



2024:DHC:10001



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

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*Reserved on: 16<sup>th</sup> December 2024*

*Pronounced on: 24<sup>th</sup> December 2024*

+ **BAIL APPLN. 422/2024**

TINKU

.....Applicant

Through: Mr. Anurag Ahluwalia, Sr.  
Advocate, Mr. Kaushal Jeet Kait,  
Ms. Satya Siddiqui, Ms Lara  
Siddiqui, Mr. Marshall Siddiqui,  
Advocates

versus

THE STATE (NCT OF DELHI)

.....Respondent

Through: Mr. Aman Usman, APP for State  
with SI Parvir Singh, PS Crime  
Branch

**CORAM:  
HON'BLE MR. JUSTICE ANISH DAYAL**

**JUDGMENT**

**ANISH DAYAL, J.**

1. This bail application has been filed under Section 439 of the Code of Criminal Procedure 1973 ("*Cr.P.C*") seeking regular bail in FIR No. 193/2022 under Section 21 (c) and Section 29 (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("*NDPS Act*") registered at Police Station Crime Branch, Delhi. Applicant has been in custody since 2<sup>nd</sup> September 2022.

2. As per the Nominal Roll, applicant has been in custody for about two and



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half years and his jail conduct has been satisfactory. Applicant has one previous involvement as per Status Report in FIR No. 209/2017 registered at P.S Vivek Vihar under Section 33 of the Excise Act, in which reportedly he has been acquitted.

### **Factual Background**

3. The case of the prosecution is that on the night of 01<sup>st</sup> September 2022, at around 10:30 P.M, HC Pradeep along with his team, while conducting surveillance near Bahadur Shah Marg, Deep Vihar, Rohini, noticed a "White Creta" vehicle bearing registration number DL-1C-AA-8080 with two occupants engaged in suspicious activity. The vehicle was intercepted, and the driver identified himself as Manish (*co-accused*), while the co-passenger disclosed his identity as Tinku (*applicant herein*). The team observed that co-accused, upon noticing the police, attempted to flee while carrying a black polythene bag. Simultaneously, applicant exited the car, discarded a bag, and tried to escape. Both were apprehended by the police team.

4. HC Pradeep immediately conveyed the information to the Duty Officer, and the case was subsequently assigned to SI Satender Kumar, who arrived at the scene at around 12:40 A.M on 02<sup>nd</sup> September 2022. HC Pradeep presented the two individuals, along with the black polythene bags recovered from their possession. Upon inspection, both bags were found to contain a clay-coloured substance suspected to be *heroin*. Preliminary testing using a field kit confirmed the substance as *heroin*. Upon weighing, the bag recovered from co-accused Manish contained 400 grams of *heroin*, while the bag discarded by applicant contained 945 grams of *heroin*. The contraband was secured in transparent plastic containers, marked as "M" (for Manish) and "T" (for Tinku), and duly



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seized through prepared memos. White Creta vehicle used by the accused persons was also seized and taken into police possession through a seizure memo.

5. After completing the formalities under the NDPS Act, an FIR was registered, and the investigation was handed over to SI Satender Kumar. On 02<sup>nd</sup> September 2022, applicant and co-accused were interrogated and formally arrested based on sufficient evidence. During interrogation, both co-accused and applicant disclosed that the *heroin* was procured from one Anil. They further revealed that on 30<sup>th</sup> August 2022, they had met one Jitender, an associate of Anil, near Pillar No. 30 on Outer Ring Road, Tilak Nagar, who supplied the contraband. Co-accused Manish also disclosed that he regularly supplied heroin to one Minakshi.

6. On 2<sup>nd</sup> September 2022, the applicant and co-accused were produced before the Court, and two days' police custody remand was obtained. During the remand period, co-accused Manish led the police to the residence of Anil at House No. B-155, Raghubir Nagar, Delhi; however, the house was found locked. Investigations revealed that Anil, also known as Bhola, was later granted anticipatory bail on 22<sup>nd</sup> November 2022 by the Court of Additional Sessions Judge/Special Judge (NDPS), Rohini Courts.

