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

+ **BAIL APPLN. 4303/2024**

ROHAN MALIK

.....Petitioner

Through: Mr. Tarish Vijay Sathe, Advocate.

versus

STATE GOVT. OF NCT OF DELHI

.....Respondent

Through: Mr. Mukesh Kumar, APP for State
with Mr. Amrendra, SI, ANTF, Crime
Branch.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

13.01.2025

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1. The present application has been filed under Section 483 of the Bharatiya Nagrik Suraksha Sanhita, 2023 (erstwhile Section 439 of the Code of Criminal Procedure, 1973) seeking grant of regular bail in respect of FIR No. 187/2022 registered under Sections 22/25/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985,¹ instituted at Police Station Crime Branch.

2. A copy of the Status Report filed by the Respondent has been handed over across the Board and is taken on record.

3. In brief, the case of the prosecution is as follows:

3.1. On 26th August, 2022, SI Om Prakash along with HC Mahipal, on

¹ "the NDPS Act"



information received about drug traffickers in Delhi from P.S. Crime Branch, went to Punjab Bagh Bus Stop, Moti Nagar. There, an informer disclosed that one Mr. Rohan Malik @ Billi, resident of Ramesh Nagar, is supplying Crystal MDMA and LSD papers in Delhi. He further revealed that Mr. Rohan would be supplying huge quantity of the said contraband around 10:15 PM to 10:30 PM on the same day. This information was conveyed to the ACP/ANTF, Crime Branch who directed Inspector Jai Bhagwan to constitute a team and conduct a raid.

3.2. Thereafter, SI Om Prakash reached the location and asked a few persons that were present to be public witnesses, however, they denied citing their own reasons and no notice could be served on such persons as their identities could not be ascertained. At the instance of the informer, the Applicant was apprehended. He was informed about his legal rights and a notice under Section 50 of the NDPS Act was served upon him, to which he gave his written refusal to be searched before a Gazetted Officer or Magistrate. His search was conducted and two zip locked transparent polyethene pouches were recovered from him. Both the bags were checked using a field testing kit and MDMA, weighing 12.60 Grams and 28 sheets of LSD were recovered. The weight of the LSD was found to be 0.30 Grams, excluding the weight of the pouch, and 0.51 Grams after weighing with the pouch. The transparent pouches were taken into police possession through seizure memo after sealing and marking them.

3.3. Thereafter, a complaint along with the seized case property and copy of seizure memos were sent to the P.S. Crime Branch for registration of the FIR with the direction to hand over the case property to SHO/Crime Branch for compliance of Section 55 of the NDPS Act. Subsequently, the FIR in



question was registered and the Applicant was arrested on 27th August, 2022.

3.4. During the investigation, the Applicant disclosed that he procured the psychotropic substances from one Mr. Jasneet Singh @ Sahib, resident of Gurudwara Road, Naraina and supplied it to his friend namely, Mr. Yash Gupta, resident of Paschim Vihar.

3.5. Subsequently, on 29th August, 2022, Mr. Yash Gupta was also arrested at the instance of the Applicant. The disclosure statements of both the accused were recorded and 2 days police custody remand was obtained from the Trial Court. During the remand, Mr. Jasneet Singh was also arrested.

ARGUMENTS ADVANCED BY THE PARTIES

4. In this background, the Applicant urges that he has been falsely implicated and advances the following:

4.1. The procedural requirement under Section 52A of the NDPS Act has not been complied with. The absence of an inventory provided by the prosecution constitutes a violation of Section 52A(2) of the NDPS Act. Since no inventory was prepared for the seized contraband, the question of obtaining certification of such an inventory for correctness by a Magistrate does not arise. This lack of compliance undermines the integrity of the primary evidence as the inventory certificate thereof constitutes the primary evidence of the offence.

4.2. Additionally, the alleged recovery from the Applicant was made from a bus stand which is a busy and populated location and it is highly improbable that no public witnesses were present at the time of the seizure. This along with the absence of videographic or photographic evidence of the



alleged recovery, raises substantial doubts regarding the legitimacy of the seizure.

4.3. The Applicant has been in judicial custody for more than 2 years and he is pursuing his education and is committed to self-improvement. He has no criminal antecedents and undertakes to abide every condition that may be imposed for grant of bail.

