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

% **Reserved on: 25th January, 2022**
Pronounced on: 8th February, 2022

\+ **BAIL APPLN. 51/2022**

MAHESH … Petitioner
Through: Mr. Akshay Bhandari and
Mr. Digvijay Singh, Advocates

Versus

STATE (GOVT OF NCT OF DELHI) … Respondent
Through: Ms. Kusum Dhalla, APP for State

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The present application has been preferred under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "Code") for seeking regular bail in FIR bearing No. 192/2017 registered at Police Station Crime Branch under Section 22 of Narcotics, Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "NDPS Act").

2. The factual matrix in the instant case, as submitted by the prosecution, is as under:

a) On 29th October 2017, ASI Pawan Kumar of Narcotics Cell Crime Branch, received a secret information that one person namely Kamal Kalra resident of Rohini Delhi who was involved in sale & supply of Ecstasy (a party drug) in Delhi-NCR, and would come near Goodwill Apartment Sector-13, Rohini, Delhi with his associate Akshay in between 06:30-07:00 PM to deliver Ecstasy to someone. The secret information was shared with Inspector/NCB, who verified the facts and conveyed the same to ACP/NCB. The ACP ordered to conduct a raid. The secret information was reduced into writing vide DD No. 07 dated 29th October 2017 at 05:50 PM at Narcotics Cell, Crime Branch and the same was forwarded to senior officers in compliance of Section 42 of the NDPS Act.

b) After obtaining permission from senior officers and following all the mandatory provisions under NDPS Act, ASI Pawan Kumar organized a raiding party comprising of himself, ASI Satbir Singh, and HC Satender Pal and left for the spot at 06:00 PM vide DD No. 8 in a private vehicle No. HR-10N-0449. On the way to the spot, public persons were requested to join the raiding party but none of them agreed.

c) Trap was laid at the spot and at the instance of informer, one person was apprehended at about 07:05 PM whose identity was revealed as Kamal Kalra s/o Rajinder Kaira r/o F-3/58 (2nd Floor) Sector-11, Rohini, Delhi. The apprehended person was apprised about the secret information and his legal rights to be searched in

presence of a Gazetted Officer or Magistrate. A written notice u/s 50 NDPS Act was also served upon him, but he declined to be searched in presence of a G.O/Magistrate.

d) Thereafter his formal search was carried out wherein, 100 Pills of Ecstasy (weighing 42 grams) were recovered from his possession. The recovered contraband was seized after taking out two samples of 10 pills each. Accordingly, the FIR bearing No. 192/17 dated 29th October 2017 under Sections 22/29 of the NDPS Act was registered at Crime Branch and further investigation of the case was carried out by ASI Dushyant Kumar.

e) During investigation, IO/ASI Dushyant Kumar arrested the accused Kamal Kalra who made a disclosure statement, stating therein that he procured the recovered contraband from Mahesh Goel and disclosed the Mobile number of the Applicant. Accused Kamal Kalra was allowed to use his seized Mobile phone during PC remand just to apprehend the applicant.

f) Accordingly, at the instance of accused Kamal Kalra, Applicant was apprehended at 8:30 PM on 31st October 2017 from Dwarka and 20 grams of 3,4-Methylenedioxymethamphetamine (MDMA) was recovered from his possession and subsequently he was arrested in the case. Exhibits were sent to FSL for analysis and the report thereof received was positive for Ecstasy (MDMA).

3. The investigation has been completed and chargesheet has been filed before the Court of Learned ASJ. Charges have been framed by the Learned Trial Court on 15th November 2018 *qua* the commission of offences under Sections 22 and 29 of the NDPS Act.

4. Mr. Akshay Bhandari assisted by Mr. Digvijay Singh, learned counsels for the Applicant submitted that the present case as alleged against the Applicant is false and fabricated.

5. Learned counsels further submitted that the main accused against whom there is an allegation of being in possession of 42 grams of Ecstasy has already been enlarged on bail by a Coordinate Bench of the Hon"ble High Court vide the order dated 17th October 2019. The allegation against the Applicant is that he was found in possession of 20 grams of Ecstasy which is much lesser than the allegation against the main accused and therefore, it has been submitted that the Applicant be released on bail as the case of the Applicant is on a better footing.

6. Furthermore, it was submitted by the learned counsels that the Applicant has been languishing in jail for more than 4 years as an undertrial accused. So far, only two witnesses have been examined, therefore there is no chance that the trial shall be concluded in near future.

