



\$~86

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

+ **BAIL APPLN. 4275/2024 & CRL.M.A. 35034/2024**

BLESSING UDOCHUKWOApplicant

Through: Mr. Sidak S. Kalra, Adv.
(through VC)

versus

CUSTOMSRespondent

Through: Mr. Gibran Naushad,
Senior Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE AMIT MAHAJAN

ORDER

22.11.2024

%

1. The present application is filed seeking regular bail in File No. VIII(AP)(10)P&I/3952-C/Arrival/2023, registered for offences under Sections 8/21/23/28 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

2. The brief facts of the case are that specific information was received that the applicant will be arriving at Delhi International Airport from Addis Ababa, Ethiopia on 08.02.2023 and she will be carrying some contraband. Pursuant to the same, the applicant was intercepted at the airport and 200g of Cocaine/Methaqualone was recovered from a golden coloured hand bag being carried by her. Further, 1000g of Cocaine/ Methaqualone was also recovered from a blue coloured trolley bag being carried by the applicant.

3. The learned counsel for the applicant submits that the three packets recovered from the applicant were arbitrarily mixed in a single lot. He submits that the same is in violation of the mandates of the standing orders 1/88 and 1/89 and casts a doubt



on the veracity of the recovered substance.

4. He submits that there is a delayed compliance of Section 52A of the NDPS Act as the representative samples of the contraband allegedly recovered from the bags of the applicant were drawn before the learned Magistrate after a delay of 18 days.

5. He submits that the recovery in the present case is doubtful as there is total non-compliance of Sections 41 and 42 of the NDPS Act. He submits that there is nothing on record to show that Ms. Kiran Sharma, who conducted the search, was authorised under Section 41 of the NDPS Act. He further submits that despite having specific information, the same has not been placed on record and there is no compliance of Section 42(2) of the NDPS Act. He submits that when the officers are acting on prior information, Section 43 of the NDPS Act has no application.

6. *Per contra*, the learned Senior Standing Counsel for the respondent department vehemently opposes the grant of any relief to the applicant.

7. He submits that commercial quantity of contraband was recovered from the applicant and the embargo under Section 37 of the NDPS Act is attracted against the applicant.

8. He further submits that the concerned Intelligence Officer was fully authorised to conduct the search and seizure and the samples were drawn in accordance with the procedure.

9. He submits that the intelligence information is highly classified and the same could thus not be shared on record.

10. He submits that the arguments in relation to statutory non-compliances cannot be looked into at this stage and the same will



be seen in trial after the prosecution has led its evidence.

11. I have heard the counsel and perused the record.

12. 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.

13. 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.”



14. 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.

15. 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 in violation of the Standing Orders 1/88 and 1/89 as the substances were mixed before the samples were drawn;
- b. Delayed compliance of Section 52A of the NDPS Act;
- c. No material on record to show Ms. Kiran Sharma, who conducted the search and seizure operation, was authorised under Section 41 of the NDPS Act;
- d. Prior information received by the Intelligence Officer has not been placed on record and there is also non-compliance of the provisions of Section 42 of the NDPS Act.

16. 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.

17. It is argued that the application under Section 52A of the NDPS Act was filed after a delay of 18 days. It is also argued that the samples were compromised as the substances found in the transparent pouches were mixed in violation of the stipulated guidelines before the samples were drawn.

18. 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 v. 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.

19. Admittedly, there is a delay of about 18 days in compliance of the procedure under Section 52A of the NDPS Act. The prosecution has vehemently contested that the sampling was done in accordance with law.

20. 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.

21. Insofar as the non-compliance of Sections 41 of the NDPS Act is concerned, it is pointed out that Ms. Kiran is yet to be completely examined.

22. It is also argued that there is non-compliance of Section 42 of the NDPS Act and Section 43 of the NDPS Act has no application in the present case. It is trite law that whether there is adequate or substantial compliance with Section 42 of the NDPS Act is a question of fact that is to be determined on the basis of the facts in each case [Ref. ***Karnail Singh v. State of Haryana : (2009) 8 SCC 539***]. The non-compliance cannot be presumed at this stage before the prosecution has had an opportunity to lead its evidence. Thus, the said issues will be seen by the learned Trial Court during the course of the trial.

23. It is also relevant to note that independent witnesses have been associated by the prosecution in the present case. The same endorses the veracity of the prosecution's case at this stage.

24. 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.

25. The applicant has been in custody since 09.02.2023. 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 delayed compliance of Section 52A of the NDPS Act and the alleged non-compliance of Sections 41 and 42 of the NDPS Act and Standing Orders 1/88 and 1/89.

26. 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/-.

27. In the present case, the applicant has only spent over an year in custody. Charges have been framed against the applicant and the matter is at the stage of examination of prosecution witnesses. At this stage, it cannot be presumed that it is implausible that the trial will conclude in a timely manner.

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

29. The present bail application is therefore dismissed.

30. 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.

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

AMIT MAHAJAN, J

NOVEMBER 22, 2024