



2024:DHC:8386



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

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Reserved on: 02nd September, 2024

Pronounced on: 21st October, 2024

+ **BAIL APPLN. 2324/2024 & CRL.M.A. 19599/2024**

CHIMA VITALIS

.....Applicant

Through: Mr. Chitwan Sharma, Advocate.

versus

STATE THROUGH PS DELHI RAILWAY STATIONRespondent

Through: Mr. Amit Ahlawat, APP for State with
Ms. Shehnaz Khan, Advocate Insp.
Yakub Khan & ASI Upender Singh, PS
Crime Branch.

CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. The present application is filed under Section 439 of the Criminal Procedure Code, 1973 ('CrPC') seeking grant of regular bail in FIR No. 43/2020 dated 9th December 2020 registered at New Delhi Railway Police Station for offences under Sections 22/29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') and 14 of The Foreigners Act, 1946 and



2024:DHC:8386



467/474 of the Indian Penal Code ('IPC'). The applicant was arrested on 9th December 2020 from New Delhi Railway Station.

Background Facts

2. The case of the prosecution is that on 8th December 2020, HC Dharmender and HC Pawan were on patrolling duty at the Railway Station. At about 8:45 PM, the applicant was spotted boarding 02692 Bengaluru Rajdhani AC Special and one lady with a polythene packet was also boarding the train, behind the said person. The Head Constables entered the coach of the train and saw that the applicant was on upper berth no.14 with one polythene packet, whereas, the lady was sitting on the lower berth with two polythene packets. On inquiry, they said these were domestic articles, however, on searching the same, a white crystal type substance was found in the polythene bags. Thereafter, the accused along with the other lady was brought to the police station for further questioning.

3. After testing the substance by way of field-testing kits, 'amphetamine' was found in polythene pouches which were in contained cardboard boxes in the plastic packets. It was further revealed that applicant was an African citizen & the other lady namely Shrimathi (*whose Bail Application No. 2672/2024 has also been preferred*) was from Tamil Nadu. One polythene packet was found in the possession of applicant and two polythene packets were found in the possession of co-accused/Shrimathi. On checking of the polythene packet within possession of the applicant, two cardboard boxes with 6 transparent pouches each (a total of 12 packets) were found. A total of 57



2024:DHC:8386



packets were recovered from both accused, amounting to a weight of 10.5 kg. From the recovered substance, two samples of 250g each were taken into police possession through seizure memo and the present FIR was registered. Subsequently, the accused persons were arrested on the same day i.e. 9th December 2020.

4. During the course of investigation, they disclosed that one person namely Michel of Dabri, Delhi had provided the drugs for supply of the same in Bangalore. Efforts were made to trace co-accused Michel, however, he could not be traced. Sampling was conducted in the MM Court and exhibits deposited in FSL Rohini for examination. CCTV footage was obtained and placed on record. Railway tickets of both the accused were verified. Visa No. VJ5374920 of the applicant was verified from concerned officials, which was found to be fake, issued in the name of Quaid Johar of Pakistan. On inquiry, it was found that applicant had come to Mumbai Airport on 15th December 2011 on his passport and visa. Therefore, sections 467/474 IPC and 14 of Foreigners Act, 1946 were added. FSL report confirmed that the substance was 'methamphetamine'. CDRs were analyzed to show that both accused were connected with each other. Chargesheet was filed after completion of investigation. Previous bail application of applicant was dismissed by Special Judge (NDPS) Tis Hazari Courts *vide* order dated 29th February 2024. Hence, the present application.

Submissions on behalf of Applicant

5. Counsel for applicant has raised *inter alia* the following contentions.



2024:DHC:8386



6. On the issue of delay in trial, counsel for applicant submitted that the applicant has been falsely implicated in the present case & has been in custody for a period of 3 years and 9 months approximately. He states that out of the total of 45 packets recovered from both accused, only 12 packets were recovered from the applicant herein. He submits that all packets recovered, were mixed together and sample was drawn on the spot after mixing of all packets recovered from both co-accused persons. He submits that the said combined substance was emptied on one cloth and then weighed, after which samples were sent to FSL Rohini for testing. He submits that this is a clear violation of Section 52A NDPS Act and Standing Order 1/88.

