



2024:DHC:7332



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

% Reserved on : 2nd August, 2024

Pronounced on: 11th September, 2024

+ **BAIL APPLN. 4019/2023**

BADAKULU LADU @ SUSHANTPetitioner

Through: Mr. Aditya Aggarwal and Ms.
Shivani Sharma, Advocates
through VC.

versus

STATERespondent

Through: Mr. Aman Usman, APP for the
State with SI Ankur Yadav, P.S.
Crime Branch.

**CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL**

JUDGMENT

ANISH DAYAL, J.

1. This petition seeks regular bail for petitioner in FIR No. 21/2021 PS Crime Branch under Sections 20/25/29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('**the Act**'). FIR was registered on 10th February 2021. Petitioner has been incarcerated since 17th January 2023 and has no previous involvements.

Background facts

2. As per the case of the prosecution, on 10th February 2021, responding to a secret information, two persons namely Mohit Yadav and Subhash Chander @ Deepu were apprehended from over bridge



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DND, Ring Road Delhi, with a truck UP 81AF 7152 found with 116.5 kgs of cannabis in 5 plastic bags. During the course of investigation, accused Mohit Yadav disclosed that he had been directed by one Prince resident of Noida, Uttar Pradesh, to meet one Sushant @ Badakulu Ladu (petitioner) in Orissa. He met Sushant in Digaphandi, Orissa, who handed over 5 plastic bags of cannabis to him. The cannabis, according to disclosure, was to be delivered to Prince; mobile number of Sushant was provided by Mohit Yadav. On 15th February 2021, proceedings under Section 52A of the Act were conducted before Saket Court, Delhi. Samples were drawn from all 5 plastic bags. On 16th February 2021, samples were deposited in FSL, Rohini, for expert opinion on the contraband. On 6th July 2021, FSL report stated that the contraband was found to be cannabis (*ganja*).

3. Registered owner of recovered truck was one Srinivas, resident of District Aligarh, U.P., who stated that he had sold his truck to one Pushpender Gupta, District Gautam Budh Nagar, U.P. Pushpender Gupta stated that he had handed over the truck to Mohit Yadav for transportation from Delhi to Orissa. He did not state anything about recovered cannabis.

4. Both Srinivas and Pushpender were kept in Column 12 of the charge-sheet since there was no direct evidence against them. The CAF of Sushant's mobile number 7788915531 was obtained from Jio Telecom Services and found registered in the name of petitioner who was resident of Digaphandi, Orissa.

5. Accused Mohit Yadav identified Sushant @ Badakulu Ladu by seeing his photo in CAF. As per CDR analysis of mobile numbers of



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Mohit and that of petitioner, both were found connected with each other and had contacted each other 16 times between 1st February 2021 to 10th February 2021. Their locations were found in Digaphandi, Orissa. Raids were conducted at petitioner's residence at his village in Orissa but he was avoiding arrest. NBWs were issued but could not be executed as petitioner could not be found. Process under Sections 82 and 83 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') were issued from the Trial Court.

6. On 15th January 2023, Special Cell, Southern Range, Saket, arrested petitioner from Ganjam, Orissa; on 17th January 2023, he was formally arrested and examined. As per prosecution, he disclosed that one Prince @ Pushpender @ Rahul used to buy cannabis from him and had sent the money in his SBI account No.35545981890. The same was verified from accounts statement. Money was found transferred in this account from one Raghavendra Gupta in three tranches, two of Rs.10,000/- and one of Rs.20,000/-. Raghavendra Gupta was interrogated and stated that he had paid this amount as per directions of his brother Pushpender. Supplementary charge-sheet was submitted. On 8th December 2023, charges were framed against all the accused.

7. Petitioner was granted interim bail for a period of 12 days *vide* order dated 23rd February 2024 of this Court, for the marriage of his niece. He was released on 22nd April 2024 and surrendered on 4th May 2024.

Submissions on behalf of Petitioner

8. Counsel for the petitioner mounted his case on three aspects:



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Firstly, that sampling was defective and not in compliance with Section 52A of the Act; *Secondly*, the petitioner was arrested merely on the basis of disclosure, CDR analysis and monetary transactions; *Thirdly*, that proceedings under Section 82 and 83 Cr.P.C. would not disentitle the petitioner from being enlarged on bail.

