



2025:DHC:2166



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IN THE HIGH COURT OF DELHI AT NEW DELHI*Pronounced on: 01.04.2025***+ BAIL APPLN. 4364/2024****MOHAN GUPTA**

.....Petitioner

Through: Mr. Aditya Aggarwal, Ms. Shivani
Sharma, Ms. Pooja Roy and Mr.
Yasir, Advs.

versus

STATE GOVT. OF NCT OF DELHI

.....Respondent

Through: Mr. Aman Usman, APP for State with
SI Amrendra ANTF, Dariyaganj**CORAM:****HON'BLE MR. JUSTICE VIKAS MAHAJAN****JUDGMENT****VIKAS MAHAJAN, J.**

1. The present petition has been filed under Section 483 of BNSS 2023 read with Section 36A(3) of the NDPS Act, 1985 seeking regular bail in connection with FIR No.0357/2019 under Sections 21(c)/29 NDPS Act registered with P.S. Crime Branch.

2. The case of the prosecution is that on 25.12.2019, a secret information was received by ASI Ashok Kumar at Narcotics Cell, Crime Branch mentioning therein that a person namely Gopal r/o Nangloi, Prem Nagar, Delhi is indulging in the supply of Heroin in Delhi and he would be coming to supply Heroin to unknown person near Railway Phatak Kirari, Nangloi, Delhi between 2:00 PM to 4:00 PM. A raiding team led by ASI Ashok Kumar was constituted and trap was laid at the place of information. At the

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Signing Date: 01.04.2025
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BAIL APPLN 4364/2024

Page 1 of 9



2025:DHC:2166



instance of secret informer, two persons, namely, Kailash @ Gopal and Mohan Gupta (present petitioner) were apprehended. They were found in possession of a scooty bearing registration no.DL-11SX-7693, which co-accused Kailash @ Gopal was driving. Upon search of scooty, 510 grams of heroin was recovered.

3. Mr. Aditya Aggarwal, the learned counsel appearing on behalf of the petitioner submits that the petitioner is in custody for almost 4 years 6 months and only one witness has been examined out of total fifteen witnesses cited by the prosecution.

4. He submits that co-accused Kailash @ Gopal has been granted bail by the learned Sessions Court on 23.01.2024. He submits that the said co-accused was the driver of scooty from which recovery was effected. Further, the said co-accused also had previous involvements in the NDPS cases. Likewise, co-accused Parvinder @ Babbal has also been granted bail by the learned Sessions Court on 22.01.2020 on the pretext that no recovery was effected from him and the incriminating material against him was only CDR connectivity.

5. He submits that the petitioner was granted interim bail *vide* order dated 04.06.2024 by the learned Sessions Court in the present case FIR, as well as, *vide* order dated 07.06.2024 by this court in another FIR No.54/2023 under sections 21/25 of NDPS Act and the petitioner did not flout the conditions of interim bail.

6. He further contends that insofar as other cases alleged against the petitioner are concerned, he has already been granted bail in FIR No.22/2019 under Sections 21/25 NDPS Act registered at P.S. Crime Branch, Delhi *vide* order dated 28.08.2019. However, his bail application in

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Signing Date: 01.04.2025
16:15:49

BAIL APPLN 4364/2024

Page 2 of 9



2025:DHC:2166



relation to FIR No.54/2023 is stated to be pending.

7. Mr. Aggarwal has relied upon the following decisions of the Hon'ble Supreme Court in – (i) *Rabi Prakash v. State of Odisha, 2023 SCC OnLine SC 1109*, (ii) *Dheeraj Kumar Shukla v. State of UP, SLP (Crl.) NO. 6690/2022* (iii) *Nitish Adhikary v. The state of Bengal SLP (Crl.) NO. 5769/2022* to contend that the accused therein were granted bail in NDPS matters involving commercial quantity contraband regard being had to the long custody and the fact that the trial would take long time.

