



2024:DHC:5178



IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 15.07.2024

+ **BAIL APPLN. 3278/2023**

RAKESH KUMAR

..... Applicant

versus

**STATE OF NCT OF DELHI THROUGH
THE SHO CRIME BRANCH, PUSHP
VIHAR, DELHI**

..... Respondent

Advocates who appeared in this case:

For the Applicant : Ms. Leelawati, Mr. Nakul Chaudhary &
Mr. Sagar Chhikara, Advs.

For the Respondent : Mr. Y.R. Ansari, ASC for the State with
Mr. Alok Sharma & Mr. Vasu Agarwal,
Advs.
Inspector Vikas Pannu, AGS, Crime Branch,
Dwarka

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

JUDGMENT

1. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') seeking regular bail in FIR No. 104/2021 dated 12.06.2021, registered at Police Station Crime Branch, for offences under Sections 20/25/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').



2024:DHC:5178



2. The brief facts of the case are that on 12.06.2021, at about 4:30 AM, a secret information was received that one Shanta Ram (resident of Himachal Pradesh), who was involved in supply of Charas in Delhi, Haryana, Punjab and Himachal Pradesh, would be sending one consignment of Charas to Delhi through his trustworthy driver, that is, the applicant in a Truck. It was also informed that the applicant would deliver the consignment to co-accused Ridhm Rana near Fortis Hospital, Vasant Kunj.

3. The information was lodged in the General Diary. Accordingly, a raid was conducted near the red light near Fortis Hospital. The raiding party reached the spot at about 6:10 AM and observed that two vehicles, including the truck bearing the registration number as informed by the secret informer, were parked on the Vasant Kunj Road. Three persons were found talking to each other near the vehicles and they were allegedly identified by the secret informer as the applicant, co-accused Ridhm and the third person was identified as a friend of co-accused Ridhm who also indulged in illegal drug business (that is, co-accused Sarvesh Chaudhary). It is alleged that the applicant took out two polythene bags (one black in colour and the other white in colour) from the cabin above the truck. It is alleged that the applicant handed over the Black polythene to co-accused Ridhm and the White Polythene to the friend of co-accused Ridhm. It is alleged that both the co-accused persons checked the substance and thereafter, gave some money to the applicant. It is alleged that the accused persons shook hands and started sitting in their respective vehicles.



2024:DHC:5178



4. When they were about to leave, the raiding team apprehended all three of them around 6:20 PM. Upon spotting the raiding team, the co-accused persons discarded their polythene bags on the road. Testing revealed that the polythene bags contained Charas. Co-accused Sarvesh's bag (that is, the white bag) contained Charas weighing 456g and co-accused Ridhm's bag (that is, the black bag) weighing 750g.
5. A personal search of the applicant was conducted and it is alleged that ₹20,000/- given to him by the co-accused persons and a mobile phone were recovered from his possession.
6. All the three accused persons were arrested and it is alleged that after thorough investigation, they all admitted their active involvement in the crime.
7. As per the FSL Chemical Report, the contraband recovered from the possession of accused persons was tested positive to be Charas.
8. It is the case of the prosecution that the co-accused persons went to the spot in the wee hours on the day of the incident to receive the consignment of Charas from the applicant.
9. It is alleged that the CDR of the mobile number recovered from the possession of the applicant revealed that he was in constant touch with the co-accused Shanta Ram, who is alleged to be the source of the contraband, and co-accused Ridhm.
10. The applicant's bail application was dismissed by the learned Trial Court *vide* order dated 21.07.2023 due to the embargo under Section 37 of the NDPS Act.



SUBMISSIONS OF THE APPLICANT

11. The learned counsel for the applicant submitted that the applicant has been falsely implicated in the present case.

12. She submitted that it is natural that if the accused was driving the truck on said date, he must have had a valid Driving License and if he has no Driving License, then he is liable to be proceeded under Section 181 of the Motor Vehicles Act, 1988 which is missing in the present case.

13. She further submitted that the police officials had sufficient time to make sincere efforts to associate independent public witnesses in the raiding team. However, there is no independent witness in the present case.

14. She submitted that the alleged personal search memo was prepared by the police under the signature of official witnesses and the same was not signed by any independent witness which clearly reveals that the case of the prosecution is fabricated.

