



2024:DHC:5174



IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment delivered on:15.07.2024*

+ **BAIL APPLN. 3047/2023, CRL.M.A. 24516/2023,
CRL.M.A. 4839/2024 & CRL.M.A. 4840/2024**

ANKIT SAGAR

..... Applicant

versus

**STATE (GOVT. OF NCT
OF DELHI)**

..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Aditya Aggarwal, Mr. Naveen Panwar,
Ms. Kajal Garg, Mr. Manas Agarwal & Ms.
Shivani Sharma, Advs.

For the Respondent : Mr. Amol Sinha, ASC for the State with
Mr. Kshitiz Garg & Mr. Ashvini Kumar,
Advs.

**CORAM
HON'BLE MR JUSTICE AMIT MAHAJAN**

JUDGMENT

1. The present application is filed under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') read with Section 36A (4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act'), seeking regular bail in FIR No. 084 of 2022 under Sections 21/22/29 of the NDPS Act.



2024:DHC:5174



2. The FIR was registered on the basis of a secret information received on 17.04.2022, alleging that the applicant and a Nigerian national named Izuchukwu Amara, a co-accused, were involved in illegal smuggling of drugs internationally through courier services.

3. As per the secret information, it was informed that the co-accused Izuchukwu would be arriving near Metro Pillar No. 746, Dwarka Mor metro station between 08:30 PM to 09:00 PM for delivering drugs to the applicant.

4. A trap was laid down at Metro Pillar No. 746, Dwarka Mor metro station and a few passers - by were also informed about the situation and were asked to join the police action, however, all of them refused and left without disclosing their names.

5. It is alleged that the applicant arrived at the Metro Pillar No. 746 at about 08:40 PM and the co-accused Izuchukwu also arrived after 2-3 minutes on a scooty bearing no. DL9SBX5928.

6. As per the FIR the co-accused Izuchukwu handed over two carry bags to the applicant and kept one bag with himself. Both of them were apprehended at the spot and notice under Section 50 of the NDPS Act was served upon both of them, informing them about their legal right to get their search done in front of a Gazetted Officer or a Magistrate. It is alleged that the applicant refused to be searched in the presence of a Magistrate or a Gazetted Officer. The ACP Sh. Attar Singh, on whose instructions the raid was conducted, was called and the search was conducted in front of ACP, Sh. Attar Singh.

7. At first the bag in possession of the Nigerian national was searched from which three rolls of laces were found and on opening of each roll a white-coloured crystal like substance was recovered, which



2024:DHC:5174



after being tested with field testing kit was found positive for Methamphetamine Drug (ice drug), weighing 75, 40, and 35, grams respectively along with packaging. Thereafter, the search of the bags in possession of the applicant was carried out and three similar rolls of laces were found and upon opening the said rolls, white-coloured crystal like substance was recovered weighing 50, 25, and 25 grams, respectively along with packaging.

8. As per the FIR, the recovered drugs and scooty bearing no. DL9SBX5928 were seized and the applicant along with the co-accused was arrested.

9. Upon completion of the investigation, the chargesheet in the present case was filed for offences under Sections 21/22/29 of the NDPS Act qua the applicant.

10. The learned counsel for the applicant submitted that the applicant is falsely implicated in the present case. He submitted that there are serious infirmities in the case of the prosecution. He submitted that even though the purported recovery happened in a public place, there were no independent witnesses.

11. He submitted that as per the FIR, the secret information was received at around 06:45 p.m. and the applicant came at the spot at around 08:45 p.m. after which the alleged recovery took place. He submitted that as per the secret information the investigating agency had knowledge of the approximate timing of the applicant being present at the alleged spot, which is stated to be a metro station and yet no independent witness was present.

12. He submitted that there has been non-compliance of Section 50 of the NDPS Act, in so far as the ACP, on whose instruction the



raiding team was formed, was called on the spot and he himself being part of the raiding team could not have been called as an independent witness. In support of his contention the learned Counsel has placed reliance on the judgement passed by the co-ordinate bench of this Court in the case of *Mohd. Jabir v. State of NCT of Delhi* : **2023 SCC OnLine Del 1827**.