9. As regards the first issue under Section 52A of the Act, it was contended that the truck which was in the name of Pushpender Gupta, who had been kept under Column 12, was where the five sacks weighing 25.75 Kgs, 26.45 Kgs, 13.1 Kgs, 25.4 Kgs and 25.8 Kgs *ganja* were found lying over 351 sacks of Jowar. Each sack on opening had numerous bundles. During the sampling, the Magistrate did not follow the proper procedure as the sample were not drawn from each bundle and only two samples were drawn from each sack. Reliance was placed on *Aas Mohammad v. State Govt of NCT of Delhi* Bail Appln. No. 2334/2023, *Sarvan v. State Govt. of NCT of Delhi* Bail Appln. No. 2781/2022 and *Sachin Kumar v. State (Govt. of NCT of Delhi)* Bail Appln. No. 557/2023, which are decisions of Co-ordinate Benches of this Court, granting bail upon taking into account defect in sampling procedure. Reliance was placed on clarification sought by the Trial Court from the IO with regard to the number of bundles which clearly stated that there were numerous bundles in each of the 5 sacks.

10. As regards the second issue, it is stated that no recovery has been effected from petitioner and he has been arrested merely on disclosure of the co-accused, CDR connectivity (16 calls) and monetary transactions of a total of Rs.40,000/- (Rs. 20,000/-, Rs. 10,000/-, Rs. 10,000/-) with Pushpender, who himself has not been arrested. Reliance is placed on decisions in *Kale Ram v. Narcotics Control Bureau* 2022 SCC OnLine



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Del 733; *Jalil Khan v. State* Bail Appln. No. 2585/2021, order dated 18.11.2022 (High Court of Delhi); *Ajmal T.A. @ Kuru v. State by Kerala* SLP (Crl.) No(s). 6599/2023, order dated 23.08.2023; *Usha Devi v. State (NCT of Delhi)* 2024 SCC OnLine Del 4780; *Arun Kumar Azad v. Narcotics Control Bureau* Bail Appln. No. 3620/2023, order dated 02.04.2024 (High Court of Delhi); *Amit Ranjan v. Narcotics Control Bureau* 2022 SCC OnLine Del 1532; *Sumit Fagna v. State (NCT of Delhi)* 2024 SCC OnLine Del 3039.

11. The third aspect, regards Section 82 and 83 Cr.P.C. proceedings would not disentitle the petitioner, reliance was placed on decisions of co-ordinate benches of this court in *Dinesh Khangar @ Rahul v. State NCT of Delhi* Bail Appln. No. 1425/2023, order dated 11.08.2023 and *Axat Gulia v. The State (NCT of Delhi)* Bail Appln. No. 1443/2024, order dated 07.08.2023.

Submissions on behalf of the State

12. On the first aspect of Section 52A of the Act, the APP submitted that petitioner was charged under Section 29 of the Act which has nothing to do with sampling. The prosecution has to prove its allegation *qua* the role assigned to him and it cannot take advantage of any default in sampling procedure. Even if it is assumed that non-compliance has been committed regards the sampling procedure, it was highlighted that accused Mohit Yadav and Subhash Chandra, from whom contraband was seized, never challenged the procedure under Section 52A. The Trial Court had clearly given a finding that there were no packets inside 5 *kattas*, after seeing the entire photographs of the proceedings under Section 52A conducted by the MM.



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13. Mohit Yadav's bail had been rejected by this Court *vide* order dated 23rd May 2024 in Bail Appln. No. 11732/2023. Moreover, the custody period of the accused was 16 to 17 months and the trial was progressing and possibility of his fleeing from trial could not be ruled out.

14. Elaborating more on the issue of sampling procedure, the APP submitted that the Act itself does not provide any specific procedure for drawing of samples and therefore, for sake of uniformity, the Narcotics Control Bureau ('NCB'), by way of Standing Orders, has prescribed a procedure. Subsequently, Section 52A of the Act was added by the Parliament to curb the misuse of seized drugs and therefore, provided a procedure for disposal of seized narcotic drugs and psychotropic substances. Section 52A provides for disposal of case property by making inventory and keeping samples of seized contrabands. The purpose of keeping representative samples is primarily to exhibit case property during course of trial.

