

SC 49/2021
STATE Vs. SONU KUMAR AND ANR.
FIR no.301 /2019
PS Crime Branch-West Delhi

19.04.2024

Pr: Sh. Subhash Chauhan, Ld. Addl. PP for the State.
Sh. Deepak Ghai, Ms. Kamini Malik and Ms. Ruby Arora,
Ld. Counsels for the applicant.
IO SI Sanjeev Kumar in person.

File perused. Heard.

This is an application u/s 439 Cr. P.C. filed on behalf of the applicant/accused Sonu for grant of regular bail.

Reply filed on behalf of the IO. Copy supplied.

Arguments heard. Case file gone through.

It is submitted by the Ld. Counsel for the accused that applicant/accused is innocent and has been falsely implicated in the present case. It is further submitted that the applicant was arrested in the present case on 05.10.2019 and since then he is in JC. It is further submitted that there is a non-compliance of section 42 of the NDPS Act as the alleged secret information was not reduced into writing by the concerned police official, who has received the same. It is further submitted that notice u/s 50 of NDPS Act served upon the applicant is defective, as same does not bear the signature of accused. It is further submitted that the search of the accused is conducted in the presence of the ACP of

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the police, who is itself connected with the raiding party of the police in the present case and not by an independent Gazetted Officer/Magistrate, who should have in no way connected to the raiding party. It is further submitted that there is no public witness of alleged recovery in the present case. It is further submitted that there is a difference of colour of allegedly recovered material at the time of its recovery as mentioned in the rukka of the present case and as mentioned in the FSL result. It is further submitted that the present case is pertaining to the year 2019 and till date only few PWs have been examined and substantial number of PWs are yet to be examined. It is further submitted that applicant/accused was also released on interim bail and he has not misused the liberty of the bail at any point of time. It is further submitted that the accused is not involved in any other case of similar kind. It is further submitted that the conclusion of trial shall take more considerable time. With these submissions, prayer is made for grant of bail.

On the other hand, Ld. Addl. P. P. for the state has strongly opposed the present bail application on the ground that the allegations against the accused are pertaining to the recovery of the commercial quantity of the contraband. Ld. Addl. PP further submits that the allegations against the accused are serious in nature and has prayed for the dismissal of the present bail application of the accused.

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The case of the prosecution is that on 05.10.2019, in pursuance of a secret information, accused/applicant was apprehended and 1 Kg Heroin was recovered from him from a black colour bag, which he was carrying on his shoulder. It is pertinent to mention here that as per the chargesheet, at about 10.45 AM, a secret information was received by HC Ravinder Malik that one person is indulge in sale and supply of Heroin and would be coming through Chander Vihar Ranjeet Nagar area in the afternoon and would deliver heroin to someone. The said information was shared by HC Ravinder Malik with ASI Abdul Barkat and thereafter same was conveyed to Inspector Ram Manohar and accordingly suitable legal action was ordered by the concerned ACP namely R.K. Ojha. Later on the said secret information was reduced into writing by ASI Abdul Barkat.

Hon'ble High Court of Delhi in a case law Gulab Rai @ Chetan Vs. State of NCT of Delhi in Bail Appln. no. 3840/2023 dated 19.01.2024, has held that the secret information was not reduced in writing by the persons instead same was reduced into writing by someone else, due to which there is violation of compliance of section 42 of the NDPS Act. It is also held by Hon'ble Apex Court in case Directorate of Revenue and Another Vs. Mohammed Nisar Holia, (2008) 2 SCC 370 that an officer who first received information is bound to reduce the same

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writing and not the person who hears about it. Relevant observations of the Supreme Court are as follows:

“19. In the instant case, the statutory requirements had not been complied with as the person who had received the first information did not reduce the same in writing. An officer who received such information was bound to reduce the same in writing and not for the person who hears thereabout.....”

Admittedly, in the present case the officer, who received the first information was HC Ravinder Malik and in view of the above said dictum of law he was bound to reduce the same in writing, however, the same was not done at his part. It is relevant to mention here that it is not disputed at all that the above said secret information was reduced into writing by another police official, who merely hears the said information. Moreover, it is admitted position of the present case that the personal search of the accused was effected in the presence of the abovesaid ACP namely R.K. Ojha, who himself is supervisory officer of the raiding police team of the present case. Meaning thereby, the abovesaid ACP in whose presence personal search of the accused was effected was not an independent person and was duly connected with the raiding party. However, as per the case law Ranjan Kumar Chadha Vs. State of Himachal Pradesh in CrI.

