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

Judgment reserved on: 23.11.2022

Judgment pronounced on: 28.03.2023

+ **BAIL APPLN. 1725/2022**

MOHD. JABIR

..... Petitioner

Through: Mr. U.A. Khan, Advocate with Mr.
Shahrukh Khan and Mr. Ali Aariz,
Advocates

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Y.S. Chauhan, APP for State

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, (J)**

1. This is an application seeking regular bail in FIR bearing No.637/2020, U/s 21/29 NDPS Act, P.S. Bhalswa Dairy, Delhi dated 28.10.2020.
2. The facts of the case are that on 27.10.2020 at about 07:45 pm, SI Dilbag Singh at the Narcotic Cell's office in the Outer North District of Delhi received a secret information stating that one Wasim (co-accused herein) had previously bought heroin from one Rashid, who was a resident of Bareilly. He used to bring it to Delhi, and supply it to Mohd. Jabir (applicant herein), a resident of Bhalswa Dairy.
3. It was also stated in the secret information that on 27.10.2020, Jabir, the applicant herein, would come to Bhalswa Chowk in between 9:30

pm to 11:30 pm to take supply of heroin from Wasim and would go to Bhalswa Dairy after taking the same. Additionally, it was suggested in the secret information that both of them could be caught in the act if Nakabandi is done at Bhalswa Chowk.

4. The secret informer was produced before the Insp. Brij Pal Singh at his office at 08:00 pm who after satisfying himself, informed ACP/Operation/OND Sh. Rich Pal about the secret information. Sh Rich Pal received the same at 08:07 pm and instructed for raid to be conducted.
5. It is the case of the prosecution that the secret information was reduced into writing vide DD no.7 at 08:15 pm and the copy thereof handed over to Insp. Brij Pal Singh who forwarded the same to ACP/Operations/OND. Post this a raiding team was constituted by SI Dilbag Singh consisting of HC Sandeep NO.234/OLD, HC Pawan No.177/OND, Ct. Vinod No.1945/OND, Ct. Bishadev No.2434/OND and allegedly the raid was conducted.
6. At about 09:45 pm, one person was noticed coming on foot from the side of Outer Ring Road who crossed the bridge and was seen coming towards Nala Road, Bhalswa Chowk. He was carrying a black coloured bag on his back. The secret informer identified the said person as Wasim. Wasim after crossing the bridge, stopped and started waiting for someone. In the meantime, another person was also noticed coming from the side of Bhalswa Dairy on the Nala Road, who was identified by the secret informer as Jabir-applicant herein.
7. It is further the case of the prosecution that upon meeting with each other, Wasim took out a packet from inside his black coloured bag and

handed it over to Jabir, , the applicant herein. It was at that point of time, at 09:55 pm, the police apprehended both of them. After enquiring their name and addresses, police identified one as Wasim S/o Chhote Khan R/o Village Laxmiyapur, Harvanshpur, PS Bhojipura, District Bareilly, UP aged about 28 years and second as Mohd. Jabir (the applicant herein) S/o Matloob R/o D-1/764, J/ Colony, Bhalswa Dairy, Delhi aged about 32 years.

8. The prosecution further states that notices U/s 50 NDPS Act were served. Post which their replies were obtained on the body of their respective notices in their own hand writing. Thereafter ACP/Operation/Outer North Distt. was called at spot and in the presence of ACP/Operation their search was carried out. And 500 gm of heroin was recovered from each person separately.
9. Thereafter investigation was carried out and after completion of the investigation the charge sheet was filed against the applicant U/s 21/29 NDPS Act before the court of Sh. Gagandeep Singh, ASJ, North Distt., Rohini Courts, Delhi. Vide order dated 23.05.2022 charges U/s 21/29 NDPS Act were framed against the applicant. The matter is at the stage of the prosecution evidence.
10. The Trial Court was pleased to dismiss the regular bail application of the applicant vide order dated 06.05.2022, observing that the present case is related to the commercial quantity and therefore, the applicant is not entitled to be released on regular bail.