15. In essence, there would be two types of samples --- one for the purpose of testing the nature of contraband from FSL and the other to retain as part of the case property so as to be exhibited later during the course of trial. As per Standing Order 1/89 Clause 2.1 sample should be taken on the spot to rule out any possibility of tampering at a later stage.

16. A decision of 2008 by the Supreme Court in *E. Micheal Raj v. Narcotic Control Bureau* (2008) 5 SCC 161 leaned towards the purity of the substance being considered for determining quantity, while subsequently in *Hira Singh v. Union of India* (2020) 20 SCC 272 it was held that even neutral substances have to be accounted for while



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determining quantity. In *Union of India v. Mohanlal* (2016) 3 SCC 379 the Supreme Court laid emphasis on drawing samples before the Magistrate, but it was meant for the disposal of case property.

17. Subsequently, new rules were enacted under Section 76 read with Section 52A of the Act which came into existence on 23rd December 2023. As per the Standing Orders, though generally samples are to be drawn from each packet, the APP submitted that by way of exception to generality, it also provided for a composite sample if the truck of contraband was large in number and identical in appearance, shape, size and then lots of maximum 10 and 40, as the case may be, could be made. If by application of field-testing kit, substances were found to be similar, samples from any of the packets would be taken and homogenously mixed with other samples taken from other lots. If possibility of any neutral substance is ruled out, then it was not mandatory to take samples from each packet.

18. For the purpose of sampling, it makes no difference if all packets are mixed from samples from each packet are mixed to make a composite sample. Notwithstanding the above, APP argued that the Standing Orders 1/88 or 1/89 are merely advisories issued by NCB and do not have a statutory mandate. He then relied upon decision of the Supreme Court in *State of Punjab v. Balbir Singh* (1994) 3 SCC 299 to contend that the accused could not be given benefit of hyper-technicalities as Standing Orders are merely directory in nature and require substantial compliance. Reliance was placed on *Masibur Khan v. State (NCT of Delhi)* 2023 SCC OnLine Del 3326 where, as regards defective sampling procedure, a co-ordinate bench of this court held as under:



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"40. ..In the opinion of this Court, whether the sample drawn would be a true representative sample of the contraband recovered, can be answered by the chemical analyst, who analyses the sample and gives his/her opinion. Learned Special Judge during the course of the trial will have the advantage of the testimony of the chemical analyst as well as the production of contraband seized in the Court. It is pertinent to note that the case property is still there for any further analysis if so required. Therefore, it is premature at this stage to say that the sample drawn are not true representative samples of the contraband seized. In the present case, at the time of examination of case property, the learned Special Judge can satisfy himself with regard to the correctness of the procedure followed."

19. Further reliance was placed on *Shailender v. State (NCT of Delhi)* 2022 SCC OnLine Del 4896 where a co-ordinate bench of this court observed as follows:

"14. ..The circumstances under which the sampling procedure could not be followed as per the mandate, needs to be duly considered after the evidence has been led on record and the FSL expert is examined. Considering the limitations for grant of bail referred in Section 37(1)(b)(ii) for offences punishable under Sections 19, 24 or 27A and also for offences involving a commercial quantity, there must exist 'reasonable grounds to believe' at this stage that the person is not guilty of such an offence. In my considered opinion, there does not exist reasonable grounds at this stage to give a finding that the entire proceedings stand vitiated because of the alleged sampling procedure adopted by the Investigating Agency. The procedural deficiency in sampling, as contended by learned counsel for the petitioner, can be considered only after the evidence is led on record."

20. Reliance was also placed on the observations in *Saddad Alam v. State (Govt. of NCT of Delhi)* Bail Appln. No. 2475/2023 where Coordinate Bench of this Court elucidated that issues pertaining to



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Section 52A cannot be examined at the stage of consideration of bail and have to be decided during trial. APP for the State therefore thus submitted that non-adherence to Standing Orders was not a ground of bail, as sampling was a matter of trial. The IO could adopt different practical approaches at the field to draw the samples and unless prejudice was shown to be caused by such drawing, same cannot become a ground for grant of bail. The Court should give due weightage to practical difficulties of IO and various hyper-technicalities adopted by accused to seek bail, particularly when contraband was kept in small packets or capsules.

