

Court No. - 44

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 15872 of 2023

Applicant :- Ashraf

Opposite Party :- State of U.P.

Counsel for Applicant :- Rakesh Kuamr Yadav

Counsel for Opposite Party :- G.A.

Hon'ble Pankaj Bhatia,J.

1. Supplementary Affidavit filed today is taken on record.
2. Heard learned counsel for the applicant, learned AGA and perused the record.
3. The accused-applicant seeks bail in Case Crime No.68 of 2022 under section 8/21 NDPS Act, P.S. Kaushambi, District Ghaziabad.
4. The FIR in question was lodged alleging that on the basis of a search of the applicant, four packets of alprazolam powder were found in the pocket of the applicant which weighed in total 115 grams. It further records that the applicant was given the option of getting himself searched in the presence of a magistrate or gazetted officer to which he had stated that the search may be carried out by the raiding party, after which a consent letter was got signed by the applicant. It further records that out of the total 115 grams recovered from 4 separate packets, ten grams of alprazolam powder was taken out and the rest 105 grams were kept separately and the said ten grams were sent for analysis for forensic science laboratory. The applicant is said to be in custody since 28.01.2022. The criminal antecedents have been explained in the supplementary affidavit which indicates two cases under the NDPS Act in which he is enlarged on bail. He argues that even after about more than two years in custody, the trial has not yet been concluded, as such, the right of speedy trial of the applicant has been adversely affected. He also draws my attention to the judgment of the Supreme Court in the case of ***Ranjan Kumar Chadha vs. State of Himanchal Pradesh Criminal Appeal No.2239-2240 of 2011 decided on 06.10.2023.***
5. A counter affidavit has been filed by the State stating that the sample was sent to the forensic science laboratory on 05.02.2022, however, the report was not received for which a reminder was

also sent, as is clear from the letter contained in Annexure CA-1. Along with the said counter affidavit, the consent letter, which was allegedly given by the applicant has also been annexed. It is stated that as the quantity recovered from the applicant is more than the commercial quantity prescribed and notified, the bail application should be rejected.

6. Considering the submissions, prima-facie, in terms of the FIR, four packets were recovered from the pocket of the applicant and the right of getting searched before Magistrate was refused by the applicant, requires to be dealt with as annexure no. CA-2, is prima facie not in the handwriting of the applicant. The same is also not in consonance with the law clarified and explained by the Supreme Court in the case of ***Ranjan Kumar Chadha vs. State of Himanchal Pradesh; 2023 (4) RCR (Criminal) 458***. The relevant para 64 is quoted herein below :

"64. From the aforesaid discussion, the requirements envisaged by Section 50 can be summarised as follows:—

(i) Section 50 provides both a right as well as an obligation. The person about to be searched has the right to have his search conducted in the presence of a Gazetted Officer or Magistrate if he so desires, and it is the obligation of the police officer to inform such person of this right before proceeding to search the person of the suspect.

(ii) Where, the person to be searched declines to exercise this right, the police officer shall be free to proceed with the search. However, if the suspect declines to exercise his right of being searched before a Gazetted Officer or Magistrate, the empowered officer should take it in writing from the suspect that he would not like to exercise his right of being searched before a Gazetted Officer or Magistrate and he may be searched by the empowered officer.

(iii) Before conducting a search, it must be communicated in clear terms though it need not be in writing and is permissible to convey orally, that the suspect has a right of being searched by a Gazetted Officer or Magistrate.

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

(v) *In case of multiple persons to be searched, each of them has to be individually communicated of their right, and each must exercise or waive the same in their own capacity. Any joint or common communication of this right would be in violation of Section 50.*

(vi) *Where the right under Section 50 has been exercised, it is the choice of the police officer to decide whether to take the suspect before a Gazetted Officer or Magistrate but an endeavour should be made to take him before the nearest Magistrate.*

(vii) *Section 50 is applicable only in case of search of person of the suspect under the provisions of the NDPS Act, and would have no application where a search was conducted under any other statute in respect of any offence.*

(viii) *Where during a search under any statute other than the NDPS Act, a contraband under the NDPS Act also happens to be recovered, the provisions relating to the NDPS Act shall forthwith start applying, although in such a situation Section 50 may not be required to be complied for the reason that search had already been conducted.*

(ix) *The burden is on the prosecution to establish that the obligation imposed by Section 50 was duly complied with before the search was conducted.*

(x) Any incriminating contraband, possession of which is punishable under the NDPS Act and recovered in violation of Section 50 would be inadmissible and cannot be relied upon in the trial by the prosecution, however, it will not vitiate the trial in respect of the same. Any other article that has been recovered may be relied upon in any other independent proceedings. "

7. Even otherwise, the manner of sampling is contrary to the notification which requires the sampling to be drawn from each of the packets, whereas as evident from record the sampling has not been properly done.

8. Considering the fact that the applicant is in custody for almost two years and the trial has not yet proceeded coupled with the fact that the manner in which the recovery has been effected and the manner of sampling are enough to create a suspicion with regard to the alleged recovery, however the same is to be established during trial, the applicant who is in custody since 28.01.2022 is entitled to be enlarged on bail. Thus the bail application is allowed.

9. Let the applicant ***Ashraf*** be released on bail in aforesaid first information report number subject to his furnishing a personal bond and two reliable sureties each of the like amount to the satisfaction of the court concerned with the following conditions:

(a) The applicant shall execute a bond to undertake to attend the hearings;

(b) The applicant shall not commit any offence similar to the offence of which he is accused or suspected of the commission; and

(c) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

Order Date :- 3.11.2023

VNP/-