

IA No. 35/2024
SC No. 53/2022
State Vs. Furkan Ahmad & Ors.
FIR No. 760/2021
PS: New Usmanpur
U/s: 20 of NDPS Act
07.10.2024

**ORDER ON APPLICATION FOR GRANT OF BAIL FILED
BY THE APPLICANT/ACCUSED FURKAN AHMAD**

1. This order of mine shall dispose of an application for bail filed by this applicant/accused Furkan Ahmad.
2. I have already heard the counsel for this applicant /accused and Ld. Additional Public Prosecutor for State.
3. Sh. Karan Verma, Ld. Counsel for applicant/accused submitted that this applicant/accused was arrested way back on dated 17.10.2021 and since then, he is in judicial custody and the applicant/accused has already spent about three years in the judicial custody and also submitted that there is non-compliance of section 42 of NDPS Act, because as per the requirement of section 42 of NDPS Act, after sunset and before sunrise a written authorization or a warrant is mandatory to be obtained, which has not been fulfilled, which causes prejudice to the applicant /accused and vitiates the trial.
4. Ld. Counsel for applicant/accused further submitted that the prosecution failed to bring the best possible evidence on record, as no photographs or videography was made by the Investigating Officer during the course of search, seizure and recovery of the contraband, nor any effort was made to trace any

CCTV camera installed at or near the place of recovery and also submitted that the prosecution also failed to bring any independent witness on record in order to prove it's case.

5. Ld. Counsel for applicant/accused further submitted that this is the case of chance recovery, however, the prosecution failed to join any independent witness, despite the fact that the place of alleged occurrence is a crowded place and independent witnesses could have easily been joined and also submitted that the alleged recovered contraband cannot be termed as Ganja, in accordance with the definition provided as per the NDPS Act. Moreover, there are material contradictions in the story of the prosecution and statements of the witnesses.

6. Ld. Counsel for applicant/accused further submitted that in the present case, the compliance of section 52A of NDPS Act is improper and there are possibility of tempering with the case property. So, taking into consideration the period of incarceration spent in judicial custody by this applicant/accused and trial will take long time to conclude, he may be granted bail.

7. He has relied upon the judgments, **Dheeraj Kumar Shukla v. The State of Uttar Pradesh, Petition for Special Leave to Appeal (Crl.) No. 6690/2022; Sheshmani Patel v. The State of Chhattisgarh, Petition for Special Leave to Appeal (Crl.) No. 11401/2022; Boota Singh & Ors. v. State of Haryana, Criminal Appeal No. 421/2021; Mohammad Jakir Nawab Ali v. The State of Maharashtra, Criminal Application (BA) No. 602/2024 and Akil Ahmed v. State (NCT of Delhi), Bail Appln. 2525/2024.**

8. On the other hand, Sh. F. M. Ansari, Ld. Additional Public Prosecutor for the State vehemently opposed the present application and submitted that in the case in hand, the present applicant/accused alongwith co-accused were found transporting 31.084 kilograms Ganja in a car, which was being driven by the co-accused Shakil Ahmed and the quantity recovered in the present case is commercial in nature, so, embargo contained U/sec. 37 of the NDPS Act is applicable in the case in hand.

9. He further submitted that the evidence of the prosecution is going on and 11 witnesses, out of total 15 witnesses are yet to be examined and cross-examined, therefore, possibility of hampering with the witness and tampering with the evidence cannot be ruled out and there is also likelihood of fleeing away from justice by this applicant/accused, if he is granted bail at this stage and also submitted that the maximum punishment for the offence punishable u/s. 20(C) of NDPS Act is 20 years, so, as per the law laid down by the Hon'ble Appex Court in case “**Satender Kumar Antil vs. Central Bureau of Investigation and another**” and in view of the embargo contained U/sec. 37 of the NDPS Act and the law laid down in case, “**Union of India v. Ram Samujh and Anr. Appeal (Crl.)866 of 1999**”, this applicant/accused does not deserve the concession of bail and prayed for dismissal of this application for grant of bail.

10. I have given thoughtful consideration to the submissions made by counsel for this applicant/accused and Ld. Additional Public Prosecutor for State and perused the record.

11. The perusal of the record reveals that in the case in hand, this applicant/accused alongwith the co-accused is alleged to have found transporting 31.084 kilograms ganja in a car and quantity of the said contraband is alleged to have been found in commercial nature and the bar of Sec. 37 of the NDPS Act is applicable in the case in hand.

12. The perusal of the record reveals that the prosecution has cited total 15 witnesses and till date, only 4 witnesses have been examined and cross-examined. The trial is not likely to be concluded in the near future.

13. The Hon'ble High Court of Delhi in case, **Nadeem Chaudhary Vs. State of NCT of Delhi** (Bail Application No. 39/2022) has observed that:

“The object of Jail is to secure the appearance of the accused persons during the trial. The object is neither punitive nor preventive and the deprivation of liberty has been considered as a punishment. The applicant cannot be made to spend the entire period of trial in custody specially when the trial is likely to take considerable time. The presence of the accused can be secured at the time of trial by putting appropriate conditions”.

14. The Hon'ble High Court of Delhi relying upon the case, **Deepak Yadav V. State of U.P.**, (2022) 8 SCC 559 has observed that:

“Moreover, it is settled law that this Court at the stage of granting bail to the applicant is only to look into the (i) the nature and gravity of the offences/charges coupled with the severity of punishment in case of conviction; and (ii) if there is any chances of the accused absconding once out of bail; and (iii) if there is a reasonable

apprehension of the accused influencing the witnesses or tampering the records when released on bail; and (iv) the past conduct and previous record of the accused as he should neither be a threat to the society of which he is going to be a part of once again nor there should be any change of his repeating the same or indulging in any other offence; and (v) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; and (vi) behaviour, means, position and standing of the accused in the society”.

