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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **BAIL APPLN. 4068/2024**

JAKHIR HUSSAIN

.....Petitioner

Through: Mr. Arvind Vats &
Ms. Yashika Arora, Advs.

versus

STATE NCT OF DELHI

.....Respondent

Through: Mr. Ashneet, APP for the
State
SI Kartar Singh Rawat, PS-
Anti-Narcotics Cell OND

CORAM:

HON'BLE MR. JUSTICE AMIT MAHAJAN

ORDER

% **08.11.2024**

CRL.M.A. 33536/2024 (for exemption)

1. Exemptions allowed, subject to all just exceptions.
2. The application stands disposed of.

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3. The present application is filed seeking regular bail in FIR No. 433/2023 dated 24.06.2023, registered at Police Station Narela, for the offence under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').
4. The brief facts of the case are that on 24.06.2023, on the basis of secret information, the applicant was apprehended when he came outside the lane near the mosque and a recovery of 282 gram of Heroin was effectuated from his personal search. Thereafter, the applicant was arrested in the present case on 24.06.2023. It is alleged that the applicant was involved in the supply of Heroin.
5. During interrogation, the applicant disclosed that his wife—co-accused Hasina used to procure Heroin from one Rahul. A raid was conducted at the house of the applicant and his wife and a



recovery of 40 grams of Heroin was effectuated from there. The co-accused Hasina was arrested and she also disclosed that she and the applicant used to procure the contraband from the co-accused Rahul.

6. Subsequently, a raid was also conducted at the house of co-accused Rahul and a recovery of 50 grams of Heroin was effectuated from there.

7. The learned counsel for the applicant submits that the applicant is innocent and he has been falsely implicated in the present case.

8. He submits that the notice under Section 50 of the NDPS Act that was served upon the applicant suffered from grave infirmities as the applicant was only given an option to call for a Gazetted Officer or Magistrate to be present at the time of search and the second option of the search being conducted before the nearest Magistrate or Gazetted Officer was not given to the applicant.

9. He submits that the information recorded in the report under Section 57 of the NDPS Act also suffers from grave infirmities. He submits that the information as recorded in the DD No.7 at 3:20 PM mentions that information was received that a “lady” namely Jakir was indulging in sale of Heroin.

10. No other argument is raised by the learned counsel for the applicant.

11. *Per contra*, the learned Additional Public Prosecutor for the State vehemently contests the grant of any relief to the applicant. He submits that commercial quantity of contraband has been recovered from the applicant and the bar under Section 37 of the NDPS Act is attracted against the applicant.

12. I have heard the learned counsel and perused the record.



13. 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.

14. 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—

(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.”

15. 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.

16. During the course of the arguments, the learned counsel for the applicant has contested that there is non-compliance of Section 50 of the NDPS Act and that as per the information recorded in the report under Section 57 of the NDPS Act, the secret informer seems to be talking about a lady instead.

17. Section 50 of the NDPS Act outlines the conditions under which a search of a person is to be conducted, specifying that such search must be performed in the presence of a Gazetted Officer or a Magistrate if the individual so requests. This provision is intended to safeguard the rights of individuals and ensure the fairness and integrity of the search process. In the case of ***Bantu v. State Govt of NCT of Delhi : 2024: DHC: 5006***, this court while noting that the judgment passed by a coordinate bench of this Court in the case of ***Mohd. Jabir v. State (NCT of Delhi) : 2023 SCC OnLine Del 1827***, is under consideration before the Hon'ble Apex Court, has held that the essence of Section 50 of the NDPS Act— to inform the suspect of his right to be searched before the Gazetted Officer or a Magistrate — is not vitiated due to failure in strictly adhering to the precise language in the notice. The same does not undermine the overall compliance if no prejudice is shown. Hence, while the wording is important, the ultimate focus remains on whether the suspect's rights were adequately protected, a question to be resolved during trial.

18. In the present case, prima facie, the applicant has not been able to establish any prejudice caused to him. Infirmities in the



procedure, if any, will be tested during the course of the trial.

19. The applicant voluntarily denied to exercise his right. It appears that the applicant was substantially informed of his right. The issue of whether the refusal to exercise his right is affected by the wording of the notice, leading to non-compliance with Section 50 of the NDPS Act and the legality of the subsequent search and seizure is a nuanced question and the same is a matter of trial and cannot be looked into at this stage.

20. It is also argued that the special report under Section 57 of the NDPS Act suffers from grave infirmities as the same uses female pronouns and refers to the applicant as a “lady”. A bare perusal of the report shows that the applicant has been named and his particulars, including, the name of his father and residence, have also been mentioned in the report. At this stage, in such circumstances, the typographical infirmities do not make out a case for grant of bail to the applicant.

21. 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.

22. The applicant has been in custody since 24.06.2023. The Hon’ble Apex Court in a number of cases, including, ***Mohd. Muslim v. State (NCT of Delhi) : 2023 SCC OnLine SC 352***, has granted bail in cases of similar nature 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 grounds argued on behalf of the applicant to contend that no case is made out, is the alleged non-compliance of Section 50 of the NDPS Act and the typographical error in the report under



Section 57 of the NDPS Act.

23. As noted above, the aforesaid issues will be seen during the course of the trial. No benefit can be given to the accused for the alleged non-compliance, at this stage, while considering the application for bail. 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 same falls within the parameters of the guidelines laid down by 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***. In the said case, the Hon'ble Apex Court had directed that an undertrial shall be released if he has been in jail for not less than five years in relation to offences with minimum punishment of ten years and a minimum fine of ₹1,00,000/-.

24. In the present case, the applicant has only spent over an year in custody. The chargesheet has already been filed. At this stage it cannot be presumed that it is implausible that the trial will conclude in a timely manner.

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

26. The present bail application is therefore dismissed.

27. 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.

28. The bail application is dismissed in the aforesaid terms.

AMIT MAHAJAN, J

NOVEMBER 8, 2024