21. Judgment of the Supreme Court in *CCE v. Hari Chand Shri Gopal* (2011) 1 SCC 236 was relied upon to invoke the doctrine of substantial compliance; following extract of the said judgment was placed as being instructive in this regard:

“Doctrine of substantial compliance and “intended use”

32. The doctrine of substantial compliance is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably be expected of it, but failed or faulted in some minor or inconsequential aspects which cannot be described as the “essence” or the “substance” of the requirements. Like the concept of “reasonableness”, the acceptance or otherwise of a plea of “substantial compliance” depends upon the facts and circumstances of each case and the purpose and object to be achieved and the context of the prerequisites which are essential to achieve the object and purpose of the rule or the regulation. Such a defence cannot be pleaded if a clear statutory prerequisite which effectuates the object and the purpose of the statute has not been met. Certainly, it means that the Court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was



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enacted and not a mirror image type of strict compliance. Substantial compliance means “actual compliance in respect to the substance essential to every reasonable objective of the statute” and the Court should determine whether the statute has been followed sufficiently so as to carry out the intent of the statute and accomplish the reasonable objectives for which it was passed.”

22. APP for the State referred to section 29 of the Act while contending that if two persons are apprehended while travelling together and both are carrying contraband sourced from a common place, it cannot be their case that they be charged separately for the quantity possessed by them since the quantities carried by them form a part of the same transaction even though such quantities are possessed separately. Further, the APP relied upon a judgment of a co-ordinate bench of this court in ***Ridhm Rana v. State (NCT of Delhi)*** 2022 SCC OnLine Del 771 to seek reliance for the proposition that there cannot be direct evidence of criminal conspiracy and the same can only be inferred from prevailing circumstances, incidences, etc., relevant paragraphs of the said judgment are extracted as under:

“24. There cannot be any direct and clear-cut evidence of criminal conspiracy and Court has to only infer the same from prevailing circumstances, incidences and other related material, which is outcome of the investigation carried out by the prosecuting agency...”

23. Reliance was placed on ***Awadhesh Yadav v. State (NCT of Delhi)*** 2023 SCC OnLine Del 7732 where a co-ordinate bench of this court illustrated instances where clubbing of substances may be allowed. Following extracts of the said precedent are instructive in this regard:



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“49. From the provisions of law and the essence of case-laws, as discussed above, following principles can be culled out governing clubbing of the quantity of contraband recovered from two or more co-accused, at the stage of bail:

i. invocation of offence of abetment and/or conspiracy under Section 29 of the Act is must for clubbing of quantity. However, there cannot be a straight jacket formula for clubbing the quantity of contraband recovered from all the accused, merely on the basis of invocation of offence under Section 29 of the Act. It will depend on the factual backdrop of each case and the incriminating material available against the accused persons.

ii. the incriminating material relied upon to invoke the offence of abetment and/or conspiracy under Section 29 of the Act, has to be cogent and convincing against each one of the accused charged with the offence of abetment and/or conspiracy.

iii. in a case where joint recovery of contraband has been effected from two or more co-accused, the recovered contraband cannot be equally divided amongst the number of accused to determine whether the quantity of contraband recovered in “commercial quantity” or not.

iv. where accused persons are travelling together in the same private vehicle individually carrying contraband, it will not be proper to consider the alleged recovery to be an individual recovery and the contraband recovered from all persons can be clubbed.

v. if an accused is a habitual offender, it gives rise to an inference that he knows the tricks of the trade. In such a situation, previous involvement of the accused in the case(s) under the NDPS Act, is an additional factor which could be considered, besides other incriminating circumstances, for adding the quantities of contraband recovered from two or more co-accused.”

Analysis

24. Though the submissions on behalf of APP were on the issue of substantial compliance of Section 52A in respect of sampling, the APP



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also submitted that since petitioner was charged under Section 29 of the Act, the aspect of sampling would not relate to this accused. The role ascribed to petitioner/ accused under Section 29 of the Act is abetment and being a part of criminal conspiracy to commit an offence under the NDPS Act. For this reason, the Court does not consider it necessary to deliberate upon the issue of sampling.

