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

Date of decision: 10.02.2025

+ **BAIL APPLN. 4442/2024**

TARKESHWAR SINGH @ RAKESH SINGHPetitioner
 Through: Mr. Aditya Aggarwal, Mr. Manas
 Agarwal and Mr. Kajol Garg,
 Advocates
 versus

STATE THROUGH SHO PS NARAINARespondent
 Through: Mr. Laksh Khanna, APP for State
 with SI Rajendra Meena, Anti
 Narcotics Squad, West Distt.

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. The present application is filed under Section 483 of the Bhartiya Nagarik Suraksha Sanhita, 2023 (BNSS) seeking grant of regular bail in FIR No. 240/2022 registered under Sections 20/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and Sections 419/468/417 of the Indian Penal Code, 1860 (IPC) at Police Station (P.S.) Naraina.

Brief Facts

2. As per the case of the prosecution as set out in the status report, on 04.05.2022, on the basis of a secret information raid was conducted near H.No. WZ-328, First Floor, Naraina, New Delhi. It is stated that when the Applicant who was carrying two bags saw the raiding party, he went inside the house to attempt escape and kept the two (2) trolley bags inside the



house. It is stated that at the instance of the Applicant a search of the house was conducted and a total of 21.084 Kgs of *Ganja* was recovered and seized from the said two trolley bags. It is stated that thereafter, the captioned FIR No. 240/2022 was registered. It is stated that the Applicant herein was arrested on 04.05.2022.

2.1. It is stated that as per the secret information the Applicant was named as Rakesh Singh. It is stated that however, during the investigation it was found that the real name of the Applicant herein is Tarkeshwar Prashad Shah. It is stated that it was found that the Applicant changed his identity from Tarkeshwar Prashad Shah to Rakesh Singh and had identity documents in both names. It is stated that therefore, Sections 419/468/471 of the IPC was also invoked in this case.

2.2. It is stated that the Applicant disclosed during investigation that he earlier used to procure *Ganja* from one Awadhesh (co-accused) and used to sell the same to the different persons in Delhi. It is stated that it was also disclosed by the Applicant that he used to pay the co-accused Awadhesh through bank transfer and cash. It is stated that the bank account of the Applicant reflected the transactions with Awadhesh of Rs. 2 Lakhs each on 22.04.2022 and 27.04.2022. It is further stated that amount of Rs. 2.5 Lakhs and Rs. 2 Lakhs were transferred to the account of co-accused Awadhesh through RTGS by the Applicant herein on 30.10.2021 and 23.12.2021 respectively.

2.3. It is stated that the Applicant was in the village of the accused Awadhesh on 03.05.2022 to collect the delivery of *Ganja*. It is stated that a total of 430 calls were made between the Applicant and the co-accused/Awadhesh Yadav between 01.01.2022 to 03.05.2022.



2.4. It is stated that co-accused Awadhesh was arrested on 08.05.2022 and a total of 828 grams *Ganja* was also recovered from his possession. It is stated that a person named Manish Kumar Bharti is stated to be the source of the *Ganja* who is absconding and was declared a proclaimed offender on 03.08.2022.

2.5. It is stated that charges against all the accused were made on 31.10.2022. It is stated that the next date of hearing before the Trial Court is 13.02.2025 for prosecution evidence.

Arguments of the Applicant

3. The learned counsel for the Applicant states that the Applicant has been falsely implicated in the captioned FIR.

3.1. He states that the Applicant herein filed a regular bail application before the Trial Court and the same was dismissed vide order dated 20.11.2024.

3.2. He states that the alleged recovery of contraband is marginally above the commercial quantity i.e., 20 Kgs with respect to *Ganja*. He states that Courts in various other cases have granted bail to the accused similarly placed as the Applicant herein.

3.3. He states that as per the case of the prosecution the accused was apprehended while he was in a public place near his house. He states that the police officials did not carry out any photography or videography of the arrest of the Applicant and of the alleged recovery.

3.4. He states that this Court in the case of **Bantu v. GNCTD**¹ has observed that the investigation authorities should understand the importance of photography and videography during raid and recovery which evidence



can be used to corroborate the alleged recovery with the accused person. He states that the Court further observed that such evidence belies the allegations if any of the foul play.

