



2024:DHC:5184



IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on:15.07.2024

+ **BAIL APPLN. 3460/2023**

UMAR SEBANDEKE

..... Applicant

versus

CUSTOMS

..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Archit Upadhyay, Adv. (DHCLSC)
with Ms. Ramya Tiwari, Adv.

For the Respondent :Ms. Sonu Bhatnagar, Senior Standing
Counsel with Ms. Nishtha Mittal and Ms.
Apurva Singh, Advs.

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 bail in C. No. VIII(AP) 10/P&I/3075-B/Arrival/2021 for offences under Sections 8/21/23/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').



2024:DHC:5184



2. It is alleged that on 24.01.2021, the officers of Customs, IGI Airport, New Delhi intercepted the co-accused Hamuza Sserugo and the applicant, both residents of Uganda, who arrived at T-3, IGI Airport, New Delhi by flight QR 578 from Doha/Qatar. Both the accused persons were carrying one black coloured check-in bag each.

3. It is alleged that the Customs Officer asked both the accused persons whether they were carrying any contraband items like drugs, to which both the accused persons replied in the negative. Thereafter, to ascertain the correctness of the said assertion, both the accused persons along with their baggage were then taken to the Customs Preventative Room for their personal search and examination of their baggage.

4. It is alleged that thereafter, examination of the two black luggage bags of both the accused persons was conducted by the Customs Officer. On opening the bag carried by co-accused Hamuza, 6 transparent pouches wrapped with black tape were found concealed inside false cavities along the length of the bag and 39 transparent pouches concealed within false cavities between the cardboard bindings of books were also recovered from the same bag. The recovered transparent pouches were cut open and some white powdery substance was found inside them. The white powdery substance was tested with the help of a Field Drug Test Kit, which tested positive for "Heroin". The said white powdery substance recovered from all the transparent packets was collected in a plastic container. The plastic container was marked as "X1".



2024:DHC:5184



5. It is alleged that thereafter, the second black luggage bag belonging to applicant was opened. On examination, another 6 transparent pouches wrapped with black tape were found concealed inside false cavities along the length of the bag. The recovered transparent pouches were cut open and some white powdery substance was found inside them as well. The white powdery substance was tested with the help of a Field Drug Test Kit, which tested positive for “Heroin”. The said white powdery substance recovered from all the transparent packets was collected in a plastic container. The plastic container was marked as “X2”.

6. It is alleged that the plastic container marked as “X1” was weighed and found to contain 7500 grams of Heroin. Thereafter, two samples of 10 grams each were drawn from the said container.

7. It is alleged that the plastic container marked as “X2” was weighed and found to contain 2300 grams of Heroin. Thereafter, two samples of 10 grams each were drawn from the said container as well.

8. It is alleged that the accused persons admitted to their involvement in the offence of illegal trafficking of Heroin in their respective disclosure statements under Section 67 of the NDPS Act.

9. The accused persons were arrested on 24.01.2021.

10. It is alleged that on 05.02.2021, an application under Section 52A for drawing of samples before the learned Magistrate was filed by the respondent and the same was disposed of on 08.02.2021.



2024:DHC:5184



11. The learned Trial Court dismissed the bail application filed by the applicant *vide* order dated 06.04.2023 in view of the embargo under Section 37 of the NDPS Act.

12. The learned counsel for the applicant submitted that the learned Trial Court erroneously dismissed the bail application of the applicant in a slipshod manner without going into the relevant facts of the case.

13. He submitted that as per the case of the prosecution, the contraband was recovered from 6 transparent pouches wrapped with black tape and the same were cut open and collected in a plastic container marked as “X2”. He submitted that this mixing of substances without appreciating the mandate of settled law destroys the sanctity of the substance and vitiates the trial.

