

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

BAIL APPLN. 2270/2021

Date of Decision: 28.09.2021

IN THE MATTER OF:

MAMTA

..... Petitioner

Through: Mr. Rahul Sharma, Advocate

versus

STATE OF DELHI

..... Respondent

Through: Ms. Neelam Sharma, APP for State with
SI Jai Kishan (Mob. No.9871756875), P.S. Budh
Vihar

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

MANOJ KUMAR OHRI, J. (ORAL)

1. The present application has been filed under Section 439 Cr.P.C. read with Section 37 of the NDPS Act on behalf of the applicant seeking regular bail in FIR No. 312/2020 registered under Sections 21/61/85 of the NDPS Act at Police Station Budh Vihar, Delhi.
2. Learned counsel for the applicant submits that as per the prosecution case, a secret information was received at about 8:00 p.m. that the applicant, who was involved in selling of drugs, could be arrested. A raid team was organized and at about 9:15 p.m. when the applicant was allegedly getting down from an auto, she was identified by the secret informer and apprehended. A notice under Section 50 of the NDPS Act was given to her and on being searched by *W/Ct. Rekha*, 50.75 gms *Smack* was allegedly recovered from the possession of the applicant. Learned counsel has

contended that the provisions of Section 50 of the NDPS Act were not strictly complied with in the present case. He submitted that the search of the applicant, admittedly conducted by *W/Ct. Rekha*, was in complete contravention of Section 50(4) of the NDPS Act and the alleged recovery being of 'intermediate quantity' in nature, the rigours of Section 37 of the NDPS Act are not applicable to the case.

3. It is also submitted that the applicant has been in judicial custody since 17.11.2020 and the charge sheet having been filed, the applicant is no longer required for the purpose of investigation. Learned counsel also submits that the applicant was granted interim bail by the Sessions Court for a period of 45 days vide order dated 16.12.2020 and for another period of 10 days vide order dated 01.07.2021, however, on account of misunderstanding as to whether the directions passed by the Supreme Court and the Full Bench of this Court with respect to continuation of interim bail orders would be applicable to the case of the applicant or not, the applicant did not surrender in time.

4. Learned APP for the State, on the other hand, has vehemently opposed the bail application. She submits that the search proceedings were conducted in presence of public witnesses as well as the ACP and SHO, Police Station Budh Vihar, Delhi. The seized substance was sent for examination to the FSL and as per the Report, it was found to contain '*Diacetylmorphine (22.6%)*', '*Acetyl codeine*', '*6-Monoacetylmorphine*' and '*Trimethoprim*'.

5. It is further submitted that there was no violation of the provision under Section 50(4) of the NDPS Act and the same has to be interpreted in the fact-situation of the case. In the present case, the secret information was

received at about 8:00 p.m. wherein, it was disclosed that the applicant was likely to come along with drugs and could be arrested. Due to the paucity of time, the raiding team had to immediately rush to the spot and for that reason no female police officer could join the raid/search proceedings. In support of her submissions, learned APP has relied upon the decision of the Supreme Court in Sajan Abraham v. State of Kerala reported as **(2001) 6 SCC 692** as well as the decision of a Single Bench of the Kerala High Court in Amina v. Circle Inspector of Police reported as **2001 SCC OnLine Ker 266**.

6. Learned APP has also submitted that the applicant has been found involved in two other cases being FIR No. 284/2010 registered under Sections 61/1/14 of the Punjab Excise Act and FIR No. 1000/2018 registered under Section 33 of the Delhi Excise Act at Police Station Mangol Puri, Delhi. It is further submitted that on account of her conduct during period of release, the applicant does not deserve the concession of bail inasmuch as she failed to surrender in time.

7. In rebuttal, learned counsel for the applicant submits that the applicant is already on bail in the aforesaid two cases registered under the Excise Act.

8. I have heard learned counsels for the parties and have also gone through the material placed on record.

9. The short issue raised in the present case is whether a female suspect is required to be searched by a female or an '*empowered/authorised*' female officer. To appreciate the submissions, I deem it apposite to refer to Section 50 of the NDPS Act, which reads as under:

"50. Conditions under which search of persons shall be conducted.- (1) When any officer duly authorised under Section

42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the gazetted officer or the Magistrate referred to in sub-section (1).

(3) The gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

⁶⁶[(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]”

10. Chapter V of the NDPS Act deals with procedure. Before proceeding further, I may take note of Sections 41 and 42 as well as Section 51 of the NDPS Act, 1985. In terms of Sections 41(2) and 42(1) of the NDPS Act, it is only an empowered officer or duly authorised officer, as enumerated therein, who can take actions under the provisions of the Act. Section 41(2)

of the NDPS Act prescribes that it is only an empowered officer who can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. The aforesaid Sections also provide that an authorised officer is an officer who is superior in rank to a peon, sepoy or constable. A police constable is not an officer authorised. In fact, the aforementioned Sections specifically bar the inclusion of a constable in the ambit of ‘authorised officer’.

