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2025:DHC:423

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on:20.01.2025

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BAIL APPLN. 4072/2024**SHEELA**

.....Applicant

versus

STATE GOVT. OF NCT OF DELHI

.....Respondent

Advocates who appeared in this case:

For the Applicant

: Mr. Aditya Aggarwal, Ms. Kajol Garg and
Mr. Naveen Panwar, Advocates.

For the Respondent

: Mr. Manoj Pant, APP for the State with SI
Nagendra Kumar, PS Anti-Narcotics Squad.**CORAM****HON'BLE MR JUSTICE AMIT MAHAJAN**

JUDGMENT

1. The present application is filed seeking regular bail in FIR No. 251/2022 dated 20.04.2022 registered at Police Station Sarita Vihar for offences under Sections 20/29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').

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2. It is alleged that on 20.04.2022, a secret information was received regarding the illegal supply of Ganja. Subsequently, a raiding party was constituted, and thereafter a raid was conducted at around 10:00 AM above the Sarita Vihar Flyover. It is averred that before the search and seizure proceedings, few passersby were informed about the situation and were asked to join the police action, however, all of them refused and left without disclosing their names.

3. During the raid three people, namely Vinod, Iqbal and the applicant were apprehended who were travelling in a three-wheeler. The co-accused Vinod and the applicant were sitting on the back seat of the auto, while co-accused Iqbal was the driver of the said auto. It is alleged that the co-accused Vinod was holding a large red-black-white coloured carry bag between his legs, and the applicant too was holding a black bag. It is alleged that upon the search of the bag held by the co-accused Vinod, a total of 24.20 kgs of *ganja* was recovered. Further, upon the search of the bag held in the possession of the applicant, 14.13kgs of *ganja* was recovered. Subsequently, both the carry bags were seized, sealed and taken into possession, and all the accused persons including the applicant were arrested on 20.04.2022.

4. It is averred that thereafter, samples were drawn and sent for testing. In accordance with the FSL report, the samples were found to be *ganja*. Upon the conclusion of the investigation, the chargesheet

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was filed, and the FSL report was filed through supplementary chargesheet.

5. The learned Trial Court *vide* order dated 29.08.2023 framed charges against all the accused persons under Sections 20(c)/29 of the NDPS Act.

6. The first bail application preferred by the applicant was dismissed by the learned Trial Court *vide* order dated 27.08.2022. Thereafter, the application preferred by the applicant before this Court was withdrawn *vide* order dated 01.03.2023 with liberty to approach the learned Trial Court in view of the filing of the chargesheet and the supplementary chargesheet.

7. The second bail application preferred by the applicant was also dismissed by the learned Trial Court *vide* order dated 15.04.2023 considering the gravity of the offence, the role attributed to the applicant. Thereafter, the applicant had filed a second bail application before this Court which was dismissed *vide* order dated 11.10.2023. This Court, on that occasion, had noted that all the accused persons were travelling together in a vehicle from which commercial quantity of *ganja* was recovered. Consequently, the bail application filed by the applicant was dismissed. Further, the SLP filed by the applicant challenging the order of dismissal was also subsequently dismissed by the Hon'ble Apex Court *vide* order dated 19.10.2023.

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8. The third bail application filed by the applicant before the learned Trial Court was also dismissed *vide* order dated 01.04.2024. The applicant had sought liberty to file an appropriate application before the Hon'ble Apex Court seeking clarification whether a fresh application can be entertained in view of the change in circumstances that the trial had not proceeded. In view of the same, the third bail application preferred by the applicant was withdrawn and disposed of accordingly by this Court *vide* order dated 28.08.2024. The applicant has now approached this Court seeking regular bail in view of the delay in trial, non-compliance of Section 42 of the NDPS Act and the absence of photography/videography during the search and seizure in the present case.

9. The learned counsel for the applicant, at the outset, submitted that the present bail application preferred on behalf of the applicant is maintainable. He submitted that successive bail application can be filed despite the dismissal of previous bail applications if there is a change in circumstance. He submitted that more than one year has elapsed since the bail application was dismissed on an earlier occasion by this Court *vide* order dated 11.10.2023. He submitted that even after the passing of an year, the trial has not proceeded which entitles the applicant to seek bail by preferring a fresh application.

10. He submitted that the search of the applicant was conducted in contravention of the manner prescribed under Section 42 of the NDPS

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Act. He submitted that as per Section 42 of the NDPS Act, the search could have been conducted only by an officer being superior in rank to a constable. He consequently submitted that since the search was conducted by a constable, the same fell foul of Section 42 of the NDPS Act.

11. He further submitted that the applicant was apprehended from a public place, yet the police officials failed to produce a single independent witness. He submitted that except for a bald averment that efforts were made to secure the presence of independent witnesses, it is apparent from a perusal of the record that no action was taken against such persons, if any, who failed to join them. He submitted that the applicant has been in custody since 20.04.2022, and consequently prayed that in view of the changed circumstance of the delay in trial, the applicant be enlarged on regular bail.