7. Further investigation led to the arrest of Minakshi on 16<sup>th</sup> September 2022. Technical surveillance and local intelligence traced Jitender Chitra *alias* Jeetu, to P-83, Vijay Vihar, Tilak Nagar, Delhi. He was apprehended on 30<sup>th</sup> September 2022 following a tip-off. During sustained interrogation, Jitender disclosed that Anil managed the drug syndicate by providing logistical support, including fake SIM cards, mobile phones, and vehicles. Jitender further revealed that he had contacted co-accused Manish on his mobile number



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8595736915 using a SIM provided by Anil. Call detail records (“*CDRs*”) confirmed regular contact between Manish and Jitender on 30th August 2022, with six calls exchanged between 4:13 P.M and 7:35 PM.

8. In their disclosure statements, the applicant and co-accused admitted that all financial transactions for the narcotics deal were conducted in cash. Further investigation revealed that co-accused Manish was already wanted in a narcotics case registered under FIR No. 72/2022 at PS Crime Branch (Narcotics Unit) and had been declared absconding, with a reward of ₹50,000 announced by the Delhi Police for his apprehension.

### **Submissions on behalf of Applicant**

9. Senior Counsel for applicant submits that, in the present case, only two out of twenty-five witnesses, all formal witnesses, have been examined over a span of two-and-a-half years. The next date of hearing is fixed before the Trial Court for 18<sup>th</sup> February 2025, and the trial's conclusion is not in sight. Applicant has remained in custody since 2<sup>nd</sup> September 2022, for over two-and-a-half years. It was contended that such an inordinate delay amounts to a violation of the applicant’s fundamental rights under Article 21 of the Constitution of India.

10. Applicant’s counsel emphasized that the applicant has no prior criminal antecedents and has never been found guilty of any offence. It was argued that the investigating agency acted *mala fide* by portraying applicant as having antecedents, despite an acquittal in 2018. The chargesheet, filed in 2023, was alleged to have been prepared in a manner prejudicial to applicant.

11. Counsel for applicant further points it out to significant discrepancies in the handling of the Forensic Science Laboratory (“*FSL*”) report. It was submitted that while the sample was collected on 9<sup>th</sup> September 2022 and the



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FSL report was prepared on 26<sup>th</sup> July 2023, and forwarded to the police on 2<sup>nd</sup> August 2023, the same was inexplicably withheld and submitted to the Trial Court only on 8<sup>th</sup> April 2024. Further, the FIR described the contraband as “*matiyala*” or “*mithi*” (sand) like powder, while the FSL report described it as “*reddish-pink coloured coarse powdery material with lumps.*” Such discrepancies, would cast doubt on the prosecution’s claims.

12. Counsel states that the chargesheet fails to establish any money trail or CDR connecting the applicant with the co-accused or any other individual. It was further submitted that no mobile phone was recovered from the applicant, highlighting a lack of evidence directly linking the Applicant to the alleged offence.

13. Senior counsel for applicant has strongly challenged the prosecution's narrative as implausible and inconsistent with rational human behaviour. Key points raised were as follows:

**i) Co-accused’s Alleged Actions Defy Logic:**

The chargesheet records that the co-accused was driving a white Creta car bearing registration number DL-1C-AA-8080. It is alleged that the co-accused parked the vehicle in front of the police team, without any barricade or interception, waited in the car for some time, then exited voluntarily while holding a black polythene bag suspected to contain contraband, and stood outside the car before attempting to flee. Counsel states that this sequence of events is highly improbable. Senior counsel questioned why an individual carrying contraband would voluntarily stop and park in front of a police team, especially when no effort was made by the police to stop the vehicle. Counsel submitted that such behaviour



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lacks any rationale, as it would have been more logical for the co-accused to either drive away from the scene or avoid drawing attention to himself.

**ii) Applicant's Alleged Actions Are Irrational:**

The chargesheet further alleges that applicant, seated in the passenger seat of the same vehicle, stepped out holding a bag, threw it on the roadside, and attempted to flee but was apprehended by the police. Counsel for applicant argued that this narrative is equally implausible.

It was submitted that upon witnessing the co-accused's alleged actions and apprehension by the police, applicant could have taken several rational steps to avoid suspicion:

- He could have left the contraband in the vehicle and fled the scene without implicating himself.
- He could have remained in the car and driven away to avoid detection.
- Instead of stepping out with the alleged contraband, he could have attempted to dispose of it discreetly.

