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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **BAIL APPLN. 3500/2023**
ASLAM

.....Petitioner

Through: Mr. Suraj Prakash Sharma, Mr. Ankit
Sharma and Mr. Mayank, Advocates.

versus

STATE (NCT OF DELHI)

.....Respondent

Through: Mr. Tarang Srivastva, APP for the
State with SI Kartar Singh Rawat,
P.S. Narcotics Cell, OND.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

18.09.2024

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By way of the present petition filed under section 439 of the Code of Criminal Procedure 1973 ('Cr.P.C.'), the petitioner seeks regular bail in case FIR No.66/2021 dated 10.02.2021 registered under sections 21/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') at P.S.: Bawana, Delhi. Consequent upon completion of investigation, charge-sheet dated 02.08.2021 has been filed in the matter.

2. Notice on this petition was issued on 17.10.2023.
3. Status report dated 26.03.2024 has been filed in the matter.
4. Mr. Tarang Srivastva, learned APP appearing for the State has also handed-up status report dated 'nil' today. The same is taken on record.
5. Nominal Roll dated 01.07.2024 has also been received from the Jail Superintendent.



6. Mr. Suraj Prakash Sharma, learned counsel appearing for the petitioner submits, that the allegation against the petitioner is that 260 grams of *heroin* was recovered from him in the course of a search and seizure operation conducted on 09.02.2021.
7. Mr. Sharma submits that it may be noted at the outset, that the ‘commercial quantity’ of *heroin* is 250 grams; and that therefore, the quantity of contraband allegedly recovered from the petitioner was only marginally above the commercial quantity.
8. Furthermore, it is argued that the notice under section 50 of the NDPS Act served upon the petitioner was *defective* inasmuch as it did not mention the word ‘nearest’ before the words ‘Gazetted Officer’, as is required under section 50 of the NDPS Act. Counsel submits, that section 50 requires that before a person is searched on the suspicion of carrying contraband, he must be informed in writing that he is entitled to be searched in the presence of the nearest Gazetted Officer (or Magistrate); and that this requirement is not only to be acted upon, but it *must also be so stated* in the notice served upon such person under section 50. Counsel argues that it has been so held by a Co-ordinate Bench of this court in *Mohd. Jabir vs. State of NCT of Delhi*¹, which has taken the view that a notice under section 50 of the NDPS Act which omits to mention the word ‘nearest’ before ‘Gazetted Officer’ is faulty in law.
9. Counsel further submits, that the inventorisation and sampling of the contraband allegedly recovered from the petitioner was also not done

¹ 2023 SCC OnLine Del 1827



in conformity with section 52-A(2) of the NDPS Act; and that therefore, in light of the judgment of the Supreme Court in *Yusuf @ Asif vs. State*², there is no primary evidence available against the petitioner.

10. On the other hand, opposing the grant of bail, Mr. Tarang Srivastva, learned APP appearing for the State submits, that the omission to mention the word 'nearest' before the words 'Gazetted Officer' in a notice served under section 50 of the NDPS Act is not fatal to the case of the prosecution; and that a view contrary to *Mohd. Jabir* (supra) has been taken by another Co-ordinate Bench of this court in *Bantu vs. State Govt. of NCT of Delhi*³.
11. Learned APP also submits that proper inventorisation and sampling of the contraband recovered from the petitioner was done, for which purpose an application dated 15.02.2021 was duly moved by the Investigating Officer before the learned Metropolitan Magistrate, North, Rohini Courts, Delhi at the earliest opportunity, which was dealt-with by the learned Magistrate *vide* order dated 26.02.2021. A copy of the application moved before the learned Magistrate alongwith a copy of order dated 26.02.2021 made thereon has been appended to the status report dated 'nil' handed-up in court today.
12. In addition, learned APP also argues that it is not available for the petitioner to draw a further distinction between 260 grams and 250 grams of *heroin*, to say that since the quantity recovered is *only 10*

² 2023 INSC 912

³ 2024 SCC OnLine Del 4671



grams above the 250 grams threshold for ‘commercial quantity’, the contraband recovered should be treated as non-commercial quantity; and that consequently, the rigours of section 37 of the NDPS Act would not apply.