15. She submitted that it is the case of the prosecution that the amount taken by the Applicant is ₹20,000/-, however, the police recovery only showed ₹400/- in the personal search memo.

16. She submitted that it is difficult to believe that the applicant was only travelling with ₹400/- to transport the contraband over such a large distance.

17. She further submitted that the phone number attributed to the applicant is registered in the name of someone else. She submitted that except for the police party, there is no proof that the phone was used by the applicant or that the same was recovered from him.



2024:DHC:5178



18. She submitted that the applicant was not arrested at the spot as per arrest memo and no independent witness had joined at the time of apprehension and recovery and therefore there was clear violation of Section 100(4) of the CrPC.

19. She also contended that there was non-compliance of Section 50 of the NDPS Act as the and the applicant was not apprised of his legal rights under Section 50 of the NDPS Act.

20. The learned counsel also submitted that the endorsement under Section 50 of the NDPS Act was not in the handwriting of the applicant, therefore there is a fabrication of the consent memo.

21. She submitted that there is non-compliance of Section 42 of the NDPS Act as the secret information was not recorded in writing by the concerned Investigating Officer.

22. She further submitted that there is a clear violation of Section 52A of the NDPS Act as there is no mention as to the whereabouts of the samples drawn on the spot. Furthermore, the weight of the respective packets was measured as 750g and 456g on the spot, however, there was a slight discrepancy before the learned Magistrate wherein the packets were found to contain 752g and 462g of substance respectively.

23. She submitted that the FSL Report is not of the samples that were drawn on the spot but of the substance presented before the learned Magistrate, the legitimacy of which is dubious since the weight of the seized substance and the substance presented before the learned Magistrate does not match.

24. She submitted that the applicant is in custody since 12.06.2021 and the trial is still at the stage of examination of witnesses. She



submitted that the applicant cannot be subjected to indefinite incarceration in such circumstances.

SUBMISSIONS OF THE STATE

25. *Per contra*, the learned Additional Standing Counsel for the State vehemently opposed the grant of any relief to the applicant. He submitted that commercial quantity of contraband was recovered and therefore the bar under Section 37 of the NDPS Act would apply to the present case.

26. He submitted that sincere efforts were made to include public persons in the raiding team, however, none joined the investigation and left after disclosing their problem.

27. He also submitted that the applicant and the co-accused persons were apprehended when they were trying to escape. He submitted that at that time also, a request was made to the public persons to join the raiding team however none agreed.

28. He submitted that the mandatory provisions of the NDPS Act were duly complied with meticulously. He submitted that the defences of the applicant in regard to any procedural anomalies would be a matter of trial.

29. He submitted that the CDR shows connectivity between the applicant and the other co-accused persons. He submitted that the CDR allegedly shows that the applicant had made calls to his wife from the said number on previous occasions as well.

CONCLUSION

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



31. It is settled law that the Court, while considering the application for grant of bail, has to keep certain factors in mind, such as, whether there is a *prima facie* case or reasonable ground to believe that the accused has committed the offence; circumstances which are peculiar to the accused; likelihood of the offence being repeated; the nature and gravity of the accusation; severity of the punishment in the event of conviction; the danger of the accused absconding or fleeing if released on bail; reasonable apprehension of the witnesses being threatened; etc.

32. It is unequivocally established that, to be granted bail, the accused charged with offence under the NDPS Act must fulfil the conditions stipulated in Section 37 of the NDPS Act. Section 37 of the NDPS Act reads as under:

“37. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor oppose the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force, on granting of bail.”



33. The accusation in the present case is with regard to the recovery of commercial quantity of contraband. Once the rigours of Section 37 of the NDPS Act are attracted, as provided under the Section, the Court can grant bail only when the twin conditions stipulated in Section 37(1)(b) of the NDPS Act are satisfied in addition to the usual requirements for the grant of bail – (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; and (2) That the person is not likely to commit any offence while on bail.

34. The learned counsel for the applicant submitted that a liberal interpretation of Section 37 of the NDPS Act must be taken into account by the Court in the present case primarily on the following grounds :

- a) During the course of the arguments, the learned counsel for the applicant also pointed out the alleged non-compliance of Section 42 and Section 50 of the NDPS Act, however, the applicant did not press the grant of bail on the said issues;
- b) Non-compliance of Section 52A of the NDPS Act;
- c) Non-joinder of independent witnesses and no photography/ videography; and
- d) Delay in trial.

