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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **BAIL APPLN. 2279/2024**

NABIULLAH HABIB ZADA

.....Petitioner

Through: Mr. Arjun Malik, Ms. Mayuri
Makhija, Ms. Cherry Suri and Mr.
Nigar Khan, Advocates.

versus

CUSTOMS

.....Respondent

Through: Ms. Anushree Narain, SPP.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

ORDER

26.07.2024

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1. By way of present bail application, the applicant seeks regular bail in SC No. 298/2021 arising out of Crime No. VIII(AP)/10 P&I/2991-C/Arrival/2020 registered under Sections 8/21/22 of the NDPS Act at P.S. Customs.

2. Learned counsel for the applicant submits that in the present case charge-sheet has been filed and that the applicant has been in custody since 13.10.2020. On merits, it is stated that there is illegality in the collection of samples and in this regard, reference has been made to the Standing Order 1/88 dated 15.03.1988 as well as order dated 05.08.2022 passed in BAIL APPLN. 1623/2022 titled 'Ram Bharose v. State (Govt. of NCT of Delhi)' wherein upon a similar issue in sampling being raised, the accused therein was granted bail. Additionally, it is contended that there is variance in the seizure memo, inasmuch as, at one place it is stated to be 2832.2 grams of



heroin and at other place its weight is shown as 2490 grams.

3. Learned counsel further submits that the prosecution has cited as many as 9 witnesses and out of them only 3 witnesses have been examined till date and thus, the trial is likely to take a long time. It is further contended that the applicant is not involved in any other case and has clean antecedents. Lastly, it is submitted that considering the period of custody, the applicant be released on bail and in this regards, reference has been to decision of the Supreme Court in:-

- i) Order dated 01.08.2022 passed in SLP (Crl.) 5769/2022 titled 'Nitish Adhikary @ Bapan v. The State of West Bengal'.
- ii) Order dated 04.08.2022 passed in SLP (Crl.) 4173/2022 titled 'Shariful Islam @ Sarif v. The State of West Bengal'.
- iii) Order dated 22.08.2022 passed in SLP (Crl.) 5530/2022 titled 'Mohammad Salman Hanif Shaikh v. The State of Gujarat'.
- iv) Order dated 17.01.2024 passed in SLP (Crl.) 12844/2023 titled 'Tinku Tagadgiri v. State of Odisha'
- v) Rabi Prakash v. State of Odisha reported as **2023 SCC OnLine SC 1109**

4. Learned SPP for the respondent, on the other hand, has vehemently opposed the bail by contending that applicant is an Afghan national and further that in the present case, there has been seizure of commercial quantity. Therefore, it is contended that since commercial quantity having been seized, parameters of Section 37 of the NDPS Act need to be met/satisfied. She, on instructions, submits that applicant's passport is lying with the Investigating Officer.

5. I have heard learned counsels for the parties and have also perused the



material placed on record.

6. Nominal roll of the applicant has been placed on record as per which, the applicant has undergone incarceration for a period of 3 years, 9 months and 7 days as on 20.07.2024. Statedly, though trial is underway, however, only 3 witnesses have been examined till date.

7. In the present matter, as per the prosecution case, it has been alleged that on 13.10.2020, the Customs officers apprehended the applicant and co-accused *Mohammad Haleem Hashimi*, and on account of some suspicious behaviour, physical search of the luggage and personal search of the said individuals was undertaken. Upon a personal search of the applicant, 12 polythene pouches containing an off-white-coloured powder were found in a black and orange vest jacket worn by the applicant. Upon testing, the substance tested positive for heroin. From the personal search of the co-accused, 13 similar polythene pouches, containing heroin were recovered.

8. The prime contention raised by learned counsel for the applicant is that till date, only 3 out of the 9 witnesses have been examined and that the trial is likely to take a long time. It is further submitted that the applicant is not found involved in any other case.

9. For appreciation of the said contention, it is deemed apposite if reference is made to certain decisions of the Supreme Court as well as this Court, wherein while considering the long period of incarceration and the fact that the trial was likely to take a long time, the accused was directed to be released on bail, even in those cases wherein commercial quantity was recovered.

