maximum period of imprisonment specified for such an offence, this Court had called upon the learned Additional Solicitor General to obtain instructions from the Department and submit a clarification regarding application of the said provision to all undertrials across the country.

3. Today, Ms. Aishwarya Bhati, learned Additional Solicitor General, submits that pursuant to the aforesaid order, instructions have been obtained from the Department to the effect that the aforesaid provision under the BNSS shall apply to all undertrials in pending cases irrespective of whether the case was registered against them before 01st July, 2024, the date when the newly minted legislation has come into effect.

4. In that view of the matter, it is deemed appropriate to direct immediate implementation of Section 479 of the BNSS by calling upon Superintendents of Jails across the country wherever accused persons are detained as



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undertrials, to process their applications to the concerned Courts upon their completion of one-half/one-third, as the case may be, of the period mentioned in sub-section (1) of the said provision, for their release on bail. This step will go a long way in easing overcrowding in jails which is the primary focus of this Court in the present petition.”

(emphasis added)

41. Though the benchmark is 1/3rd of maximum imprisonment specified for such an offence; applicant's counsel has adverted to this as a useful guideline to consider prolonged custody. In any event, considering that applicant has undergone incarceration for more than 3.5 years, has no previous involvements, having been granted bail on 3 previous occasions without any misuse, as well as submissions of applicant's counsel having raising certain doubts and possible discrepancies in seizure itself and nature of contraband, the Court considers it fit to grant bail to applicant, particularly since the trial is pending and only 2-3 witnesses have been examined so far out of 22 odd witnesses.

42. Consequently, the applicant is directed to be released on bail on furnishing a personal bond in the sum of Rs. 1,00,000/- with one surety of the like amount subject to the satisfaction of the Trial Court, further subject to the following conditions:

- i. Applicant will not leave the country without prior permission of the Court.
- ii. Applicant shall provide permanent address to the Trial Court. The applicant shall intimate the Court by way of an affidavit and to the IO regarding any change in residential



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address.

- iii. Applicant shall appear before the Court as and when the matter is taken up for hearing.
- iv. Applicant shall join investigation as and when called by the IO concerned.
- v. Applicant shall provide all mobile numbers to the IO concerned which shall be kept in working condition at all times and shall not switch off or change the mobile number without prior intimation to the IO concerned.
- vi. Applicant will mark presence physically before the concerned I.O. every Tuesday on 4 pm and will be not kept waiting for more than an hour.
- vii. Applicant shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses, the complainant/victim or any member of the complainant/victim's family or tamper with the evidence of the case.

43. Needless to state that 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 merits of the matter.

44. Copy of the judgement be sent to the concerned Jail Superintendent for information and necessary compliance.

45. Accordingly, the bail application is disposed of. Pending applications (if any) are disposed of as infructuous.

46. Judgment be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

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