11. Section 51 of the NDPS Act provides that the provisions of Cr.P.C. shall apply insofar as they are not inconsistent with the provisions of the NDPS Act, to all warrants issued and arrests, searches and seizures made under the Act.

12. While interpreting the expression ‘*insofar as they are not inconsistent with the provisions of this Act*’ as occurring in Section 51 of the NDPS Act, a Constitution Bench of the Supreme Court in State of Punjab v. Baldev Singh reported as (1999) 6 SCC 172 explained that the provisions of Cr.P.C. relating to search, seizure or arrest apply to search, seizure and arrest under the NDPS Act also except to the extent they are ‘*inconsistent with the provisions of the Act*’. It was further held:

“13. Vide Section 51, the provisions of the Code of Criminal Procedure, 1973 shall apply, insofar as they are not inconsistent with the provisions of the NDPS Act, to all warrants issued and arrests, searches and seizures made under the NDPS Act. Thus, the NDPS Act, 1985 after incorporating the broad principles regarding search, seizure and arrest etc. in Sections 41, 42, 43, 49 and 50 has laid down in Section 51 that the provisions of the Code of Criminal Procedure shall apply insofar as they are not inconsistent with the provisions of the NDPS Act. The expression ‘insofar as they are not inconsistent with the provisions of this Act’ occurring in Section 51 of the NDPS Act is

of significance. This expression implies that the provisions of the Code of Criminal Procedure relating to search, seizure or arrest apply to search, seizure and arrest under the NDPS Act also except to the extent they are 'inconsistent with the provisions of the Act'. Thus, while conducting search and seizure, in addition to the safeguards provided under the Code of Criminal Procedure, the safeguards provided under the NDPS Act are also required to be followed. Section 50(4) of the NDPS Act lays down that no female shall be searched by anyone excepting a female. This provision is similar to the one contained in Section 52 of the Code of Criminal Procedure, 1898 and Section 51(2) of the Code of Criminal Procedure, 1973 relating to search of females. Section 51(2) of the Code of Criminal Procedure, 1973 lays down that whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency. The empowered officer must, therefore, act in the manner provided by Section 50(4) of the NDPS Act read with Section 51(2) of the Code of Criminal Procedure, 1973 whenever it is found necessary to cause a female to be searched. The document prepared by the investigating officer at the spot must invariably disclose that the search was conducted in the aforesaid manner and the name of the female official who carried out the personal search of the female concerned should also be disclosed. The personal search memo of the female concerned should indicate compliance with the aforesaid provisions. Failure to do so may not only affect the credibility of the prosecution case but may also be found as violative of the basic right of a female to be treated with decency and proper dignity."

13. In the aforesaid case, a reference was made to the decision of a Division Bench of the Supreme Court in State of Punjab v. Balbir Singh reported as **(1994) 3 SCC 299**, wherein it was held that:

"25. ...(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the

provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Sections 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between

sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an 'empowered' officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply

with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.”

(emphasis added)

14. Keeping in view the object of the NDPS Act and the stringent conditions provided therein, certain safeguards have also been put in place which, in order to avoid any harm to innocent persons and to avoid abuse of the provisions by officers, have to be scrupulously followed [Refer: State of Punjab v. Baldev Singh (Supra) and Tofan Singh v. State of Tamil Nadu reported as **(2021) 4 SCC 1**].

15. The Supreme Court, time and again, has declared that the compliance with Section 50 of the NDPS Act is mandatory. In connection with Section 50(4), it has been observed that the mandate of the provision cannot be diluted even on the ground that a female officer was not available at the time of search [Refer: State of Punjab v. Surinder Rani alias Chhindi reported as **(2000) 10 SCC 429**].

16. Despite addition of sub-sections (5) and (6) in Section 50 of the NDPS Act in the year 2001, the Supreme Court in Vijaysinh Chandubha Jadeja v. State of Gujarat reported as **(2011) 1 SCC 609** has held that the two newly inserted sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Further, it was observed that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial.

17. A holistic reading of Sections 41, 42 and 43 of the NDPS Act would show that only an empowered officer, being an officer superior in rank to a peon, sepoy or constable, has been authorised with power of entry, search, seizure and arrest. Even Section 50 of the NDPS Act refers to such an officer. The Supreme Court in unequivocal terms has held that the provisions of Sections 41 and 42, as regards authorization and recording of information, are mandatory in nature and only an empowered officer as enumerated in Sections 41(2) and Section 42(1) of the NDPS Act can act under the provisions thereof. Section 41(2) of the NDPS Act further provides that the empowered officer may authorise his subordinate, who in turn, has also to be superior in rank to a peon, sepoy or a constable. Section 43 of the NDPS Act too uses the expression ‘officer’ and provides for search of a person to be conducted by an officer of departments mentioned in Section 42. From the foregoing, it is apparent that the expression ‘officer’, whether empowered, authorised or subordinate, has to be necessarily read to mean a person who is above the rank of a peon, sepoy or a constable.