Counsel for applicant emphasized that stepping out of the vehicle with the alleged contraband in hand and then attempting to flee only increases suspicion and defies common sense.

**iii) Discrepancy in the Chargesheet and Site Map:**

It was highlighted by Senior Counsel that both the co-accused and applicant are alleged to have attempted to flee on foot but were conveniently apprehended by the police without any resistance.



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This factual narrative, it was argued, is inconsistent with the site map and raises doubts about the actual sequence of events.

iv) **Lack of Purpose Behind the Alleged Actions:**

Counsel further contended that there is no mention in the chargesheet of any purpose for which the co-accused exited the car holding the alleged contraband. There is no indication that the co-accused intended to deliver the contraband to anyone or that any individual was present in the vicinity to receive it.

v) **Creation of More Than Reasonable Doubt:**

Counsel submitted that the highly improbable nature of the prosecution's narrative raises more than a reasonable doubt about its veracity. The mechanical and implausible sequence of events detailed in the chargesheet, coupled with the absence of corroborating evidence or independent witnesses, undermines the credibility of the prosecution's case.

14. Senior Counsel drew attention to the absence of independent witnesses in the investigation. It was pointed out that the police claimed to have requested "4-5" passers-by on three occasions to join the investigation, all of whom declined. Counsel states that the mechanical repetition of this claim and the failure to issue notices under Section 100(8) of Cr. P.C. raises serious doubts about the credibility of the investigation.

15. Furthermore, counsel states that the procedural safeguards under the NDPS Act and Cr.P.C, were not adhered to. In cases of chance recovery, the absence of independent witnesses and the alleged circumvention of procedural safeguards were highlighted as significant shortcomings in the prosecution's case.



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16. Senior Counsel for applicant relied upon the decision of ***Madhuri Chauhan v. State of NCT of Delhi*** (2024) SCC OnLine Del 4735, decision dated 8<sup>th</sup> July 2024, rendered by a Coordinate Bench of this Court. In that case, four different packets were recovered from a polythene bag from which the contraband was taken out and mixed in white-coloured polythene and weighed, totalling 10 kgs. In this case of a chance recovery, the Coordinate Bench noted that the investigating agency did not get sufficient time to prepare, but given the nature of the place from where the recovery was made, it is peculiar that no public witnesses had been joined in the search. Reliance was placed on a previous decision of the Coordinate Bench in ***Bantu v. State of GNCT of Delhi*** 2024:DHC:5006, where it was noted that lack of independent witnesses in certain cases had cast doubt as to the credibility of the prosecution's case.

17. In ***Sukhvinder Singh v. State*** (2024) SCC OnLine Del SC 4733, decision dated 8<sup>th</sup> July 2024 of a Coordinate Bench of this Court again highlighted the aspect of independent witnesses and lack of photography and videography, which casts doubt on the credibility of evidence. Senior Counsel also relied upon ***Lovepreet Singh v. State of Punjab*** (2024) SCC OnLine P&H 9765, ***Shrimathi S. v. State NCT of Delhi*** (2024) SCC OnLine Del 7531; ***Shivam v. State of NCT of Delhi*** (2024) SCC OnLine Del 4824.

### **Submissions on Behalf of State**

18. It was submitted by the APP for State that recovery is of commercial quantity and, therefore, the bar of Section 37 of the NDPS Act must be overcome. In relation to chance recovery, he submitted that in Section 43 of the NDPS Act, a police officer empowered under Section 42, may seize any substance when he has reason to believe that substance that offence punishable





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under the NDPS Act has been committed. Section 49 of NDPS Act empowers a police officer to stop and search any vehicle for purposes of investigation. This aspect has been dealt with by the Supreme Court in **Ranjan Kumar Chadha v. State of Himachal Pradesh** 2023:INSC:878 and in paragraph 42 it has been observed as under :

