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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 20th May, 2021

Decided on: 6th July, 2021

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BAIL APPLN. 851/2021

ANTHONY UMEH

..... Petitioner

Represented by: Mr.Amjad Khan, Advocate.

Versus

STATE

.... Respondent

Represented by: Mr.Amit Gupta, APP for the State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this petition, petitioner seeks regular bail in case FIR No.109/2015 under Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act') and Section 14 of the Foreigners Act, registered at PS Crime Branch, Delhi
2. Learned counsel for the petitioner contends that the petitioner entered India on a valid visa, thus an offence under Section 14 of the Foreigners Act is not made out. As regards offence punishable under Section 29 NDPS Act is concerned, learned counsel for the petitioner contends that even if the alleged recovery is made from the hand or vehicle however, personal search of an accused is taken, Section 50 of the NDPS Act will be applicable and since in the present case no notice under Section 50 NDPS Act was given, the petitioner is entitled to be released on bail on this ground itself. No recovery of any narcotic substance was effected from the personal search of the petitioner and on the basis of a box of 2 feet length, 1.5 feet width and 1 feet height carried by the co-accused Agbahia Ikenna under his armpit which

is highly improbable, the petitioner has been falsely implicated. There is no evidence in the form of telephonic conversation or otherwise to link the petitioner with the main accused. The petitioner has been languishing in jail for the last five years and eight months and the trial is likely to take some time. Further as per the case of the prosecution, the entire alleged contraband was collected together and thereafter samples were drawn which is contrary to the law laid down by the Supreme Court, this Court and para-2.8 of the Standing Order No.1/89. Only seven witnesses of the prosecution have been examined till date and seven more witnesses are still required to be examined. Reliance is placed on the decisions reported as AIR 2014 SC 1384 State of Rajasthan vs. Parmanand & Anr.; 2011 (5) SCC 123 Ashok @ Dangra Jaiswal vs. State of M.P.; 2018 (252) DLT 748, Earnest @ Aik vs. State; 2015 SCC OnLine Del. 9860/MANU/DE/1748/2015 Edward Khimani Kamau vs. The Narcotics Control Bureau; 2012 (191) DLT 403 Basant Rai vs. State; AIR 2005 SC 4248 Amarsingh Ramjibhai Barot vs. State of Gujarat; and N.Ayyappan vs. State, Bail Appln. 405/2005 decided on 21st April, 2005.

3. It is further contended that there is violation of Section 52A(2) (a) of NDPS Act in so far as the FIR was registered on 24th July, 2015 when the alleged samples were taken however, they were received by PW-4 on 27th July, 2015 after a considerable delay of three days. Some of the witnesses stated that cream colour powder was recovered; whereas the other stated that light brown powder was recovered; hence there are major contradictions in the testimony of the witnesses. Section 57 of NDPS Act has also not been complied with as ACP Ravinder Tyagi PW-7 was not in a position to inform as to when the special report was placed before him by the Reader.

4. Learned APP for the State has taken this Court through the status report as also to the statements of the witnesses filed along with the charge sheet and states that there is no violation of the mandatory provisions of Section 50 NDPS Act or Section 57 or Section 52A(2) (a) NDPS Act. The petitioner and the co-accused Agbahia Ikenna were apprehended along with the parcel containing heroin and all mandatory provisions were complied with.

5. Case of the prosecution in the charge sheet is that on 23rd July, 2015 SI Shiv Darshan of Narcotics Cell, Crime Branch received a secret information that two African nationals namely Anthony and Ikenna, residing somewhere in Delhi and exporting heroin through parcel would be coming between 10.00 PM to 10.30 PM on that day near Government School, Jain Road, Uttam Nagar, Delhi along with a parcel of heroin and if raid is conducted both of them can be apprehended with the parcel of heroin. SI Shiv Darshan shared this information with Inspector Vivek Pathak, who shared the same with ACP, Narcotics Cell Shri Ravinder Kumar Tyagi and was directed to take legal action. The information was recorded vide DD No.25A on 23rd July, 2015. Copy of the same was also produced before Inspector Vivek Pathak in compliance of Section 42 NDPS Act.

6. The raiding team led by SI Shiv Darshan along with the informer, IO bag, field testing kit, camera, electronic weighing machine etc. reached the spot and tried to associate passers-by in the investigation however, none was willing to join in. At about 10.25 PM two African nationals who were coming on feet from Dwarka Mor side were spotted. One of them was wearing a white colour shirt and having a cardboard box in his left armpit whereas the other was wearing a half sleeves t-shirt. The informer identified