8. *Per contra*, the learned APP appearing on behalf of the State has argued on the lines of status report. He points out the other involvements of the present petitioner. He submits that the repeated involvements of the petitioner in NDPS case goes to show that there is a very strong apprehension that if bail is granted, the accused may jump the bail and may commit crime of similar nature.

9. I have heard the learned counsel for the petitioner, as well as, the learned APP for the State and have perused the record.

10. It may be noted that recovery was made in the present case at about 3.50 PM in the broad day light, but no independent witness was joined during such recovery. The reason put forth in the chargesheet is that 4-5 persons were present at the spot out of their curiosity and they were requested to join as witnesses after being apprised about the secret information but they refused to join as witness. Incidentally, the name of such persons have not been mentioned in the chargesheet. Insofar as the absence of videography and photography is concerned, there is absolutely no justification given for the same in the chargesheet.

11. A Coordinate Bench of this Court in *Bantu vs. State Govt. of NCT of*

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16:15:49

BAIL APPLN 4364/2024

Page 3 of 9



2025:DHC:2166



Delhi, 2024 SCC OnLine Del 4671 (supra) has observed that though, sufficiency of explanation as regards lack of videography and photography is to be tested during the course of trial, however, in the absence of any independent witnesses in support of recovery, the lack of videography and photography is a relevant factor while considering applications for grant of bail as the same cast a doubt over the very fulcrum of the case. The relevant paragraphs from the said decision are as under:

“72. Almost all individuals carry a mobile phone compatible for videography these days. From the above cases, it is clear that it is open for the prosecution to furnish reasons to explain and justify the absence of videography and photography in a case. Mere absence of videography and photography of the recovery does not nullify the case of the prosecution, however, the same can in some circumstances be sufficient to create a doubt as to the veracity of the prosecution’s case.

73. The Hon’ble Apex Court, in a catena of judgments has held that the more severe the punishment, greater has to be the care taken to ensure that all the safeguards provided in the statute are scrupulously followed.

74. While a little play in the joint has to be afforded to investigating agencies to enable them to discharge their duties, the authorities also have to be held accountable to prevent abuse of law. In cases where the factum of recovery of the contraband is supported only by official witnesses, lack of videography and photography, especially in the absence of independent witnesses, casts a doubt on the recovery of the contraband, unless the same is justified by cogent reasons.

75. As already noted above, in the case of absence of independent witnesses, it is to be seen whether any prejudice is caused to the accused person and testimonies of the police officials can be believed even without corroboration if the same is found to be credible. This Court is of the opinion that the same rationale would



2025:DHC:2166



extend to cases where there is no photography and videography as well, specially when the same has been deliberated and commented upon by Courts on numerous occasions.

76. The sufficiency of the explanation, if any, is to be tested during the course of the trial after the prosecution has led its evidence, however, in the opinion of this Court, the absence of any independent evidence to support recovery (presence of public witnesses, videography or photography) is a relevant factor while considering applications for grant of bail as the same casts a shadow over the very fulcrum of the case.”

12. A perusal of the Nominal Roll shows that petitioner has completed custody of 04 years 04 months and 23 days as on 13.12.2024. Therefore, as on date the petitioner would have completed custody of more than 04 years and 08 months.

13. The learned counsel for the petitioner has argued that prosecution has cited as many as fifteen witnesses but till date one witness has been examined, which position is not disputed by the learned APP. Inevitably, the conclusion of trial will take some time.

14. The Nominal Roll also reveals that the jail conduct of the petitioner during past one year and overall conduct has been ‘satisfactory’. Though the petitioner has criminal record and he is stated to be on bail in case FIR No. 22/2019 and still in JC in case FIR No. 54/2023, but long incarceration as well as the delay in trial cannot be overlooked.