*“42. The said principle clearly postulates a situation where a police officer in the normal course of investigation of an offence or suspected offences as provided under the provisions of CrPC 1973 and in the course of such investigation when a search is completed and, in that process, happens to stumble upon possession of a narcotic drug or psychotropic substance, the question of invoking Section 50 would not arise. When that principle is examined carefully one can easily understand that without any prior information as to possession of any narcotic drug and psychotropic substance, a police officer might have held a search in the course of discharge of his duties as contemplated under the provisions of CrPC 1973 and, therefore, it would be well nigh impossible to state that even under such a situation, the application of Section 50 would get attracted. The facts involved in Balbir Singh (supra) would indicate that the police officer effected then arrest, search and seizure on reasonable suspicion that a cognizable offence was committed and not based on any prior information that any offence punishable under the NDPS Act was committed and, therefore, it was argued that complying with the provisions of the NDPS Act at the time of the said arrest, search and seizure did not arise inasmuch as such arrest, search and seizure was substantially in accordance with the provisions of CrPC 1973. It was, therefore, contended that such arrest, search and seizure cannot be declared as illegal. While examining the contention in the said background, Principle 1 in para 25 referred to above came to be rendered. (See Gurjant Singh v. State of Punjab (2014) 13 SCC 603).”*



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19. On this basis, APP submitted that since it is a chance recovery, Section 50 of NDPS Act would not apply in a strict manner. Even otherwise, the Investigating Officer, upon reaching the spot, conducted the proceedings and gave notice under Section 50.

20. As regards violation of Section 100(4) Cr.P.C., NDPS is a special statute with specific provisions that have an overriding effect over the general law. Section 51 of the NDPS Act clarifies those provisions of Cr.P.C. apply only to the extent they are not inconsistent with the NDPS Act. Adverting to Section 50 of the NDPS Act, which governs the search of a person, it had been held by the Courts that provisions of Section 50 are mandatory in nature. However, an exception was introduced to Section 50 NDPS in the year 2001 by way of Section 50(5), which allows an officer duly authorised under Section 42 to conduct a search by taking the person to be searched to a Gazetted Officer. Section 50(5) of the NDPS Act applies in a situation where Section 100 Cr.P.C. provisions would have to be read as mandatory. However, upon refusal of the accused/applicant to exercise the option provided under Section 50(1) NDPS, it could not be argued that Section 100 Cr.P.C. provisions would also apply. Moreover, Section 100 Cr.P.C. provisions are not mandatory in nature.

21. Non-compliance with Section 100 Cr.P.C. still can result in a valid recovery, which can constitute an offence under the NDPS Act. Absence of independent witnesses may cause concerns regarding the credibility of evidence, but such an irregularity does not render the search or recovery illegal. Reliance was placed on *Sunder Singh v. State of U.P.* 1955 SCC OnLine SC 99, where the Supreme Court held that non-compliance of Section 103 Cr.P.C. (predecessor to Section 100 (4) Cr.P.C.) does not render the search illegal. The Supreme Court held that irregularity affects the weight of the evidence but not



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its admissibility. A similar view was taken in *Pooran Mal v. Director of Inspection (Investigation)* 1973 SCC OnLine SC 401.

22. As regards the non-joining of independent witnesses, it was submitted that IO made attempts to secure public witnesses, but they refused to join. The Supreme Court in *Jarnail Singh v. State of Punjab* (1996) 1 SCC 527 held that failure to secure independent witnesses, where attempts were made in good faith, does not vitiate the proceedings. In *Kallu Khan v. State of Rajasthan* 2021 INSC 873, it was held that in case of chance recovery from a vehicle intercepted on a public road, provisions of Section 43 of the NDPS Act would apply. Reliance was placed on a previous decision of the Supreme Court in *Surinder Kumar v. State of Punjab* 2020 INSC 1 delivered by three Judges of the Supreme Court. The Supreme Court, while relying on *Jarnail Singh (supra)*, stated that merely because prosecution did not examine any independent witness, would not necessarily lead to a conclusion that the accused was falsely implicated. The evidence of official witnesses cannot be distrusted or disbelieved merely on account of their official status. The Supreme Court in *Kallu Khan (supra)*, therefore, stated that when the conduct of accused was found suspicious, and chance recovery was made from a vehicle, then appellant/accused cannot avail any benefit on this issue and stated that it was not proved beyond reasonable doubt.

