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

Judgment reserved on: 19.12.2024

Judgment pronounced on: 22 .01.2025

+ **BAIL APPLN. 1418/2024**

ZAKIR HUSSAIN

.....Petitioner

Through: Mr Aditya Aggarwal and Ms
Ruchika, Advs.

versus

STATE GOVT. OF NCT OF DELHI

.....Respondent

Through: Mr. Aman Usman, APP for State
with SI Vikas, ISC/Crime

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, J**

1. This is a petition filed under section 439 of Code of Criminal Procedure ("**Cr.P.C**") seeking regular bail in FIR bearing No. 0142/2022 dated 18.07.2022 under section 18/21/25/29 of Narcotic Drugs and Psychotropic Substances Act, 1985 ("**NDPS Act**") PS Crime Branch, New Delhi.

FACTUAL MATRIX

2. The facts of the case are that a secret information was received on 17.07.2022 at around 07:25 PM that one person namely Firoz along



with other persons would come in Bolero car bearing no. HR02AM5455 to supply opium/heroine at Dhuala Kuan, Delhi Cant. area. The said information was reduced into writing after informing ACP who gave direction to raid and take appropriate action.

3. One raiding team was constituted and the same left for the spot. When they reached the Dhaula Kuan Bus Stand, the SI introduced the raiding team to 4-5 passers-by requesting them to join as independent witnesses, but all of them denied citing justified compulsion. At 9:45 PM, the raiding team reached the spot and took their positions.
4. At around 11:15 PM, they saw a Bolero car bearing no. HR02AM5455 in which 3 individuals were sitting. The car stopped in between pillar no. 80 and 81 to which the secret informer identified the suspected person as Firoz – sitting adjacent to the driver namely Munsad and his accomplice person who was sitting on the back seat identified as Zakir Hussain (the petitioner herein). The three individuals came to supply opium/heroin.
5. After sometime, the person sitting at the front seat namely Firoz and the person sitting at back seat namely Zakir Hussain (the petitioner herein) came out of the car carrying bags in their hands and started waiting for someone to whom the alleged contraband was to be delivered. After waiting for 10 minutes when nobody came to collect the bags, the raiding team apprehended the abovesaid persons with their bags.
6. The passers-by who had gathered there were informed about the



information and asked to join the investigation, refused to join the same by citing their own justified compulsions. All the apprehended persons including the petitioner were apprised about the secret information and were told about their personal search. The SI then informed Inspector Manmeet Malik over phone about the apprehended persons and requested to reach the spot. Subsequently, notices were served under Section 50 of NDPS Act to all apprehended persons.

7. From search of Firoz (co-accused), 0.510grams of opium was recovered and from the petitioner i.e. Zakir Hussain, 2.615 Kgs of opium was found from the bag which he was carrying and from Munsad, nothing was recovered. Hence, the FIR.
8. The petitioner was arrested on 18.07.2022.
9. After completion of investigation, chargesheet was filed against all the abovesaid persons including the petitioner under section 18, 25 and 29 of NDPS Act.
10. The petitioner filed his regular bail application before the learned Trial Court which was dismissed *vide* Order dated 06.02.2024. Hence the present petition.

SUBMISSIONS ON BEHALF OF THE PETITIONER

11. It is submitted by the learned counsel for the petitioner that Section 50 of the NDPS Act should be complied with fully as it is a mandatory requirement. It is stated that the word 'any' instead of 'nearest' has been used in the notice given under Section 50 of the NDPS Act. It is further submitted that the words 'any' and 'nearest' have different



interpretations. Reliance is placed on *Mohd. Jabir v. State (NCT of Delhi)*, 2023 SCC OnLine Del 1827.

12. He further contends that the samples for the FSL report should have been sent within 72 hours from the date of seizure, as per the Standing Order 1/88 dated 15.03.1988. There has been a delay of 13 days in sending the samples to the FSL for examination. Reliance is placed on *Kashif v. Narcotics Control Bureau in Bail Appln. 253/2023* decided on 18.05.2023, *Vinod Nagar v. NCB in Bail Appln. 3149/2022* decided on 19.02.2024.