35. It is the case of the prosecution that the applicant was acting as a transporter of the contraband and had delivered the same to the co-accused persons and received a monetary consideration of ₹20,000/- for the same. The applicant was arrested after he had allegedly delivered the contraband.



2024:DHC:5178



36. It is argued that there is a non-compliance of Section 52A of the NDPS Act.

37. This Court in *Sovraj v. State : 2024:DHC:5009*, advertent to a number of judgments, has concurred with the view of a Coordinate Bench of this Court in *Somdutt Singh @ Shivam : Narcotics Control Bureau : 2023:DHC:8550*, and held that irregularity in procedure or belated compliance of the procedure under Section 52A of the NDPS Act is not a ground for grant of bail. Admittedly, there is a minor discrepancy in the weight of the contraband as measured on the spot and as presented before the learned Magistrate. However, it is relevant to note that the samples have been duly drawn before the learned Magistrate and sent to the Forensic Science Laboratory.

38. At this stage, the applicant has failed to establish a *prima facie* case as to how he has been prejudiced by the alleged non-compliance. In the opinion of this Court, any observation as to the veracity of the recovery at this stage would be premature. It is open to the applicant to press the aforesaid defence at the time of the trial.

39. It is also argued that the seizure of the contraband is suspicious as no independent witnesses were associated by the prosecution and no photography or videography of the seizure was done either despite the recovery being effectuated at a public place.

40. In the present case, secret information was received at about 4:30 AM on 12.06.2021 and raid was conducted at around 6:10 AM. It is the case of the prosecution that 3-4 passers-by were asked on the Palam flyover to join the raiding team, however, they all left citing valid compulsions and left without disclosing their names. Thereafter, another attempt was made to join 4-5 onlookers who had watched the



2024:DHC:5178



raiding party apprehending the accused persons, however, they also allegedly left citing their reasons.

41. This Court in the case of ***Bantu v. State Govt of NCT of Delhi : 2024:DHC:5006***, observed that while the testimony of the police witness is sufficient to secure conviction if the same inspires confidence during the trial, however, lack of independent witnesses in certain cases can cast a doubt as to the credibility of the prosecution's case.

42. It was held that when the Investigating Agency had sufficient time to prepare before the raid was conducted, not finding public witness and lack of photography and videography in today's time cast a doubt on the credibility of the evidence.

43. In the present case, no notice was served on the people under Section 100(8) of the CrPC and neither any effort was made to jot down the names or details of such passers-by. The secret information was received more than one and a half hours prior to the applicant being apprehended. It is peculiar that the Investigating Agency was unable to associate even a single public witness at the same time, especially since the prosecution had prior secret information and the applicant and co-accused persons were apprehended at a public place.

44. This Court in ***Bantu vs. State Govt of NCT of Delhi (supra)***, had noted that the Hon'ble Apex Court, way back in the year 2018 in ***Shafhi Mohd. v. State of H.P. : (2018) 5 SCC 311***, after taking note of the technological advancements, had passed certain directions. The Hon'ble Apex Court had emphasised the role of audio-visual technology in enhancing the efficacy and transparency in the Police investigations.



2024:DHC:5178



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

46. This Court further noted that the procedure prescribed in NCB Handbook which has been adopted by the Delhi Police may be argued to be not binding, however, it cannot be denied that the same has been prescribed as the best and crucial practice for obtaining evidence in order to avoid the allegation in regard to foul play.

47. Thus, while it is true that the effort, if any, made by the prosecution to have the search conducted in the presence of the independent witnesses would be tested during the course of trial and the same may not be fatal to the case of the prosecution, however, the benefit, at this stage, cannot be denied to the accused / applicant. Undoubtedly, the search in the present case was conducted at a busy public place. It is not the case of the prosecution that no CCTV were installed around the area where raid/search was conducted. It is also not the case that equipments were not available to videograph and photograph the search/seizure. It cannot be denied that almost every person today carries a smart phone with a camera installed in it.

48. Delay in trial and long period of incarceration is also an important factor which has to be kept in mind while considering the application for bail.

49. In the present case, the matter is at the stage of prosecution evidence. It is stated that three witnesses have been examined out of the eighteen listed prosecution witnesses. It is also stated that another two witnesses have been partly examined. The applicant has been in



custody since 12.06.2021. There is no likelihood of the trial being completed in the near future.