7. He submits that the manner and mode of sampling of drugs under Section 52A of NDPS mandates that the officer in charge must make an application to the Magistrate prior to drawing representative samples of a recovered substance. He submits that the objective of Section 52A is to avoid the likelihood of tampering of the substance recovered from an accused and it is for this reason that representative samples are provided to be drawn before the Magistrate. However, in the instant case, it was the constables themselves who emptied all packets recovered from both the accused into one cloth and in the absence of drawing samples in presence of a Magistrate, the entire recovery from the accused is cast under a shadow of doubt. For this, he places reliance on *Simarnjit Singh v State of Punjab* 2023 SCC OnLine SC 906 where the Apex Court held that the act of drawing samples in the absence of Magistrate was fatal to the case of the prosecution.



2024:DHC:8386



8. He further submits that a perusal of the chargesheet reveals that the procedure adopted in drawing representative samples from the recovered substances is not in accordance with the Standing Order No. 1/88. He further submitted that in accordance with the Standing Instructions No. 1/88, in the event samples are recovered from different packets, the same should not be mixed and samples should be taken from each packet. For this, he placed reliance on ***Ram Bharose v Government of NCT of Delhi*** 2022 SCC OnLine Del 5029 where a Coordinate Bench of this Court held that the said act of mixing prior to drawing of samples, vitiated the sanctity of the recovered substances and released the accused on bail. He submits that there can be no ascertainment of the quantity of contraband substances recovered from the applicant as the quantities from both packets had been mixed and emptied on one cloth before they were weighed. Furthermore, he submits that despite the incident happening on a railway station, there is no independent witness to attest the entire process.

9. Counsel for applicant submits that drawing of samples was done on 9th December 2020 in the absence of the Magistrate and it is on 16th December 2020, that the samples were sent to FSL Rohini. He submits that the penalty for holding a fake passport/visa is 5 years and the applicant has already spent 4 years in custody. He submits that the next date of hearing in Trial Court is 11th September 2024 and that even though 4 years have elapsed, out of 15 witnesses, only one formal witness has been examined till date.

Submissions on behalf of State



2024:DHC:8386



10. The APP for the State strongly opposed the grant of any relief to the applicant. He submitted that lack of strict adherence to the Standing Orders, delay in preferring the application under Section 52A of the NDPS Act or absence of independent witnesses are merely procedural irregularities and would not vitiate the trial. He placed reliance on the decision in *Vaisakh v State of Kerala 2024* SCC OnLine Ker 924 while interpreting Section 52A of NDPS Act and the decision in *Union of India v Mohanlal* 2016 3 SCC 379 where the Supreme Court observed that there is no question of drawing samples at time of seizure.

11. Regarding no independent witnesses present, he placed reliance on the order dated 2nd November 2023 arising out of Criminal Appeal No. 2027 of 2012 titled *Jagwinder Singh v State of Punjab*. Regarding vitiation of standing orders, he placed reliance on *Masibur Khan v State (Govt. of NCT of Delhi)* 2023 SCC OnLine Del 3326 where a Single Bench of this Court held that standing orders cannot be exhaustive enough to cover all factual scenarios at the time of seizure of the contraband.

Analysis

12. The seizure in this case was on 8th December 2020, upon interception of the applicant along with co-accused namely Shrimathi and the total quantity recovered was 10.5 kg of 'methamphetamine'. The threshold for commercial quantity of 'methamphetamine' is 50 gms, the seized contraband therefore, was at least two hundred times that quantity. Applicant was arrested on 9th December 2020 and has been incarcerated since almost 4 years. The



2024:DHC:8386



case is pending trial at the stage of prosecution evidence and one formal witness, out of 15 witnesses, has been examined.

