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

% *Order pronounced on 06.05.2022*

+ BAIL APPLN. 455/2022

AGBAHIA IKENNA

..... Petitioner

Through: Mr. J.S. Kushwaha and Mr. Suryansh
Soam, Advocates.

versus

STATE

..... Respondent

Through: Mr. Ravi Nayak, APP for State with
ASI Ramesh, PS Crime Branch.

CORAM:

HON'BLE MR. JUSTICE TALWANT SINGH

TALWANT SINGH, J.:

1. The petitioner has moved this application for grant of bail. It has been mentioned that the petitioner was arrested 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 on 25.07.2015 and since then the petitioner is in jail.

1.1 The case of the prosecution is that a tip was received that petitioner alongwith another accused Anthony Umeh will come near government school between 10:00 PM to 10:30 PM on 23.07.2015. A raiding team was formed and when they reached at the spot they found two Africans, out of which one person was having a cardboard box in his left armpit and another was with him. The person with cardboard was identified as Anthony and when he handed over the cardboard box to the present petitioner, who took it



in his left armpit, he was apprehended and from the cardboard box 15 packets were found, out of which police checked only 5 packets and found Heroin in them. After mixing the mixture of all the packets police put the contents of all the 15 packets in one polythene and total weight was 800 grams, out of which samples were drawn of 5 grams each and the same were sent to FSL for testing.

1.2 As per the petitioner, he has been falsely implicated in the case; his bail application was dismissed by the Trial Court on 06.07.2021. Hence, the present bail application has been moved on the ground that the petitioner is a young man and has been falsely implicated; the manner of drawing the sample was not as per law as the investigating agency had not taken samples from all the packets and had taken out 5 packets out of the 15 packets for sampling purpose and assumed that all the remaining packets were having the same substance; no person from any nearby house was joined as witness; cardboard box in question was with the other co-accused and the police had seen the same, the petitioner is not a previous convict; petitioner is having his family in Delhi; the mandatory provisions regarding the manner in which notice under Section 50 NDPS Act was to be issued was not followed and the petitioner undertakes to abide by such terms and conditions as may be imposed by granting bail and the trial will take some time to reach its logical conclusion.

2. Notice was issued. Status report has been filed. The facts mentioned above the manner in which applicant was apprehended have been reiterated in the pending paragraphs of the status report. It has been submitted that during investigation the present petitioner and co-accused did not cooperate and did not give information about their passport and Visa, so Section 14 of



the Foreigners Act was applied.

2.1 No credible information was supplied by the petitioner and his co-accused regarding the source of the contraband. After investigation charge-sheet has been filed in this case. The trial is at its fag end of prosecution evidence as out of 14 witnesses, 13 have already been examined. The regular bail application of the co-accused Anthony Umeh, in which similar pleas were raised, was dismissed by the coordinate Bench of this Court on 06.07.2021. The two interim bail applications moved by the present petitioner were also dismissed by the coordinate Bench of this Court on 31.08.2021 and 12.01.2022 respectively.

2.2 The bail application has been strongly opposed on the ground of commercial quantity of Heroin in which punishment may extend upto 20 years and the bar of Section 37 NDPS Act would also apply; moreover, the petitioner is a Nigerian national having no verified passport details and there is every likelihood of his absconding and indulging in similar offences again. Copy of the order passed by the coordinate Bench of this Court dismissing the bail application of the accused Anthony Umeh in Bail Appl. No. 851/2021 decided on 06.07.2021 has also been placed on record.

2.3 The observations made by the coordinate bench are hereunder:-

“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.

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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.”

3. During arguments the learned counsel for the petitioner reiterated the contents of the bail application as detailed above. The counsel for the petitioner has relied upon the judgment of the coordinate Bench of this Court titled as ***Ahmed Hassan Muhammed vs. the Customs*** 2021 (2) JCC 1187 in para 18, the following observations were made:-

“18. The fact of the present case is that prosecution has mixed all the packets and thereafter, sent to FSL for examination, which is contrary to the procedure prescribed under the law.”