13. He further submitted that there is an alleged infirmity in the notice that was served upon the applicant under Section 50 of the NDPS Act, in so far as the word 'any' was mentioned specifically instead of 'nearest' for the Gazetted Officer/ Magistrate.

14. He also submitted that the accused persons were not informed about their rights under the provisions of Section 50 of the NDPS Act.

15. By placing reliance on the case of *Emeka Emmanuel v. State* : **2022 SCC OnLine Del 4493** the learned counsel also submitted that since the mandatory requirement of Section 50 of the NDPS Act has not been met at the first instance, the recovery itself is under doubt.

16. He submitted that the chargesheet in the present case was filed on 15.10.2022 and the applicant is in custody for more than two years. He relied upon the observations of the Hon'ble Supreme Court in *Mohd. Muslim v. State (NCT of Delhi)* : **2023 SCC OnLine SC 352**. He submitted that given the applicant's clean antecedents and deep roots in the society, there is no possibility of the applicant influencing the witnesses. Therefore, no purpose would be served by keeping the applicant in further incarceration.

17. He submitted that there are no independent witnesses in the present case and thus the story of the prosecution comes under the



shed of suspicion. He further submitted that no endeavor was made by the prosecution to photograph or videotape the recovery either.

18. He further placed reliance on the following judgments in support of his contentions:

- a. *Emeka Emmanuel v. The State (supra)*
- b. *Akhilesh Bharti v. State : 2020:DHC:340;*
- c. *SK Raju v. State of West Bengal : (2018) 9 SCC 708* and;
- d. *Kamruddin v State : 2022 SCC OnLine Del 3761.*

19. The learned Additional Public Prosecutor for the State opposed the grant of bail and submitted that during the course of investigation, it was revealed that the co-accused and the applicant were involved in drug trafficking from various foreign countries *via* courier services. It was also revealed that they concealed narcotics in various items and fancy objects by creating secret compartments.

20. He submitted that the offence is grave and commercial quantity of the contraband (Methamphetamine) has been recovered from the possession of the applicant and hence the embargo under Section 37 of the NDPS Act is attracted.

21. He submitted that an additional 100 grams of Methamphetamine was recovered, at the applicant's instance from his room in Naharpur Rupa Village, Gurgaon. During further investigation, the applicant also disclosed that his friend namely, Abhinandan, who is a co-accused, was part of the drug syndicate and engaged in illegal drug trafficking.

22. He submitted that on the applicant's disclosure a raid at co-accused, Abhinandan's residence in Naharpur Village, Gurugram was conducted, which led to the recovery of 200 grams of Heroin and 200



grams of Methamphetamine, hidden in secret compartments within bangle boxes.

23. He submitted that the use of the word 'nearest Gazetted Officer' in Section 50 of the NDPS Act is directory in nature and not mandatory. The use of the word 'nearest' or the omission to write 'nearest' does not affect/ hamper the intent or alter the safeguard of Section 50 of the NDPS Act. He stated that once the applicant was informed about his rights, the mandatory requirements of Section 50 of the NDPS Act were complied with. Therefore, there was no irregularity.

24. He submitted that non-compliance of procedural requirements is to be tested during the course of the trial. In this regard, he placed reliance on the judgment of a Coordinate Bench of this Court in *Gauri Shankar Jaiswal v. Narcotics Control Bureau : 2023 SCC OnLine 3327*.

25. He further submitted that the FSL report has also confirmed that the seized contraband were narcotic drugs, and therefore his bail application ought to be dismissed.

26. He submitted that the defences of the applicant in regard to any procedural anomalies would be a matter of trial.

Analysis

27. Arguments were heard in detail from the learned counsel for the parties.

28. 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.

29. 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.”

30. 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.

31. The learned counsel for the applicant submitted 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 it did not stipulate that the accused has a right to be searched in the presence of the ‘nearest’ Gazetted Officer or Magistrate.
- b) Non-joinder of independent witnesses by the prosecution and no photography and videography, when the recovery / search was conducted at a highly dense public place.
- c) Delay in trial.

