



\$~3

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

+ **BAIL APPLN. 3494/2024**

PASCAL EZEIGBO @PRINCE

.....Petitioner

Through: **Mr. J. S. Kushwaha and Ms. Tanya Kushwaha, Advocates.**

versus

THE STATE NCT OF DELHI

.....Respondent

Through: **Mr. Amit Ahlawat, APP with SI Kalyan Chand, Crime Branch.**

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

31.01.2025

%

1. The present application has been filed under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023, seeking grant of regular bail in FIR No. 10/2023 dated 10th January, 2023, registered at P.S. Crime Branch for the offence under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985,¹ and additional charges framed under Section 14 of the Foreigners Act, 1946² and Sections 471 of the Indian Penal Code, 1860.³

Prosecution's Case

2. The case of the Prosecution is as follows:

2.1 On 10th January, 2023, secret information was received indicating that a Nigerian national namely Prince, the Applicant, residing in Anand Vihar, Uttam Nagar, Delhi, was involved in the supply of drugs. It was further

¹ "NDPS Act"

² "Foreigners Act"

³ "IPC"



reported that between 11:00 AM to 12:00 PM that day, he would come to supply drugs to an unknown person. This information was shared with ACP/WR-1/Crime Branch, Delhi, and was recorded *vide* DD No. 03, dated 10th January, 2023.

2.2 Thereafter, a raiding team was deployed to the Main Road, C-Block, T- Point, near Kheda Park, Anand Vihar, Uttam Nagar, Delhi. At around 11.25 AM the team apprehended the Applicant, who was found carrying a white polybag containing a knotted transparent white polythene bag with an unknown substance. Upon examination, the substance was confirmed to be heroin, weighing 1010 grams. The recovered contraband was subsequently seized and taken into police custody, as documented in the seizure memo.

2.3 Notice under Section 50 of the NDPS Act was served upon the Applicant, however, he refused to get his search conducted by any Gazetted Officer and Magistrate.

2.4 The aforesaid events culminated into the registration of the FIR. During the investigation, the Applicant was arrested and, upon interrogation, revealed that one Paul was the source of the drugs. However, he provided no further information about the source, or the identity of the person to whom he was supposed to deliver the contraband. As a result of his lack of cooperation, the source of the drugs could not be traced.

2.5 The Applicant was produced before the special NDPS court and an application under Section 52A of the NDPS Act was filed for sampling of the recovered contraband. The sample was collected and sent to the FSL Rohini on 13th January 2023 for analysis and expert opinion.

2.6 During the course of investigation, one mobile phone and the passport of the Applicant were recovered, with the following details:



a. Passport No. A01286648, Date of Issuance: 16th January, 2021; Date of Expiry 15th January, 2026.

b. Visa No. VJ0485001, Date of Issuance: 07th October, 2021; Date of Expiry: 06th January, 2022.

2.7 The recovered passport was sent to the Nigerian High Commission for verification. As per the report, the passport had been tampered with and was found to have expired on 07th July, 2014. Further, a report from the Immigration Bureau confirmed the Applicant's arrival on the said passport on 28th September, 2009, *vide* Visa No. AF655388.

2.8 It was further revealed that the recovered Passport No. A01286648 and Visa No. VJ0485001, had been issued to one Malaysian national namely Chadramathy Gusumathri. As a result of the said findings, charges under Sections 467/468/471 of IPC and Section 14 of the Foreigners Act, were also added in the case.

2.9 The investigation in the present case has been concluded, with the chargesheet having been filed on 30th June 2023.

2.10 The report from FSL Rohini was received, with the result of examination of sample of Chemistry Division as follows: - *"On Chemical, TLC & GC-MS examination, exhibit 'S-I' was found to contain Diacetylmorphine, 'Acetaminophen', 'Caffeine', 'Dextromethorphan', 'Codeine', 'Acetylcodeine', 'Morphine', 'Monoacetylmorphine', and 'Alprazolam'".*

2.11 The FSL results of the samples, along with the Applicant's mobile phone, were submitted before the Trial Court through a supplementary charge-sheet. On 24th April 2024, charges were framed against the Applicant under Section 21(c) of the NDPS Act, Section 471 of the IPC and Section 14



of the Foreigners Act.

2.12 The Applicant, being a foreign national, is illegally residing in India, without any valid documents. He has committed a grave offence, which poses a significant threat to society, and he has failed to provide a certificate of assurance from his Embassy or any evidence of having applied for one.

(Frank Vitus v. Narcotics Control Bureau & Ors.⁴)

Applicant's Case

3. Against this backdrop, counsel for the Applicant makes the following submissions:

3.1 The Applicant was arrested on 10th January, 2023 and has been in judicial custody for more than two years.

3.2 The Applicant is innocent and has been falsely implicated in the present case. The investigation has been concluded, and the chargesheet stands filed. As such, the Applicant is no longer required for the purposes of investigation or custodial interrogation. Furthermore, given that the trial is expected to take a considerable amount of time, continued detention would adversely impact the Applicant's career as well as his defence.