18. Further, the condition imposed under sub-section (4) of Section 50 of the NDPS Act is in addition to the other conditions appearing therein. It is

unfathomable that a male suspect has to be searched by an empowered/authorised officer but while conducting a search on a female suspect/accused, the provision is given a complete go bye.

19. I also deem it expedient to take note of the decision in Chhotu v. State of Maharashtra reported as **1994 SCC OnLine Bom 331**, where in a case involving search of an accused/suspect for an offence punishable under the NDPS Act, J. V.S. Sirpurkar (as his Lordship then was) held that there was total non-compliance of the provisions of the Act as the search of the accused person was conducted by a police constable.

20. There is no gainsaying that if the law requires an act to be done in a particular manner, that act has to be done in that manner, or not done at all [Refer: Taylor v. Taylor reported as **(1875) LR 1 Ch D 426**, Nazir Ahmad v. The King-Emperor reported as **1936 SCC OnLine PC 41**, State of Uttar Pradesh v. Singhara Singh and Others reported as **(1964) 4 SCR 485**, Chandra Kishore Jha v. Mahavir Prasad and Others reported as **(1999) 8 SCC 266**, Dhanajaya Reddy v. State of Karnataka reported as **(2001) 4 SCC 9**, and Dipak Babaria and Another v. State of Gujarat and Others reported as **(2014) 3 SCC 502**].

21. In the present case, the secret information stated to be received was with respect to a female. A perusal of the material placed on record would show that it has not been stated as to why no effort was made to secure presence of a female police officer. In view of the above enunciation of law, this Court is of the *prima facie* view that the search conducted by *W/Ct Rekha* does not appear to be in strict compliance with the mandate of Section 50(4) of the NDPS Act. For that reason, search conducted by *W/Ct Rekha*, even in the presence of the ACP/SHO, appears to suffer from the

vice discussed above. Needless to add that whether there is strict compliance of Section 50(4) of the NDPS Act while conducting search of the applicant, is a matter of trial.

22. It is also noted that the reliance placed by the learned APP on the decision in Sajan Abraham (Supra) is entirely misplaced. The facts involved in the captioned case were that a head constable received an information at about 7 p.m. that a person was selling narcotic drugs at a particular place. He passed on the information to a Sub-Inspector, who was on patrolling duty. In these circumstances, it was held that the Sub-Inspector could not have recorded the information while he was in motion, on patrol duty, and had the police party not gone immediately to apprehend the accused, it might have led to his escape. Notably, a Constitution Bench of the Supreme Court in Karnail Singh v. State of Haryana reported as **(2009) 8 SCC 539** has clarified that the Court in Sajan Abraham (Supra) did not hold that requirements of Sections 42(1) and 42(2) need not be fulfilled at all.

23. Insofar as the decision in Amina (Supra) by the Kerala High Court is concerned, the same was given on the facts of the case, and thus the reliance sought to be placed thereon by the learned APP is also misplaced.

24. Keeping in view the aforesaid facts and circumstances, it is directed that the applicant be released on regular bail subject to her furnishing a personal bond in the sum of Rs.25,000/- with one surety in the like amount to the satisfaction of the concerned Jail Superintendent/concerned Court/Duty M.M. and also subject to the following further conditions :-

- i) The applicant shall not leave the NCT of Delhi without prior permission of the concerned Court;

ii) The applicant shall remain available on mobile number i.e., 8373913622 (which belongs to her husband), which she undertakes to keep operational at all times during the pendency of the trial;

iii) The applicant shall not directly or indirectly try to get in touch with the complainant or any other prosecution witnesses or tamper with the evidence;

iv) The applicant shall regularly appear before the concerned Court during the pendency of the trial;

v) In case of change of residential address/contact details, the applicant shall promptly inform the same to the concerned Investigating Officer as well as to the concerned Court.

25. The bail application is disposed of in the above terms.

26. A copy of this order be communicated electronically to the concerned Jail Superintendent for information and necessary compliance.

27. A copy of this order be uploaded on the website forthwith.

28. Needless to state that nothing observed hereinabove shall amount to an expression on the merits of the case. It is made clear that the observations made hereinabove are only *prima facie* and shall not affect the appreciation of evidence at the conclusion of the trial.

(MANOJ KUMAR OHRI)
JUDGE

SEPTEMBER 28, 2021

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Click here to check corrigendum, if any