13. The seizure in this case was on 8th December 2020, upon interception of the applicant along with co-accused namely Chima and the total quantity recovered was 10.5 kg of '*methamphetamine*'. The threshold for commercial quantity of '*methamphetamine*' is 50 gms, the seized contraband therefore, was at least two hundred times that quantity. Applicant was arrested on 9th December 2020 and has been incarcerated since almost 4 years. The case is pending trial at the stage of prosecution evidence and one formal witness, out of 15 witnesses, has been examined so far.

Sampling Procedure

14. The first objection is regarding the sampling procedure where applicant contends that mandatory provisions of sampling procedure under Section 52A of NDPS Act were not complied with. In the present case, the seizure was made on a railway platform in Bengaluru, where a total of 57 packets were found to be in possession of both applicant and co-accused Shrimathi while they were boarding the train. Out of these, 12 packets were recovered from the polythene, in possession of applicant. 33 packets were found from the first polythene bag recovered from the co-accused and 12 packets were found from the second polythene bag recovered from the co-accused. As per seizure memo dated 9th December 2020, cardboard boxes were found in the polythenes carried by the accused and upon opening such boxes, transparent pouches were retrieved, containing crystal white substance. These pouches were opened and weighed on a cloth and the total weight was found to be



2024:DHC:8386



10.5 kg. From that substance, two samples of 250 gms each were drawn, kept separately in two plastic containers and which were sealed and marked S-1 & S-2. It would have to be seen whether, the process adopted of mixing all the samples at the spot recovered from the packets, would cause any prejudice to the accused.

15. Prior to 23rd December 2022, when the Standing Order ('SO') issued by Ministry of Finance came into the picture (*issued under Section 76 read with Section 52A NDPS Act*), the seizure and sampling guidelines which regulated the process were resident in SO 1/88 [*issued by the Narcotics Control Bureau*] and SO 1/89 [*applicable from 13th June 1989 issued by Government of India, Ministry of Finance*].

16. SO 1/89 was promulgated in exercise of powers conferred by Section 52A(1) NDPS Act dealing with disposal of seized narcotics and primarily provides for a regime of proper disposal of drugs as envisaged under Section 52A. While *Section I* provides a list of drugs meant for disposal, *Section II* provides the general procedure for sampling, storage etc., *Section III* is for receipt of drugs in godowns and the procedure to be followed while *Section IV* for actions to be taken for pre-trial disposal. The sequential flow, therefore, in essence, is as under:

- i. Drugs seized shall be classified, weighed and sampled at the time of seizure;
- ii. Seized packages shall be carefully numbered and kept for sampling;



2024:DHC:8386



- iii. Samples shall be drawn on the spot of recovery, in duplicate, in presence of *panchas* and the person accused. Mention of this should be made in the *panchnama* drawn on the spot;
- iv. The quantity drawn from each sample shall be not less than 5 g (24 g in cases of *opium, ganja, and charas*);
- v. The seized drugs from the packages/containers shall be well-mixed to make it homogenous before the sample is drawn;
- vi. In case the seizure is from a single packet, one sample in duplicate will be drawn; if more packages/containers then one sample will be taken from each of them. If many packages are seized of identical size and weight, they “*may be bunched in lot of 10 packages/containers*” (in case of *ganja and hashish*) in lots of 40 packages/containers;
- vii. Post the sampling it shall be secured and marked. They shall be dispatched to the FSLs. The residual quantity of the drugs would be stored in safes and vaults with the prescribed agencies after following due process;
- viii. Orders may be obtained for pre-trial disposal under Section 52A(2), NDPS Act and an application pertaining to the same be made to the Magistrate after proper inventorisation has been achieved;
- ix. Magistrate would allow an application as soon as possible and go through the process of certifying the inventory, taking photographs, drawing representative samples and certifying the same, followed by disposal.