13. Learned counsel for the petitioner submits that no independent witness has joined the investigation even though the petitioner was apprehended from a crowded roadside at 11:15 PM. Additionally, no CCTV footage has been taken by the prosecution in support of their case. Reliance is placed on *Krishan v. State (NCT of Delhi)*, 2023 SCC OnLine Del 864 and *Vikash v. State (NCT of Delhi)*, 2024 SCC OnLine Del 7359.

14. Lastly, it is prayed that the petitioner is languishing in jail since 18.07.2022, none of the witnesses have been examined till yet out of total 22 prosecution witnesses and the co-accused namely Munsad is released on bail *vide* order dated 16.09.2023.

SUBMISSIONS ON BEHALF OF THE STATE

15. It is argued by the Ld. APP that NDPS Act is a special statute with an overriding effect over CrPC. Sections 41, 42 and 43 of NDPS Act provides for warrants, search, arrest and seizure. These have an



overriding effect over corresponding sections of CrPC. Section 51 of NDPS Act clarifies that the provisions of CrPC apply only to the extent they are not inconsistent with the NDPS Act. Therefore, the provisions of the NDPS Act take precedence over the general provisions of the CrPC, particularly concerning the procedure for search, seizure, and arrest.

- 16.** It is contended by the Ld. APP that the provisions of Section 50 of NDPS Act are mandatory in nature, however, there is an exception i.e. Section 50(5), which allows a duly authorized officer to conduct a search without taking the person to be searched to a Gazetted officer or Magistrate if it is not feasible to do so. Section 50(5) of NDPS Act must be read in harmony with the other sub-sections of Section 50. Section 100 CrPC applies in the event the investigating officer is unable to take the accused to a Gazetted officer or Magistrates due to circumstances. It is not mandated that the provisions of Section 100 CrPC, would also apply upon refusal by the accused to exercise the option provided under Section 50(1) of the NDPS Act. The provisions of Section 100(4) are not mandatory in nature and even if there is non-compliance, the recovery may still be valid if it constitutes an offense under the NDPS Act.
- 17.** He further states that non-joining of independent witnesses despite the best efforts by the IO, does not automatically vitiate the proceedings. The recovery effected in the presence of police officials cannot be doubted and the recovery is a subject matter of Trial. Reliance is



placed on *Kallu Khan v. State of Rajasthan, (2021) 19 SCC 197*, *Jagwinder Singh v. State of Punjab, Crl. Appl. No. 2027/2012* dated 02.11.2023 and *Ram Swaroop v. State (Govt. of NCT of Delhi), (2013) 14 SCC 235*.

18. He further states that the police in performing their official duties, act under the presumption of regularity. There is a presumption in favour the police in discharge of their official duties unless contrary evidence is produced. Reliance is placed on *Surinder Kumar v. State of Punjab, (2020) 2 SCC 563*.
19. The argument pertaining failure of the IO to record the raid via photography or videography is impractical. Practical difficulties during investigation often limit the IO to record every raid. Reliance is placed on *Chidi Berr Nwayoga v. State, 2022 SCC OnLine Del 2558*.
20. Lastly, it is stated that delay in trial cannot be attributed to prosecution. It is contended by the Ld. APP that the delays in the trial are due to presiding officer being on leave. Reliance is placed on *Mohd Akhtar v. State (NCT of Delhi), 2022 SCC OnLine Del 3210*.

ANALYSIS

21. I have heard the learned counsels for the parties and perused the material available on record.
- Non compliance of Section 52A (Delay in sending the samples to FSL)*
22. Learned counsel for the petitioner has argued that the samples drawn from the seized contraband were sent to the FSL after a delay of 13



days whereas the same should have been sent within 72 hours from the date of seizure.

23. Recently, the Hon'ble Supreme Court in *Narcotics Control Bureau v. Kashif*, 2024 SCC OnLine SC 3848 has elaborately dealt with the contours of section 52A of NDPS Act and has summarized as under:-

“39. The upshot of the above discussion may be summarized as under:

(i) The provisions of NDPS Act are required to be interpreted keeping in mind the scheme, object and purpose of the Act; as also the impact on the society as a whole. It has to be interpreted literally and not liberally, which may ultimately frustrate the object, purpose and Preamble of the Act.