3.3 The Applicant was not served with a proper notice under Section 50 of the NDPS Act at the time of his arrest. Instead, the notice was only provided after the alleged contraband was recovered, which is in direct violation of the law. As such, the recovery was conducted illegally, and the entire process of seizure deviated from the prescribed legal standards.

3.4 The Prosecution has failed to establish the source from which the Applicant allegedly obtained the contraband. No incriminating evidence has been presented on record against the Applicant.

⁴ 2024 INSC 479



3.5 According to the Prosecution, the Applicant was apprehended near Kheda Park, Anand Vihar, Uttam Nagar, a densely populated area. Despite this, no independent witnesses have been produced to corroborate the alleged recovery of contraband from the Applicant, raising doubts about the credibility of the Prosecution's version.

3.6 The Applicant's wife is suffering from cancer, and as a result, he was granted custody bail on two occasions to accompany her to the hospital.

3.7 The Applicant has no prior criminal record and is free from any antecedents.

Respondents' Case

4. On the other hand, Mr. Amit Ahlawat, APP, strongly opposes the present bail application on the following grounds:

4.1 The quantity of Heroine recovered from the Applicant falls within the category of commercial quantity, thereby invoking the rigours of Section 37 of the NDPS Act.

4.2 The Applicant has been residing in India without any valid documentation. He has committed a serious offence and poses a threat to the society.

4.3 The Applicant has failed to submit a certificate of assurance from his embassy, which is required to ensure the individual's cooperation and accountability. This certificate provides assurance that the individual will comply with court proceedings and not abscond.

4.4 The Applicant has not yet served even half of the maximum sentence prescribed for the offences he is charged with, which is an important factor to consider when determining bail.

4.5 The Trial Court had previously dismissed the bail application filed by



the Applicant on 28th August, 2024. The Applicant had also approached the High Court *vide* Bail Application No. 869/2024, however the same was subsequently withdrawn.

4.6 If bail is granted, there is a possibility that the Applicant may abscond and even leave the country to evade the trial.

4.7 The Applicant has not cooperated with the investigation, as he failed to provide any information regarding the source or the intended recipient of the contraband.

Analysis and Findings

5. The Court has considered the facts of the case and the contentions advanced by the parties. While evaluating a bail application several factors must be considered, including whether there is a *prima facie* case or reasonable grounds to believe the accused has committed the offence, the likelihood of the accused repeating the offence, the nature and seriousness of the accusation, the severity of the potential punishment upon conviction, the risk of the accused absconding or fleeing if granted bail and the reasonable apprehension of witnesses being intimidated by the accused.

6. In the instant matter, the contraband recovered from the Applicant comprises heroin weighing 1010 grams. As a result, the provisions of Section 37 of the NDPS Act are attracted, which impose stringent conditions for the grant of bail.

7. Under Section 37, the Court can grant bail only after hearing the public prosecutor and upon being satisfied of the following twin conditions: (i) that there are reasonable grounds to believe that the accused is not guilty of the offence, and (ii) that the accused is not likely to commit any offence while on bail. The Supreme Court has consistently held that negation of bail



is the rule and its grant is an exception under Section 37(1)(b)(ii).⁵ In the instant matter, given the recovery of contraband is a commercial quantity, the rigours of Section 37 must be strictly applied. Consequently, the twin conditions mandated under the provision must be carefully examined to determine whether the Applicant satisfies the statutory requirements for the grant of bail.

8. The Court must now examine the grounds raised by the Applicant to determine whether the conditions under Section 37 are satisfactorily met.

The Test of Reasonable Grounds to Believe that the Accused is Not Guilty of the Offence

Absence of Independent Witnesses

9. The Applicant has raised the issue of the prosecution's failure to include independent witnesses during the search and seizure operations, despite the Applicant being apprehended near Kheda Park, Anand Vihar, Uttam Nagar, a densely populated area. The Applicant argues that the lack of independent witnesses' casts doubt on the fairness and credibility of the prosecution's case.

10. It is to be noted that the raiding party, acting on information received at 8:05 AM on 10th January, 2023 had sufficient time to secure independent witnesses before conducting the raid at around 11 AM. The prosecution's explanation that attempts were made but that none agreed to co-operate, and left without disclosing their names or addresses, appears mechanical and unconvincing. This Court is of the view that the failure to associate independent witnesses in a public area like Kheda Park, Anand Vihar, Uttam Nagar, could have been avoided with greater diligence. Such omissions,

⁵ *State of M.P. v. Kajda*, (2001) 7 SCC 673



while not necessarily fatal to the prosecution's case, do impact the transparency and credibility of the search and seizure process and merit scrutiny at the stage of considering bail.

