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

+ **BAIL APPLN. 2525/2024 & CRL.M.A. 21133/2024**

AKIL AHMED

.....Applicant

Through: Mr. Karan Verma & Ms.
Nayan Maggo, Advocates.

versus

STATE NCT OF DELHI

.....Respondent

Through: Mr. Ajay Vikram Singh,
APP for the State.
SI Vishan Kumar (P.S.
ANTF, Crime Branch).

CORAM:

HON'BLE MR. JUSTICE AMIT MAHAJAN

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O R D E R
30.08.2024

1. The present application is filed seeking regular bail in FIR No.19/2022, dated 24.02.2022, registered at police station Crime Branch (Delhi), for offences under Sections 21/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act').
2. The case of the prosecution is that on 24.02.2022, at around 1:00 pm, SI Naveen along with some staff of Narcotics Cell were present in the area of Om Vihar, near Metro Pillar No. 700, Uttam Nagar in pursuit of obtaining information about drug traffickers. It is alleged that upon noting the suspicious behaviour of two persons, namely, one Rehan and Gulrez, the team led by SI Naveen apprehended them, and upon inquiry learnt that they work in supplying illegal smack from Bareilly to Delhi.



3. It is alleged that SI Naveen was directed to take necessary actions. It is alleged that the said information was lodged in CCTNS *vide* DD No. 0065A dated 24.02.2022.

4. Notices under Section 50 of the NDPS Act were served upon both the accused, and their refusal was recorded thereafter.

5. It is alleged that thereafter, during the search conducted, 50 gms of heroin each was recovered from the person of both Rehan, and Gulrez. It is alleged that upon further enquiry, the accused persons disclosed, that the applicant was also involved in bringing Heroin from Bareilly, and is allegedly present in a rented room in Uttam Nagar Area.

6. It is alleged SI Naveen, upon directions, and at the instance of the apprehended Rehan, conducted a raid at H. No. WZ-59A, Ground Floor, Om Vihar Phase-II, Uttam Nagar, and apprehended the applicant. A notice under Section 50 of the NDPS Act was served upon him, and the refusal of the applicant was recorded thereafter.

7. It is alleged that upon search, 260 gms of heroin was recovered from the person of the applicant.

8. All three accused persons, including the applicant were arrested on 25.02.2022. It is alleged that during investigations, the accused persons disclosed that they used to procure heroin from one person, namely Moin Khan.

9. Charge sheet in the present case was filed under Sections 21/29 of the NDPS Act against all three accused.

10. The learned counsel for the applicant submits that the applicant has been falsely implicated in the present case. He submits that there are serious infirmities in the case of the prosecution.



11. He submits that the applicant has been apprehended on the disclosure statement of the other two accused, namely Rehan and Gulrez, however, the investigating agency failed to obtain a warrant to search the premises of the applicant. He submits that there was non-compliance of Section 42 of the NDPS Act. He submits that the investigating agency neither obtained a warrant to search the house of the applicant after sunset and before sunrise, nor did it record separate reasons for not doing so.

12. He submits that there has also been a non-compliance of Section 50 of the NDPS Act in the present case. He submits that not only was there no gazetted officer present at the spot, nor did the raiding team call any gazetted officer on spot. He submits that in terms of Section 50 of the NDPS Act, not only is it imperative on the part of the officer to apprise the accused person of his right to be searched before the nearest Gazetted officer/Magistrate but it is also mandatory for such officer to produce the said accused before the nearest Gazetted officer/Magistrate.

13. He submits that allegedly a quantity of 260 gms of smack was recovered from the person of the applicant, however, there is absence of any photo/video at the time of the apprehension of the applicant. He submits that there is no independent witness in the present case.

14. He submits that the trial is at the stage of examination of prosecution witnesses and only one out of twenty witnesses have been examined by the prosecution. He submits that the applicant has been in custody since 25.02.2022, and there is a delay in trial.

15. He submits that the applicant has clean antecedents and deep roots in the society. He further submits that the applicant be enlarged on bail on the ground of parity since the other three



accused in the present case namely, Rehan, Gulrez and Moin Khan have already been granted bail by the learned Trial Court.

16. *Per contra*, the learned Additional Public Prosecutor for the State vehemently opposes the grant of bail to the applicant. He submits that the applicant is involved in drug trafficking, and 260 gms of heroin was recovered from his possession.

17. He submits that since 260 gms of heroin was recovered from the possession of the applicant, and the bar under Section 37 of the NDPS Act is attracted.