5. *Per contra*, the APP for the State strongly opposes the Applicant's request for bail and makes the following submissions:

5.1. In the present case, chargesheet and supplemental chargesheet has already been filed and the case is pending trial.

5.2. The FSL report dated 29th May, 2023 confirmed that the substances recovered were Methamphetamine and Lysergic Acid Diethylamide and the quantity of the recovered contraband falls under the commercial quantity as defined under the NDPS Act.

5.3. Since the quantity recovered is commercial, the conditions under Section 37 must be strictly complied, without which bail cannot be granted to the Applicant. This mandate, in the facts of the present case, has not been fulfilled by the Applicant.

5.4. The procedure delineated under Sections 50 and 52A of the Act for seizure of commercial quantity of contraband has been duly complied with. These grounds are immaterial at the stage of consideration of bail.

5.5. The delay in trial cannot be attributed to the prosecution as the co-accused have time and again sought for adjournment before the Trial Court.

5.6. He further, expresses concern that the Applicant may engage in similar crimes if bail is granted.



ANALYSIS AND FINDINGS

6. 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.

7. In the instant matter, the contraband recovered from the Applicant comprises 0.3 Grams of LSD and 12.60 Kilograms of MDMA. Although the quantity of MDMA recovered falls within the intermediate category, the amount of LSD recovered qualifies as a commercial quantity under the NDPS Act. As a result, the provisions of Section 37 of the NDPS Act are attracted, which impose stringent conditions for the grant of bail.

8. 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).² 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

² *State of M.P. v. Kajda*, (2001) 7 SCC 673



determine whether the Applicant satisfies the statutory requirements for the grant of bail.

9. 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

10. 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 in a public place, namely the Kirti Nagar Bus Stand, Najafgarh Road, Delhi, at around 10:30 PM. The Applicant argues that the lack of independent witnesses' casts doubt on the fairness and credibility of the prosecution's case.

11. It is to be noted that the raiding party, acting on information received at 9:20 PM on 26th August, 2022, had sufficient time to secure independent witnesses before conducting the raid. 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 Kirti Nagar Bus Stand could have been avoided with greater diligence. Such omissions, 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.

12. This Court in ***Bantu v. State Government of NCT of Delhi***,³ took

³ 2024 SCC OnLine Del 4671



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.

Omission of Videography and Photography

13. The Applicant also points out the prosecution's failure to produce any videographic or photographic evidence of the alleged recovery.

14. The significance of video recording the recovery process especially in cases involving commercial quantities of narcotic substances, has been consistently emphasized by the Supreme Court in several judgments. The Court has highlighted that the video or photographic documentation of such recoveries serves as a critical safeguard, ensuring transparency and accountability in the handling of evidence. It is viewed as an essential step to protect the rights of the accused and maintain the integrity of the investigation. In this regard, the Supreme Court has emphasized that in instances where videography or photography has not been undertaken, the prosecution must provide clear and valid justifications for such omissions.⁴

⁴ See also: *Shafhi Mohd. v. State of H.P.*, (2018) 5 SCC 311



These judicial observations were made even prior to the enactment of the mandatory videography and photography requirements under the BNSS, illustrating that the Court has long recognized the vital role of such documentation in ensuring the fair administration of justice. This view has also been expressed by this Court in the case of ***Bantu***.

15. In the present case, the prosecution has failed to offer any adequate or convincing justification for not implementing the essential measure of videography or photography during the recovery process. Such documentation is not merely a procedural formality, but a safeguard to ensure transparency and fairness, particularly in cases involving narcotic substances. The absence of this safeguard leaves the recovery process open to question, as there is no independent evidence to corroborate the police's account. This omission, coupled with the lack of independent witnesses, casts a shadow over the credibility of the evidence and increases the potential for prejudice against the accused. Taken together, these lapses weigh in favour of granting bail to the Applicant.

16. Thus, the non-compliance with the above-mentioned safeguards i.e., non-joinder of witnesses and absence of videography and photography, 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.

No Likelihood of Committing an Offence on Bail

Criminal antecedents

17. 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.