(ii) While considering the application for bail, the Court must bear in mind the provisions of Section 37 of the NDPS Act which are mandatory in nature. Recording of findings as mandated in Section 37 is sine qua non is known for granting bail to the accused involved in the offences under the NDPS Act.

(iii) The purpose of insertion of Section 52A laying down the procedure for disposal of seized Narcotic Drugs and Psychotropic Substances, was to ensure the early disposal of the seized contraband drugs and substances. It was inserted in 1989 as one of the measures to implement and to



give effect to the International Conventions on the Narcotic drugs and psychotropic substances.

(iv) Sub-section (2) of Section 52A lays down the procedure as contemplated in sub-section (1) thereof, and any lapse or delayed compliance thereof would be merely a procedural irregularity which would neither entitle the accused to be released on bail nor would vitiate the trial on that ground alone.

(v) Any procedural irregularity or illegality found to have been committed in conducting the search and seizure during the course of investigation or thereafter, would by itself not make the entire evidence collected during the course of investigation, inadmissible. The Court would have to consider all the circumstances and find out whether any serious prejudice has been caused to the accused.

(vi) Any lapse or delay in compliance of Section 52A by itself would neither vitiate the trial nor would entitle the accused to be released on bail. The Court will have to consider other circumstances and the other primary evidence collected during the course of investigation, as also the statutory presumption permissible under Section 54 of the NDPS Act.”

(Emphasis added)

24. The Hon'ble Supreme Court has categorically observed that section



52A of NDPS Act lays down the procedure for early disposal of the contraband seized contraband drugs and substances. Any procedural lapse or delayed compliance of section 52A(2) of NDPS Act would be a procedural irregularity which will not vitiate the trial and entitle the accused to be released on bail 'on this ground alone'. The Court has to consider all the circumstances and other primary evidence and come to a finding as to whether serious prejudice has been caused to the accused.

25. Similar view has been reiterated again by the Hon'ble Supreme Court in *Bharat Aambale v. The State of Chhattisgarh, 2025 INSC 78* wherein it is observed as under:-

“50. We summarize our final conclusion as under: -

.....
 (V) *Mere non-compliance of the procedure under Section 52A or the Standing Order(s) / Rules thereunder will not be fatal to the trial unless there are discrepancies in the physical evidence rendering the prosecution's case doubtful, which may not have been there had such compliance been done. Courts should take a holistic and cumulative view of the discrepancies that may exist in the evidence adduced by the prosecution and appreciate the same more carefully keeping in mind the procedural lapses.*

.....
 (VII) *Non-compliance or delayed compliance of the said*



provision or rules thereunder may lead the court to drawing an adverse inference against the prosecution, however no hard and fast rule can be laid down as to when such inference may be drawn, and it would all depend on the peculiar facts and circumstances of each case.”

26. In the present case, the arguments raised by the learned counsel for the petitioner that the samples drawn from the seized contraband were sent to the FSL for examination after a delay of 13 days which amounts to violation of the Standing Order 1/88 dated 15.03.1988, in view of the aforesaid judgment, it will be a subject matter of trial as the same falls under the “delayed compliance”. Hence, the petitioner is at liberty to press the aforesaid ground during trial. Having said that, the other submissions of the learned counsel for the petitioner are being dealt as under:-

Non compliance of section 50

27. Learned counsel for the petitioner has contended that the notice given under section 50 of NDPS Act does not comply with the requisite condition as mentioned therein, the word ‘any’ Magistrate has been mentioned instead of ‘nearest’ Magistrate, hence there is non compliance of the said section.

28. I have already observed in *Sanjay v. The State of NCT of Delhi in BAIL APPLN. 3710/2023* while relying on the judgment of the Hon’ble Supreme Court of *State of NCT of Delhi v. Mohd. Jabir, Criminal Appeal No. 4931 of 2024* that the word ‘any’ instead of



‘nearest’ does not negate the effect and intent of notice given under section 50 of NDPS Act. Further, it is the duty imposed on the officer to inform the accused or to whom the notice under section 50 of NDPS Act is served that he has right to be searched only before a nearest Gazetted Officer or a Magistrate for the purpose of search.

