



2024:DHC:5007



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

% Judgment delivered on:08.07.2024

+ **BAIL APPLN. 2845/2023**

**KANCHAMAN YONJAN**

..... 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. Manvi Gupta, Advs.

For the Respondent : Mr. Utkarsh, APP for the State with SI  
Arun Kumar, Anti Narcotics Squad, Distt.  
South East.

**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 (3) of the Narcotics Drugs & Psychotropic Substances Act, 1985 ('NDPS Act') seeking grant of regular bail in FIR No.256/2022 dated 07.05.2022, registered at Police Station Sunlight Colony for offence under Sections 20/29 of the NDPS Act.



2. The case of the prosecution is that on 07.05.2022, secret information was received that three persons would go to Ring Road, Sarai Kale Khan to supply a huge amount of 'charas' to some unknown persons. It is alleged that at about 11:20 AM the said three persons were apprehended by the raiding team. It is alleged that the accused persons were working together to supply 'charas' in Delhi NCR.

3. 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.

4. A notice under Section 50 NDPS Act was served to the applicant informing him about his legal right to get his search in front of the 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.

5. The recovery in the present case was made in the following manner which led to the registration of the present FIR against the applicant and co-accused persons.

S.No	Recovery from whom	From what	How	How much
1.	Kanchaman Yonjan	Carrying a purple bag having 4 chains	When the bag was checked, 9 transparent polythene were found in 2 <sup>nd</sup> chain	Polythene one containing charas weighing 4.05 kg and second polythene



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			and 2 polythene in 3 <sup>rd</sup> chain. In the 2 polythene, one was having brown colour small pieces and in second black colour substance. Both on smelling and texture seems like charas.	containing charas weighing 6.05 kg
2.	Dhananjay	Carrying a brown bag having 3 chains.	When the bag was checked, 1 transparent polythene was found in the 3 <sup>rd</sup> chain. On checking it was containing brown colour small pieces which on smelling and texture seems like charas.	Polythene containing charas weighing 2.03 kg
3.	Ashish	Carrying a black bag having 3 chains	When the bag was checked, 1 transparent polythene was found in the 3 <sup>rd</sup> chain. On	Polythene containing charas weighing 3.025 kg



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			checking it was containing black colour substance which on smelling and texture seems like charas.	
Total Recovery				15 kg 155 grams

6. Subsequently, the applicant along with the co-accused persons was arrested.

7. Upon completion of the investigation, the chargesheet in the present case was filed for offences under Sections 20/29 of the NDPS Act *qua* the applicant.

8. The learned Trial Court dismissed the regular bail application moved by the applicant by order dated 14.07.2023. Being aggrieved, the applicant filed a bail application before this Court seeking appropriate directions to the learned Trial Court to consider the law laid down by this Court in ***Mohd. Jabir v. State (NCT of Delhi): 2023 SCC OnLine Del 1827***. The same was dismissed as withdrawn by order dated 04.08.2023 with the liberty granted to the applicant to file afresh before the learned Trial Court. Subsequently, the applicant filed another bail application before the learned Trial Court which was dismissed by order dated 09.08.2023 on the ground of no change in circumstances. The applicant, thereafter, preferred another bail application before this Court which was also dismissed as withdrawn by order dated 18.08.2023. Hence, the present application.



9. The learned counsel for the applicant submitted that the applicant has been falsely implicated in the present case. He submits 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.

10. He submitted that the present applicant is entitled to bail on account of non-compliance with the mandatory requirements of Section 50 of the NDPS Act. He argued that the notice under Section 50 of the NDPS Act which was served upon the applicant mentioned the word 'any' instead of 'nearest' for the Gazette Officer or the Magistrate. Therefore, the provision was not complied with in the manner it ought to have been done. In support of his contention, learned counsel for the applicant placed reliance on the judgment passed by a coordinate bench of this Court in *Mohd. Jabir v. State (NCT of Delhi)* (*supra*).

11. He submitted that the applicant has satisfied the bar under Section 37(1)(b)(ii) of the NDPS Act of establishing reasonable grounds for believing that he is not guilty of such an offence.

12. He submitted that the applicant has been in custody for about two years and 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 the applicant has clean antecedents and deep roots in the society and there is no possibility of the applicant influencing the witnesses.

13. 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.

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

- a) ***Emeka Emmanuel v. The State* : 2002 SCC OnLine Del 3761**
- b) ***Akhilesh Bharti v. State* : 2020:DHC:340**
- c) ***SK Raju v. State of West Bengal* : (2018) 9 SCC 708**
- d) ***Kamruddin v State* : 2022 SCC OnLine Del 3761**

15. *Per contra*, the learned Additional Public Prosecutor for the State opposed the bail application citing the gravity of offence as one of the main grounds. He submitted that commercial quantity of contraband 'charas' has been recovered from the possession of the applicant and hence the embargo of Section 37 of the NDPS Act will be attracted in the present case.