them as Anthony and Ikenna respectively and left the spot. In the meantime, Anthony, who was having the cardboard box handed over to Ikenna who kept the same in his left armpit and both of them were talking to each other while walking. They were overpowered by the raiding team and they disclosed their names as Anthony Umeh, the present petitioner and Agbahia Ikenna. They were informed about the secret information and about their legal rights that search could be conducted in the presence of a Gazetted Officer or a Magistrate and that they could take prior search of the raiding team. Two separate notices under Section 50 NPDS Act were served upon them but they refused to take search of the raiding team and vehicle and refused to get searched before a Gazetted Officer or a Magistrate. Search of Anthony Umeh, the petitioner was conducted first during which no contraband was recovered. Thereafter search of Agbahia Ikenna was conducted and the cardboard box which was in his possession was checked, which was found to be containing heroin when tested by field testing kit and on weighing the same was found to be 800 grams. Two samples of 5 gram each marked 'A' and 'B' were taken and the remaining contraband was converted into a cloth parcel and marked as 'C'. The material of cardboard box was kept in a white plastic katta and its mouth tied with cloth and converted into a pullanda marked as 'D'. FSL form was filled and pullandas were sealed with the seal of '8B PS NB DELHI'. Seal was also put on the FSL form. The Pullandas were taken into possession through seizure memo and the FIR was registered. The Pullandas and FSL form were produced before the SHO, Crime Branch and the investigation entrusted to SI Rajnikant of Narcotics Cell. The prosecution thus claims that all mandatory provisions, that is, Sections 42, 50, 52, 52A, 55 and 57 NDPS Act were duly

complied with.

7. As regards the contention of the petitioner that Section 14 of the Foreigners Act is not made out, it may be noted that claim of the petitioner was that he was holding Passport No.A03078652 which was lost and he obtained a new passport bearing No.A03823448. It is on this new passport that his visa for stay in India was regularised and at the time when the petitioner was arrested he was not in possession of a valid passport or a valid visa. Thus the contention of learned counsel for the petitioner that Section 14 of the Foreigner's Act cannot be invoked deserves to be rejected.

8. The witnesses have clearly stated that when the petitioner and the co-accused were apprehended, the accused stated that they were unable to understand Hindi but could understand English. Copy of notice under Section 50 NDPS Act annexed by the petitioner, with the petition is one which was handed over to the petitioner which obviously would not bear the petitioner's reply however, the one filed in the Court with the charge sheet bears the signatures of SI Shiv Darshan and the two police witnesses besides the petitioner and the co-accused in their own handwriting have noted their replies which were exhibited as PW-2/C and PW-2/D respectively. Thus the contention of the petitioner that Section 50 NDPS Act has not been complied with is also meritless.

9. According to the case of the prosecution on opening the cardboard box it was found to be containing 15 packets wrapped with silver gota on gatta pieces and all the 15 packets were checked after removing the gatta and gota and in five packets it was found containing cream colour powder wrapped in gatta and both sides of the gatta were laminated with plastic. Cream colour powder from these five packets was taken out on a transparent

polythene and was checked with the field testing kit which gave positive of heroin. On weighing on electronic weighing machine it was found to be 800 grams and thus two samples of 5 grams each were taken and the remaining 790 grams heroin was also sealed in the cloth pullanda.

10. Contention of learned counsel for the petitioner that samples should be drawn from each of the packet though merits consideration however, does not vitiate the case of the prosecution for the reason as per the prosecution all five packets were separately tested by the field testing kit and they were found to be containing heroin. After having checked from the field testing kit, the Investigating Officer mixed the contents of the five packets which turned out to be 800 grams in total out of which two samples were drawn. Once each of the packets contained heroin at best the issue would be of percentage of purity which issue is not required to be considered at this stage.

11. Contention of learned counsel for the petitioner that the case property and the samples were deposited with undue delay also deserves to be rejected for the reason the alleged recovery was made after 10.25 PM on 23rd July, 2015 and after completing all the formalities the raiding party including the witnesses left the spot at 2.30 AM whereafter rukka was sent and the same was received at 3.35AM at PS Crime Branch and immediately the parcels containing the contraband, samples, FSL Form, carbon copy of the seizure memo etc. were handed over to Inspector Ravinder Kumar, SHO, PS Crime Branch whereafter they were deposited with the Moharar Malkhana and relevant entries were made in Register No.19.

12. ACP Ravinder Kumar Tyagi, PW-7 has clearly stated that on 24th July, 2015 he received the copy of DD No.25A in his office which was put

up by the reader as also a special report under Section 57 of NDPS Act prepared by SI Shiv Darshan and forwarded by Inspector Vivek Pathak which indicates that compliances under Sections 42 and 57 of NDPS Act were done. On 27th July, 2015 the samples were sent to FSL which were received by Dr. Adesh Kumar, PW-6 at FSL. From 24th July, 2015 to 27th July, 2015 the contraband and the samples along with the CFSL form were kept in the Moharar Malkhana and the relevant entries in this regard were made in Register No.19 and the witnesses have deposed in relation thereto. Consequently, this Court finds no merit in the present bail application seeking grant of regular bail at this stage and the petition is dismissed.

13. Order be uploaded on the website of this Court.

JULY 06, 2021
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(MUKTA GUPTA)
JUDGE

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