2024:DHC:8386



17. The above are relevant steps in the procedure, aside from other attendant guidelines. Notably, considering there is no procedure in the NDPS Act itself, SO's are usually relied upon as guideposts for proper acceptable seizure and sampling. If the Court is of the view, depending on facts and circumstances of a particular case that, the procedure adopted is so erroneous and so defective and extremely prejudicial, casting a shadow of doubt to the genuineness of the recovery and importing a suspicion of false implication and planting of the contraband, the Court may be inclined to consider grant of bail. There is no doubt, that the Court has also to consider the quantity of the recovery and the nature of the contraband, and the circumstances in which it was seized, each of which could potentially work to the benefit of the accused for the purposes of bail. Essentially, all these elements, factors, situations, are to be weighed and examined in the crucible of Section 37 NDPS parameters. The said provision requires a Court to be "*satisfied*" the accused is "*not guilty*" of the offence alleged, such satisfaction being based on "*reasonable grounds*". Likelihood of committing an offence while on bail is the other parameter. There is a distinction therefore, in an assessment made, post-conviction (*in an appeal*) where the complete evidence is before Court, and that at the stage of bail, when the material before Court is that provided by the prosecution.

18. A thoroughbred examination can happen only post-trial, post-conviction in an appeal. At the stage of bail, a subjective analysis based on some objective criteria can be made, which would determine whether the Section 37 threshold is passed or not. This, in the opinion of this Court, is



2024:DHC:8386



what imbues as assessment at the stage of bail. Circumstances of sampling and seizure can vary hugely and it may not be correct to place the same, in discrete and inflexible slots.

19. As noted, there is no prohibition, at least pre-December 2022, when notification issued by Ministry of Finance came into effect, in drawing the samples at the stage of seizure. Further, it is mandated that the drugs should be well-mixed to make them homogenous before drawing a sample. Guidelines in terms of multiple packages/containers require an option to be bunching them in lots. The phrase used in clause 2.5 of SO 1/89 is “*may be carefully bunched in lots*”. This is in contrast to the other clauses which use the words “*must*” and “*should*” or “*shall*”. The option of drawing in lots must be provided in order to accommodate for various situations which may arise on the spot.

20. The contention of the applicant that there is a violation of Section 52A of NDPS Act, as mixing of packets recovered has been done prior to taking the sample, cannot be held to be tenable as violation of any Standing Order would not remove the bar under Section 37 of the NDPS Act. A Coordinate Bench of this Court in *Masibur Khan v State (NCT of Delhi)* 2023 SCC OnLine Del 3326 (where there was a recovery of 9 bags containing 4 small packets each, in total 36 packets of 5 kg each, and the total recovery being 180 kg of *ganja*) has held that at the time of deciding the bail application, determination of the compliance or non-compliance of the procedure with regard to the Standing Order NO.1/89 or under Section 52-A of the NDPS Act cannot be done because the same could only be determined after the



2024:DHC:8386



appreciation of evidence during trial. Therefore, in the opinion of this Court, no prejudice is caused to the accused as it being a chance recovery, and it is premature at this stage to say that the samples drawn are not true representative samples of the contraband seized, and the same shall be determined during the course of trial.

21. The relevant paragraphs of the said decision in **Masibur Khan** (*supra*), are extracted as under:

“38. In the present case, the Seizing Officer had taken sample from each of the 04 bags contained in each of the 09 bags and after homogenously mixing those 04 samples, 02 samples of 250 gm each has been drawn with respect to each of 04 bags containing in one bag. It is also pertinent to note that recovery was with regard to ganja which otherwise is identifiable by its texture and smell, so non usage of field testing kit is not fatal to the procedure. In any case final confirmation has to be from the chemical analyst.

39. In view of the aforesaid, this Court is of the opinion that the procedure adopted with respect to contraband in the present case is not defective in nature, at this stage. The applicant will get ample opportunity to prove that the said recovery was defective and samples drawn were not the true representatives of the contraband recovered, during the course of trial before learned Special Judge. It is pertinent to note that, the said standing orders cannot be exhaustive enough to cover all factual scenarios at the time of seizure of the contraband. Various factors like nature of contraband seized, the volume/quantity of the seizure, place of seizure, time of seizure, etc. will be relevant to determine any non-compliance thereof and effect of such non-compliance.



