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

+ **BAIL APPLN. 2520/2024**

TAMALA BVUMBWE

.....Petitioner

Through: Mr. Shiv Chopra, Ms. Surbhi Arora
and Mr. Siddharth Arora, Advocates.

versus

CUSTOMS

.....Respondent

Through: Mr. Shubham Tyagi, SSC for CBIC.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

ORDER

12.02.2025

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1. This hearing has been done through hybrid mode.
2. The present application has been filed under Section 439 read with Section 482 CrPC for grant of regular bail in SC No. 606/2021 and Case File/Complaint No.-VIII(AP)10/P&I/3145-A/Arrival/2021, registered under Sections 8/21/23/29 of the NDPS Act by customs.
3. The case of the prosecution as per the Status Report dated 27.08.2024 is as under:

“1. One passenger, namely Ms. Tamala Bvumbwe (D.O.B- 27.10.1988), R/o Malawian, holder of Malawi Passport No. MB108233 arrived on 07.04.2021 at Terminal-3, IGI Airport, New Delhi by Qatar Airways Flight No. QR 1366 dated 06.04.2021 from O.R. Tambo International Airport, Johannesburg to Doha and further, Flight No. QR 578 dated 06.04.2021 from Doha to Delhi. The Pax was asked by the Customs Officers on duty, who intercepted her, whether she was carrying any dutiable or contraband or prohibited goods, to which she replied in negative. Thereafter, a Notice under Section 50 of the NDPS Act, 1985 and a Notice under Section 102 of the Customs Act, 1962 were served upon to Ms. Tamala Bvumbwe (D.O.B- 27.10.1988) by the Customs Officer, whereby she was informed of the requirement of her personal and baggage search and was apprised of her legal rights. Search of her one checked-in luggage yielded in recovery of two packets wrapped with



black PVC adhesive tape. On examination, it was found to contain white colour powder/granules suspected to be narcotics substance. It also contained another black coloured hand bag. On examining it, two packets wrapped with yellow colour PVC adhesive tape was found. On examination of the recovered two packets white colour powder/granules suspected to be narcotics substance was found.

2. The total recovered four packets were opened and their contents were kept in four transparent plastic containers. On weighment, their weight came to be 1498 gms, 1496 gms, 504 gms and 502 gms (all net weight). The recovered substance from Black Colour Trolley Bag were kept in the box No. I & II and recovered substance from hand bag were kept in box No. III & IV and marked as I, II, III & IV. Thus, a powder/granules total of 4000 gms of white colour suspected to be narcotics substance were recovered from the applicant and were tested with the help of Modified Narcotic Drugs Detection Kit, manufactured by Hindustan Antibiotics Limited (a Govt, of India Enterprise), Pimpri, Pune- 411018. The substance, white colour powder/granules recovered from all four packets separately were tested positive as "Heroin".

3. The above said substance were detained by the Customs Officer through Panchanama dated 07.04.2021. At the time of recovery of the said substance, the recovered concealment i.e. one black colour trolley bag and one black colour hand bag were kept in brown colour corrugated box and sealed with customs plier seal 'PA IGF on one side and 'Ashoka Stambh' on another side. After affixing paper slip duly signed by Customs Officer, Ms. Tamala Bvumbwe, and the panchas under D.R. No.51529 dated 07.04.2021. The details of the above said seals are annexed as annexure-1 attached with panchnama dated 07.04.2021. The recovered contraband and concealing material are seized under Section 43 of the NDPS Act, 1985 on a reasonable belief that same are brought into India illegally and liable for confiscation under the said Act.