7. *Per contra,* Ms. Kusum Dhalla, learned APP for State vehemently opposed the Bail Application and submitted that the contraband recovered from the Applicant was of commercial quantity. In case, bail is granted to the applicant it is quite likely that he may, again, get involved in drug

trafficking and jump bail. Furthermore, it was submitted that the CDR analysis of mobile phones of both the accused also confirm their proximity and presence at the place of delivery of contraband. After completion of investigation, charge sheet was filed in the court. CDR of both the accused is also a part of the charge-sheet. Keeping in view of above explained facts and circumstances, learned APP submitted that the present application deserves to be dismissed.

8. Heard learned counsels for the parties and perused the record, specifically the averments made in the petition, the contents of the FIR, and the Status Report filed by the State.

9. In light of the aforesaid, it is pertinent to refer and analyze the provisions and objective of the NDPS Act. Section 37 of the 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 27A 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 opposes 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.*

10. In view of the gravity of the consequences of drug trafficking, the offences under the NDPS Act have been made cognizable and non-bailable. The Section does not allow granting bail for offences punishable under Section 19 or Section 24 or Section 27A and for offences involving commercial quantity unless the two-fold conditions prescribed under the Section have been met. The conditions include - hearing the Public Prosecutor and satisfaction of the court based on reasonable grounds that the accused is not guilty of the offence and that he is likely to not commit an offence of a similar nature.

11. The fetters on the power to grant bail do not end here, they are over and above the consideration of relevant factors that must be done while considering the question of granting bail. The Court also needs to be

satisfied before grant of bail about the scheme of Section 439 of the Code. Thus, it is evident that the present Section limits the discretion of the court in matters of bail by placing certain additional factors over and above, what has been prescribed under the Code.

12. While considering the question of bail, the Court under Section 37(b)(ii) of the NDPS Act is not required to be merely satisfied about the dual conditions i.e., *prima facie* opinion of the innocence of the accused and that the accused will not commit a similar offence while on bail, but the court must have *„reasonable grounds"* for such satisfaction.

13. The term *„reasonable grounds"* under Section 37(b)(ii) has been interpreted by the Hon"ble Supreme Court in the case of ***Union of India v. Shiv Shanker Kesari*, (2007) 7 SCC 798.** It was a case where an appeal was preferred against the order granting bail under the NDPS Act by the High Court. The prosecution alleged that the raiding party seized nearly 400 kgs of poppy straw from the possession of the accused therein. The special court rejected the bail while the High Court granted the bail on the ground that the recovery was not from the exclusive possession of the accused, but other family members were also involved. The Supreme Court set aside the order granting bail. In this context, it interpreted *„reasonable grounds"* under Section 37 of the Act, as under:

> *"7. The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the*

> *accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word "reasonable".*

14. Thus, the term „reasonable grounds" is not capable of any rigid definition nor of being put into any straight-jacket formula, but its meaning and scope will be determined based on the surrounding facts and circumstances of each case. Thus, what may be reasonable in one set of facts may not be reasonable in another set of facts.

15. The Supreme Court recently in the case of ***Union of India v. Md. Nawaz Khan*** **(2021) 10 SCC 100** has reiterated the position of law with respect to Section 37 of the Act. After analysing the previous decisions of the Hon"ble Supreme Court, the court prescribed the following test for granting bail under Section 37 of the NDPS Act:

> *"20. Based on the above precedent, the test which the High Court and this Court are required to apply while granting bail is whether there are reasonable grounds to believe that the accused has not committed an offence and whether he is likely to commit any offence while on bail. Given the seriousness of offences punishable under the NDPS Act and in order to curb the menace of drug-trafficking in the country,*

stringent parameters for the grant of bail under the NDPS Act have been prescribed."

16. Thus, the Court must be conscious about the mischief that is sought to be curbed by the Act and the consequences that might ensue if the person accused of the offence under the Act is released on bail. The court ought to be satisfied on the basis of reasonable grounds discernible from the facts and circumstances that the Petitioner is not guilty of offences that the accused is charged with. Additionally, the court also needs to be satisfied that the person so released will not commit the offence while being on bail.

17. In the instant case, the Applicant has been accused of and charged for possessing 20 grams of Ecstasy being a commercial quantity. However, the main accused, charged with the possession of a larger quantity of contraband and on the basis of whose statement the Applicant was arraigned and subsequently raided upon in the instant case, has already been released on Bail by a Coordinate Bench of this High Court. Thus, the application of the Applicant merits indulgence of this Court on the ground of parity.

18. Further, neither the Status Report on record, nor the learned APP in the course of her arguments, has cited the previous involvement of the Applicant in any other criminal cases, and as such the Applicant has clean antecedents, as evident from material on record.

