



2024:DHC:5175



IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment delivered on: 15.07.2024*

+ **BAIL APPLN. 3350/2023**

GOPAL DANGI Applicant

Through:

versus

STATE NCT OF DELHI Respondent

Through:

+ **BAIL APPLN. 3946/2023, CRL.M.A. 7728/2024 & CRL.M.A. 7729/2024**

MOHD MUNIB Applicant

versus

STATE Respondent

Advocates who appeared in this case:

For the Applicant : Mr. Mohammad Nabi & Mr. Faraz Nabi,
Advs. in BAIL APPLN. 3350/2023
Mr. Aditya Aggarwal, Mr. Naveen Panwar,
Ms. Kajal Garg, Mr. Manas Agarwal & Ms.
Shivani Sharma, Advs. in BAIL APPLN.
3946/2023

For the Respondent : Mr. Amol Sinha, ASC for the State with Mr.
Kshitiz Garg & Mr. Ashvini Kumar, Advs. SI
Dinesh Kumar, Special Staff/SD



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

JUDGMENT

1. The present applications are 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.566/2022 dated 06.09.2023 registered at Malviya Nagar Police Station for offences under Sections 20/25 the NDPS Act.
2. The case of the prosecution is that on 05.09.2022, secret information was received that a person, namely, Mohd Munib, would come in Grey coloured Swift car bearing number DL 3CCR 5870 with another person to supply 'Ganja' to someone *via* Aurobindo road. Thereafter, a raiding team was constituted and two persons namely, Mohd Munib and Raviul Islam were intercepted in a 'Swift car' from Aurobindo Road, near red light, Mother's International School at about 10:25 PM.
3. It is alleged that 13 bags containing 41 packets were recovered from the car, and were found to be containing 'Ganja' weighing 259.607 Kgs.
4. Subsequently, the accused persons were arrested on 06.09.2022.
5. During the course of the investigation, accused Mohd. Munib disclosed the involvement of a person, namely, Gopal Dangi who was an active part of their group. It is alleged that the accused (Mohd Munib)



assisted the police in apprehending Gopal Dangi. It is alleged that on 12.09.2022, at about, 8:30PM, the police officials apprehended him near the Delhi Jal Board Office, DDA Janta Flats, Jasola, Delhi. It is further alleged that 7 packets of Ganja weighing 30.9 Kg were recovered from the scooty driven by Gopal Dangi.

6. Subsequently, accused – Gopal Dangi was arrested on 12.09.2022.

7. It is alleged that a few passers - by were also informed about the respective situations and were asked to join the police action, however, all of them refused and left without disclosing their names.

8. Upon completion of the investigation, the chargesheet in the present case was filed for offences under Sections 20/25 of the NDPS Act and Sections 39/192 of the Motor Vehicles Act,1988.

9. The applications seeking regular bail moved by the applicants were dismissed by the learned Trial Court by orders dated 22.05.2023 and 19.09.2023 respectively. Hence the present applications.

10. The learned counsel for the applicants submitted that the applicants have been falsely implicated in the present case. It is submitted that there are serious infirmities in the case of the prosecution. It is submitted that even though the purported recovery happened in a public place, there are no independent witnesses. It is submitted that no endeavor was made by the prosecution to photograph or videotape the recovery either. Reliance was placed on the judgment passed by the Hon'ble Apex Court in *Shafhi Mohd. v. State of H.P.* :



(2018) 5 SCC 311 where the Hon'ble Apex Court had observed that steps ought to be taken to introduce videography in investigation.

11. Further reliance was placed on Field Officers Handbook issued by the Narcotics Control Bureau whereby it is stipulated that to avoid a situation of accused person alleging foul play at the time of recovery, all recovery and concealment methods should be videographed simultaneously.

12. It is submitted that even though recoveries were made on 05.09.2022 and 12.09.2022, the application under Section 52A of the NDPS Act was filed belatedly on 21.09.2022 after an unexplained delay of 16 and 9 days respectively. It is submitted that there was sufficient time for the prosecution to tamper with the samples. He relied on the order in the case of *Kashif v. Narcotics Control Bureau : 2023 SCC OnLine Del 2881*, where it was held that the application for drawing a sample of narcotic drugs or psychotropic substances must be made within 72 hours to the Magistrate concerned under Section 52A of the NDPS Act.