29. In the present case, notice given to the petitioner under section 50 of NDPS Act reads as under:-

“You Mussammi Zakir Hussain S/o Fakir Mohammad R/o VPO Boliya, PS & Tehsil Gharound, Dist Manasaur, MP, Age: 55 years are informed through this notice that the police have information that you are in possession of opium and smack. You are involved in the smuggling of opium and heroin and you supply opium and heroin to your customers and opium and heroin may be recovered from your possession for which you have to be searched. It is your legal right to get yourself searched before any Gazetted Officer or Magistrate, which can be arranged. Before your search, you can search the members of the police party and the police vehicles.

.....

Received the notice which I read and understood. You also told me the meaning of Gazetted Officer or Magistrate. I do not want to get my search conducted in front of any Gazetted Officer or Magistrate. I do not want to search the



police party members and police vehicles. You can search me.....”

30. On perusal, the aforesaid content of the notice clearly shows that the petitioner was duly informed about his right to get searched in the presence of any Gazetted Officer or Magistrate. The petitioner did not exercise that option. The duty cast upon the officer has been duly discharged by the said officer. The petitioner was duly informed about his right and the petitioner chose not to exercise the same. Therefore, I am of the view that the requisite conditions of section 50 of NDPS Act have been complied with.

Non Joinder of Independent Witness and lack of photography and videography

31. It has further been argued by the learned counsel for the petitioner that there have been no independent witnesses who have joined the investigation for the purpose of search even though the officers were already informed by secret information. Further, there is no photography and videography of the seizure process.

32. The said contention raised by the learned counsel for the petitioner and the identical submissions advanced by the learned APP for the State, I have already taken a view in *Sanjay v. The State of NCT of Delhi in BAIL APPLN. 3710/2023* while relying on several judgments of the Hon'ble Supreme Court and of this Court that sentence/punishments are based on the quantity of the seized contraband, hence the procedure prescribed under the NDPS Act must



be adhered to when any such recovery of the contraband is made. It was further observed that absence of independent witnesses may not vitiate the trial and the prosecution is at liberty to explain the said absence during trial but when it is coupled with lack of photography and videography, it cast a serious doubt on the prosecution's case unless the same is proved by cogent materials.

- 33.** In the present case, a secret information was received at 7:25 PM and on the basis of the said information and on the directions of the ACP, a raiding team was constituted which left for the spot at around 8:54 PM and reached the spot at around 9:45 PM. The petitioner along with other co-accused persons were apprehended at around 11:15 PM. It appears that the raiding team successfully reached the spot and there was sufficient time to get the independent witness/es from Dhuala Kuan Bus Stand as the same is very crowded place. Only a bald averment is made in the chargesheet that 4-5 passers-by were requested to join but all of them denied citing justified compulsion. No details have been recorded of such passers-by who were asked to join and then refused subsequently. Also, no notice under section 100 (8) of CrPC was given to such passers-by on their refusal to join the seizure process. Further, when the officers had prior secret information, no justifiable reasons have been given.
- 34.** As noted above, non joining of independent witnesses is not fatal to the case of the prosecution but while considering the bail application, the benefit must be extended to the petitioner.



Long Incarceration and Delay in Trial

- 35.** Learned counsel for the petitioner has argued that there is delay in trial as none of the witnesses out of total 22 witnesses have been examined yet.
- 36.** To grant bail in NDPS Act, the accused person has to cross the hurdle of twin conditions mentioned in section 37 of NDPS Act. Time and again, the Hon'ble Supreme Court in catena of judgments has laid down that the twin conditions can be relaxed provided the accused person has undergone substantial period of incarceration and the trial is unlikely to end in near future. In addition, the accused person has a right to speedy trial which flows from Article 21 of Constitution of India.
- 37.** In *Mohd. Muslim v. State (NCT of Delhi), 2023 SCC OnLine SC 352*, the Hon'ble Supreme Court observed as under:-
- “13. When provisions of law curtail the right of an accused to secure bail, and correspondingly fetter judicial discretion (like Section 37 of the NDPS Act, in the present case), this court has upheld them for conflating two competing values, i.e., the right of the accused to enjoy freedom, based on the presumption of innocence, and societal interest - as observed in Vaman Narain Ghiya v. State of Rajasthan (“the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in*