2024:DHC:8386



40. Hon'ble Supreme Court in *Balbir Singh (supra)* observed that the Investigating Officer is bound by the procedural instructions and has to follow the same, and in case of non-compliance thereof, and if no proper explanation is forthcoming, then the same would have adverse impact on the prosecution's case. It was further noted in the said judgment that the Courts would appreciate the evidence and merits of the case keeping these aspects in view. In the opinion of this Court, whether the sample drawn would be a true representative sample of the contraband recovered, can be answered by the chemical analyst, who analyses the sample and gives his/her opinion. Learned Special Judge during the course of the trial will have the advantage of the testimony of the chemical analyst as well as the production of contraband seized in the Court. It is pertinent to note that the case property is still there for any further analysis if so required. Therefore, it is premature at this stage to say that the sample drawn are not true representative samples of the contraband seized. In the present case, at the time of examination of case property, the learned Special Judge can satisfy himself with regard to the correctness of the procedure followed."

(emphasis added)

22. Moreover, the recovery was from both the co-accused admittedly travelling together and in this regard it may be useful to note the observations of the Coordinate Bench in *Awadhesh Yadav v State (NCT of Delhi)* 2023 SCC OnLine Del 7732, which are extracted as under:

"49. From the provisions of law and the essence of case-laws, as discussed above, following principles can be culled out governing clubbing of the quantity of contraband recovered from two or more co-accused, at the stage of bail:



2024:DHC:8386



i. invocation of offence of abetment and/or conspiracy under Section 29 of the Act is must for clubbing of quantity. However, there cannot be a straight jacket formula for clubbing the quantity of contraband recovered from all the accused, merely on the basis of invocation of offence under Section 29 of the Act. It will depend on the factual backdrop of each case and the incriminating material available against the accused persons.

ii. the incriminating material relied upon to invoke the offence of abetment and/or conspiracy under Section 29 of the Act, has to be cogent and convincing against each one of the accused charged with the offence of abetment and/or conspiracy.

iii. in a case where joint recovery of contraband has been effected from two or more co-accused, the recovered contraband cannot be equally divided amongst the number of accused to determine whether the quantity of contraband recovered in “commercial quantity” or not.

iv. where accused persons are travelling together in the same private vehicle individually carrying contraband, it will not be proper to consider the alleged recovery to be an individual recovery and the contraband recovered from all persons can be clubbed.

v. if an accused is a habitual offender, it gives rise to an inference that he knows the tricks of the trade. In such a situation, previous involvement of the accused in the case(s) under the NDPS Act, is an additional factor which could be considered, besides other incriminating circumstances, for adding the quantities of contraband recovered from two or more co-accused.

(emphasis added)



2024:DHC:8386



Delay in Filing Application under 52A NDPS

23. The other contention of the accused is regarding the delay in compliance of Section 52A of NDPS Act proceedings. Section 52A of the NDPS Act prescribes that upon seizure of psychotropic substances, the officer shall approach the Magistrate, under whose presence and supervision the process of sampling will be conducted and certified to be correct.

24. In the present case, the delay claimed in filing the application under Section 52A NDPS Act, as contended by counsel for applicant, is of 11 days. The recovery of contraband from the applicant was on 8th December 2020 and the application under Section 52A NDPS Act was filed by the IO on 17th December 2020, however, the sampling of substances seized was conducted by the Judge only on 19th December 2020, causing a delay of 11 days in compliance of 52A proceedings.

25. Though the application under Section 52A of the NDPS Act has to be made without undue delay, no time limit for the same has been prescribed. SO 1/88 requires samples to be dispatched to the FSL not later than 72 hours. Further, as regards the delay in moving application under Section 52A NDPS Act, there is nothing in the SO 1/89 which prescribes specific time-period.