13. It is submitted that the samples were also belatedly sent to the FSL Laboratory on 12.10.2022. He referred to the Standing Order 1/88 dated 15.03.1988 to contend that it was mandatory that the samples ought to be dispatched to the FSL Laboratory within 72 hours of seizure. Reliance was placed on the judgment of the Hon'ble Apex Court in the case of *Noor Aga v. State of Punjab : (2008) 16 SCC 417* to contend that the guidelines in the Standing Order cannot be blatantly flouted and



the substantial compliance of the same is crucial to ensure that the sanctity of physical evidence remains intact.

14. He submitted that the applicant – Mohd. Munib has been in judicial custody since 06.09.2022 and the applicant – Gopal Dangi has been in judicial custody since 12.09.2022. He submitted that only one witness has been examined and the trial is likely to take long. He submitted that the matter regarding the alleged violation of procedural safeguards contained in the NDPS Act cannot be kept in abeyance for consideration during the course of the trial.

15. *Per contra*, the learned Additional Standing Counsel strongly opposed the grant of any relief to the applicants. He submitted that commercial quantity of contraband has been recovered from the applicants in the present case and the rigours of Section 37 of the NDPS Act are thus attracted against the applicant.

16. He submitted that lack of strict adherence to the Standing Orders, delay in preferring the application under Section 52A of the NDPS Act or absence of independent witnesses are merely procedural irregularities and would not vitiate the trial. He relied on the judgment of the Hon'ble Apex Court in the case of *State of Punjab v. Balbir Singh : (1994) 3 SCC 299* in this regard.

17. He submitted that it is trite law that merely because there is no independent witness, it cannot be said that the accused person has been falsely implicated, and the case of the prosecution cannot be rejected solely on the said ground.



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

Analysis

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

20. It is settled law that the Court, while considering the application for grant of bail, has to keep certain factors in mind, such as, whether there is a prima facie case or reasonable ground to believe that the accused has committed the offence; circumstances which are peculiar to the accused; likelihood of the offence being repeated; the nature and gravity of the accusation; severity of the punishment in the event of conviction; the danger of the accused absconding or fleeing if released on bail; reasonable apprehension of the witnesses being threatened; etc.

21. It is unequivocally established that, to be granted bail, the accused charged with offence under the NDPS Act must fulfill the conditions stipulated in Section 37 of the NDPS Act. Section 37 of the NDPS Act reads as under:

“37. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and



(ii) where the Public Prosecutor oppose the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force, on granting of bail.”

22. The accusation in the present case is with regard to the recovery of commercial quantity of contraband. Once the rigours of Section 37 of the NDPS Act are attracted, as provided under the Section, the Court can grant bail only when the twin conditions stipulated in Section 37(1)(b) of the NDPS Act are satisfied in addition to the usual requirements for the grant of bail – (1) The court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence; and (2) That the person is not likely to commit any offence while on bail.

23. The learned counsel for the applicants 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) Delay in filing application under Section 52A of the NDPS Act and delay in sending samples to FSL;
- b) Non-joinder of independent witnesses and no photography/videography; and
- c) Delay in trial.

24. This Court in the case of *Sovraj v. State* : 2024:DHC:5009, advertent to a number of judgments, has concurred with the view of a



Coordinate Bench of this Court in *Somdutt Singh @ Shivam v. Narcotics Control Bureau : 2023:DHC:8550*, and held that irregularity in procedure or belated compliance of the procedure under Section 52A of the NDPS Act or Standing Order No.1/88 is not a ground for grant of bail.

25. Evidently, there is a delay of about 16 and 9 days respectively in compliance of the procedure under Section 52A of the NDPS Act. It is open to the applicants to press the aforesaid defence at the time of the trial. However, at this stage, the applicants have failed to establish a *prima facie* case as to how they have been prejudiced on account of the delayed compliance. In the opinion of this Court, any observation as to the veracity of the recovery on account of delay while considering the application of bail would be premature.