14. He relied on the judgment in the case of ***Amani Fidel Chris v. NCB : CrI.A. 1027/2015***, where it was held that mixing of substances from different parcels without observing the proper protocol invalidates the evidence. He also relied on the case of ***Gopal Das v. NCB : Bail Appln. 3491/2020*** wherein the Court had granted bail to the accused therein in similar circumstances and observed that mixing substances compromises the trial.

15. He further submitted that the application under section 52A of the NDPS Act for drawing the sample was filed by the prosecution after an unexplained delay of 13 days on 05.02.2021. He relied on the order in the case of ***Kashif v. Narcotics Control Bureau : 2023 SCC OnLine Del 2881***, where it was held that the application for drawing a sample



2024:DHC:5184



of narcotic drugs or psychotropic substances must be made within 72 hours to the Magistrate concerned under Section 52 A of the NDPS Act.

16. He further submitted that the applicant has been in judicial custody since 24.01.2021. He submitted that out of 14 witnesses cited by the prosecution, only 2 have been examined till date. He submitted that in such circumstances, when the trial is likely to take long, the matter regarding the alleged violation of procedural safeguards contained in the NDPS Act cannot be kept in abeyance for consideration during the course of trial.

17. *Per contra*, the learned Senior Standing Counsel for the respondent opposed the bail application and submitted that the learned Trial Court had rightly dismissed the bail application of the applicant.

18. She submitted that commercial quantity of contraband is involved in the present case and 2300 grams of Heroin was recovered from the applicant, whereby, the rigors of Section 37 of the NDPS Act would be attracted in the present case.

19. She submitted that all provisions of the NDPS Act have been followed and samples had been drawn as per law, whereby, the accused persons had not been prejudiced in any manner.

20. Se submitted that the statutory compliances in regard to mixing of samples and preferring application under Section 52A of the NDPS Act are directory in nature and lack of strict adherence to the said mandates would not render the seizure of the contraband as null and void. She relied on the judgment of the Hon'ble Apex Court in the case of *State of Punjab v. Balbir Singh : (1994) 3 SCC 299*.



2024:DHC:5184



21. She submitted that the defences of the applicant in regard to any procedural anomalies would be a matter of trial.

CONCLUSION

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

23. 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.

24. It is unequivocally established that, to be granted bail, the accused charged with offence under the NDPS Act must fulfill 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—*



2024:DHC:5184



- (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.”

25. 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.

26. The learned counsel for the applicant submitted that a liberal interpretation of Section 37 of the NDPS Act must be taken by this Court on the following grounds:

- a. Improper sampling by the prosecution as the substances from different parcels were mixed before the samples were drawn;
- b. Delay in filing the application under Section 52A of the NDPS Act;
- c. Delay in trial



2024:DHC:5184



27. It is true that the search and seizure of the contraband so seized is a serious aspect during the investigation and if there is any violation of the mandatory requirements as prescribed under the NDPS Act as to the manner in which search and seizure is effectuated, the courts ought to take a serious view and the benefit, in some circumstances, could be extended to the accused.

28. It is argued that the application under Section 52A of the NDPS Act was filed after a delay of 13 days. It is also argued that the samples were compromised as the substances found in the 6 transparent pouches (recovered from the applicant's bag) were mixed before the samples were drawn.

29. This Court in the case of *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 the accused persons cannot be allowed to go scot free on minute irregularities in procedure of sampling or belated compliance of the procedure under Section 52A of the NDPS Act and Standing Order No.1/88, especially when the prosecution has not had the opportunity to furnish an explanation. It was held that the alleged violation in manner of mixing of seized substances and whether the same has caused any prejudice to the applicant would be a matter of trial.

30. It is relevant to note that the white powdery substance recovered from all the transparent pouches was tested with the help of the Field Drug Test Kit and the substances were mixed only after the same tested



2024:DHC:5184



positive for Heroin. The prosecution has vehemently contested that the sampling was done in accordance with law.

31. It is also pertinent to note that evidently, there is a delay of about 13 days in compliance of the procedure under Section 52A of the NDPS Act.