4. In voluntary statement recorded under Section 67 of the NDPS Act, 1985 on 07.04.2021 Ms. Tamala Bvumbwe stated that she came to India for her medical treatment; that she reached Johannesburg, South Africa on 31.03.2021 and stayed with a relative of her; that during that time she came in contact with one lady named 'Magi', who was knowing her reason for visit to India; that she offered Tamala Bvumbwe to carry a black trolley bag and another black hand bag kept inside the trolley bag in which Heroine was concealed; that she was offered Indian Rs. 50,000/- for the purpose. She assured me that the said drugs would be concealed in such a way that nobody would be able to catch her; Magi handed over black trolley bag and another black hand bag kept inside the trolley bag



in which Heroine was concealed and took her photograph and told her that a person will meet her outside Delhi Airport at Pillar No. 3 and will recognize from her photograph will take over the said trolley bag and hand over the sum of Rs. 50,000/- against handing over the trolley bag; that the person waiting outside Delhi Airport at Pillar No. 3 would also arrange accommodation for her; that she don't know that person neither I have his phone number or address; that she had never met that person before; that she was knowing that carrying drugs in India is illegal and caught will be prosecuted as per Govt, laws, but in need of money for my treatment she visited India and did such crime in greed of money. The recovered contraband and concealing material are seized under Section 43 of the NDPS Act, 1985, on a reasonable belief that same are liable to be confiscation under the said Act. As the Pax was found to have contravened the provisions of the NDPS Act, 1985 therefore, the Pax was placed under arrest under Section 43 of the NDPS Act, 1985 on 07.04.2021 at 2200.”

4. Learned counsel appearing on behalf of the applicant has raised various grounds in the present application seeking bail. It is pointed out that provisions of Section 50 of the NDPS Act have been violated. It is submitted that the said notice was not given in the language known to the applicant and further the word ‘nearest’ was missing in the said notice. It is submitted there has been complete non compliance of Section 52 A of NDPS Act.
5. It is submitted that on 07.04.2021 on the basis of suspicion, accused was intercepted by the Custom officials and taken to the Custom Preventive Room at International arrival hall at Airport and was served with the notice under Section 102 of Customs Act and 50 of NDPS Act by the Customs officer which was neither according to the rules and guidelines of the NDPS Act nor in the language of the accused. Further, it is pointed out that the 4 packages that were recovered at the instance of the applicant were not tested at the spot with the Field Testing Kit.
6. Learned counsel for the applicant submitted that the latter was not



provided with a translator and the contents of the notice served under Section 50 of NDPS Act could not be understood by her. Also, both the *panch* witnesses were stock witnesses and their signatures were taken on blank papers.

7. It is further submitted that there was non-compliance of Section 52A of the NDPS and Standing Order 1/88 Act because the prescribed time for the sampling of the seized contraband was done after a substantial delay. Reliance has been placed on *Kasif vs. Narcotic Control Bureau*, 2023 SCC online Del 288.

8. It is finally submitted that the applicant has been in custody since 07.04.2021 and has completed more than 3 years and 9 months and 17 days in judicial custody. It is submitted that the prosecution has cited 14 witnesses and only 4 have been examined. Reliance is being placed on the following judgments.

- (i) *Javed Gulam Nabi Shaikh vs. State of Maharashtra and Anr.*, 2024 SCC Online SC 1693
- (ii) *Rabi Prakash vs. State of Odisha*, 2023 SCC Online SC 1109
- (iii) *Dheeraj Kumar Shukla vs. State of Uttar Pradesh*, 2023 SCC Online SC 918;
- (iv) *Man Mandal and Anr. Vs. State of West Bengal*, 2023 SCC Online SC 1868;
- (v) *Badsha SK Vs. State of West Bengal*, 2023 SCC Online SC 1867
- (vi) *Biswajit Mondal @ Bishwajit Mandal vs. State of West Bengal* in Criminal Appeal No. 450/2022;
- (vii) *Sheela vs. State of Govt. of NCT of Delhi*, 2025 SCC Online Del 296;



- (viii) Zakir Hussain vs. State, 2025 SCC Online Delhi 253
- (ix) Sanjay vs. State (NCT of Delhi) 2025, SCC Online Del 255
- (x) Jitendra Singh vs. NCB passed by the Hon'ble Supreme Court in SLP (Crl.) No. 8900/2022.

