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

Judgment Delivered on: 01.04.2025

+ BAIL APPLN. 754/2024

OBINNA AUGUSTIN NDUBUBA

.....Petitioner

Through: Mr. Nitin Saluja, Ms. Simran
Khurana and Mr. K.S. Jaggi, Advs.
(DLSA).

versus

THE STATE (GOVT. OF NCT OF DELHI)

.....Respondent

Through: Mr. Aman Usman, APP for State.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J

1. The present petition has been filed under Section 439 CrPC (now Section 483 BNSS) seeking regular bail in connection with FIR No. 243/2022 under Sections 21/25 of NDPS Act registered at Police Station Mehrauli.

2. The case of the prosecution is that on 06.04.2022, a secret information was received by SI Rajeev Kumar at Narcotics Squad, South District, New Delhi that a Nigerian national who resides somewhere in the area of Chattarpur or Maidangarhi and is into supply of drugs in Delhi/NCR is coming near Buddha Temple Ahinsa Sthal behind *Samshan* Ghat Street, Mehrauli, Delhi to supply narcotic substance/smack/heroine to someone.



3. Accordingly, a raiding team was constituted which went to the informed place. At about 01:25 p.m. a scooty (registration no. DL 7S AL 4056) which was being ridden by Nigerian person wearing black jeans, Green and Black Army T-shirt and sky-blue jacket came towards M.B. Road and was waiting for someone. At the instance of secret informer, he was detained and on searching his body, Heroin weighing 272 gms was recovered from his denim jacket worn by him. Accordingly, he was arrested.

4. Mr. Nitin Saluja, the learned counsel for the petitioner submits that the petitioner is in custody since 06.04.2022 and he has been incarcerated for a period little less than 03 years. He submits that the prosecution has cited as many as 17 witnesses of which only 05 witnesses have been examined, Thus, the conclusion of trial is likely to take some time.

5. He further contends that the petitioner has no criminal record, therefore, the rigours of Section 37 of NDPS are not attracted.

6. He further submits that during the seizure proceedings neither any independent public witnesses were joined nor any photography or videography was conducted. In support of his contention, he placed reliance on the decision of a coordinate bench of this Court in ***Bantu vs. State Govt of NCT of Delhi, 2024 SCC OnLine Del 4671.***

7. He further contends that there is no CDR or CCTV footage relied upon by the prosecution to substantiate the claim that the petitioner was present at the place of incident.

8. *Per contra*, the learned APP has argued on the lines of the status report.

9. He submits that the recovery from the petitioner is of commercial quantity. Therefore, the rigors of Section 37 of NDPS are applicable. He



submits that at the time of commission of offence, the Code of Criminal Procedure was applicable and the same does not provide for photography or videography to be done during the search and recovery.

10. He further contends that the law is well settled that conviction can be based even on the testimonies of the official witnesses. He, therefore, urges the Court that the petitioner's bail application be rejected.

11. I have heard the learned counsel for the petitioner, as well as, learned APP for the State and have perused the record.

12. It may be noted that recovery was made in the case at about 1:25 pm in the month of April during broad day light but no independent witnesses was joined. The justification given in the charge-sheet as well as in the status report is that efforts were made to join the independent witnesses but no one was ready for the same but insofar as absence of videography and photography is concerned, no justification for the same is forthcoming. A coordinate bench of this Court in **Bantu** (supra) has observed that though, sufficiency of explanation as regards lack of videography and photography is to be tested during the course of trial, however, in the absence of any independent witnesses in support of recovery, lack of videography and photography is a relevant factor while considering applications for grant of bail as the same cast a doubt over the very fulcrum of the case. The relevant paragraphs from the said decision are as under:

“72. Almost all individuals carry a mobile phone compatible for videography these days. From the above cases, it is clear that it is open for the prosecution to furnish reasons to explain and justify the absence of videography and photography in a case. Mere absence of videography and photography of the recovery does not nullify the case of the prosecution, however, the same can in some



circumstances be sufficient to create a doubt as to the veracity of the prosecution's case.

73. The Hon'ble Apex Court, in a catena of judgments has held that the more severe the punishment, greater has to be the care taken to ensure that all the safeguards provided in the statute are scrupulously followed.

74. While a little play in the joint has to be afforded to investigating agencies to enable them to discharge their duties, the authorities also have to be held accountable to prevent abuse of law. In cases where the factum of recovery of the contraband is supported only by official witnesses, lack of videography and photography, especially in the absence of independent witnesses, casts a doubt on the recovery of the contraband, unless the same is justified by cogent reasons.