26. The learned counsel for the applicants have also raised the issue that no independent witness was joined by the prosecution even though the applicants were apprehended in a public place. This Court in the case of *Bantu v. State Govt of NCT of Delhi: 2024: DHC: 5006* has observed that while the testimony of police witness is sufficient to secure conviction if the same inspires confidence during the trial, however, lack of independent witnesses in certain cases can cast a doubt as to the credibility of the prosecution's case.

27. 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 casts a doubt to the credibility of the evidence.



28. 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.

29. In the present case, no notice under Section 100 (8) of the CrPC was given to any person on the refusal to support the Investigating Agency during the search procedure. The secret information was received almost three hours prior to the accused person ('Mohd Munib') being apprehended on 05.09.2022. Subsequently, on a disclosure given by the accused ('Mohd Munib') co-accused ('Gopal Dangi') was apprehended on 12.09.2022. It is peculiar that the Investigating Agency was unable to associate even a single public witness at the time, especially since the prosecution had prior secret information and the applicants were apprehended at a public place.

30. It is also pertinent to note that the investigating agency was also unable to procure/ place on record any CCTV footage since the alleged recovery was made at a public place.

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

32. This Court also noted that realising the need of change in time, the Legislature has now passed the Bharatiya Nagarik Suraksha Sanhita,



2023 ('BNSS'), where the practice of photography and videography has now been made mandatory as part of the investigation.

33. 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.

34. 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. Undoubtedly, the search in the present case was conducted at a busy public place. 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.

35. 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.

36. In the present case, the matter is at the stage of prosecution evidence. It is stated that only one witness has been partly examined out of the twenty- two listed prosecution witnesses. The applicant – Mohd. Munib has been in custody since 06.09.2022 and the applicant – Gopal



Dangi has been in custody since 12.09.2022. There is no likelihood of the trial being completed in the near future.

37. It is trite law that grant of bail on account of delay in trial cannot be said to be fettered by the embargo under Section 37 of the NDPS Act. The Hon'ble Apex Court, in the case of **Mohd. Muslim v. State (NCT of Delhi) : 2023 SCC OnLine SC 352** has observed as under:

“21....Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the 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 31st December 2021, over 5,54,034 prisoners were lodged in jails against total capacity of 4,25,069 lakhs in the country²⁰. Of these 122,852 were convicts; the rest 4,27,165 were undertrials.

23. The danger of unjust imprisonment, is that inmates are at risk of “prisonisation” a term described by the Kerala High Court in A Convict Prisoner v. 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.”

(emphasis supplied)

38. 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.”

39. 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.

40. Similarly, in ***Man Mandal & Anr. v. The State of West Bengal*** (order dated 14.09.2023 passed in **Special Leave Petition (Crl.) 8656/2023** decided on 14.09.2023), the petitioner therein had been in custody for almost two years and the Hon’ble Apex Court found that



the trial is not likely to be completed in the immediate near future. The petitioner was, therefore, released on bail.

41. 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.”

42. 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.”

43. From the foregoing, it is evident that despite the stringent requirements imposed on the accused under Section 37 of the NDPS Act for the grant of bail, it has been established that these requirements



do not preclude the grant of bail on the grounds of undue delay in the completion of the trial. Various courts have recognized that prolonged incarceration undermines the right to life, liberty, guaranteed under Article 21 of the Constitution of India, and therefore, conditional liberty must take precedents over the statutory restrictions under Section 37 of the NDPS Act.

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

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

46. The applicants are, therefore, directed to be released on bail on furnishing a personal bond for a sum of ₹50,000/- each with two sureties of the like amount, subject to the satisfaction of the learned Trial Court, on the following conditions:

- a. The applicants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- b. The applicants shall under no circumstance leave the country without the permission of the learned Trial Court;



- c. The applicants shall appear before the learned Trial Court as and when directed;
- d. The applicants shall provide the address where they would be residing after their release and shall not change the address without informing the concerned IO/ SHO;
- e. The applicants shall, upon their release, give their mobile numbers to the concerned IO/SHO and shall keep his mobile phone switched on at all times.

47. In the event of there being any FIR/DD entry / complaint lodged against the applicants, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

48. 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.

49. The bail applications are allowed in the aforementioned terms.

50. The pending applications are also disposed of.

51. A copy of this order be placed in both the matters.

AMIT MAHAJAN, J

JULY 15, 2024