18. He submits that the applicant cannot be granted bail on the ground of parity, since there was no recovery from accused Moin Khan; and as regards the other two accused, namely Rehan and Gulrez, the recovered contraband was only of an intermediate quantity, that is, 50 gms each.

19. He submits that the defences of the applicant in regard to any procedural anomalies would be a matter of trial, and the applicant should not be granted bail at this stage.

Analysis

20. 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.

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



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.”

22. 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.

23. The learned counsel for the applicant submits that a liberal interpretation of Section 37 of the NDPS Act must be taken into account by the Court in the present case on the following grounds:



- a) Illegality in the notice served under Section 50 of the NDPS Act in so far as the search of the accused was not conducted in the presence of a Gazetted Officer or a Magistrate;
- b) Non-joinder of independent witnesses and no photography/videography; and
- c) Delay in trial.

24. Section 50 of the NDPS Act outlines the conditions under which a search of a person is to be conducted, specifying that such a search must be performed in the presence of a Gazetted Officer or a Magistrate if the individual so requests. This provision is intended to safeguard the rights of individuals and ensure the fairness and integrity of the search process. This Court in the case of *Bantu vs. State Govt of NCT of Delhi: 2024: DHC: 5006*, while noting that the judgment passed by a coordinate bench of this Court in the case of *Mohd. Jabir v. State (NCT of Delhi) (supra)*, is under consideration before the Hon'ble Apex Court, held that the essence of Section 50 of the NDPS Act— to inform the suspect of his right to be searched before the Gazetted Officer or a Magistrate — was communicated to the accused person, and any failure in strictly adhering to the precise language in the notice should not undermine the overall compliance if no prejudice is shown.

25. It was observed that prejudice to the applicant is to be seen by the procedural lapse in such a case. In the present case, *prima facie*, the applicant has not been able to establish any prejudice caused to him. Infirmities in the procedure, if any, will be tested during the course of the trial.

26. In the present case, the accused was duly informed of his statutory right to be searched before the Gazetted Officer or a

BAIL APPLN. 2525/2024



Magistrate, as stipulated under Section 50 of the NDPS Act. However, the accused voluntarily declined to exercise this right. The issue whether this refusal, following the police officials intimating him of his rights, leads to non-compliance with Section 50 of the NDPS Act or affects the legality of the subsequent search and seizure is a nuanced question and the same is a matter of trial and cannot be looked into at this stage.

27. The learned counsel for the applicant also contends that though the recovery was made from the person of the applicant, that too, when he was in his house, there is an absence of any public witness. This Court in the case of *Bantu v. State Govt of NCT of Delhi (supra)* has observed that while the testimony of police witness is sufficient to secure conviction if the same inspires confidence during the trial, however, lack of independent witnesses in certain cases can cast a doubt as to the credibility of the prosecution's case.

28. Primarily, it is the prosecution's case that it did not have sufficient time to obtain a house search warrant before the raid was conducted. Even if for argument's sake it is assumed that the raiding team did not have sufficient time to obtain house search warrant, the fact that it did not find any public witness, and that there is a complete lack of photography and videography in today's time casts a doubt to the credibility of the evidence.

29. A bald statement has been made, as stated in the chargesheet filed, that the nearby neighbours were apprised of the entire situation, and had been asked to take part in the police action, however, they refused to join the investigation and closed their gates. Furthermore, no notice under Section 100 (8) of the CrPC was given to any person on the refusal to support the Investigating Agency during the search procedure.



30. This Court in *Bantu v. State Govt of NCT of Delhi (supra)*, noted that the Hon'ble Apex Court, way back in the year 2018 in *Shafhi Mohd. v. State of H.P. : (2018) 5 SCC 311*, after taking note of the technological advancements, had passed certain directions. The Hon'ble Apex Court had emphasised the role of audio-visual technology in enhancing the efficacy and transparency in the Police investigations.

31. This Court also noted that realising the need of change in time, the Legislature has now passed the Bharatiya Nagarik Suraksha Sanhita, 2023 ('BNSS'), where the practice of photography and videography has now been made mandatory as part of the investigation.

32. This Court further noted that the procedure prescribed in NCB Handbook which has been adopted by the Delhi Police may be argued to be not binding, however, it cannot be denied that the same has been prescribed as the best and crucial practice for obtaining evidence in order to avoid the allegation in regard to foul play.