3.5. He states that no independent witness to corroborate the alleged recovery of contraband from the Applicant has been cited by the prosecution. He states that lack of independent witnesses along with there being no photography and videography of the alleged recovery from the Applicant raises a serious doubt on the genuineness of the raid and raises presumption of there being a foul play. In this regards he relies upon the judgment of this Court in the case of **Rohan Malik v. State**².

3.6. He states that the Applicant has undergone a substantial period of incarceration of more than 2 Years 3 Months and 8 Days. He states that there are 28 prosecution witnesses and out of which only 3 formal witnesses have been examined till date, therefore there is no certain period in which the Trial will be completed and the Applicant cannot be detained for an indefinite period which would as a result violate right of the Applicant under Article 21 of the Constitution of India. He states that the chargesheet has already been filed and the investigation qua the Applicant is complete and therefore, no purpose would be served by keeping the Applicant in jail. In this regards he relies upon the judgments of the coordinate benches in **Jonial v. State**³ and **Ashok Kumar alias Lala v. State**⁴. He states that the Applicant has no prior criminal antecedents.

¹ Bail APPL No. 2287/2022 decided on 08.07.2024.

² Bail APPL No. 4303/2024 decided on 13.01.2025.

³ Bail APPL No. 1779/2024 decided on 10.01.2025.

⁴ Bail APPL No. 1814/2024 decided on 19.09.2024.



3.7. He states that the Applicant has been released on interim bail on three occasions by the order of Trial Court and this Court. He states that the Applicant has not misused the liberty granted.

Arguments of the State

4. In reply, Mr. Khanna, learned APP states that since the recovery of contraband in the present case from the Applicant is of commercial quantity therefore, rigors of Section 37 of the NDPS Act are applicable and therefore the Applicant should not be enlarged on bail.

4.1. He states that the Applicant herein has changed his name and identity to mask his previous criminal involvement in an FIR No. 125/2016 at P.S. Manjhi, Chhapra, Bihar under Section 376 of the IPC. He states that there is no other FIR against the Applicant under NDPS Act. He states that various Government issued identity cards in his given name Tarkeshwar Singh and assumed name Rakesh Singh were found during investigation. He states that in the birth certificate of the child of the Applicant the name of the father is recorded as Tarkeshwar Singh.

4.2. He states that delay in the trial and/or long incarceration of the accused cannot be a ground for Applicant's release on regular bail in the light of the fact that the quantity of the contraband recovered from the accused is commercial quantity and, in this regard, he relies upon the judgment of coordinate bench of this Court in **Tifal Naukhej alias Tifley v. State**⁵ and **Gauri Shankar Jaiswal v. NCB**⁶, which were both not interfered with by the Supreme Court.

⁵ Bail APPL No. 111/2024.

⁶ 2023 SCC OnLine Del 3327.



5. In response, learned counsel for the Applicant states that Applicant will only use the given name Tarkeshwar Singh and not use the assumed identity of Rakesh Singh until the conclusion of the trial. He states that the Applicant holds an Aadhar Card, Voter ID Card and PAN Card for the identity Rakesh Singh and all these identification cards have been seized by the IO. He states that Applicant does not hold any other identification card.

Analysis and conclusion

6. This Court has heard the learned counsel for the parties and perused the record.

7. In the facts of the present case the recovery made from the Applicant was 21.084 Kgs which is a commercial quantity as per the NDPS Act. The said recovery of commercial quantity of *Ganja* would attract Section 37 of the NPDS Act and therefore, ordinarily the Applicant will have to satisfy the Court that the twin conditions of Section 37 of the NDPS Act for grant of bail are made out.

8. The learned counsel for the Applicant has contended that the raiding party did not comply with the requirement of doing photography and videography of the raid and alleged recovery of the contraband from the Applicant. In the case of **Ram Prakash v. State**⁷ this Court acquitted an accused on the ground of lack of photography, videography and CCTV footage and further opined that lack of such evidence cast a doubt on the investigation/raid done by the prosecution and hampers the case of the prosecution from being proved beyond reasonable doubt. The findings returned in the said case emphasize the relevance and necessity of piece of

⁷ 2014 SCC OnLine Del 6936.



evidence like photography and videography, which if missing make the case of accused strong for grant of bail.