3.1 The petitioner has relied upon an order dated 05.04.2022 in bail application No. 3490/2021 titled “*Tunkara Ali vs. Narcotics Control Bureau*” passed by a coordinate Bench of this Court, in which following observations were made:-

“7. Considering the submissions above, viz. the violation of



standing orders 1/88 and 1/89 as also the fact that the above drug does not attract the bar under Section 37 NDPS Act, thus relying upon Niranjan Jayantilal Shah Vs. Directorate of Revenue Intelligence 2014 (2) LRC 295 (Del), I admit the petitioner on bail on his executing a personal bond of Rs.1.00 lac with one surety of the like amount to the satisfaction of the learned Trial Court/Duty MM.

3.2 Directions in regard to samples are contained in standing order No. 1/88 dated 15.03.1988 issued by Narcotics Control Bureau, which are reproduced hereunder:-

“1.5 Place and time of drawal of sample. - Samples from the Narcotic Drugs and Psychotropic Substances seized, must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug is recovered, and mention to this effect should invariably be made in the panchnama drawn on the spot.

1.6 Quantity of different drugs required in the sample - The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn 1.7 Number of samples to be drawn in each seizure case-

(a) In the case of seizure of single package/container one sample in duplicate is to be



drawn. Normally it is advisable to draw one sample in duplicate from each package/container in case of seizure of more than one package/container.

(b) However, when the package/container seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N. kit, conclusively indicating that the packages are identical in all respect/the packages/container may be carefully bunched in lots of 10 packages/containers may be bunched in lots of 40 such packages such packages/containers. For each such lot of packages/containers, one sample in duplicate may be drawn.

(c) Where after making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remains, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

(d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package/containers.

(e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot."

It has been submitted that samples have not been drawn as per the directions.



4. On the contrary, it has been submitted on behalf of the State that trial is at the fag end and there is every possibility that the present petitioner may abscond as he is a foreign national and his passport particulars are also not available. It has been further argued that there is a bar under Section 37 NDPS Act as the quantity recovered was the commercial quantity. Learned APP has further relied upon the judgment titled as “**Union of India v. Ram Samujh & Ors.** 1999(9) SCC 429, wherein it was observed as under:-

“It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reasons may be large stake and illegal profit involved.”

5. Reliance has also been placed on judgment of **State of Kerala vs. Rajesh** in CrI.A.No. (S) 154157/2020 decided on 24.01.2022 by Hon’ble Supreme Court.

6. Reliance has also been placed on judgment of Division Bench of this Court in **Nabi Alam @ Abbas vs. State** in Bail Appl. No. 2641/2018, decided on 04.06.2021 wherein it was held that the mandate of Section 50 NDPS Act does not require to take search of the person suspected to be in possession of narcotic only in the presence of a Gazetted officer or Magistrate, if he has been apprised by the empowered officer of his right



under Section 50 of the Act and he categorically waives such right by electing to be searched by empowered officer.

7. Learned APP has reiterated that a coordinate Bench of this Court has dismissed the regular bail application of the accused, which was moved under the similar circumstances and the same was decided on 06.07.2021 and as there is no material change in circumstance thereafter and only material change which can be pointed out is that the trial has progressed further and it is seeing its fag end; hence accused is not entitled to bail.

8. Keeping in view the fact that the trial is near to its end and out of 14 witnesses 13 have been examined and there being no passport details of the present petitioner available with the police and he being a resident of Nigeria, there is possibility of his absconding and not appearing before the trial Court. Moreover, another major fact to be taken into consideration is that the bail application of the co-accused, which was moved under the similar circumstances, has already been dismissed on 06.07.2021 and reference to the relevant paragraphs has been made above. The petitioner may have many defences available to him while defending his case on merits before the trial Court, however no case for bail is made out only on mere technicalities. The way in which the contents recovered from five packets were mixed and samples were drawn, may be a plea of defence before the trial Court but this itself cannot be a ground for grant of bail.

9. Although, I refrain myself from commenting upon the plea raised by the present petitioner that provision of Section 50 of the NDPS Act have not been complied with, as the same may be a defence to be argued on behalf of the present petitioner, this Court has to keep in mind the order of the Division Bench of this Court in *Nabi Alam* (supra), the matter wherein it has



been specifically pointed out there is no need to take the accused to the nearest Gazetted Officer/Magistrate in case he intentionally chooses not to exercise the said option after being informed by the IO about it and the search was conducted by the IO in the presence of the witnesses.

10. No ground for bail is made out. The present application is liable to be dismissed and the same is accordingly dismissed.

TALWANT SINGH, J

MAY 6, 2022/mr

[Click here to check corrigendum, if any](#)