23. As regards the allegation that contraband may have been planted, it was submitted that the quantity of contraband would be approximately valued at Rs.60 to 80 lakhs approximately, and in such huge quantities of recovery, police cannot afford to plant such recovery running into lakhs or crores of rupees. Besides, there was no allegation of enmity or animosity against the



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applicants/accused or the IO and therefore, the contention of it being planted would be untenable.

24. Reliance was further placed on decision of the Coordinate Bench of this Court in *Chidi Berr Nvayoga @ James v. State* 2022:DHC:3208, where it was held that the contention of the accused that no videography was shot or CCTV footage was collected was rejected. It would not be possible to accept that police officers would park a car and make arrangements for videography in advance, and there is a likelihood of the accused coming to know about the proposed raid. The entire action of interception/raid would become futile.

25. Reliance has also been placed on decision of the Supreme Court in *Ajmer Singh v. State of Haryana* (2010) 3 SCC 746, where it was observed that efforts were made by the investigating party to include witnesses at the time of recovery, but none was willing. The Supreme Court stated that it was not inviolable that independent witnesses should be available and that the accused cannot be acquitted merely on the basis that no independent witness was produced. For lack of independent witnesses, the Trial Court would have to assess the relevant evidence to determine whether the evidence of the police officer was believable or not. The evidence could be evaluated on the basis of recognised principles, and simpliciter on that basis, acquittal cannot be given. As regards the delay in trial and rights of the applicant under Article 21 of the Constitution of India, it was submitted that delay cannot be attributed to prosecution.

### Analysis

26. Applicant seeks bail after having spent about two years and five months in custody. Applicant had been on interim bail in January 2023, April 2023,



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July 2023, and May 2024. As regards the previous involvement of applicant, alleged by the prosecution in FIR No.209/2017 registered at P.S Vivek Vihar under Section 33 of the Excise Act, he was acquitted in 2018. The reference in the charge sheet, which was filed in 2023, to a previous involvement is therefore incorrect.

27. As per FIR, when the police officers were present at about 1:30 P.M. on 1<sup>st</sup> September 2022 near Bahadur Shah Marg in Rohini, Delhi, it is alleged that a person came arriving in a white colour Creta car and *stopped in front of the police*. A man from the driver seat of the car *got down with polythene in his right hand*; another person who was sitting on the seat next to the driver, sensing the presence of the police team, tried to run away. HC Pardeep and HC Ashok stopped and controlled him. The person sitting next to the driver seat also got out of the car and had a bag in his hand. He tried to run away but threw the bag on the roadside but was quickly controlled. On opening the bags, an earthy colour powder was found, which looked like *heroin/smack*. The person driving the car identified himself as Manish, and the person sitting next to him was identified as Tinku, the applicant.

28. ACP was informed who sanctioned further action. Four to five persons from the public were requested to join the raiding party but they did not. The contents of the bag were found to be *heroin* and were tested with the field testing kit. The bag that was carried by Manish/co-accused was found to be 400 gms along with the weight of the bag, and the one carried by Tinku/applicant was found to be 945 gms. Contraband was seized.; yet again, passers-by were asked to join as witnesses but they refused. Thereafter, notice under Section 50 NDPS was served in order to search the person/accused and the car. The contents of the notice were explained to them, but they refused to get searched



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before a Gazetted Officer of a Magistrate. He got the refusal in Hindi on the copy of the notice and got their signatures. No recovery was made from their person or from the car. At this stage also, public persons were asked to join but refused. Both the accused were arrested.

29. On 3<sup>rd</sup> September 2022, application to draw samples from the contraband was moved before the Magistrate and the date of 6<sup>th</sup> September 2022 was fixed. The Magistrate drew four samples from the two parcels, which were marked and deposited with FSL, Crime Branch, Rohini on 9<sup>th</sup> September 2022 for expert opinion.

30. On their disclosure, accused Meenakshi was apprehended on 16<sup>th</sup> September 2022, Chitra was arrested on 30<sup>th</sup> September 2022; accused Anil @ Bhola filed for anticipatory bail before the Trial Court, and subsequently joined the investigation. He was granted anticipatory bail on 22<sup>nd</sup> November 2022; since there was no concrete evidence, he was not charge-sheeted.