15. At this stage, apt would it be to refer to the decision of Hon’ble Supreme Court in ***Rabi Prakash v. State of Odisha, 2023 SCC OnLine SC 1109***, wherein it was observed 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.***

(emphasis supplied)

16. Likewise, in *Naeem Ahmed Alias Naim Ahmad vs. Govt. of NCT of Delhi, 2024 SCC OnLine SC 220*, the Hon'ble Supreme Court granted bail to the accused from whom commercial quantity of contraband was recovered, having regard to his custody of 01 year and 11 months, the fact that the accused had no criminal antecedents and that the conclusion of trial would take time. The relevant paras of the decision reads as under:

“8. It is informed by learned counsel for the parties that the appellant has, as on date, spent more than 01 year and 11 months in custody. The investigation is complete but framing of the charges is yet to be done. The conclusion of trial will thus take time. There are no criminal antecedents.

9. It is a seriously debatable question of fact whether the appellant was also found in the conscious possession of the contraband (smack). But such a question of fact will obviously be determined by the Trial Court at an appropriate stage. That being so, it seems to us that as of now, the twin test of Section 37 of the Act, need not be invoked against the appellant.

10. Taking into consideration the totality of the circumstances, especially the period of custody undergone by the appellant however, without expressing any views on the merits of the case, the appeal is allowed. Accordingly, the appellant is ordered to be



2025:DHC:2166



released on bail subject to his furnishing the bail bonds to the satisfaction of the Trial Court.”

(emphasis supplied)

17. Likewise, in ***Man Mandal &Anr. vs. State of West Bengal, 2023 SCC OnLine SC 1868***, the Hon'ble Supreme Court granted bail to the petitioners therein from whom commercial quantity of contraband had been recovered considering the fact that they had been incarcerated for a period of almost 02 years and the trial was not likely to conclude in the near future.

18. In the facts and circumstances of the present case, more particularly, in view of the lack of photography and videography, the long incarceration and delay in trial, the previous involvement of petitioner cannot be the sole ground for denial of bail in the present case.

19. The Hon'ble Supreme Court has repeatedly observed that prolonged incarceration militates against the precious fundamental right under Article 21 of the Constitution of India, and as such, conditional liberty overriding the statutory embargo created under Section 37 (1)(b) of the NDPS Act may, in such circumstances, be considered.

20. In view of the aforesaid position and taking into consideration the circumstances in entirety, especially the period of custody undergone by the petitioner and the trial being still at the initial stage, this Court is of the view that the present case warrants relaxing of statutory embargo created under Section 37 (1) (b)(ii) of the NDPS Act. However, to allay the apprehension of the prosecution that the petitioner if released on bail may commit another offence under the NDPS Act, strict conditions can be imposed.

21. Accordingly, the petitioner is entitled to regular bail subject to his furnishing a personal bond in the sum of Rs.50,000/- with one surety of the



2025:DHC:2166



like amount to the satisfaction of the learned Trial Court/JMFC/Duty JM, further subject to the following conditions:

- (i) The applicant shall not leave NCR without prior permission of the concerned Court.
- (ii) The applicant shall provide his mobile number to the Investigating Officer on which he will remain available during the pendency of the trial.
- (iii) In case of change of residential address or contact details, the applicant shall promptly inform the same to the concerned Investigating Officer as well as to the concerned Court.
- (iv) The applicant shall not directly/indirectly try to get in touch with any prosecution witnesses or tamper with the evidence.
- (v) Petitioner shall report to the concerned Investigating Officer between 04:00 p.m. to 05:00 p.m. on every second and fourth Saturday of the month and in case the IO is not available, he will report to the Duty Officer. The petitioner will, however, not be kept waiting beyond 5.00 p.m. on the day he reports.

22. It is made clear that in the event any condition is violated by the petitioner or if in future he is found involved in any offence under the NDPS Act, the State shall be at liberty to seek cancellation of the petitioner's bail.

23. It is clarified nothing mentioned above shall be construed as expression of opinion on the merits of the case.

24. The petition stands disposed of in the above terms.

25. Copy of the order be forwarded to the concerned Jail Superintendent for necessary compliance.

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BAIL APPLN 4364/2024

Page 8 of 9



2025:DHC:2166



26. Order *dasti* under signatures of the Court Master.

VIKAS MAHAJAN, J

APRIL 1, 2025
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BAIL APPLN 4364/2024

Page 9 of 9