26. Counsel for applicant relies upon ***Kashif v Narcotics Control Bureau*** 2023 SCC OnLine Del 2881, a decision of a Coordinate Bench of this Court, in order to contend that delay in filing Section 52A application ought to



2024:DHC:8386



render the Court, to afford benefit of doubt to the applicant. Relevant portions of the said decision are extracted as under:

“24. Hence, I am of the view that non-compliance of section 52A within a reasonable time gives rise to the apprehension that sample could have been tampered with and in case of a wrongly drawn sample, the benefit of doubt has to accrue to the accused. The prosecuting agency has to prove at the time of trial that the sample was immune from tampering.

25. In the present case, the sample was kept in the custody of the prosecuting agency for more than one and a half month, thus, raising doubt with regards to tampering of the same.

26. Another reason which persuades me to take this view is that once the Apex Court has held in Mohanlal (supra) that the application under 52A has to be made without any undue delay, there should not be any reason for delaying the filing of application.

27. The application for sample collection under section 52A is not a technical application wherein elaborate reasons, principles of law or detailed facts are required. It is more of a clerical application and should mandatorily be made within a reasonable time under section 52A NDPS. The application has to be moved at the earliest and in case, the same has not been moved, the reasons for delay must be explained by the authorities.

Reasonable time under section 52A

28. What is reasonable time depends on the facts and circumstances of each case. However, it cannot be the intention of the legislature that an application for sample collection can be moved at the whims and fancies of the prosecuting agency. Therefore, taking cue from the



2024:DHC:8386



Standing Order 1/88, it is desirable that the application under 52A should be made within 72 hours or near about the said time frame.”

(emphasis added)

27. Thereafter, another Coordinate Bench of this Court in **Somdutt Singh @Shivam v Narcotics Control Bureau** 2023:DHC:8550 distinguished the judgment in the case of **Kashif** (*supra*) on the aspect that no recovery was effected from the possession or at the instance of the applicants therein and thus, embargo of Section 37 was not attracted. While dismissing the bail application, Court in **Somdutt Singh @ Shivam** (*supra*) observed as follows:

*“16. Furthermore, recently a Co-ordinate Bench of this Court in Surender Kumar (*supra*) has observed that Section 52-A of the NDPS Act is directory in nature and non-compliance of the same, in itself, cannot render the investigation invalid. Accordingly, the bail application of an accused charged of illegally selling narcotic medicines was dismissed by taking into account that the case involved commercial quantity of such medicines.*

17. It is clear from a reading of the aforesaid judgments that there is no mandatory time duration prescribed for compliance of Section 52-A of the NDPS Act. Though it is desirable that the procedure contemplated in Section 52-A of the NDPS Act be complied with at the earliest, mere delayed compliance of the same cannot be a ground for grant of bail. The applicant will have to show the prejudice caused on account of delayed compliance of Section 52-A of the NDPS Act.”

(emphasis added)



2024:DHC:8386



28. The order passed in the case of **Somdutt Singh** (*supra*) was challenged before the Apex Court in Special Leave Petition (Crl.) No. 415/2024. By order dated 16th May 2024, the Court dismissed the said special leave petition.

29. In this Court's opinion, the applicant has failed to overcome the threshold as prescribed by Section 37 of the NDPS Act and the applicant may, in accordance with applicable law, contend prejudice caused on account of this delay, during trial. The judgement of a Coordinate Bench in **Sovraj v State** 2023:DHC:8550, on similar lines, has observed as under:

57. It is pertinent to note that the Hon'ble Apex Court in the case of Union of India v. Mohanlal (supra) had specifically noted that while the process of sampling cannot be left to the whims of the prosecution and the application for sampling and certification ought to be made without undue delay, there was no room for prescribing or reading a time-frame into the provision. Though no timeframe has been incorporated in the provision, the application should be made without undue delay. The cause of delay, however, in the opinion of this Court, can be explained by the prosecution during the course of trial and is not fatal.

58. As long as the prosecution is able to justify the delay on its end, mere delay would not vitiate the evidence. To hold otherwise would lead to an odd situation where even a few hours post the threshold of 72 hours would nullify the evidence. The Court has to be cognizant of the ground realities where situations may arise where the sample was not sent to FSL on time or the application under Section 52A of the NDPS Act could not be preferred on time.