15. The Hon’ble High Court of Delhi in another case, **Raghav Thakur Vs. State** (Bail Application No. 1397/2023) has also observed that:

“The object of keeping a person in custody is to ensure his availability to face the trial and to receive the sentence that may be passed. Apart from the seriousness of the offence, other factors also have to be borne in mind while considering the bail application. Delay in commencement and/or conclusion of trial is also to be taken into account and the accused cannot be kept in custody for indefinite period, if the trial is likely to take long time”.

16. The Hon’ble Supreme Court of India in case, **Tofan Singh Vs. State of Tamil Nadu, 6 (2021) SCC 1** has also observed that:

“a confessional statement recorded under section 67 of the NDPS Act will remain inadmissible in the trial of an offence under the NDPS Act.”

17. The Hon'ble Apex Court, in the case of **Union of India v. Shiv Shanker Kesari: (2007) 7 SCC 798**, has observed as under:

"11. The court while considering the application for bail

with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.

12. Additionally, the court has to record a finding that while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion."

18. The Hon'ble Apex Court, in the case of **Mohd. Muslim v. State (NCT of Delhi): 2023 SCC OnLine SC 352**, has reiterated the law in regard to Section 37 of the NDPS Act as under:

"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 comm't 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 offences such as those enacted under Section 37 of the NDPS Act."

19. The Supreme Court in **State of Haryana v. Samarth Kumar, 2022 SCC OnLine SC 2087**, has held that:

“The advantage of the law laid down in Tofan Singh (supra) can be availed of by the accused at the stage of arguing a regular bail application. It is also an admitted position that despite search by the raiding team, no recovery of any narcotic or psychotropic substance was made from the Applicant or his premises.”

20. In **Phundreimayum Yas Khan v. State (NCT of Delhi)**, 2023 SCC OnLine Del 135, the Hon’ble High Court of Delhi has held that:

“Where there is no recovery from or at the instance of the Applicant and there is no other material to link the Applicant to the recovery of commercial quantity from the co-accused, rigours of Section 37 of NDPS Act would not apply.”

21. The counsel for the applicant/accused has relied upon the judgments of Hon’ble Supreme Court of India **Dheeraj Kumar Shukla v. The State of Uttar Pradesh, Petition for Special Leave to Appeal (Crl.) No. 6690/2022**; **Sheshmani Patel v. The State of Chhattisgarh, Petition for Special Leave to Appeal (Crl.) No. 11401/2022** and also Hon’ble High Court of Delhi in **Akil Ahmed v. State (NCT of Delhi), Bail Appln. 2525/2024** and in the concerned opinion of this court, the said judgments fairly apply in the present case also.

22. In Akil Ahmed’s case (supra), it was observed:

“39. 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."

40. 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.

41. 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.

42. 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."

43. 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."

44. 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.

45. The applicant is also stated to be of clean antecedents.

46. Appropriate conditions can be put to allay any apprehension of the applicant committing another offence of a similar nature while on bail.

47. 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."

23. In the present case also, the applicant/accused is in

custody for almost three year now and there is no criminal antecedents of the applicant/accused. Admittedly, it is a case of chance recovery, that too, from the boot of the car in which the three accused persons were travelling. Now, whether the necessary compliances as per the NDPS Act have been done or not, shall be tested during trial, which may take some time to complete. As per the prosecution case, the contraband was recovered at around 2:15 AM at night, despite that as per the chargesheet, there were 4-5 persons who were present at the spot, but, they were not included during the search procedure, nor any notice was given to them by the IO. Moreover, no videography /photography was done by the IO at the time of alleged recovery.

24. So far as the bar u/s. 37 of NDPS Act is concerned, the prosecution has been duly heard. Therefore, the first requirement of Sec. 37 of NDPS Act has been complied with. In view of the various pronouncements of the Hon'ble High Court of Delhi and Hon'ble Supreme Court of India 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. It is further worth-noticing that the applicant/accused was released on interim bail and after expiry of the period of interim bail, the applicant/accused had surrendered and there is no allegation that he had misused the liberty while on interim bail. Moreover, since the applicant/accused has clean antecedents, there is no

likelihood of him committing any offence in future. Needless to say that in case, the applicant/accused is found involved in any criminal case in future, the State shall be at liberty to move an appropriate application for cancellation of bail.

25. Considering all the facts and circumstances of the present case, the fact that it will take some time in concluding the trial, this applicant/accused Furkan Ahamd is ordered to be released on bail on furnishing personal bond in the sum of Rs.50,000/- each with two sureties of like amount, subject to the following conditions:

- (1). He will not come in contact with any of the witnesses of the prosecution.
- (2). He will not tamper with the evidence of the prosecution.
- (3). He will not indulge in any criminal activity of similar nature in future.
- (4). He shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case, so as to dissuade him from disclosing such facts to the court or the IO.

26. In case, if he violates any of the above conditions, the prosecution will be at liberty to file application for cancellation of bail of this accused.

27. In the above said terms, the application for grant of bail filed by applicant/accused Furkan Ahmad stands **allowed**. Dasti copies of this order be provided to the parties. **Attested copy of this order be also sent to the Superintendent of Central Jail concerned for supplying the same to this applicant/accused.**

(PUNEET PAHWA)
Special Judge (NDPS)/Addl. Sessions Judge/
North East/KKD Courts/Delhi/07.10.2024