12. *Per contra*, the learned Additional Public Prosecutor vehemently opposed the grant of any relief to the applicant. He submitted that the bail application preferred by the applicant has been dismissed on multiple occasions.

13. He submitted that the recovery in the present case is one of commercial quantity. He submitted that all the accused persons entered into a criminal conspiracy for the supply of *ganja*. He submitted that as per the CDRs, all the three accused were found to be in touch with each other. He submitted that no fresh ground has been

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pleaded so as to merit interference by this Court while considering the application for grant of bail. He consequently submitted that the application preferred by the applicant be dismissed.

Analysis

14. 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. However, at the same time, the period of incarceration is also a relevant factor that is to be considered.

15. It is unequivocally established that, to be granted bail, the accused charged with offence under the NDPS Act must fulfil 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.”

16. 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.

17. Insofar as the maintainability of the present application is concerned, the learned counsel for the applicant submitted that the present application for bail is maintainable on account of change in circumstances after the dismissal of the earlier bail application. The change in circumstances, as argued by the learned counsel are threefold – *firstly*, it is contended that in the precious application for grant of bail, the issue of non-compliance of the mandatory provision of Section 42 of the NDPS Act was not raised or argued, *secondly*,

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delay of more than one year in the trial since the last dismissal of bail and *thirdly*, non-joinder of independent witnesses and no photography/videography during the search and seizure.

18. The Hon'ble Apex Court in the case of ***Prasad Shrikant Purohit v. State of Maharashtra : (2018) 11 SCC 458***, held as under :

“30. Before concluding, we must note that though an accused has a right to make successive applications for grant of bail, the court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duty to record the fresh grounds which persuade it to take a view different from the one taken in the earlier applications.”

19. The application filed by the applicant on an earlier occasion was dismissed as withdrawn by order dated 01.03.2023 passed by this Court whereby, this Court had granted liberty to the accused persons to approach the learned Trial Court. The learned Trial Court dismissed the application preferred by the applicant by order dated 15.04.2023. The dismissal was predicated on the grounds of an absence of any change in circumstances since the last judicial consideration and the severity of the allegations levied against the applicant. The applicant preferred a second bail application before this Court which was dismissed by a Coordinate Bench of this Court by order dated 11.10.2023. The said order was admittedly carried in appeal before the Hon'ble Apex Court and the said SLP was dismissed.

20. It is well-established in law that a fresh consideration of a bail application requires a material change in circumstances. Filing

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successive bail applications without any substantive change is strongly discouraged. As a general principle, issues that have already been adjudicated cannot be revisited on the same grounds. Doing so risks creating speculation, uncertainty in the administration of justice, and may encourage forum shopping. The Hon'ble Apex Court, in ***Kalyan Chandra Sarkar v. Rajesh Ranjan and Another : (2005) 2 SCC 42***, emphasized that while considering a subsequent bail application, the court must evaluate the reasons for the rejection of the earlier application. Only after such consideration, and if the court is satisfied that bail should be granted, it must provide specific reasons justifying why the subsequent application is being allowed despite the earlier denial. The relevant excerpt from the judgment reads as follows:

“19. The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher court or a coordinate Bench must receive serious consideration at the hands of the court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the courts must give due weight to the grounds which weighed with the former or higher court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be reagitated on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting.

20. The decisions given by a superior forum, undoubtedly, are binding on the subordinate fora on the same issue even in bail matters unless of course, there is a material change in the fact situation calling for a different view being taken. Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited

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area in which an accused who has been denied bail earlier, can move a subsequent application. Therefore, we are not in agreement with the argument of learned counsel for the accused that in view of the guarantee conferred on a person under Article 21 of the Constitution, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by the courts earlier, including the Apex Court of the country.”

21. This Court, thus, cannot revisit or re-evaluate the issues already decided in the previous bail application, particularly when the said order has been affirmed by the Hon’ble Apex Court.

22. A bare perusal of the order dated 11.10.2023 dismissing the previous bail application reflects that no adjudication had taken place with respect to non-compliance of Section 42 of the NDPS Act, period of incarceration or the absence of photography and videography during the search and seizure process.

23. Pursuant to the dismissal of bail application preferred by the applicant by order dated 11.10.2023 passed by this Court, more than one year has been spent in custody which, in the opinion of this Court, is a ground to move for bail afresh. This approach is consistent with the Hon’ble Apex Court’s acknowledgment that prolonged detention can itself be a ground for reconsideration of bail, independent of the earlier dismissal, thereby not constituting a review but rather a fresh consideration under changed conditions. This aligns with the judicial imperative to ensure that detention prior to the trial does not become punitive and is in accordance with the principles of justice and liberty.

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24. It is well settled that an accused cannot be kept in custody for an indefinite period of time, and the bail application can be considered on its own merits, even if filed repeatedly. It is trite that every day spent in custody can provide a new cause of action for filing a bail application under certain circumstances. This principle is part of a broader approach emphasizing that the law prefers bail over jail, aiming to balance the rights of the accused with the requirements of the criminal justice system. This leads to the principle that each additional day in custody could potentially alter the circumstances under which bail is considered, thereby necessitating a fresh evaluation of the bail application.