32. While it is open to the applicant to press the aforesaid defence at the time of trial and contest that the drawn samples were not true representatives of the seized substance, however, at this stage, the applicant has failed to establish a *prima facie* case as to how he has been prejudiced on account of the delayed compliance or the alleged irregular procedure of sampling. Prejudice caused to the applicant by any procedure anomalies, including any infirmity in the procedure of drawing samples or delay in compliance of the procedure under Section 52A of the NDPS Act, will be tested during the course of the trial.

33. It is also relevant to note that two independent witnesses have been associated by the prosecution.

34. The bar under Section 37 of the NDPS Act is attracted against the applicant as commercial quantity of contraband is involved in the present case.

35. It was argued by the learned counsel for the applicant that the applicant is in custody since 24.01.2021 and the Fundamental Rights as guaranteed under Article 21 of the Constitution of India will override the statutory embargo created under Section of the 37 of the NDPS Act.

36. The applicant relied upon the judgments passed by the Hon'ble Apex Court in the case of ***Rabi Prakash v. State of Odisha : 2023 SCC***



2024:DHC:5184



OnLine SC 1109 and of ***Mohd. Muslim v. State (NCT of Delhi) : 2023 SCC OnLine SC 352***. The Hon'ble Apex Court in the said cases, after noting the arguments advanced on behalf of the accused, granted bail on the ground that the accused persons therein had been incarcerated for a long period of time and the trial was likely going to take a considerable amount of time. There is no quarrel as far as the law laid down by the Hon'ble Apex Court is concerned. However, in the present case, the sole ground taken by the applicant to contend that no case is made out, is the alleged improper procedure of sampling.

37. As noted above, the issue in regard to improper sampling and any alleged non-compliance of the Standing Order No. 1/88 would be a matter of trial. No benefit can be given to the accused for the alleged non-compliance, at this stage, while considering the application for bail.

38. The substance recovered in the present case was tested with the help of Field Test Kit and found to be positive for Heroin. The applicant, thus, in the opinion of this Court, has failed to satisfy that no reasonable ground exists for believing that he is guilty of the offence. It is trite law that long period of incarceration is a relevant factor for considering the application for bail. However, the same cannot be the sole ground for grant of bail unless the accused person falls within the parameters of Section 436A of the CrPC.

39. Section 436A of the CrPC reads as under:

“436A. Maximum period for which an undertrial prisoner can be detained. –Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone



2024:DHC:5184



detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.”

40. The Hon’ble Apex Court in the case of ***Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India : (1994) 6 SCC 731*** had observed 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.



2024:DHC:5184



(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.”*

(emphasis supplied)

41. The Hon’ble Apex Court in the case of ***Satender Kumar Antil v. CBI : (2022) 10 SCC 51*** also observed that Section 436A of the CrPC will also apply in cases where the rigours of Section 37 of the NDPS Act are applicable:

“Special Acts (Category C)

86. Now we shall come to Category C. We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigour imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436-A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigour as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigour, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code.”

(emphasis supplied)

42. In the present case, the charges have been framed against the applicant for the offences under Sections 29, 21 and 23 of the NDPS Act, which are punishable with a minimum punishment of 10 years and a minimum fine of ₹1,00,000/-. Admittedly, the applicant has spent almost three and a half years in custody, however, he has not undergone a minimum of five years of incarceration in the present case to be entitled to bail solely on the ground of delay in trial. It does not seem



2024:DHC:5184



entirely implausible at this stage that the trial will not conclude within the next one and a half years.

43. However, considering that the case is pending since the year 2021, this Court considers it apposite to request the learned Trial Court to expedite the trial.

44. In such circumstances, this Court is of the opinion that the applicant has not made out a *prima facie case* for grant of bail.

45. 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.

46. The bail application is dismissed in the aforementioned terms.

AMIT MAHAJAN, J

JULY 15, 2024