50. It is trite law that grant of bail on account of delay in trial cannot be said to be fettered by the embargo under Section 37 of the NDPS Act. The Hon'ble Apex Court, in the case of ***Mohd. Muslim v. State (NCT of Delhi) : 2023 SCC OnLine SC 352*** has observed as under:

“21....Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.

22. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country²⁰. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

23. The danger of unjust imprisonment, is that inmates are at risk of “prisonisation” a term described by the Kerala High Court in A Convict Prisoner v. State²¹ as “a radical transformation” whereby the prisoner:

“loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes.”

24. There is a further danger of the prisoner turning to crime, “as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal”²² (also see Donald Clemmer's ‘The Prison Community’ published in 1940²³). Incarceration has further deleterious effects - where the accused



belongs to the weakest economic strata : immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials - especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily.”

(emphasis supplied)

51. The Hon’ble Apex Court in ***Rabi Prakash v. State of Odisha*** : **2023 SCC OnLine SC 1109**, while granting bail to the petitioner therein held as under :

“4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent - State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.”

52. The Hon’ble Apex Court in ***Badsha SK. v. The State of West Bengal*** (order dated 13.09.2023 passed in **Special Leave Petition (Crl.) 9715/2023**), granted bail to the petitioner wherein who had been in custody for more than two years with the trial yet to begin.

53. Similarly, in ***Man Mandal &Anr. v. The State of West Bengal*** (**Special Leave Petition (Crl.) 8656/2023** decided on 14.09.2023), the petitioner therein had been in custody for almost two years and the Hon’ble Apex Court found that the trial is not likely to be completed in the immediate near future. The petitioner was, therefore, released on bail.



2024:DHC:5178



54. In ***Dheeraj Kumar Shukla v. State of U.P. : 2023 SCC OnLine SC 918***, the Hon'ble Apex Court released the petitioner therein on bail, and observed as under:

“3. It appears that some of the occupants of the Honda City” Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. It is true that the quantity recovered from the petitioner is commercial in nature and the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the petitioner is in custody for the last two and a half years, we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed.”

55. A Coordinate Bench of this Court in ***Gurpreet Singh v State of NCT of Delhi : 2024:DHC:796***, considered the effect of delay and observed as under:

“16. In addition to the above, only 2 (two) out of 22 witnesses have been examined by the prosecution, and that too partially, though more than three and a half years have passed since the arrest of the applicant. It may be true that the reason for the delay in the conclusion of the trial may be for various factors, may be not even attributable to the prosecution, like Covid 19 pandemic and restricted function of the Courts, however, as long as they are not attributable to the applicant/accused, in my view, the applicant would be entitled to protection of his liberty under Article 21 of the Constitution of India. Delay in trial would, therefore, be one of the consideration that would weigh with the Court while considering as application filed by the accused for being released on bail.”

56. From the foregoing, it is evident that despite the stringent requirements imposed on the accused under Section 37 of the NDPS Act for the grant of bail, it has been established that these requirements do not preclude the grant of bail on the grounds of undue delay in the completion of the trial. Various courts have recognized that prolonged incarceration undermines the right to life, liberty, guaranteed under Article 21 of the Constitution of India, and therefore,



conditional liberty must take precedents over the statutory restrictions under Section 37 of the NDPS Act.

57. In such circumstances, this Court is of the opinion that the applicant has made out a *prima facie* case for grant of bail on the grounds of absence of independent witnesses and prolonged delay in the trial.

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

59. The applicant is, therefore, directed to be released on bail on furnishing a personal bond for a sum of ₹50,000/- with two sureties of the like amount, subject to the satisfaction of the learned Trial Court, on the following conditions:

- a. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- b. The applicant shall under no circumstance leave the country without the permission of the learned Trial Court;
- c. The applicant shall appear before the learned Trial Court as and when directed;
- d. The applicant shall provide the address where he would be residing after his release and shall not change the address without informing the concerned IO/ SHO;



2024:DHC:5178



e. The applicant shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times.

60. In the event of there being any FIR/DD entry / complaint lodged against the applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

61. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the trial and also not be taken as an expression of opinion on the merits of the case.

62. The bail application is allowed in the aforementioned terms.

63. The pending applications are also disposed of.

AMIT MAHAJAN, J

JULY 15, 2024