(emphasis added)



2024:DHC:8386



Prolonged incarceration & Delay in Trial

30. The plea of delay in trial and prolonged incarceration, though being recognized by the Supreme Court as an inalienable right under Article 21 of the Constitution of India, cannot have a formulaic application. The assessment therefore, on prolonged custody and delay in trials will depend on facts and circumstances of the case. Whether 2 or 3 years or more is considered '*prolonged*', is clearly left to the assessment of the Court.

31. Reliance may be placed on the decision of ***Emeka Prince v State NCT of Delhi*** 2024:DHC:7768 where this Court while analysing various decisions of the Supreme Court, with regard to undue delay in trial, stated that the Supreme Court has consistently held in various decisions that bail on ground of undue delay in trial is unfettered by rigors by Section 37 NDPS, where there is prolonged custody even in cases of commercial quantity. In this regard the decisions of ***Rabi Prakash v State of Odisha*** 2023 SCC OnLine SC 1109 (recovery of 247 kgs of *ganja* and applicant had been in custody for more than three and a half years), ***Dheeraj Kumar Shukla v State of U.P.*** 2023 SCC OnLine SC 918 (seizure of about 65 kgs of *ganja* and the applicant was in custody for about two and a half years), ***Man Mandal & Anr. v State of West Bengal*** 2023 SCC OnLine SC 1868 (seizure which was commercial in nature and the applicant had been incarcerated for about two years), ***Badsha Sk. v State of West Bengal*** 2023 SCC OnLine SC 1867 (seizure 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 ***Mohd. Muslim alias Hussain v State (NCT of Delhi)*** 2023 SCC OnLine SC



2024:DHC:8386



352 (recovery of 180 kg of *ganja* and applicant was in custody for over 7 years and 4 months), are relevant.

32. What may be relevant is to weigh in balance, as in the present case, the nature and quantity of the contraband seized and whether there is something seriously prejudicial about the procedure undertaken by the investigation agency. Most of the decisions cited above, giving benefit of bail for prolonged custody, were based on their own peculiar facts, some with more than 3 years of custody and some of recovery of *ganja*. Though this cannot be formulaic, the analysis serves as a guidepost.

33. In this case, there has been a seizure of 10.5 kg of ‘*methamphetamine*’, which is much above the threshold for commercial quantity (50 gms). In balancing matters of personal liberty, conduct of fair trial, and the task of discharging the duty to curb the menace of drugs running rampant in this country, it is pertinent to mention observations of the Supreme Court in ***Ranjan Kumar Chadha v State of Himachal Pradesh*** 2023 SCC OnLine SC 1262 which are extracted under:

“129. It has been observed in Baldev Singh (supra) that drug abuse is a social malady. While drug addiction eats into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to some United Nation Conventions which the Government of India has ratified. It



2024:DHC:8386



is, therefore, absolutely imperative that those who indulge in this kind of nefarious activities should not go scot-free on technical pleas which come handy to their advantage in a fraction of second by slight movement of the baggage, being placed to any part of their body, which baggage may contain the incriminating article.”

(emphasis added)

34. In the present case, the applicant has undergone 4 years of custody and the trial is progressing. An attempt may be made by the Trial Court to expedite the trial. In the event, that trial does not proceed ahead expeditiously, needless to state that applicant will have the right to approach the Court at a subsequent stage.