25. It is the case of prosecution that the recovery was made from one Mohit Yadav and Subhash Chander of 116.5 kgs of *ganja* allegedly from 5 plastic bags in the truck which was owned by a third party. It was only in the disclosure statement of Mohit Yadav that petitioner was arrayed as an accused person as the source of the 5 plastic bags. Subsequently during investigation, petitioner's mobile was seized and 16 calls were found to have taken place between petitioner and Mohit. Monies totalling to Rs. 40,000/- were found to have been transferred in his account from one Raghavendra Gupta, in three tranches, two of Rs. 10,000/- each and one of Rs. 20,000/-.

26. What is evident from the submissions of the parties and records before this Court is that there is no recovery from petitioner in the first place. Petitioner was arrested merely on disclosure, as noted above, of Mohit Yadav which cannot be relied upon *per se* in view of decision of Supreme Court in *Tofan Singh v. State of Tamil Nadu* (2021) 4 SCC 1. Relevant paragraphs of the said judgment are extracted hereunder for ease of reference:

“158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them



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would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

(emphasis added)

A Coordinate Bench of this Court in ***Phundreimayum Yas Khan v. State (NCT of Delhi)*** 2023 SCC OnLine Del 135, in para 22 also stated as under:

“22. In the present case there is no narcotic substance or psychotropic substance recovered from the applicant or from his premises. There is no recovery. The disclosure statement made by the applicant, according to me cannot be read against the applicant. The fact that the anticipatory bail moved by Amarjit Singh Sandhu has been rejected by this Court or that Amarjit Singh Sandhu is absconding, cannot be a ground to deny bail to the present applicant.”

(emphasis added)

27. It has been repeatedly held by various Benches of this Court that mere reliance on CDR analysis and that there were calls which were exchanged between some parties, cannot form a basis for conviction.

28. To show that there were conversations between Mohit Yadav and any other person relating to contraband supply and simpliciter reliance on CDR analysis may not be sufficient to inculcate him, as contended by the petitioner’s counsel.

29. Reliance on ***Tofan Singh*** (*supra*) has been made by various Benches of this Court *inter alia* by Coordinate Bench in ***Sulaiman Agha***



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Saihoon v. Narcotics Control Bureau 2024 SCC OnLine Del 3309 the relevant paragraph of which is extracted as under:

“13. It is relevant to note that the case of the prosecution is essentially based upon the disclosure statement of the accused Ahmad and some unverified chats that allegedly establish that the applicant was involved in illegal drug trafficking. It is relevant to note that while the veracity of the disclosure statement of the co-accused and the chats is to be tested at the time of the trial. This Court cannot lose sight of the decision in the case of Tofan Singh v. State of Tamil Nadu, (2021) 4 SCC 1, where the Hon'ble Apex Court held that a disclosure statement made under Section 67 of the NDPS Act is impermissible as evidence without corroboration.”

(emphasis added)

30. It has been categorically opined by the Supreme Court that if the Court is reasonably satisfied on a *prima facie* look at material on record whenever an application for bail is made, that the accused may not be guilty, material conditions of Section 37 would be complied with. Following paragraphs of the decision of Supreme Court in ***Mohd. Muslim v. State (NCT of Delhi)*** 2023 SCC OnLine SC 352 are instructive in this regard:

*“20. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a *prima facie* look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of*



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offences such as those enacted under Section 37 of the NDPS Act.

21. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India v. Rattan Malik¹⁹). 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.

(emphasis added)

31. Primacy of bail has been recently reiterated by the Supreme Court in *Javed Gulam Nabi Shaikh v. State of Maharashtra* 2024 SCC OnLine SC 1693 where the Supreme Court has traversed the principles of law relating to bail. Relevant paragraphs of the said decision are extracted:

“9. Over a period of time, the trial courts and the High Courts have forgotten a very well settled principle of law that bail is not to be withheld as a punishment.

*10. In the aforesaid context, we may remind the trial courts and the High Courts of what came to be observed by this Court in **Gudikanti Narasimhulu & Ors. v. Public Prosecutor**, High Court reported in (1978) 1 SCC 240. We quote:*

“What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal.



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Lord Russel, C.J., said [*R v. Rose*, (1898) 18 Cox]
:

"I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial."