favour of the alleged criminal....”). They are, at the same time, upheld on the condition that the trial is concluded expeditiously. The Constitution Bench in Kartar Singh v. State of Punjab made observations to this effect. In Shaheen Welfare Association v. Union of India again, this court expressed the same sentiment, namely that when stringent provisions are enacted, curtailing the provisions of bail, and restricting judicial discretion, it is on the basis that investigation and trials would be concluded swiftly.....

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 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 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. State*²¹ 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.”

38. The Hon’ble Supreme Court in *Man Mandal v. State of W.B., 2023 SCC OnLine SC 1868* granted bail to the petitioners on the ground that they had undergone almost 2 years and the trial is not likely to be concluded in near future. Also, in *Dheeraj Kumar Shukla v. State of U.P., 2023 SCC OnLine SC 918*, the Hon’ble Supreme Court dispensed the rigors of section 37 of NDPS Act and granted bail to the petitioner therein. Relevant para of the said judgment is extracted below:-

“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.”

39. The Hon'ble Supreme Court in *Badsha Sk. v. State of W.B., 2023 SCC OnLine SC 1867* has granted bail to the petitioner, who had been in custody for more than 2 years with trial yet to begin.
40. In the present case, the petitioner has been in custody since 18.07.2022 i.e. more than 2 years 6 months. As per the chargesheet, there are total 22 witnesses cited and as of now, not a single witness has been examined. I am of the view that the restrictions given under section 37 of NDPS Act cannot take precedence over the petitioner's rights guaranteed under Article 21 of Constitution of India. Hence, Article 21 of Constitution will prevail over the restrictions given under section 37 of NDPS Act as the petitioner has undergone more than 2 years 6 months of custody and the trial is not likely to conclude in near future.
41. As per the status report, the petitioner is accused in FIR No. 42/2007 under section 8, 15, 29 of NDPS Act, PS Manasa, Dist. Neemuch, MP wherein the petitioner has been acquitted by the learned Trial Court *vide* judgment dated 15.11.2019. The other two FIRs (FIR No. 23/06 under section 330, 342, 294, 506B, 323, 34 of IPC and section 3(1)2a of SC/ST Act and FIR No. 24/12 under section 354/509 of IPC) are not under sections of NDPS Act.

CONCLUSION

42. For the reasons noted above, I am of the view, *prima facie*, that the



petitioner has made out a case for grant of bail on the ground of non joinder of independent witnesses and most importantly delay in trial and long incarceration.

43. For the foregoing reasons, the petitioner herein is released on bail subject to the following terms and conditions:-

- a) The petitioner shall furnish a personal bond in the sum of Rs 20,000 (Rupees twenty thousand only) each with 1 surety in the like amount, to the satisfaction of the concerned trial court;
- b) The petitioner shall not leave the country without the permission of the concerned court and if the petitioner has a passport, he shall surrender the same to the concerned trial court;
- c) The petitioner shall furnish to the IO concerned the cell phone number on which the petitioner may be contacted at any time and shall ensure that the number is kept active and switched on at all times;
- d) The petitioner will furnish his permanent address to the concerned IO and in case he changes his address, he will inform the IO concerned;
- e) The petitioner shall not indulge in any act or omission that is unlawful, illegal or that would prejudice the proceedings in pending cases, if any;
- f) The petitioner shall appear before the concerned Court on



every date of hearing unless exempted;

g) The petitioner shall not communicate with, or come into contact with any of the prosecution witnesses, or tamper with the evidence of the case.

44.All the observations made herein above are only for the purpose of deciding the present petition and will have no effect on the merits of the case pending.

45.The petition along with pending applications, if any, are disposed of.

JASMEET SINGH, J

JANUARY 22, 2025/(MSQ)