16. It is 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 Act. He stated that once the applicant was informed about his rights, the mandatory requirements of Section 50 were complied with. Therefore, there was no irregularity.

17. 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 judgments of Coordinate Benches of this Court in ***Gauri Shankar Jaiswal v. Narcotics Control Bureau : 2023 SCC OnLine 3327***

18. He submitted that there is no material change in circumstances after the dismissal of the applicant's previous bail applications, and all the grounds raised by the applicant have already been considered. He further submitted that there is enough incriminating evidence against the applicant, and his bail application ought to be dismissed.

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

#### **Analysis**

20. I have heard the submissions made by the learned counsels for the parties.

21. 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.

22. 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.”*

23. 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.

24. 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; and
- c) Delay in trial.

25. The application filed by the applicant on an earlier occasion was dismissed as withdrawn by order dated 04.08.2023 passed by this Court whereby, this Court had granted liberty to the applicant to approach the learned Trial Court. The learned Trial Court dismissed the application preferred by the applicant by order dated 09.08.2023. The dismissal was predicated on the grounds of absence of any change in circumstances since the last judicial consideration and the severity of the allegations levied against the applicant.

26. Though the applicant has the right to file successive bail applications, the same can only be entertained in light of material change in circumstances.

27. The Hon'ble Apex Court in the case of ***Kalyan Chandra Sarkar v. Rajesh Ranjan : (2004) 7 SCC 528*** had observed as under:

*“20. Before concluding, we must note that though an accused has a right to make successive applications for grant of bail the court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duty to record what are the fresh grounds which persuade it to take a view different from the one taken in the earlier*



*applications.”*

28. It has been held in a catena of judgments that there must be change in circumstances to warrant fresh consideration of the bail application. The successive bail applications filed without there being any material change in circumstances, is strongly discouraged, and is a gross abuse of the process of law.

29. In the present case, a considerable duration has lapsed subsequent to the last dismissal of the bail application filed by the applicant. Although charges have since been framed by the learned Trial Court against the applicant, the trial is yet pending.

30. The Hon'ble Apex Court in a catena of judgments has observed that every day spent in custody can provide a new cause of action for a bail application under certain circumstances. This leads to the principle that each additional day in custody could potentially alter the circumstances under which bail is considered, thereby necessitating a fresh evaluation of the bail application.

31. The applicant is in custody since 07.05.2022. The application seeking bail was lastly considered on 04.08.2023 and eleven months have since elapsed and the trial has still not proceeded and, admittedly, no witness has been examined as yet. In such circumstances, this Court deems it appropriate to entertain the present bail application on merits.

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 by a separate judgment 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, has 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 during the course of the trial.

34. 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 of 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.

35. 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)*, has observed that while the testimony of the independent 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.

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

37. 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 co-accused 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.



38. This Court in *Bantu vs. State Govt of NCT of Delhi* (*supra*), had noted that the Hon'ble Apex Court, way back in the year 2018 in *Shafhi Mohd. v. State of H.P.* (*supra*), 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.

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

40. This Court also 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.

41. 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.

42. In the present case, while the charges have been framed against the applicant, none of the witnesses have been examined yet. The applicant has been in custody since 07.05.2022. There is no likelihood of the trial being completed in the near future.



43. 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 appellants deserve 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 wreaked 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 31<sup>st</sup> December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country<sup>20</sup>. 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<sup>21</sup> 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”<sup>22</sup> (also see Donald Clemmer's ‘The Prison Community’ published in 1940<sup>23</sup>). 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)

44. 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.”*

45. 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.

46. 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.



47. 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.”*

48. 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.”*

49. 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 precedents over the statutory restrictions under Section 37 of the NDPS Act.

50. 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.

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

52. However, keeping in mind the fact that the applicant is a foreigner, appropriate conditions have to be imposed while granting bail.

53. 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 investigation as and when directed by the IO;
- b. The applicant will not leave the boundaries of Delhi without prior permission of the Court, and will deposit his passport with the learned Trial Court;
- c. The applicant shall provide the details of his permanent address to the learned Trial Court and intimate the Court, by



way of an affidavit, as well as the IO about any change in his residential address;

d. 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;

e. The applicant shall appear before the learned Trial Court on every date of hearing;

f. The applicant shall, after his release, appear before the concerned IO/SHO once in every week;

g. 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;

54. The learned Trial Court is directed to ensure that the certificate of assurance, from the Embassy/ High Commission of the applicant's native country, that is, Nepal, that the applicant shall not leave the country and shall appear before the learned Trial Court as and when required, is placed on record.

55. 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.

56. 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.



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

**JULY 8, 2024**

**AMIT MAHAJAN, J**