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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **BAIL APPLN. 4172/2023**

HUSSAIN ZAHEER

.....Petitioner

Through: Mr. Vikram Hegde and Mr. Abhinav
Hansakaman, Advocates.

versus

STATE NCT OF DELHI

.....Respondent

Through: Mr. Laksh Khanna, APP for State
with SI Udit Kumar, P.S. Anti
Narcotics.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

ORDER

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22.08.2024

1. By way of present application, the applicant seeks regular bail in FIR No. 952/2021 registered under Sections 20/22/25/8(C) of the NDPS Act at P.S. Mangol Puri.
2. Learned counsel for the applicant contends that the applicant is 61 years of age and languishing in jail since 04.08.2021. He submits that as per the prosecution case, the applicant was apprehended at the instance of co-accused *Naresh @ Mental* and recovery of 489 Buprenorphine Injections, 90 Phiniramine Avil and 1720 Tramadol Tablets were also shown to be recovered at his instance. It is further stated that though the charge has been framed and trial has begun however, FSL report is yet to be received. Ld. counsel also contends that Sections 42 and 52A of the NDPS Act were violated, inasmuch as, there was not any authorisation of search and there was delay in sending the samples to the FSL as well.



3. The application is resisted by Id. APP for the State who submits that there is no doubt on the identification of the applicant as he was apprehended at the disclosure of *Naresh @ Mental* who stated that he used to obtain injections from one *Budha* who also runs a dental clinic in his building. The applicant was apprehended on the pointing of co-accused *Naresh @ Mental*. Insofar as Section 42 is concerned, he referred to the decision of Supreme Court in Union of India v. Mohd. Nawaz Khan reported as **(2021) 10 SCC 100** to submit that Section 42 is a matter of trial. In the context of Section 52A, Id. APP has relied upon the decision of Coordinate Bench of this Court in Quentin Decon v. Customs reported as **(2023) SCC OnLine Del 3329**, against which SLP preferred has also been dismissed. It is lastly stated that five witnesses have been examined. Learned counsel however states that only 3 witnesses are examined.

4. I have heard the learned counsels for the parties and have also perused the material placed on record.

5. It is observed that the applicant in the case is presently 61 years of age and has remained incarcerated since 04.08.2021. It is further informed that the FSL report is yet to be received and thus, the trial is likely to take some time.

6. At this stage it is apposite for the Court to refer to decision of the Supreme Court in Union of India v. K.A. Najeeb reported as **(2021) 3 SCC 713**, wherein it was stated that if a timely trial is not possible, courts are ordinarily obligated to release the undertrial on bail and statutory restrictions do not exclude the discretion of Constitutional courts to grant bail on grounds of violation of Fundamental Rights enshrined in Part III of the Constitution of India. While the said judgement was passed in the context of



UAPA, the said observations merit mention:-

“xxx

12. Even in the case of special legislations like the Terrorist and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985 (“the NDPS Act”) which too have somewhat rigorous conditions for grant of bail, this Court in Paramjit Singh v. State (NCT of Delhi), Babba v. State of Maharashtra and Umarmia v. State of Gujarat enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians.

xxx

15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee (Representing Undertrial Prisoners v. Union of India, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.

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17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional



jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

xxx”

6. While considering a case where the accused had undergone custody of more than two years, Supreme Court in Jitendra Jain v. Narcotics Control Bureau reported as **2022 SCC OnLine SC 2021**, the Supreme Court observed as under:-

“xxx

3. Though it is a case of commercial quantity and allegations levelled against the petitioner are serious in nature, but having regard to the fact that he is in custody for 2 years and conclusion of trial will take time, we are inclined to release the petitioner on bail.

4. The petitioner is , accordingly, ordered to be released on bail, subject to his furnishing bail bonds to the satisfaction of trial court.

xxx”

7. Again in Rabi Prakash v. State of Odisha reported as **2023 SCC OnLine SC 1109**, where the accused had remained incarcerated for more than three and a half years, the Supreme Court while releasing the applicant on bail observed that:-

“xxx

4... 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.

xxx

6. Consequently, while directing that the petitioner shall be released on bail on his furnishing bail bonds to the satisfaction of the Trial Court...

xxx”

8. More recently in Man Mandal and Anr. v. State of West Bengal reported as **2023 SCC OnLine SC 1868**, while taking into account continued custody of more than two years, the accused was granted bail. The relevant extract of observations is extracted hereunder:-

“xxx

5. Learned counsel appearing for the State submitted that in view of the statutory restrictions under Section 37 of the NDPS Act and the quantity being commercial in nature, the present special leave needs to be dismissed.

6. Taking into consideration the fact that the petitioners have been incarcerated for a period of almost two years and the trial is not likely to be taken up for hearing in the immediate near future, we are inclined to grant bail to the petitioners.

7. The petitioners are directed to be released on bail in connection with aforesaid FIR, on such terms and conditions as may be imposed by the Trial Court.

xxx”

9. Taking cue from the legal position enumerated hereinabove, Coordinate Benches of this Court, after due consideration of the facts including the fact that the trial is likely to take time, have released the accused on bail. Positive reference in this regard may be made to the



decisions in Sachin Arora v. State Govt. of NCT of Delhi reported as **2023 SCC OnLine Del 4941** and Vishwajeet Singh v. State (NCT of Delhi) reported as **2024 SCC OnLine Del 1284**.

10. Considering the aforesaid legal position and especially the fact that the applicant has been in custody since 04.08.2021 and the further fact that the FSL report has not been placed on record despite passage of three years, the parameters of Section 37 of the Act are met and it is directed that the applicant be released on regular bail subject to his furnishing a personal bond in the sum of Rs.25,000 with one surety of the like amount to the satisfaction of the concerned Jail Superintendent/concerned Court/Duty JM and subject to the following further conditions:-

- i) The applicant shall not leave the NCR without prior permission of the concerned Court.
- ii) The applicant shall provide his mobile number to the Investigating Officer on which he will remain available during the pendency of the trial.
- iii) In case of change of residential address or contact details, the applicant shall promptly inform the same to the concerned Investigating Officer as well as to the concerned Court.
- iv) The applicant shall not directly/indirectly try to get in touch with the complainant or any other prosecution witnesses or tamper with the evidence.
- v) The applicant shall regularly appear before the concerned Court during the pendency of the trial.

11. The bail application is disposed of in the above terms.

12. Copy of the order be communicated to the concerned Jail



Superintendent electronically for information.

13. Copy of the order be uploaded on the website forthwith.

14. Needless to state that nothing observed hereinabove shall amount to an expression on the merits of the case and shall not have a bearing on the trial of the case as the same has been expressed only for the purpose of the disposal of the present bail application.

MANOJ KUMAR OHRI, J

AUGUST 22, 2024/js