18. In the instant case, it has been submitted that the Applicant has no prior criminal antecedents and has actively participated in several competitive examinations, demonstrating a constructive approach and a desire to lead a law-abiding life. 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, coupled with evidence of a proactive effort toward personal growth, supports the conclusion that the Applicant is unlikely to commit any offence while on bail.

Non-compliance of Section 52A of the NDPS Act

19. In addition to the aforesaid, the Applicant has also urged the non-compliance with Section 52A of the NDPS Act, asserting that the same would significantly undermine the primary evidence in the case. Reliance in this regard is placed on the decision rendered in ***Union of India v. Mohan Lal and Anr.***⁵ which observed that the procedure under Section 52A of the NDPS Act is mandatory and not directory. Further, the Applicant has also relied upon ***Yusuf @ Alias v. State***⁶ to urge that if an inventory of the seized contraband was neither prepared nor certified by a Magistrate, the contraband and any samples drawn therefrom cannot be regarded as valid evidence, therefore, the absence of evidence renders the trial itself vitiated.

20. Section 52A outlines the mandatory procedure for the disposal of seized narcotics and psychotropic substances. However, the Supreme Court in its recent judgment in ***Narcotics Control Bureau v. Kashif***,⁷ clarified that

⁵ (2016) 3 SCC 379

⁶ 2023 SCC Online SC 1328

⁷ 2024 SCC OnLine SC 3848



any delay or lapse in complying with Section 52A would not by itself render the evidence inadmissible. In this case, the Supreme Court was faced with a situation where the High Court allowed the bail application solely on the ground of belated compliance of Section 52A and without recording the findings as mandated under Section 37 of the Act. While rendering this decision, the Supreme Court considered the decisions of *Yusuf @ Asif* wherein conviction was set aside on the finding of non-compliance of Section 52A by relying on *Mohan Lal*. It was ultimately concluded that non-compliance of Section 52A neither vitiates the trial affecting conviction nor can be the only ground to seek bail.

21. In view of the Supreme Court's ruling, the Applicant's argument of non-compliance with Section 52A cannot be the sole ground for granting him bail. However, as examined above, both essential requirements under Section 37(1)(b)(ii)—reasonable grounds to believe the Applicant is not guilty of the offence and an assurance that the Applicant is not likely to commit an offence while on bail—have been satisfactorily met.

Delay in Trial

22. Additionally, it is pertinent to note that the Applicant has been in custody since 27th August, 2022. Although the chargesheet and supplemental has been filed, the charges are yet to be framed and there is no indication that the trial will conclude in the foreseeable future. While the prosecution has argued that the delay in the trial cannot be solely attributed to them, the fact remains that the Applicant has already been incarcerated for over two and a half years before the beginning of trial.

23. The right to life and personal liberty, enshrined under Article 21 of the Constitution of India, 1950, cannot be rendered nugatory by unwarranted



delays in the judicial process. The prolonged incarceration undermines the fundamental right to personal liberty. In such circumstances, the protection of liberty must take precedence over the statutory restrictions imposed under Section 37(1)(b)(ii) of the NDPS Act. The extended period of custody, combined with the delay in trial, justifies the Applicant's plea for conditional liberty through the grant of bail, thereby balancing the rights of the accused with the requirements of justice.⁸

CONCLUSION

24. In view of the foregoing discussion, this Court is of the opinion that the Applicant has satisfied the statutory conditions for grant of bail on the grounds of absence of witnesses and prolonged delay in trial.

25. The Applicant is, therefore, directed to be released on bail on furnishing a personal bond for a sum of INR 50,000/- with two sureties of the like amount, subject to the satisfaction of the Trial Court/Duty MM/Link MM, on the following conditions:

- a. The Applicant 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;
- 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 Trial Court as and when directed;
- d. The Applicant shall provide the address where he would be residing after his release and shall not change the address without informing the

⁸ See also: *Rabi Prakash v. State of Odisha*, 2023 SCC OnLine SC 1109



concerned IO/SHO;

e. 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.

26. 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.

27. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and shall not influence the outcome of the trial and also not be taken as an expression of opinion on the merits of the case.

28. With the above directions, the present application, is allowed.

SANJEEV NARULA, J

JANUARY 13, 2025

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