31. As per the charge sheet and the CDR records, it was revealed that arrested persons Manish, Jitendra and Chitra were in regular touch at every stage; there were 271 calls between them. Location of the accused was the same at 7:00 P.M. on 13<sup>th</sup> August 2022 when Manish and Tinku/applicant allegedly procured *heroin* from Jitendra and Chitra. As per the charge sheet, the bank statements of accused were obtained from the banks. No money transaction was found from the bank accounts of accused Manish and the applicant into accounts of other arrested accused persons. Vehicle was found registered in the name of Jyoti, wife of accused Manish. During the course of investigation, Meenakshi was granted regular bail by the Sessions Court on 26<sup>th</sup> November 2022, while interim bail was granted to Manish for 15 days on 22<sup>nd</sup> December 2022 which was subsequently extended. The Sessions Court also



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granted interim bail of 45 days to applicant on 21<sup>st</sup> January 2023.

32. A careful perusal of FIR and the charge sheet, particularly with respect to the narration made by the police personnel who were present at the place of chance recovery, would show that *prima facie* there is some lack of probability whether that sequence of events as reported could have taken place. *Firstly*, the police personnel, including H.C. Pradeep and H.C. Ashok, stated that they were present at Bahadur Shah Marg near Deep Vihar Rohini Delhi; *secondly*, there was absolutely no mention of any barricade which they had erected; *thirdly*, that the Creta car came and stopped in front of them; *fourthly*, that the driver of the Creta car came out of the car with a black colour polythene and the driver then noticed the police team, started to run, upon which he was controlled; *fifthly*, the co-passenger also came out of the car with black polythene and tried to throw the bag, at which point of time it was controlled; at that stage, both the polythene bags were recovered and seized.

33. Since this is the sequence categorically stated in the charge sheet, the contention of the Senior Counsel for the applicant that the whole sequence of events is quite improbable/ unlikely and defies logic, is not unmerited.

34. It would be unnatural conduct for somebody driving a car and not being intercepted to stop the car in front of a *posse* of police personnel and voluntarily get out of the car without being asked to do so. Having obviously noticed the police personnel, it would have been quite difficult to assume that person tried to come out with the black polythene outside the car, in the presence of the police, making the polythene bag visible, in which there was alleged contraband, and tried to run.

35. In the charge sheet, it is noted that there were five personnel at that spot, i.e. HC Ashok, HC Pardeep, HC Sachin, HC Nitin and HC Devender. That



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being so, an act of a person carrying contraband to come out of a car, in full exposure of five police personnel, and try and run without being asked to stop, certainly leaves a question mark on the manner in which the recovery was made.

36. More importantly, the above relates to the driver identified as co-accused Manish, but then what follows as regards the applicant is also to be noted. As per the charge sheet, after apprehending Manish, applicant, who was sitting in the co-passenger seat along with the bag, came out with the bag, tried to throw the bag, and run when he was controlled.

37. The very act of alighting from the car by both driver Manish and co-passenger applicant, with black polyphone bags, as contended by the Senior Counsel, *prima facie* seems doubtful. On the contrary, it would have been natural conduct for two accused carrying contraband to have possibly hidden the black polyphone bags in the car and come out to be searched by police personnel, even assuming that if police had intercepted them and asked them to step out to be searched, which is not the case as projected in the charge-sheet.

38. The scenarios pointed out by Senior Counsel for applicant that the applicant could have undertaken rationally to avoid suspicion are notable in that they could have left the contraband in the vehicle and left from the scene without implication, or could have remained in the car and driven away to avoid detection and could have stepped out without the contraband and later attempted to dispose of it.

39. Moreover, there is no reason for the applicant to alight from the car, since it is not stated that there was a case of delivery to the receiver at that point. Even assuming that the applicant's submissions are unacceptable, at the very least, this nature of recovery would have been fortified by witnesses, independent





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witnesses, who would have joined.

40. Though APP has filed substantial case laws to contend that the lack of independent witnesses would not vitiate the seizure and the recovery, it is noted that all these decisions, inter alia ***Kallu Khan (supra)***, ***Surinder Kumar (supra)*** ***Jagvinder Singh (supra)***, are decisions in appeals against convictions where evidence has already been led and appreciated. In each of these cases, there could have been potentially other circumstances and other factors which the court would have considered and not declined to acquit the accused merely on the basis of the plea of lack of independent witnesses.