25. 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) Non-compliance of the mandatory provision of Section 42 of the NDPS Act;
- b) Non-joinder of independent witnesses and no photography/videography; and
- c) Delay in trial.

26. It is argued that there is non-compliance of Section 42 of the NDPS Act inasmuch as the search of the applicant was conducted by a female constable however, the search could only have been conducted by an officer who is superior to the rank of a peon, sepoy or constable. It is trite law that issue of adequate or substantial compliance with



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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 after the evidence is led.

27. The learned counsel for the applicant has also contended that the process of search and seizure in the present case was carried out in the absence of any public witnesses. It is not in doubt that while the testimony of the police witnesses in absence of independent witnesses can be sufficient to secure conviction, if the same inspires confidence during the trial. However, lack of independent witness in certain cases can cast a doubt as to the credibility of the prosecution's case. It is not disputed that the investigating agency had sufficient time to prepare before the raid was conducted. [Ref : ***Bantu vs. State Govt of NCT of Delhi: 2024: DHC: 5006***]

28. Thus, not finding the public witness and lack of photography and videography of the alleged recovery in today's time and age casts a doubt on the credibility of the evidence. It is also not the case of the prosecution that notice was served under Section 100(8) of the CrPC on the persons who refused to join the raiding party in the process of seizure.

29. It is relevant to note that the NCB Handbook which has been adopted by the Delhi Police, though may not be binding, prescribes



the photography and videography as crucial practice for obtaining evidence in order to avoid allegation in regard to the foul play.

30. Thus, while it is true that the effort, if any, made by the prosecution to have the search conducted in the presence of the independent witnesses would be tested during the course of trial and the same may not be fatal to the case of the prosecution, however, the benefit, at this stage, cannot be denied to the accused.

31. It is pertinent to note that the applicant has been in custody since 20.04.2022. Only three witnesses have been examined till now. Speedy trial in such circumstances does not seem to be a possibility. The applicant cannot be made to spend the entire period of trial in custody especially when the trial is likely to take considerable time.

32. A long period of incarceration, thus, is also a factor which has to be kept in mind at the time of deciding the question of grant or refusal of bail. It is not stated that the applicant is required for further investigation, however, appropriate conditions ought to put to allay the apprehension of tampering the evidence and hampering the witness.

33. It is trite that grant of bail on account of delay in trial and long period of incarceration cannot be said to be fettered by the embargo under Section 37 of the NDPS Act. The Hon'ble Apex Court, in the case of **Mohd. Muslim v. State (NCT of Delhi) : 2023 SCC OnLine SC 352** has observed as under:

“21....Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS



Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.

22. Before parting, it would be important to reflect that laws which impose stringent conditions for grant of bail, may be necessary in public interest; yet, if trials are not concluded in time, the injustice wrecked on the individual is immeasurable. Jails are overcrowded and their living conditions, more often than not, appalling. According to the Union Home Ministry's response to Parliament, the National Crime Records Bureau had recorded that as on 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country²⁰. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

23. The danger of unjust imprisonment, is that inmates are at risk of "prisonisation" a term described by the Kerala High Court in A Convict Prisoner v. State²¹ as "a radical transformation" whereby the prisoner:

"loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status, possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes."

24. There is a further danger of the prisoner turning to crime, "as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal"²² (also see Donald Clemmer's 'The Prison Community' published in 1940²³). Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata : immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials - especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily."

(emphasis supplied)

34. The Hon'ble Apex Court in the case of **Man Mandal & Anr. v.**



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The State of West Bengal : SLP(CRL.) No. 8656/2023 had granted bail to the petitioner therein, in an FIR for offences under the NDPS Act, on the ground that the accused had been incarcerated for a period of almost two years and the trial was likely going to take considerable amount of time.

35. The Hon'ble Apex Court in **Rabi Prakash v. State of Odisha : 2023 SCC OnLine SC 1109**, while granting bail to the petitioner therein held as under :

"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."

36. The applicant is also stated to be of clean antecedents. In view of the above, this Court is of the opinion that the applicant has made out a *prima facie* case for grant of bail.

37. The applicant is, therefore, 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:

a. The applicant shall not directly or indirectly make any

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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;

- b. The applicant shall under no circumstance leave the boundaries of the country without the permission of the Trial Court;
- c. The applicant shall appear before the learned Trial Court as and when directed;
- d. The applicant shall, after her release, appear before the concerned IO/SHO once in every week;
- e. The applicant shall provide the address where she would be residing after her release to the concerned IO/SHO and shall not change the address without informing the concerned IO/ SHO;
- f. The applicant shall, upon her release, give her mobile number to the concerned IO/SHO and shall keep her mobile phone switched on at all times.

38. 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.

39. 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.

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40. The bail application is allowed in the aforementioned terms.

AMIT MAHAJAN, J

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