33. 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. The raid was conducted inside the premises, there is no justification why no photo/video of the proceedings at the time of apprehension of the applicant were made. It is also not the case of the prosecution that equipments were not available to videograph and photograph the search/seizure. Even otherwise, it cannot be denied that almost every person today carries a smart phone with a camera installed in it.



34. This Court has come across a number of cases where the investigating authority has in fact done photography and videography of the recovery. It is peculiar that the investigating authorities, understanding the importance of such additional evidence, makes efforts to belie allegations of false implication and endorse the recovery of contraband by photography and videography in some cases, but fails to undertake any steps to do the same in other cases.

35. Even if the explanation tendered by the prosecution for non-joinder of independent witnesses is to be believed, it is more peculiar that despite the same, evidently, no effort to photograph or videotape the recovery has been made by the prosecution in the present case to endorse the credibility of the recovery.

36. Delay in trial and long period of incarceration is also an important factor which has to be kept in mind while considering the application for bail.

37. In the present case, the matter is at the stage of prosecution evidence. It is stated that only one witness has been completely examined out of twenty witnesses. The applicant has been in custody since 25.02.2022. There is no likelihood of the trial being completed in the near future.

38. It is trite law that grant of bail on account of delay in trial 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. State*²¹ 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)

39. 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

BAIL APPLN. 2525/2024

Page 10 of 14



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.”

40. The Hon’ble Apex Court in ***Badsha SK. v. The State of West Bengal*** (order dated 13.09.2023 passed in **Special Leave Petition (Crl.) 9715/2023**), granted bail to the petitioner wherein who had been in custody for more than two years with the trial yet to begin.

41. Similarly, in ***Man Mandal & Anr. v. The State of West Bengal*** (order dated 14.09.2023 passed in **Special Leave Petition (Crl.) 8656/2023** decided on 14.09.2023), the petitioner therein had been in custody for almost two years and the Hon’ble Apex Court found that the trial is not likely to be completed in the immediate near future. The petitioner was, therefore, released on bail.

42. In ***Dheeraj Kumar Shukla v. State of U.P. : 2023 SCC OnLine SC 918***, the Hon’ble Apex Court released the petitioner therein on bail, and observed as under:

“3. It appears that some of the occupants of the Honda City” Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. It is true that the quantity recovered from the petitioner is commercial in nature and the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the petitioner is in custody for the last two and a half years, we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed.”

43. A Coordinate Bench of this Court in ***Gurpreet Singh v State of NCT of Delhi : 2024:DHC:796***, considered the effect of **BAIL APPLN. 2525/2024**

Page 11 of 14



delay and observed as under:

“16. In addition to the above, only 2 (two) out of 22 witnesses have been examined by the prosecution, and that too partially, though more than three and a half years have passed since the arrest of the applicant. It may be true that the reason for the delay in the conclusion of the trial may be for various factors, may be not even attributable to the prosecution, like Covid 19 pandemic and restricted function of the Courts, however, as long as they are not attributable to the applicant/accused, in my view, the applicant would be entitled to protection of his liberty under Article 21 of the Constitution of India. Delay in trial would, therefore, be one of the consideration that would weigh with the Court while considering as application filed by the accused for being released on bail.”

44. From the foregoing, it is evident that despite the stringent requirements imposed on the accused under Section 37 of the NDPS Act for the grant of bail, it has been established that these requirements do not preclude the grant of bail on the grounds of undue delay in the completion of the trial. Various courts have recognized that prolonged incarceration undermines the right to life, liberty, guaranteed under Article 21 of the Constitution of India, and therefore, conditional liberty must take precedents over the statutory restrictions under Section 37 of the NDPS Act.

45. The applicant is also stated to be of clean antecedents.

46. Appropriate conditions can be put to allay any apprehension of the applicant committing another offence of a similar nature while on bail.

47. In such circumstances, this Court is of the opinion that the applicant has made out a *prima facie* case for grant of bail on the grounds of absence of independent witnesses and prolonged delay in the trial.

48. The applicant is, therefore, directed to be released on bail on furnishing a personal bond for a sum of ₹1,00,000/- 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 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 Delhi without informing the concerned SHO;
- c. The applicant shall appear before the learned Trial Court as and when directed;
- d. The applicant shall provide the details of his permanent address where he would be residing after his release to the learned Trial Court and intimate the Court, by way of an affidavit, as well as to the IO about any change in his residential address;
- 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.

49. 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.

50. 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.

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



52. The pending applications are also disposed of.

AMIT MAHAJAN, J

AUGUST 30, 2024

'Aman'