41. A view has been taken by this Court in ***Sanjeev Kumar v. State*** 2024:DHC: 8163, noting decisions of the Coordinate Bench of this Court and stating that in the event where it is a crowded/public place, the lack of witnesses and photography/videography would provide reasonable doubt in the case of the prosecution.

42. Considering this was a case of chance recovery, it would have been even more critical to have independent witnesses at some stage of the recovery, seizure, or search. But, as per the prosecution, an attempt was made, but none agreed. There is also no footage to rely upon in order to corroborate this nature of recovery. Even though the Coordinate Bench of this Court has held in ***Cheidi Berr (supra)*** that it would be difficult to expect the police officers to park their cars and make arrangements for the job in advance of the likelihood of a seizure, it is noted that the said judgment was also passed in an appeal against conviction and therefore, the said observation cannot be considered in isolation.

43. The Supreme Court in ***Ajmer (supra)***, considered an appeal against conviction. In that case, the Court had the benefit of other evidence for its



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appreciation, and it was evident that the absence of an independent witness alone was not regarded as sufficient ground for acquitting the accused, however the Apex Court highlighted that it was normally expected that there would be independent witnesses. Relevant paragraph is extracted under:

*“19. The learned counsel for the appellant has submitted that the evidence of the official witnesses cannot be relied upon as their testimony, has not been corroborated by any independent witness. We are unable to agree with the said submission of the learned counsel. It is clear from the testimony of the prosecution witnesses PW 3, Paramjit Singh Ahalwat, DSP, Pehowa; PW 4, Raja Ram, Head Constable and PW 5, Maya Ram, which is on record, that efforts were made by the investigating party to include independent witness at the time of recovery, but none was willing. It is true that a charge under the Act is serious and carries onerous consequences. The minimum sentence prescribed under the Act is imprisonment of 10 years and a fine. In this situation, it is normally expected that there should be independent evidence to support the case of the prosecution. However, it is not an inviolable rule. Therefore, in the peculiar circumstances of this case, we are satisfied that it would be travesty of justice, if the appellant is acquitted merely because no independent witness has been produced.”*

(emphasis added)

44. As regards the issue of Section 50 notice, it may not be relevant to enter that discussion considering, as per the prosecution, the contraband was recovered from bags that were thrown by the applicant and the co-accused and was not from their person. It is also noted that no recovery was made from their Creta car as well.

45. Aside from these aspects, what is also important, particularly in relation



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to the applicant, is that charge sheet does not indicate existence of any call records between the applicant or any of the other co-accused, particularly, Jitendra Chitra, Anil @ Bhola or Meenakshi. Quite otherwise, there are 271 calls between co-accused Manish and Jitendra Chitra over a span of approximately eight to nine months prior to the date of seizure.

46. The charge sheet also states that there is no money transaction found from the bank accounts of the applicant to the bank accounts of other arrested accused persons. Even the vehicle they were driving which was there, belonged to the co-accused Manish's wife.

47. The charge sheet notes that there is a prior involvement against the applicant in FIR 209/2017 under Section 33 of the Delhi Excise Act, though it came to light during the submissions before the Court that the applicant had already been acquitted in 2018. Senior counsel for the applicant had made a serious issue regarding callousness of the prosecution in noting previous involvements, in which the accused/applicant had already been acquitted, thereby unnecessarily increasing the pitch against the accused/applicant.

48. In the peculiar circumstances of this case, where there is a reasonable doubt in the circumstances related to the recovery as per the sequence of events as narrated in the FIR, and then the charge sheet, any other corroborating evidence would have been useful to fortify the case of the prosecution. However, neither are there any independent witness nor any CDR connectivity related to the applicant, nor any financial trail. No doubt, at this stage, it's a *prima facie* assessment only, since evidence would be weighed during the trial.

49. The other factor that is important to consider, is the possible delay in the trial and therefore, the supervening right of the applicant under Article 21. Besides there are no prior involvements of the petitioner.