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Appeal no. 2239-2204 of 2011 decided on 06.10.2023, it is held that :

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iv) While informing the right, only two options of either being searched in presence of a Gazetted Officer or Magistrate must be given, who also much be independent and in no way connected to the raiding party.

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In the present case, the accused is facing trial for the commission of offence u/s 21 (c) r/w section 29 of NDPS Act. The co-accused Suraj is already on bail. The present case is at the stage of PE. It is relevant to mention here that the present case is pertaining to the year 2019 and only four formal witnesses have been examined in the present case out of the 20 cited witnesses in the list of witness. In the present case, the accused was arrested on 05.10.2019 and is in JC.

Reflecting upon the impact of delay in trial while considering the embargo of section 37 NDPS Act, Hon'ble Supreme Court in Rabi Prakash Vs. The State of Odisha, Special Leave to Appeal (Crl.) No. 4169/2023 decided on 13.07.2023, observed in respect of prolonged incarceration which is here as under:

As regard to the twin conditions contained in Section 37 of 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

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are reasonable grounds to believe that the petitioner is not guilty, the same may not be informed 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.

Hence, as per the Rabi Prakash (supra), formation of opinion as to whether there are reasonable grounds to believe that the accused is not guilty, the same may not be formed at this stage when he was already spent many years in custody since his arrest on 05.10.2019. 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 NDPS Act. Further, Hon'ble High Court of Delhi in another case titled as Soletto Justniano Fernando Tito Vs. Narcotics Control Bureau, in Bail Appln. 850/2023, (decided on 26.07.2023), it has been observed that most recently, the Hon'ble Apex Court in case of Rabi Prakash (supra) has again reiterated that bar under section 37 of NDPS Act would not come in way of grant of bail to under trials in case of prolonged incarceration.

Moreover, in Special Leave Petition (Crl.) 9715/2023, titled as Badsha S.K. Vs. The State of West Bengal (order dated

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13.09.2023), court granted bail to the accused observing that the accused was in custody for more than two years and four months and the trial was yet to begin. Similarly, in Special Leave Petition (Crl.) 8658/2023 titled Man Mandal & Anr. v. The State of West Bengal (decided on 14.09.2023), the accused was granted bail with observation that he was in custody for almost two years and the trial was not likely to be taken up for hearing in the immediate near future.

Further, in Dheeraj Kumar Shukla v. State of U.P., 2023 SCC OnLine SC 918, the Supreme Court again released the accused therein on bail, observing 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.”

In Gurpreet Singh v State of NCT of Delhi, Neutral Citation No.2024 : DHC:796, this Court has considered the effect of delay in trial, observing 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

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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.”

Moreover, in case law Jitender Jain VS. NCB & Anr. SLP no. 8900/2022 decided on 16.12.2022, Hon'ble Apex Court has noted the impact of delay in trial and granted bail to the accused in a case of recovery of commercial quantity to the accused, who was in custody for two years. Further, in another case law Nitish Adhikary @ Bapan Vs. The State of West Bengal SLP no. 5769/2022 decided on 01.08.2022, Hon'ble Apex Court has granted bail to the accused facing accusation u/s 21 (c) & 37 of NDPS Act with observations that accused has undergone custody of period of one year and seven months and the trial is at the preliminary stage, wherein only one witness was examined.

In the present case, accused is facing trial wherein minimum punishment is of 10 years and has already spent more than 4 years in judicial custody. Admittedly, the accused is not involved in any other case of similar nature. The rigors of section 37 of NDPS Act become inoperative in view to the above mentioned cases and observation of Hon'ble Supreme Court

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and aforesaid discussions. Accordingly, the applicant/accused is admitted to bail upon furnishing of personal bond in sum of ₹30,000/- with one surety of the like amount with following conditions:

- i) That the accused will not jump the bail and will appear in the court regularly.
- ii) That accused shall not indulge into similar offence or any other offence in the event of release on bail.
- iii) That accused shall not tamper/influence any evidence/witness in any manner.
- iv) That in case of change of residential address, accused shall intimate the court about the same within a week.
- v) That accused shall give his mobile number to the IO and will keep it operational.
- vi) That accused shall not leave the country without permission of Court and the accused shall deposit his passport, if any, with the court.

Nothing stated hereinabove shall tantamount to be an expression of final opinion on the merits of the case. With above observations, application stands disposed off accordingly.

Copy of the order be given dasti, as prayed for. Copy of the order be also sent to the concerned Jail Superintendent.

(SATVIR SINGH LAMBA)
ASJ/ SPECIAL JUDGE (NDPS),
WEST DISTRICT, DELHI/19.04.2024