9. *Per contra*, learned Standing Counsel for the Customs submits that in the present case there was a recovery of 400 grams of heroin which is of commercial quantity and the rigours of Section 37 of the NDPS Act would be applicable. It is pointed out that the period of judicial incarceration cannot be a sufficient ground to grant bail. Reliance is placed on the following judgments:-

- (i) Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) vs. Union of India, (194) 6 SCC 731 (SC)
- (ii) Kitoko Ngitembo Alain vs. Customs (DHC) BAIL APPLN. 2907/2024 dated 03.12.2024
- (iii) Pauline Nalwoga vs. Customs (DHC) BAIL APPLN. 1112/2023 dated 18.10.2024
- (iv) Blessing Udochukwo vs. Customs in BAIL APPLN. 4275/2024 dated 22.11.2024
- (v) Gulaam Hazrat Mizzale vs. Customs (DHC) BAIL APPLN. 1845/2024 dated 15.01.2025.
- (vi) FRANCIS MARION GEGG vs. CUSTOMS (DHC) BAIL APPLN. 931/2024 dated 01.10.2024.

10. Attention of this Court was drawn to a judgment passed by the learned Coordinate Bench of this Court in Blessing Udochukwo (*supra*) wherein the learned Coordinate Bench declined bail while holding that period of judicial incarceration cannot be the sole ground to grant bail. Similarly, it is argued



that in Supreme Court Legal Aid Committee (supra), the learned Apex Court had directed that the under trial shall be released on bail if they have been in jail for more than 5 years in relation to offences stipulating punishment of 10 years and a fine of Rs. 10 lakhs.

11. Heard the learned counsel for the parties and perused the record.

12. The Hon'ble Supreme Court in Rabi Prakash vs. State of Odisha, 2023 SCC Online SC 1109 *vide* order dated 13.07.2023 has held and observed as under:-

“2.The prosecution case appears to be that the police party while on patrolling duty on 02.10.2019 at about 12.30 p.m. on Nandapur-Semiliguda road MDR-55, spotted one full body twelve wheeler Truck (Eicher) bearing No.EB-13-BD-5753 coming from Nandapur side at a high speed and accordingly they chased and detained the truck at Bodenga Chhak and found three persons boarded in the said truck including the driver. Eventually, 247 kg. Ganja was recovered from the truck. The petitioner was one of the occupants of the truck and was arrested at the spot. He has been in custody for more than three and a half years. There are no criminal antecedents against the petitioner.

3. We are informed that the trial has commenced but only 1 out of the 19 witnesses has been examined. The conclusion of trial will, thus, take some more time.

4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent - State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. 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.”

13. The Hon'ble Supreme Court in Man Mandal and Anr. Vs. State of West Bengal 2023, SCC Online SC 1868 has held as under:-



“2. Learned counsel for the petitioners submitted 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.

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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.”

14. In the present case as well, the prosecution has cited 14 witnesses in the chargesheet out of which only 2 have been examined and 2 have been dropped and trial is likely to take time to conclude. As per the nominal roll dated 24.01.2025, the applicant has been in judicial custody since 3 years, 9 months and 17 days. In Blessing Udochukwo (supra) it is pertinent to note that the period of incarceration was only 1 year.

15. Considering the delay in trial and long incarceration of more than 3 years and 9 months the embargo under Section 37 of the NDPS Act, in view of the aforesaid judgments passed by the Hon’ble Supreme Court, will not be applicable in the facts and circumstances of the present case.

16. In view thereof, the present application is allowed. The applicant is directed to be released on bail, on his furnishing a personal bond of Rs. 50,000/- with one surety of like amount, to the satisfaction of the learned Trial Court/Link Court, further subject to following conditions:

- i. The applicant shall not leave India without prior permission of the learned Trial Court.
- ii. The applicant shall intimate the learned Trial Court by way of an



affidavit and to the Investigating Officer regarding any change in residential address.

iii. The applicant shall appear before the learned Trial Court as and when the matter is taken up for hearing.

iv. The applicant is directed to give his mobile number to the Investigating Officer and keep it operational at all times.

v. The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witness in any manner.

17. The application is allowed and disposed of accordingly.

18. Pending applications, if any, also stand disposed of.

19. Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case and any observations made are only for the purpose of the present bail application.

20. Copy of the order be sent to the concerned Jail Superintendent for necessary information and compliance.

21. Order be uploaded on the website of this court *forthwith*.

AMIT SHARMA, J

FEBRUARY 12, 2025/nk

Click here to check corrigendum, if any