13. Learned APP submits, that the petitioner’s bail plea must be tested on the anvil of section 37 of the NDPS Act.
14. Learned APP also argues, that as reflected in SCRB report dated 26.03.2024 relating to the petitioner, he is also implicated in another FIR bearing No. 47/2010 registered under section 21 of the NDPS Act; and that therefore, the petitioner is likely to commit the same offence again.
15. In rejoinder, Mr. Sharma submits, that regardless of the position under the NDPS Act, it is now the settled position that prolonged incarceration of a person as an undertrial is not to be countenanced by the court; and, as will be seen from the nominal roll, in the present case the petitioner has already been in custody for about 03 years and 07 months, while only 01 out of 16 prosecution witnesses have deposed in the trial so far.
16. Counsel for the petitioner further submits, that no weight can be attached to the petitioner having been implicated in FIR No. 47/2010, since he has already been acquitted in that case *vide* judgment dated 29.02.2012 passed by the learned Special Judge (NDPS), Patiala House Courts, New Delhi. A copy of the judgement has been shown in court.



17. Counsel also submits, that two other co-accused persons, namely - Mohd. Salim and Manik Sheikh - have already been admitted to regular bail in the subject FIR.
18. Upon an overall conspectus of the facts and circumstances of the case, what weighs with the court, at this stage, is the following:
 - 18.1. Whether or not inventorisation and sampling of the contraband allegedly recovered from the petitioner was done in accordance with the statutory requirements contained in section 52-A(2) of the NDPS Act remains to be examined, except to say that a process of inventorisation and sampling was conducted before the learned Magistrate.
 - 18.2. Insofar as the question of validity of the notice under section 50 of the NDPS Act is concerned, as argued by the two sides, two divergent views have been taken by Co-ordinate Benches of this court; and the petitioner would therefore be entitled to raise this issue in the course of trial.
 - 18.3. However, what appears to be dispositive of the matter is that the petitioner has already suffered judicial custody for about 03 years and 07 months as an undertrial; and only 01 witness out of 16 prosecution witnesses has so far been examined in the case. It is therefore clear that the trial in the matter is unlikely to be completed any time soon. Needless to reiterate that prolonged custody of a person as an undertrial has now been clearly held by the Supreme Court in various rulings to be violative of a person's 'right to liberty' guaranteed under Article 21 of the Constitution of India.



19. Upon a balance of the aforesaid considerations, this court is persuaded to admit the petitioner – *Aslam s/o Md. Sefuddin* – to *regular bail* pending trial, subject to the following conditions :
- 19.1. The petitioner shall furnish a personal bond in the sum of Rs.25,000/- (Rs. Twenty-five Thousand Only) with 02 sureties in the like amount from family members, to the satisfaction of the learned trial court;
- 19.2. The petitioner shall furnish to the Investigating Officer a cellphone number on which the petitioner may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;
- 19.3. If the petitioner has a passport, he shall surrender the same to the learned trial court and shall not travel out of the country without prior permission of the learned trial court;
- 19.4. The petitioner shall not contact, nor visit, nor offer any inducement, threat or promise to any of the prosecution witnesses or other persons acquainted with the facts of case. The petitioner shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial.
- 19.5. In case of any change in his residential address/contact details, the petitioner shall promptly inform the I.O. in writing.
20. Since the petitioner is facing trial and is therefore appearing before the learned trial court from time-to-time, it is not considered necessary to impose a reporting requirement as a condition of regular bail.



21. The petition stands disposed-of in the above terms.
22. Other pending applications, if any, are also disposed-of.
23. A copy of this order be sent to the concerned Jail Superintendent *forthwith*.

ANUP JAIRAM BHAMBHANI, J

SEPTEMBER 18, 2024

V.Rawat