10. In Union of India v. K.A. Najeeb reported as **(2021) 3 SCC 713**, the Supreme Court stated that if a timely trial is not possible, courts are



ordinarily obligated to release the undertrial on bail and statutory restrictions do not exclude the discretion of Constitutional courts to grant bail on grounds of violation of Fundamental Rights enshrined in Part III of the Constitution. While the said judgement was passed in the context of UAPA, the said observations merit mention:-

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12. Even in the case of special legislations like the Terrorist and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985 (“the NDPS Act”) which too have somewhat rigorous conditions for grant of bail, this Court in Paramjit Singh v. State (NCT of Delhi), Babba v. State of Maharashtra and Umarmia v. State of Gujarat enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians.

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15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee (Representing Undertrial Prisoners v. Union of India, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where 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 a 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.



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17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. 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 where 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. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

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11. While considering a case where the accused had undergone custody of more than two years, the Supreme Court in Jitendra Jain v. Narcotics Control Bureau reported as **2022 SCC OnLine SC 2021**, observed as under:-

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3. Though it is a case of commercial quantity and allegations levelled against the petitioner are serious in nature, but having regard to the fact that he is in custody for 2 years and conclusion of trial will take time, we are inclined to release the petitioner on bail.

4. The petitioner is, accordingly, ordered to be released on bail, subject to his furnishing bail bonds to the satisfaction of trial court.

xxx”

12. Again in Rabi Prakash v. State of Odisha (Supra), where the accused had remained incarcerated for more than three and a half years, the Supreme



Court while releasing the applicant on bail observed that:-

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4... 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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6. Consequently, while directing that the petitioner shall be released on bail on his furnishing bail bonds to the satisfaction of the Trial Court...

xxx”

13. More recently in Man Mandal and Anr. v. State of West Bengal reported as **2023 SCC OnLine SC 1868**, while taking into account continued custody of more than two years, the accused was granted bail. The relevant extract of observations is extracted hereunder:-

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5. Learned counsel appearing for the State submitted that in view of the statutory restrictions under Section 37 of the NDPS Act and the quantity being commercial in nature, the present special leave needs to be dismissed.

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.

7. The petitioners are directed to be released on bail in connection with aforesaid FIR, on such terms and conditions as may be imposed by the Trial Court.

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14. Taking cue from the legal position enumerated hereinabove, Coordinate Benches of this Court have, after due consideration of the facts



including the fact that trial is likely to take time, have released the accused on bail. Positive reference in this regard may be made the decision in Sachin Arora v. State Govt. of NCT of Delhi (2023:DHC:5808) and Vishwajeet Singh v. State (NCT of Delhi) (2024:DHC:1554).

15. In view of the discussions undertaken above, it is clear that even in situations wherein commercial quantity has been recovered from the accused, the said individual has been granted the benefit of bail, while considering the period of incarceration as well as the fact that the trial is likely to take some time in the case.

16. Considering the aforesaid factual and legal position, and especially the fact that the applicant has been in custody for more than 3 years as well as the fact that only 3 witnesses have been examined till date, in the considered opinion of the Court, the right of the applicant enshrined under Constitution of India overrides parameters of S.37 NDPS Act and therefore, the applicant is directed to be released on regular bail subject to his furnishing a personal bond in the sum of Rs.25,000 with one surety of the like amount to the satisfaction of the concerned Jail Superintendent/concerned Court/Duty M.M. and subject to the following further conditions:-

- i) The applicant shall not leave the NCR without prior permission of the concerned Court.
- ii) The applicant shall provide his mobile number to the Investigating Officer on which he will remain available during the pendency of the trial.
- iii) In case of change of residential address or contact details, the applicant shall promptly inform the same to the concerned



Investigating Officer as well as to the concerned Court.

iv) The applicant shall not directly/indirectly try to get in touch with the complainant or any other prosecution witnesses or tamper with the evidence.

v) The applicant shall regularly appear before the concerned Court during the pendency of the trial.

17. The bail application is disposed of in the above terms.

18. Copy of the order be communicated to the concerned Jail Superintendent electronically for information.

19. Copy of the order be uploaded on the website forthwith.

20. Needless to state that nothing observed hereinabove shall amount to an expression on the merits of the case and shall not have a bearing on the trial of the case as the same has been expressed only for the purpose of the disposal of the present bail application.

MANOJ KUMAR OHRI, J

JULY 26, 2024

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