11. The same principle has been reiterated by this Court in **Gurbaksh Singh Sibba v. State of Punjab** reported in (1980) 2 SCC 565 that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment.

12. Long back, in **Hussainara Khatoon v. Home Secy., State of Bihar** reported in (1980) 1 SCC 81, this court had declared that the right to speedy trial of offenders facing criminal charges is "implicit in the broad sweep and content of Article 21 as interpreted by this Court". Remarking that a valid procedure under Article 21 is one which contains a procedure that is "reasonable, fair and just" it was held that:

"Now obviously procedure prescribed by law for depriving a person of liberty cannot be "reasonable, fair or just" unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as "reasonable, fair or just" and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequence if a person accused of an offence is denied speedy trial and is sought to be deprived of



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his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21.”

13. *The aforesaid observations have resonated, time and again, in several judgments, such as **Kadra Pahadiya & Ors. v. State of Bihar** reported in (1981) 3 SCC 671 and **Abdul Rehman Antulay v. R.S. Nayak** reported in (1992) 1 SCC 225. In the latter the court re-emphasized the right to speedy trial, and further held that an accused, facing prolonged trial, has no option:*

“The State or complainant prosecutes him. It is, thus, the obligation of the State or the complainant, as the case may be, to proceed with the case with reasonable promptitude. Particularly, in this country, where the large majority of accused come from poorer and weaker sections of the society, not versed in the ways of law, where they do not often get competent legal advice, the application of the said rule is wholly inadvisable. Of course, in a given case, if an accused demands speedy trial and yet he is not given one, may be a relevant factor in his favour. But we cannot disentitle an accused from complaining of infringement of his right to speedy trial on the ground that he did not ask for or insist upon a speedy trial.”

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xxx

xxx

17. *In the recent decision, **Satender Kumar Antil v. Central Bureau of Investigation** reported in (2022) 10 SCC 51, prolonged incarceration and inordinate delay engaged the attention of the court, which considered the correct approach towards bail, with respect to several enactments, including Section 37 NDPS Act. The court expressed the opinion that Section 436A (which requires inter alia the accused to be enlarged on bail if the trial is not concluded within specified periods) of the Criminal Procedure Code, 1973 would apply:*



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“We do not wish to deal with individual enactments as each special Act has got an objective behind it, followed by the rigour imposed. The general principle governing delay would apply to these categories also. To make it clear, the provision contained in Section 436-A of the Code would apply to the Special Acts also in the absence of any specific provision. For example, the rigour as provided under Section 37 of the NDPS Act would not come in the way in such a case as we are dealing with the liberty of a person. We do feel that more the rigour, the quicker the adjudication ought to be. After all, in these types of cases number of witnesses would be very less and there may not be any justification for prolonging the trial. Perhaps there is a need to comply with the directions of this Court to expedite the process and also a stricter compliance of Section 309 of the Code.”

18. Criminals are not born out but made. The human potential in everyone is good and so, never write off any criminal as beyond redemption. This humanist fundamental is often missed when dealing with delinquents, juvenile and adult. Indeed, every saint has a past and every sinner a future. When a crime is committed, a variety of factors is responsible for making the offender commit the crime. Those factors may be social and economic, may be, the result of value erosion or parental neglect; may be, because of the stress of circumstances, or the manifestation of temptations in a milieu of affluence contrasted with indigence or other privations.

19. If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime.



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20. We may hasten to add that the petitioner is still an accused; not a convict. The over-arching postulate of criminal jurisprudence that an accused is presumed to be innocent until proven guilty cannot be brushed aside lightly, howsoever stringent the penal law may be.”

(emphasis added)

32. It is also noted that petitioner has now been incarcerated for the more than a year and a half and has no previous involvements. Petitioner was released on interim bail for a period of 12 days *vide* order dated 23rd February 2024 and was released on 22nd April 2024 and surrendered on 4th May 2024.

33. The contention of the APP that during investigation, proceedings under Section 82 & 83 Cr.P.C. were instituted against petitioner, since he was already arrested, may itself not be relevant at this stage, considering that investigation is complete, charge-sheet has been filed, petitioner has been in custody for more than year and a half, had been released on interim bail and surrendered thereafter. It is further noted that petitioner was not named in the original charge-sheet but was named in supplementary charge-sheet.