9. In addition, learned counsel for the Applicant contended that no independent witnesses were included in the raiding party, which raises doubt about the genuineness of the case of prosecution as regards recovery. He has relied upon the observation of a co-ordinate bench of this Court in the case **Bantu v. GNCTD**⁸ where the Court noted that non-joining of the independent witness by the prosecution when the arrest is in the public place and mechanical explanation offered by prosecution for the same has become a trend in matters where contraband is seized. The co-ordinate bench opined that such practice though does not invalidate the case of the prosecution but what it does, is that it strikes at the credibility of investigation making it shady and unreliable. And such fact becomes relevant at the stage when the Court is considering grant of bail to the accused. The relevant paragraph of the said judgment reads as under:

“61. In the present case as well, the raiding party was successfully able to reach the spot and lay a trap to apprehend the applicant in the intervening time after receipt of information. It is peculiar that the Investigating Agency was unable to associate even a single public witness in the same time, especially since the applicant was apprehended at a crowded place. No effort to serve any notice under Section 100 of the CrPC has been pointed out to have been made either. In such circumstances, prima facie, the non-joinder of independent witnesses by the prosecution is a frailty in the prosecution's case.

62. A Coordinate Bench of this Court in the case of Krishan @ Babu v. State: BAIL APPLN. 2804/2023 had observed that nonjoinder of a public witness when the recovery is made in public in broad daylight is a factor that ought to be considered

⁸ 2024 SCC OnLine Del 4671.



while considering the question of grant of bail to the accused person. This Court is in agreement with the said observation.

63. As held by the Hon'ble Apex Court in the case of Raveen Kumar v. State of Himachal Pradesh (supra) and State of Punjab v. Balbir Singh (supra), absence of independent witnesses does not vitiate the trial, however, in such circumstances, an additional duty is cast on the Court to consider whether any prejudice is caused to the accused person while testing the credibility of the testimonies of the official witnesses. The same is to be tested over the course of a trial. Any observation to this effect without affording an opportunity to the prosecution over the course of the trial to establish its case beyond reasonable doubt would be premature.

64. As noted above, it is open to the prosecution to justify the non-association of independent witnesses during the course of the trial, however, at this stage, prima facie, no cogent explanation has been adduced to tilt the balance in favour of the prosecution on this aspect.”

(Emphasis supplied)

10. Admittedly in the present case as well independent public witness at the time of the raid on 04.05.2022 is missing. No cogent explanation has been given for not joining public witnesses. The Constitutional Courts have been repeatedly highlighting this lacuna in the prosecution action since a long time and have repeatedly held that the failure to join independent witnesses casts a doubt on recovery and tilts the balance in favour of the accused during the hearing of the bail.

11. However, this Court is not considering the aforesaid pleas raised by the Applicant, as this Court has taken into consideration the submission of the Applicant as regard his incarceration and the delay in the and the considerable delay conclusion of the trial.

12. As per the nominal roll dated 04.01.2025 the Applicant has been in jail for 2 Years 3 Months 8 Days since the date of his arrest i.e., 04.05.2022. The said nominal roll also reflects that the Applicant has no criminal



antecedents under NDPS Act and his conduct in the jail has been satisfactory. The Nominal Roll does not refer to the FIR No 125/2016 at P.S. Manjhi and even the SCRB report filed by Respondent with the Status Report does not refer to any FIR at P.S. Manjhi.

12.1 The Nominal Roll reflects that the Applicant was granted interim bail thrice and he has duly surrendered upon expiry of the interim bail. The Applicant is currently on interim bail since 20.12.2024 on medical grounds.

12.2. The chargesheet against the Applicant and the co-accused has been filed and the same reflects that there are 28 witnesses, whom have to be examined by the prosecution and out of said 28 witnesses as on date only three (3) formal witnesses have been examined, as on date. In light of the said facts, it appears to this Court that a considerable time will take to conclude the trial.

11.3 The Supreme Court has consistently held that delay in trial/prolonged trial is antithetical to the fundamental right enshrined in Article 21 of the Constitution of India. The Supreme Court has held that even in cases relating to NDPS if the prosecution is unable to conclude the trial within a reasonable period the accused would be entitled to pray for bail if the accused is not liable for the delay.

13. The Supreme Court in **Rabi Prakash v. State of Odisha**⁹ where a recovery of 247 Kgs of *Ganja* was made and the accused had been in custody for more than three and a half years, with no criminal antecedents, the Court 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

⁹ 2023 SCC OnLine SC 1109.



duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.”