19. Therefore, proceeding to the application of Section 37 in the instant matter, the APP has been heard who has vehemently opposed the bail

petition. In light of the aforesaid facts and circumstances, *prima facie* the second condition prescribed under the section is satisfied. This Court is satisfied that there are reasonable grounds, based on the analysis of the provision in the foregoing paragraphs and its application to the facts of the case, that the Applicant praying for regular bail can be allowed indulgence of this Court.

20. Further, in the instant case, the Applicant has been incarcerated for more than four years as an undertrial, whereas on date, two of the witnesses have been examined and the trial remains pending. Speedy Justice is a Fundamental Right enshrined under the ambit of Article 21 of the Constitution of India, and the same needs to be given effect by this Court in letter and in spirit, else it will remain as a dead letter of law.

21. The Constitution Bench judgment of the Hon"ble Supreme Court in ***Abdul Rehman Antulay v. R.S. Nayak*** **(1992) 1 SCC 225** has laid down the detailed guidelines with respect to speedy trial and observed as under:

> *"86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:*
>
> > *(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or*

that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the right to speedy trial from the point of view of the accused are:

> *(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;*
>
> *(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and*
>
> *(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.*

(4) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is — who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on ex parte representation.

(5) While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the

attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on — what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

(6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in Barker [33 L Ed 2d 101] "it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate". The same idea has been stated by White, J. in U.S. v. Ewell [15 L Ed 2d 627] in the following words:

> *„... the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances."*

However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But

when does the prosecution become persecution, again depends upon the facts of a given case.

(7) We cannot recognize or give effect to, what is called the „demand" rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non-asking for a speedy trial cannot be put against the accused. Even in USA, the relevance of demand rule has been substantially watered down in Barker [33 L Ed 2d 101] and other succeeding cases.

(8) Ultimately, the court has to balance and weigh the several relevant factors — „balancing test" or „balancing process" — and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order — including an order to

conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded — as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial.

(11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis."

22. It is also pertinent to point out that these guidelines have subsequently been upheld by a seven-judge bench of the Hon‟ble Supreme Court in ***P. Ramachandra Rao v. State of Karnataka*** **(2002) 4 SCC 578.** These guidelines were further applied by the Hon‟ble Supreme Court in the subsequent decision of ***Pankaj Kumar v. State of Maharashtra*** **(2008) 16 SCC 117,** wherein the court laid down the following test with regard to the application of the guidelines:

> *"23. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case. Where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time for the conclusion of trial."*

23. In the instant case the Applicant has been in jail for more than four years. Out of a total of 14 witnesses only two witnesses have been examined as on date, and as such there is no probability of the trial being concluded in the near future. Thus, pending trial the Applicant cannot be kept incarcerated for an indefinite period. Therefore, this Court must step in to ensure that speedy justice is done, and injustice is not caused to the

undertrial Applicant. Further, as already mentioned, the main accused charged with the possession of a larger quantity of contraband has already been enlarged on Bail by a Coordinate Bench of this High Court. Thus, the application of the Applicant is also entitled to bail on the ground of parity.

24. In view of the aforementioned facts, circumstances, analysis and reasoning, keeping in mind the legal provisions specifically on the ground of parity, and clean antecedents of the Applicant, this Court is inclined to allow the instant bail application *albeit* with stringent conditions given the gravity of the accusations levelled.

25. It is accordingly directed that the Applicant shall be released on bail upon his furnishing of a personal bond of Rs. 50,000/- (Rupees Fifty Thousand only), with two sureties of like amount to the satisfaction of the Investigating Officer, subject to the following conditions:

a) he shall surrender his passport, if any, to the Investigating Officer and shall under no circumstances leave India without prior permission of the Court concerned;
b) he shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case;
c) he shall provide his mobile number(s) to the Investigating Officer and keep it operational at all times;
d) he shall drop a PIN on the Google map to ensure that his location is available to the Investigating Officer;

e) he shall commit no offence whatsoever during the period he is on bail;

f) he shall appear before the Court concerned on every date; and

g) in case of change of residential address and/or mobile number, he shall intimate the same to the Investigating Officer/ Court concerned by way of an affidavit.

26. The Trial Court is directed to continue with the trial and endeavour to conclude the same as expeditiously as possible.

27. Accordingly, the instant bail application stands allowed.

28. It is, however, made clear that the observations made herein *qua* the Applicant, while allowing this application, shall have no bearing, whatsoever, on the merits of the case or on the trial pending before the Court concerned.

29. Copy of the judgment be sent to the concerned Jail Superintendent for compliance.

30. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

February 8, 2022
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