34. This Court had taken a similar view in *Usha Devi v. The Govt. of NCT of Delhi* 2024:DHC:5229 in relation to bail for a party having been accused basis alleged disclosure and no recovery and on the basis of CDR analysis.

35. Decision of the Supreme Court in *Ajmal T.A. @ Kuru v. State* SLP (Crl.) No(s). 6599/2023 dated 23rd August 2023 has also been brought to notice by petitioner’s counsel in which case there was recovery of 119.7 gm of methamphetamine hydrochloride and 19.85 gm



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of Methamphetamine, but the petitioner's role was that co-accused was in touch with him. Search of person had not revealed anything and he was implicated purely on the statement of co-accused and on CDR details. Supreme Court held that he was entitled to be enlarged on bail subject to terms and conditions.

36. This Court also finds decision of Supreme Court in **Rajkumar Hariram Gameti v. State of Gujarat** 2024 SCC OnLine SC 572 instructive in this regard. The decision related to a case of an appeal by a convict in an NDPS case. The Supreme Court noted that the judgment of conviction was entirely based on his confessional statement under Section 67 of the NDPS Act. Relevant paragraphs of the same are extracted as under:

“6. The position of law over a period of time has changed. In the year 2020, a three-Judge Bench of this Court answered a Reference Order of a Division Bench in Tofan Singh v. State of Tamil Nadu, [(2013) 16 SCC 31] and re-examined the ratio in the case of Kanhaiyalal v. Union of India, [(2008) 4 SCC 668] and Raj Kumar Karwal v. Union of India, [(1990) 2 SCC 409], to decide as to whether the officer investigating a matter under the NDPS Act would qualify as a ‘Police Officer’ or not. The other related issue which was examined by the larger Bench in Tofan Singh, [(2021) 4 SCC 1] was whether the statement recorded by the investigating officer under section 67 of the NDPS Act can be treated as a confessional statement or not even if the offender is not treated as a ‘Police Officer’ or not.

7. The reference came to be answered in paras 158.1 and 158.2 respectively, of the decision in Tofan Singh (Supra), as under:—

8. Para 158.1 reads thus:—

“158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are “police officers” within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under



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the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

9. Para 158.2 reads thus:—

“158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

10. Thus, the position of law, as on date, is that any confessional statement made by an accused to an officer invested with the powers under Section 53 of the NDPS Act, is barred for the reason that such officers are ‘police officers’ within the meaning of Section 25 of the Evidence Act, a statement made by an accused and recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

37. Mere transactions that too of amounts of Rs. 10,000/- and Rs. 20,000/- in three tranches, from one Raghavendra Gupta, do not *prima facie* establish that the money was paid petitioner for supply of contraband to Prince @ Pushpender or to anybody else. Raghavendra Gupta was the brother of Prince @ Pushpender and he simply stated that the amount had been paid to petitioner as per his brother’s directions.

38. Yet again, these statements are purely under Section 67 NDPS Act and will not by themselves be sufficient to implicate petitioner. Needless to state that these are *prima facie* observations for assessment of grant of bail, and the final churning of facts will be in the trial.

39. Consequently, the petitioner is directed to be released on bail on his furnishing a personal bond in the sum of Rs. 50,000 with one surety of the like amount subject to the satisfaction of the Learned Trial Court, further subject to the following conditions:



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- i. Applicant will not leave the country without prior permission of the Court.
 - ii. Applicant shall provide his address to the Trial Court. The applicant shall inform the Court by way of an affidavit and to the IO regarding any change in residential address.
 - iii. Applicant shall appear before the Court as and when the matter is taken up for hearing.
 - iv. Applicant shall provide all mobile numbers to the Trial Court which shall be kept in working condition at all times and shall not switch off or change the mobile number without prior intimation to the IO concerned. Applicant will mark presence through video call before the concerned I.O. every Monday at 4 pm.
 - v. Applicant shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses, the complainant/victim or any member of the complainant/victim's family or tamper with the evidence of the case.
40. Needless to state, but any violation of bail conditions entitles the State to seek cancellation.
41. Judgment be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

SEPTEMBER 11, 2024/SM/kp