



2024:DHC:7050



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

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Reserved on: 12th August, 2024

Pronounced on: 11th September, 2024

+ **BAIL APPLN. 2358/2024**

RAM KISHAN

.....Applicant

Through: Mr. Rahul Sharma, Mr. Kshitij Goel,
Mr. Gyan Ranjan Kashiap, Mr. Deepak
Ghai, Mr. S. K. Sharma, Mr. Atul
Sharma and Ms. Shambhavi Mishra,
Advocates.

versus

STATE NCT OF DELHI

.....Respondent

Through: Mr. Amit Ahlawat, APP for State
alongwith SI Sanjeev Kumar,
ANTF/Crime Branch.

CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. This application has been filed seeking regular bail in FIR No.131/2016, PS Crime Branch, under Section 20 of the Narcotic Drugs and Psychotropic Substance Act ('*NDPS Act*'). As per the case of prosecution, on the basis of

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secret information, the applicant was raided and was apprehended with 1.5 kg of *charas*.

2. The said raid was conducted near Ghata Masjid Road, Daryaganj between 8:30 P.M. and 9:00 P.M., on 22nd July, 2016 at 7:00 P.M. Apprehension was made at about 9:00 P.M. Upon seizure, applicant was explained the meaning of Gazetted Officer/Magistrate in local language. A notice under Section 50 of the NDPS Act was prepared but he refused to have a formal search conducted before a Gazetted Officer/Magistrate. Accordingly, a formal search was conducted by ASI Sudhir during which a green-coloured carry bag was recovered from his hand. The bag had black polythene containing black colour material which is found to be 1.5 kg *charas*. Two samples of 50-50 gms each were taken and *pulandas* were prepared, an FIR was registered. FSL result was obtained reporting the substance seized as *charas* (cannabis). Charge sheet was filed and prosecution witnesses are being examined.

3. Counsel for applicant contends, in support of bail application, that on the basis of the charge sheet, it transpires that no proceeding under Section 52A of the NDPS Act was done before the Magistrate. Moreover, the applicant has been in custody for last 8 years and the trial is still in progress. Moreover, there were no independent witnesses available at the stage of the seizure. He relies on a decision of the Supreme Court in *Yusuf @ Asif v. State* 2023 SCC OnLine SC 1328 related to the possession of a commercial quantity of 20 kg of *heroin* from accused, where in an appeal against the conviction affirmed by the High Court, Supreme Court held that a reading of Section 52A of the NDPS Act

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revealed that when any contraband/narcotic substance was seized and forwarded to the police or the officer mentioned under Section 53 of the NDPS Act, such officer should prepare an inventory list which includes details and description of the seized substance like quality, quantity, mode of packaging, numbering and identifying marks, and then make an application to any Magistrate for the purpose of certifying its correctness and for allowing to draw representative's samples, in the presence of the Magistrate.

4. Noting that no evidence has been brought on record to that effect the procedure prescribed under Section 52A of the NDPS Act had been followed while making seizure and drawing samples, the Supreme Court in relying upon ***Union of India v. Mohan Lal & Ors.*** 2016 SCC OnLine SC 88 concluded that the seized contraband and samples drawn would not be a valid piece of primary evidence in the trial and the trial would stand vitiated.

5. The relevant extracts from ***Yusuf @ Asif (supra)*** are as under:

“14. It is an admitted position on record that the samples from the seized substance were drawn by the police in the presence of the gazetted officer and not in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or of the list of samples so drawn.

15. In Mohanlal's case, the apex court while dealing with Section 52A of the NDPS Act clearly laid down that it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered



under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.

16. In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn therefrom would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.”

(emphasis added)

6. As regards the delay in trial and that it dilutes and erodes the right to speedy trial, ensured under Article 21 of the Constitution of India, applicant relied upon decisions by this Court in **Jumah Khan v. State Govt. of NCT of Delhi** 2023 SCC OnLine Del 12, in Bail Application 991/2022; **Jeewan Mondal v State (NCT of Delhi)** 2023 SCC OnLine Del 3, in Bail Application 3925/2020 and **Peter Graham Wolledge v. Narcotic Control Bureau** 2023 SCC OnLine Del 288, in Bail Application 1975/2022.

7. In these decisions, this Court had relied on Supreme Court's directions in **Supreme Court Legal Aid Committee (Representing Under Trial Prisoners) v. Union of India** (1994) 6 SCC 731, that if an undertrial is charged



for an offence under the NDPS Act and the *trial is delayed*, and the accused has already undergone almost half of the sentence prescribed (or the minimum if there is a range provided), then he should be entitled to be released on bail (subject to conditions). Relevant paragraphs of the decision in the ***Supreme Court Legal Aid Committee*** (*supra*) relied by ***Jeewan Mondal*** (*supra*) are extracted under:

“9. Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, (1994) 6 SCC 731. Dealing with a petition under Article 32 of the Constitution of India by the Supreme Court Legal Aid Society regarding delay in disposal of cases under the NDPS Act and its impact on undertrials, the Hon'ble Supreme Court passed the following directions for cases in which accused are in jail and trials were delayed, on the anvil of Article 21 and 14 of the Constitution of India, notwithstanding Section 37 of the NDPS Act:

“15. ...We, therefore, direct as under:

(i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail



shall be to the satisfaction of the Special Judge concerned with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs. 50,000 with two sureties for like amount.

(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial accused is charged for the commission of an offence punishable under Sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and



send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;

(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or



a case for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.”