75. As already noted above, in the case of absence of independent witnesses, it is to be seen whether any prejudice is caused to the accused person and testimonies of the police officials can be believed even without corroboration if the same is found to be credible. This Court is of the opinion that the same rationale would extend to cases where there is no photography and videography as well, specially when the same has been deliberated and commented upon by Courts on numerous occasions.

76. The sufficiency of the explanation, if any, is to be tested during the course of the trial after the prosecution has led its evidence, however, in the opinion of this Court, the absence of any independent evidence to support recovery (presence of public witnesses, videography or photography) is a relevant factor while considering applications for grant of bail as the same casts a shadow over the very fulcrum of the case."

13. A perusal of the Status Report shows that the petitioner was arrested on 06.04.2022 and has completed almost 03 years of custody.

14. The Status Report also reveals that the prosecution has cited as many as 17 witnesses. During the course of arguments, it was submitted that till



date only 05 witnesses have been examined. The conclusion of trial thus, will take some time. Further, the previous conviction/involvements report which forms part of the Status Report indicates that except for the present case, there is no other case registered against the present petitioner. Thus, the petitioner does not have any criminal record.

15. At this stage, apt would it be to refer to the decision of Hon'ble Supreme Court in ***Rabi Prakash v. State of Odisha, 2023 SCC OnLine SC 1109***, wherein it was observed 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 1 st 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)

16. Likewise, in ***Naeem Ahmed Alias Naim Ahmad vs. Govt. of NCT of Delhi, 2024 SCC OnLine SC 220***, the Hon'ble Supreme Court granted bail to the accused from whom commercial quantity of contraband was recovered, having regard to his custody of 01 year and 11 months, the fact that the accused had no criminal antecedents and that the conclusion of trial would take time. The relevant paras of the decision reads as under:

“8. It is informed by learned counsel for the parties that the appellant has, as on date, spent more than 01 year and 11 months



in custody. The investigation is complete but framing of the charges is yet to be done. The conclusion of trial will thus take time. There are no criminal antecedents.

9. It is a seriously debatable question of fact whether the appellant was also found in the conscious possession of the contraband (smack). But such a question of fact will obviously be determined by the Trial Court at an appropriate stage. That being so, it seems to us that as of now, the twin test of Section 37 of the Act, need not be invoked against the appellant.

10. Taking into consideration the totality of the circumstances, especially the period of custody undergone by the appellant however, without expressing any views on the merits of the case, the appeal is allowed. Accordingly, the appellant is ordered to be released on bail subject to his furnishing the bail bonds to the satisfaction of the Trial Court.”

(emphasis supplied)

17. Likewise, in ***Man Mandal & Anr. vs. State of West Bengal, 2023 SCC OnLine SC 1868***, the Hon'ble Supreme Court granted bail to the petitioners therein from whom commercial quantity of contraband had been recovered considering the fact that they had been incarcerated for a period of almost 02 years and the trial was not likely to conclude in the near future.

18. In view of the above decisions and taking into consideration, the totality of circumstances, especially the period of custody undergone by the petitioner, his clean antecedents and the fact that the trial is likely to take some time, this Court is of the view that the present case warrants relaxing of statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.

19. Accordingly, the petitioner is entitled to regular bail subject to his furnishing a personal bond in the sum of Rs.50,000/- with one surety of the



like amount to the satisfaction of the learned Trial Court/JMFC/Duty JM, further subject to the following conditions:

- (i) The applicant shall not leave NCR without prior permission of the concerned Court.
- (ii) The applicant shall provide his mobile number to the Investigating Officer on which he will remain available during the pendency of the trial.
- (iii) In case of change of residential address or contact details, the applicant shall promptly inform the same to the concerned Investigating Officer as well as to the concerned Court.
- (iv) The applicant shall not directly/indirectly try to get in touch with any prosecution witnesses or tamper with the evidence.
- v) The applicant shall regularly appear before the concerned Court during the pendency of the trial.
- vi) Since the petitioner is a foreigner, the I.O is directed to communicate this order to the Foreigners Regional Registration Office (FRRO) for doing the needful. The concerned Court while accepting bail bond shall ensure that the I.O has complied with the aforesaid direction.

20. It is clarified that the observations made herein above are only for the limited purpose of deciding the present bail application and the same shall not be construed as an expression of opinion on merits of the case.

21. The petition stands disposed of.

22. Copy of the order be forwarded to the concerned Jail Superintendent for necessary compliance.



2025:DHC:2184



23. Order *dasti* under signatures of the Court Master.

APRIL 1, 2025/dss

VIKAS MAHAJAN, J