35. In this regard, it is to be noted that in the decision of the Supreme Court in **Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v Union of India** (1994) 6 SCC 731 in context of incarceration as an undertrial and delay in disposal of cases, it was stated *inter alia* that when an undertrial is charged with offences with minimum imprisonment of 10 years, and if they have been in jail for not less than 5 years, they may be released on bail upon furnishing bail bond in the sum of Rupees 1,00,000/- with two sureties for like amount. This view has been endorsed in **Thana Singh v Central Bureau of Narcotics** (2013) 2 SCC 603 as under:

“4. Time and again, this Court has emphasised the need for speedy trial, particularly when the release of an undertrial on bail is restricted under the provisions of the statute, like in the present case under Section 37 of the NDPS Act. While considering the question of grant of bail to an accused facing trial under the NDPS Act in Supreme Court Legal



2024:DHC:8386



Aid Committee (Representing Undertrial Prisoners) v. Union of India [(1994) 6 SCC 731 : 1995 SCC (Cri) 39] this Court had observed that though some amount of deprivation of personal liberty cannot be avoided in such cases, but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 of the Constitution would receive a jolt. It was further observed that after the accused person has suffered imprisonment, which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21. We regret to note that despite it all, there has not been visible improvement on this front.

(emphasis added)

Non-joinder of Independent witnesses

36. Regarding independent witnesses, reliance may be placed on the decision in Order dated 2nd November 2023 arising out of Criminal Appeal No. 2027 of 2012 titled ***Jagwinder Singh v State of Punjab*** where the Supreme Court of India held that law does not require only an independent witness to prove charges that attract the provisions of NDPS Act. The relevant paragraph is extracted as under:

“7. We find no merit in this appeal. Law does not require only an independent witness to prove a charge attracting the provisions of NDPS Act. As was rightly held by the Courts below, there is procedural compliance with respect to arrest, seizure and recovery. PW-3 is competent to undertake the exercise of gathering evidence and, in any case, PW-7 who himself is a gazetted officer was very much present. The recovery was also made from the car. The views expressed by the Courts below that non-filling of the



2024:DHC:8386



CFCL form at the site where the arrest and recovery was made would not vitiate the case as it constitutes a part of procedural law.”

(emphasis added)

37. A Coordinate Bench of this Court in ***Bantu v State Govt. of NCT of Delhi*** 2024 SCC online Del 4671 held that it is open to the prosecution to justify the non-association of independent witnesses during the course of the trial, the relevant portion of which, is extracted as under:

61. In the present case as well, the raiding party was successfully able to reach the spot and lay a trap to apprehend the applicant in the intervening time after receipt of information. It is peculiar that the Investigating Agency was unable to associate even a single public witness in the same time, especially since the applicant was apprehended at a crowded place. No effort to serve any notice under Section 100 of the CrPC has been pointed out to have been made either. In such circumstances, prima facie, the non-joinder of independent witnesses by the prosecution is a frailty in the prosecution's case.

62. A Coordinate Bench of this Court in the case of Krishan @ Babu v. State : BAIL APPLN. 2804/2023 had observed that nonjoinder of a public witness when the recovery is made in public in broad daylight is a factor that ought to be considered while considering the question of grant of bail to the accused person. This Court is in agreement with the said observation.

63. As held by the Hon'ble Apex Court in the case of Raveen Kumar v. State of Himachal Pradesh (supra) and State of Punjab v. Balbir Singh (supra), absence of independent witnesses does not vitiate the trial, however, in such circumstances, an additional duty is cast on the Court to



2024:DHC:8386



consider whether any prejudice is caused to the accused person while testing the credibility of the testimonies of the official witnesses. The same is to be tested over the course of a trial. Any observation to this effect without affording an opportunity to the prosecution over the course of the trial to establish its case beyond reasonable doubt would be premature.

64. As noted above, it is open to the prosecution to justify the non-association of independent witnesses during the course of the trial, however, at this stage, prima facie, no cogent explanation has been adduced to tilt the balance in favour of the prosecution on this aspect.

(emphasis added)

38. In light of the above discussion and taking into consideration the serious allegations, nature of offence, statutory bar under Section 37 of the NDPS Act and quantity of contraband recovered from the applicant, this Court is unable to reach a *prima facie* view that the applicant is not guilty of the offences and is unlikely to commit the same when on bail and concludes that there are no grounds made out for granting bail to the applicant at this stage.

39. Petition is therefore, dismissed. Pending applications, if any, are rendered infructuous.

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

**(ANISH DAYAL)
JUDGE**

OCTOBER 21, 2024/MK/na