(Emphasis supplied)

14. In **Man Mandal v State of West Bengal**¹⁰ where the seizure was of commercial quantity and the accused had been incarcerated for about two years and there was no hope for the trial to be concluded soon, the Supreme Court while granting bail stated as under:

“ 5. Learned counsel appearing for the state submitted that in view of the statutory restrictions under Section 37 of the NDPS Act and the **quantity being commercial in nature**, the present special leave needs to be dismissed.

6. Taking into consideration the fact that the petitioners have been incarcerated for a period of almost two years and the trial is not likely to be taken up for hearing in the immediate near future, we are inclined to grant bail to the petitioners.”

(Emphasis supplied)

15. In **Mohd. Muslim alias Hussain v State (NCT of Delhi)**¹¹ the Court stated that, grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the NDPS Act. The Supreme Court noted as under:

“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

¹⁰ 2023 SCC OnLine SC 1868.

¹¹ 2023 SCC OnLine SC 352.



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.

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. State 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” (also see Donald Clemmer's ‘The Prison Community’ published in 1940). 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)

16. The above judgments clearly hold that if prosecution is unable to conclude trial in NDPS matters speedily it cannot rely upon the fetters of Section 37 of the NDPS Act to oppose the bail of the accused who are facing trial. The Applicant in this case has no criminal priors under the NDPS Act and his conduct during his incarceration of 2 years 3 months and 8 days has been recorded as satisfactory in the Nominal Roll.

17. The judgments cited by Mr. Khanna, learned APP are distinguishable. The Court in **Tifal Naukhej alias Tifley** (supra) was concerned with an accused who had criminal priors in NDPS Act; the quantity recovered from the co-accused was of 330 kgs of *heroin* and the allegation against the accused therein was that he is the kingpin of the syndicate.

18. Similarly, the coordinate bench of this Court in **Gauri Shankar Jaiswal** (supra) was dealing with cases where quantity of contraband recovered from the accused was 63 Kgs *Charas*, which is way beyond the commercial quantity, and the only ground of bail considered by the Court therein was alleged defect in sampling procedure; however, this ground did not find favour with the Court in the facts of that case.

19. In the aforementioned facts, it is evident that the Applicant who was arrested on 04.05.2022 has not contributed to any delay in trial. It is correct that the quantity of contraband recovered from the Applicant is commercial in nature and the provisions of Section 37 of the NDPS Act are attracted. However, in these facts where the conclusion of Trial cannot be foreseen in



near future, this Court is satisfied that the conditions of Section 37 of the NDPS Act can be dispensed with at this stage.

20. Therefore, this Court is of the opinion that Applicant has satisfied the conditions for grant of bail. As a result, the Applicant is directed to be released on bail upon providing a personal bond in the sum of Rs. 1,00,000/- with one surety of the like amount subject to the satisfaction of the Trial Court, and further subject to the following conditions:

- (i) Applicant will not leave the country without prior permission of the Court.
- (ii) Applicant shall provide permanent address to the Trial Court. The Applicant shall intimate 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 join investigation as and when called by the IO concerned.
- (v) Applicant shall provide all mobile numbers to the IO concerned 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.
- (vi) Applicant will report to the concerned IO every second and fourth Friday of every month, at 4:00 PM, and will not be kept waiting for more than an hour.



(vii) Applicant shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses, or tamper with the evidence of the case.

21. In the event of there being any FIR/DD-entry/Complaint lodged against the Applicant during the period of bail, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

22. Needless to state, but any observation touching the merits of the case is purely for the purposes of deciding the question of grant of bail and shall not be construed as an expression on merits of the matter.

23. In addition, keeping in view the controversy with respect to the identity of the Applicant, the Applicant is directed to ensure that all identification documents pertained to the assumed identity Rakesh Singh will be surrendered to the I.O. and the Applicant will not use the said identity until the trial in this case is concluded. The Applicant will only use the given identity name of Tarkeshwar Singh.

24. Accordingly, the petition is disposed of. Pending applications (if any) are disposed of as infructuous.

25. Copy of the order be sent to the Jail Superintendent for information and necessary compliance.

26. The digitally signed copy of this order, duly uploaded on the official website of the Delhi High Court, www.delhihighcourt.nic.in, shall be treated as a certified copy of the order for the purpose of ensuring compliance. No physical copy of order shall be insisted by any authority/entity or litigant.

MANMEET PRITAM SINGH ARORA, J

FEBRUARY 10, 2025/mt/sk