11. This Court in *Bantu v. State Government of NCT of Delhi*,⁶ took note of the frequent and mechanical explanations offered for the non-joinder of independent witnesses in cases involving the seizure of contraband. It was observed that the absence of independent witnesses, especially in crowded public places, warrants attention. This practice undermines the transparency of the seizure procedure and weakens the evidentiary value of the recovery. In the present case, the failure to associate independent witnesses, despite the raid occurring in a public location, indicates a procedural irregularity in the search process. As noted above, while procedural lapses of this nature may not outrightly invalidate the prosecution's case, they diminish the reliability of the evidence collected, which becomes relevant at the bail stage, in order to ensure that right of the accused is not unduly curtailed.

12. In the present case, the absence of the independent witnesses leaves the recovery process open to question, as there is no independent evidence to corroborate the police's account. This omission casts a shadow over the credibility of the evidence and increases the potential for prejudice against the accused.

13. Thus, the non-joinder of witnesses by the prosecution undermines their case and *prima facie* satisfies the first condition set out under Section 37(1)(b)(ii), in favour of the Applicant.

⁶ 2024 SCC OnLine Del 4671



No Likelihood of Committing an Offence on Bail

Criminal antecedents

14. As regards the second condition of Section 37(1)(b)(ii), it is imperative for the Court to be satisfied that the Applicant is not likely to commit an offence while on bail. This condition also serves as a critical safeguard to ensure that granting bail does not result in any potential risk to public safety or impede the administration of justice.

15. In the instant case, it has been submitted that the Applicant has no prior criminal antecedents. The absence of any prior criminal record is a significant factor, as it distinguishes the Applicant from habitual or repeat offenders. This lack of antecedents supports the conclusion that the Applicant is unlikely to commit any offence while on bail.

16. Furthermore, while Section 37 of the NDPS Act is undoubtedly applicable, the Applicant's fundamental right to a speedy and expeditious trial must also be given due consideration. This right serves as a safeguard against undue and oppressive incarceration, ensuring that the judicial process does not inflict punishment prior to a finding of guilt. In the present case, the Applicant was arrested on 10th January, 2023 and as per the nominal roll dated 12th November, 2024 the Applicant had undergone 1 year 10 months and 2 days of judicial custody. As on date, he has been in judicial custody for over 2 years. This prolonged detention raises significant concerns about the balance between the rigours of Section 37 and the constitutional guarantee of a fair and timely trial.

17. As per the status report filed by the state, the Chargesheet was filed on 28th June, 2023 and the charges were framed on 24th April, 2024. Presently, only three out of 21 witnesses cited by the prosecution have been examined



and the trial is nowhere near conclusion.

18. In such circumstances, the Court must strike a balance between the fundamental right to a speedy trial, an integral aspect of the right to life and liberty under Article 21 of the Constitution of India, and the stringent requirements of Section 37 of the NDPS Act. While the rigours of Section 37 must be meticulously applied, they cannot override the constitutional mandate for timely justice. The right to life and personal liberty cannot be undermined by unwarranted delays in the judicial process, particularly when such delays are neither attributable to the accused nor adequately justified by the prosecution with compelling reasons. Furthermore, grant of bail in a case pertaining to commercial quantity, on the ground of undue delay in trial, cannot be said to be fettered by Section 37 of the NDPS Act.⁷

19. In the present case, even though the prosecution has argued that if the Applicant is released on bail, he may avoid the course of justice, however, this Court is empowered to put the conditions of bail in such a manner, so as to ensure his presence during Trial.

20. In light of the above, the Applicant is directed to be released on bail on furnishing a personal bond for a sum of ₹50,000/- with two sureties of the like amount, subject to the satisfaction of the learned Trial Court, on the following conditions:

- i. The Applicant shall not indulge in any criminal activity. He shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- ii. The Applicant shall under no circumstance leave the country without

⁷ Kulwinder v. State of Punjab CRM-M-64074-2024, decided on 10th January, 2025



the permission of the Trial Court;

iii. The Applicant shall provide the address where he would be residing after his release and shall not change the address without informing the concerned IO/ SHO;

iv. The Applicant shall appear before the Trial Court as and when the matter is taken up;

v. The Applicant shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times.

vi. The Applicant shall report to the concerned IO on the second and fourth Friday of every month, at 4:00 PM, and will not be kept waiting for more than an hour.

vii. In the event of there being any FIR/DD entry/complaint lodged against the Applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

viii. In terms of the judgment of the Supreme Court in ***Frank Vitus v. Narcotics Control Bureau & Ors***,⁸ the State shall immediately communicate the order granting bail, to the concerned Registration Officer appointed under Rule 3 of the Registration of Foreigners Rules, 1992, who in turn, shall communicate the order to all concerned authorities including civil authorities.

21. Needless to state, any observations concerning the merits of the case are solely for the purpose of deciding the question of grant of bail and shall not be construed as an expression of opinion on the merits of the case.

22. A copy of the order be sent to the Jail Superintendent for information and necessary compliance.

⁸ 2025 INSC 30



23. The bail application is allowed in the afore-mentioned terms.

SANJEEV NARULA, J

JANUARY 31, 2025

d.negi