32. 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. In the case of *Bantu vs. State Govt of NCT of Delhi: 2024:DHC:5006*, this court 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. Hence, while the wording is important, the ultimate focus remains on whether the suspect’s rights were adequately protected, a question to be resolved during trial.

33. 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 in the course of trial.

34. It was held that not mentioning the word ‘nearest’ does not constitute non-compliance with Section 50 of the NDPS Act.

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

36. It is also contended by the learned counsel for the applicant that though the recovery was allegedly made at a busy place, the same is not supported by any public witness. This Court in the case of *Bantu v. State Govt of NCT of Delhi* (*supra*), observed that while the testimony of the police witness is sufficient to secure conviction if the



2024:DHC:5174



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.

37. It was held that when the Investigating Agency had sufficient time to prepare before the raid was conducted, not finding public witness and lack of photography and videography in today's time cast a doubt on the credibility of the evidence.

38. A bald statement has been made, as stated in the chargesheet filed, that a few passers-by were asked to take part in the police action, however, they refused to join the investigation and left the spot citing legitimate compulsion of their journey.

39. In the present case, no notice was served on the people under Section 100(8) of the CrPC and neither any effort was made to jot down the names or details of such passers-by. The secret information was received almost two hours prior to the applicant being apprehended. It is peculiar that the Investigating Agency was unable to associate even a single public witness at the same time, especially since the prosecution had prior secret information and the applicant and co-accused were apprehended at a public place near a metro station.

40. It is also alleged that a search was also conducted at the residence of the applicant wherein additional 100 grams of contraband was allegedly recovered. Again, no independent witness has been mentioned to be present during the search. It cannot be said that while conducting the search at the house of the applicant, the investigating agency was not able to get a single independent witness in whose



2024:DHC:5174



presence, the said recovery could be made. Videography or photography was also not done during the raid / search at the house.

41. This Court in *Bantu v. State Govt of NCT of Delhi* (*supra*), had noted that the Hon'ble Apex Court, way back in the year 2018 in the case of *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 emphasized the role of audio-visual technology in enhancing the efficacy and transparency in the Police investigations.

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

43. 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.

44. 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 / applicant. Undoubtedly, the search in the present case was conducted at a busy public place and at the house of the applicant. It is not the case of the prosecution that no CCTV were installed around the area where



raid/search was conducted. It is also not the case that equipments were not available to videograph and photograph the search/seizure. It cannot be denied that almost every person today carries a smart phone with a camera installed in it.

45. 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.

46. The applicant is in custody since 18.04.2022. The Chargesheet was filed on 15.10.2022, since then a lot of time has passed and there is no likelihood of the trial being completed in near future.

47. 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 (supra))** 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 country. 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.”

48. 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.”

49. 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 who had been in custody for more than two years with the trial yet to begin.



50. Similarly, in ***Man Mandal &Anr. v. The State of West Bengal 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.

51. 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.”

52. A Coordinate Bench of this Court in ***Gurpreet Singh v State of NCT of Delhi : 2024:DHC:796***, considered the effect of 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.”



2024:DHC:5174



53. 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, and liberty, guaranteed under Article 21 of the Constitution of India, and therefore, conditional liberty must take precedent over the statutory restrictions under Section 37 of the NDPS Act.

54. 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.

55. The applicant is also stated to be of clean antecedents. Therefore, I am satisfied that there are reasonable grounds for believing that the applicant is not likely to commit any offence while on bail.

56. 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 join and cooperate with the further investigation, if any, as and when directed by the IO;
- b. 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;



2024:DHC:5174



- c. The applicant shall, upon his release, provide his address where he shall be residing after his release, and shall not change the same without informing the concerned IO/SHO;
- d. The applicant shall appear before the learned Trial Court on every date of hearing;
- e. 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;
- f. The applicant shall not leave the country without the permission of the learned Trial Court.

57. 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.

58. 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.

59. The bail application is allowed in aforementioned terms.

AMIT MAHAJAN, J

JULY 15, 2024