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50. Applicant has been incarcerated for two and a half years and only two out of twenty-five witnesses have been examined. The next date of hearing will be 18<sup>th</sup> February 2025. Clearly the conclusion of the trial is nowhere in sight.

51. The reliance of the applicant on various decisions of the Courts is therefore relevant. Aside from what has been cited, the following decisions of the Supreme Court in recent years have also highlighted rights under Article 21 of the Constitution of India are paramount and will not be subservient to the Section 37 rigours under the NDPS Act. Relevant paragraphs of the same have been extracted as under:

- i. ***Rabi Prakash v State of Odisha*** 2023 SCC OnLine SC 1109 where a recovery of 247 kgs of *ganja* was made and the applicant had been in custody for more than three and a half years, with no criminal antecedents, the Court 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.”*

- ii. ***Dheeraj Kumar Shukla v State of U.P.*** 2023 SCC OnLine SC 918 where there was a seizure of about 65 kgs of *ganja* from the car driven by applicant therein (*and 92 kgs ganja recovered from the car of*



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*the co-accused*) the applicant was in custody for about two and a half years, the Supreme Court while granting bail, stated 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.”*

iii. In ***Man Mandal & Anr. v State of West Bengal*** 2023 SCC OnLine SC 1868 where the seizure was commercial in nature and the applicant had been incarcerated for about two years and there was no hope of the trial concluding soon, the Supreme Court while granting bail stated as under:

*“6. Taking into consideration the fact that the petitioners have been incarcerated for a period of almost two years and the trial is not likely to be taken up for hearing in the immediate near future, we are inclined to grant bail to the petitioners.”*

iv. In ***Badsha Sk. v State of West Bengal*** 2023 SCC OnLine SC 1867 where the seizure was of 100 bottles of Phensedyl Cough Syrup (100 ml. each), containing Codeine Phosphate, the applicant had been in custody for about 2 years 4 months and the trial was yet to commence, the Supreme Court while granting bail noted as under:

*“5. The above would show that the trial is yet to commence in the matter(s) and in the meantime,*



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*petitioners have been in custody for long. The State counsel submits that there are no known criminal antecedents against the two accused.”*

52. Considering the above analysis and taking a holistic view of the facts and circumstances, and that the applicant has raised relevant grounds to dent the case of the prosecution, and that as per the Supreme Court, while Section 37 of the NDPS Act imposes stringent conditions for the grant of bail, these restrictions cannot override the fundamental rights guaranteed under Article 21 of the Constitution, the petitioner would be entitled to bail.

53. In light of the above, and that the trial in the matter is likely to take some time, and it would not be prudent to keep the applicant behind bars for an indefinite period, this Court finds it to be a fit case for grant of bail to the applicant. Consequently, the applicant is directed to be released on bail on furnishing a personal bond in the sum of Rs. 1,00,000/- with one surety of the like amount subject to the satisfaction of the Trial Court, further subject to the following conditions:

- i. Applicant will not leave the country without prior permission of the Court.
- ii. Applicant shall provide permanent address to the Trial Court. The applicant shall intimate the Court by way of an affidavit and to the IO regarding any change in residential address.
- iii. Applicant shall appear before the Court as and when the matter is taken up for hearing.
- iv. Applicant shall join investigation as and when called by the IO concerned.
- v. Applicant shall provide all mobile numbers to the IO



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concerned which shall be kept in working condition at all times and shall not switch off or change the mobile number without prior intimation to the IO concerned.

vi. Applicant will mark presence physically before the concerned I.O. every 1<sup>st</sup> and 3<sup>rd</sup> Monday of every month at 4 p.m. and will be not kept waiting for more than an hour.

vii. Applicant shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses, or tamper with the evidence of the case.

54. Needless to state, any observation touching the merits of the case is purely for the purposes of deciding the question of the grant of bail and shall not be construed as an expression on merits of the matter.

55. Copy of the order be sent to the Jail Superintendent for information and necessary compliance.

56. Accordingly, the petition is disposed of. Pending applications (if any) are disposed of as infructuous.

57. Judgement be uploaded on the website of this Court.

**(ANISH DAYAL)**  
**JUDGE**

**DECEMBER 24,2024/SM/tk**