(emphasis added)

8. Relevant observations of this Court in ***Jeewan Mondal*** (*supra*) are extracted as under:

“22. What can be culled out and is evident from these decisions listed above is that the Hon'ble Supreme Court has in 1994 in Supreme Court Legal Aid Committee (supra) enunciated certain principles/directives which inter alia provide that if an undertrial is charged for an offence under the NDPS Act punishable and the trial is delayed and the accused has already undergone almost half of the sentence prescribed (or the minimum if there is a range provided) then he should be entitled for being released on bail subject to conditions. Directive (iii), for example, provides that where minimum imprisonment of ten years and a minimum fine of Rupees one lakh is prescribed, such an undertrial shall be released on bail if he has been in jail for not less than five years on the condition that he furnishes bail in the sum of Rupees one lakh with two sureties for like amount. This principle is further buttressed by another decision of the Hon'ble Supreme Court in Satender Kumar Antil (supra) where it was held dealing with cases of category 'C' (Special Acts) that provisions contained in Sections 436A Cr. P.C. would apply to



Special Acts as well in the absence of any specific provision. It was specifically stated by the Hon'ble Supreme Court that "the rigor as provided under section 37 NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person". The jurisprudential crux of this principle being enunciated by the Hon'ble Supreme Court is that "bail is the rule and jail is an exception" that there is a principle of presumption of innocence and the core intendment being Article 21 of the Constitution of India which guarantees right to personal liberty and right to speedy trial."

(emphasis added)

9. APP for State, however, stated that the sample was drawn out at the spot by the police and FSL report was positive for *charas*, and that it was a commercial quantity (above the 1 kg threshold), and objections taken by the applicant were hyper-technical in nature. The seizure itself would show that applicant was in conscious possession of the contraband and, therefore, was not entitled to bail.

10. Post the decision in *Supreme Court Legal Aid Committee (supra)*, the Supreme Court has also accounted for the long delay in trial, resulting in prolonged incarceration, pending trial, in NDPS matters stating that Section 37 of the NDPS Act conditions, would be subject to the right under Article 21 of the Constitution.

11. In *Mohd. Muslim @ Hussain v. State (NCT of Delhi)* 2023 SCC Online SC 352, Supreme Court underscored that a strict and literal application of Section 37 could lead to punitive and unsanctioned preventive detention, which



contravenes constitutional principles. The Court emphasized that bail should not be summarily denied; instead, a reasonable assessment of the evidence must guide the determination of the accused's guilt to ensure justice within the framework of law. Relevant paragraph of the decision is extracted as under:

“20. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.”

(emphasis added)

12. Reference is also made to an order passed by the Supreme Court granting bail to an accused who had undergone custody for a period of 1 year and 7 months, the trial was only at a preliminary stage and the accused did not have any criminal antecedents, in *Nitish Adhikary alias Bapan v. State of West Bengal* 2022 SCC OnLine SC 2068. Prolonged incarceration has also been considered by the Supreme Court in *Rabi Prakash v. State Of Odisha* 2023 SCC OnLine SC 1109, wherein a case of recovery of 247 kilos of *Ganja*, and incarceration of 3 years and 6 months, the Supreme Court stated 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.”

(emphasis added)

13. Recently, the Supreme Court in ***Javed Gulam Nabi Shaikh v. State of Maharashtra and Another*** 2024 SCC OnLine SC 1693, observed as follows:

“18. Criminals are not born out but made. The human potential in everyone is good and so, never write off any criminal as beyond redemption. This humanist fundamental is often missed when dealing with delinquents, juveniles and adult. Indeed, every saint has a past and every sinner a future. When a crime is committed, a variety of factors is responsible for making the offender commit the crime. Those factors may be social and economic, may be, the result of value erosion or parental neglect; may be, because of the stress of circumstances, or the manifestation of temptations in a milieu of affluence contrasted with indigence or other privations.



19. If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime.”

(emphasis added)

14. It is quite evident from the charge sheet that the recovery was allegedly made from a bag which was carried by the applicant, which was tested at the spot by a field testing kit and found to be *charas* and weighed through an electronic weighing machine, found to be a 1.5 kgs *charas*.

15. It is noted that the charge sheet itself states that 2 samples of 50/50 grams each were taken out and secured and marked there with marks ‘A’ and ‘B’. The rest of the contraband was marked at ‘C’. It is quite clear that the sampling procedure was not carried out before the Magistrate under Section 52A of the NDPS Act and, therefore, not in consonance with what has been stated by the Supreme Court and by this Court in various decisions noted above.

16. *Prima facie*, the applicant would be able to assert these grounds subject to other facts and evidence on record. The applicant, even though found in possession of commercial quantity which would invite a minimum sentence of 10 years extendable to 20 years, it is quite evident, that the applicant has spent more than half the period of a minimum sentence of 10 years and the trial is expected to take more time and not conclude in the immediate future.

Therefore, principles enunciated by the Supreme Court will directly apply to



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the facts of this case, which would entitle the applicant to bail subject to certain conditions:

17. Consequently, in consonance with the Supreme Court directions in *Supreme Court Legal Aid Committee (supra)*, the petitioner is directed to be released on bail on his furnishing a personal bond in the sum of Rs. 1,00,000/- with two sureties of the like amount subject to the satisfaction of the Learned 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 his address to the Trial Court. The applicant shall inform the Court by way of an affidavit and to the IO regarding any change in residential address.
- iii. Applicant shall appear before the Court as and when the matter is taken up for hearing.
- v. Applicant shall provide all mobile numbers to the Trial Court 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 through video call before the concerned I.O. every Monday at 4 P.M.
- vii. Applicant shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the

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prosecution witnesses, the complainant/victim or any member of the complainant/victim's family or tamper with the evidence of the case.

18. Needless to state, but 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.

19. Copy of the order be sent to the Jail Superintendent for information and necessary compliance.

20. Accordingly, the petition is disposed of. Pending applications (if any) are disposed of as infructuous.

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

(ANISH DAYAL)
JUDGE

SEPTEMBER 11, 2024/MK/tk

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