Submissions:

11. The Ld counsel for the applicant states that no option of personal search was given to the accused for his personal search in the presence of magistrate/gazette officer nor was search conducted out in presence of Gazetted officer /Magistrate and hence there is violation of section 50 NDPS act.
12. It is also stated that there is discrepancy between the secret information and the notice served u/s 50 NDPS.
13. It is also contended that there is violation of section 55 NDPS Act in the present case. As per section 55 NDPS Act, the case property has to be deposited by the officer in-charge (SHO) of the local police station to the Malkhana while affixing his seal but here in the present case, the case property was deposited by the first IO SI Dilbag Singh.
14. It is also submitted that section 57 has been violated in the present case. Report Us 57 NDPS Act were prepared later on in order to falsely implicate the applicant.
15. Lastly the Ld. Counsel submitted that there is false implication of the applicant in the case. This is apparent from the fact that apart from the testimony of the police officials and documents prepared by them which are shaky in nature and there is no other independent witness which confirms the story of the prosecution.
16. On the other hand, the Ld. APP for the state submits the there is compliance of section 50 since the as the applicant and co-accused were served with written notices u/s 50 NDPS Act and their replies

were obtained on the body of their respective notices in the applicant and co-accused's own hand writing.

17. It is also submitted that although 1st Charge Sheet dated 01/04/2021 was filed by 1O/ASI Rajbir Singh, but inadvertently he forgot to file copy of Special Reports u/s 57 NDPS Act with the charge sheet. However, it was mentioned in the column of witnesses of the charge sheet at Sl. No. 12 & 13, that original D.D Entry recorded, u/s 42 NDPS Act and original special reports u/s 57 NDPS Act, would be produced in court by Reader to ACP/Operation and that the same would be proved by ACP/Operation at the time of evidence. Now all these original reports have been filed in court through supplementary charge sheet dated 09/05/2022, after collecting the same from office of ACP/Operation/Outer North Distt.
18. The applicant accused was previously arrested in another case of NDPS Act registered vide FIR No. 217/19 dt 26/07/2019 u/s 21/29 NDPS Act, P.S Crime Branch
19. The case involves recovery of commercial quantity of drugs hence the provisions of section 37 shall apply stringent bail condition shall apply.

Analysis:

20. I have heard the learned counsels for the parties. In cases involving commercial quantity, rigors of section 37 have to be met. The Section 37 states as under:-

“37. Offences to be cognizable and non-bailable.-(1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974) -

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless -

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of subsection (1) are in addition to the limitations under the Criminal Procedure Code, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]”

21. The Hon’ble Supreme Court in *Narcotics Control Bureau v. Mohit Aggarwal*, 2022 SCC OnLine SC 891 states that

12. The expression “reasonable grounds” has come up for discussion in several rulings of this Court. In “Collector of Customs, New Delhi v. Ahmadalieva Nodira”⁵, a decision rendered by a Three Judges Bench of this Court, it has been held thus:—

“7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions

*which really have relevance so far as the present accused-respondent is concerned, are : the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. **The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.***

[emphasis added]

13. The expression “reasonable ground” came up for discussion in “State of Kerala v. Rajesh”⁶ and this Court has observed as below:

*“20. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. **The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.** In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.”*

[emphasis added]

14. To sum up, the expression “reasonable grounds” used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.

15. We may clarify that at the stage of examining an application for bail in the context of the Section 37 of the Act, the Court is not required to record a finding that the accused person is not guilty. The Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the Court is expected to undertake at this stage is for the limited purpose of releasing him on bail. Thus, the focus is on the availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail.”

22. As is clear from the above, this court while considering the application for bail with reference to section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see, whether, there is more than a prima facie case in favour of the accused, that there are reasonable grounds for believing that the accused is not guilty and the court is required to record its satisfaction about the existence of such grounds. The court is not required to consider the matter as if it is pronouncing the judgment of

acquittal and recording the finding of “not guilty.”

23. In this background, I shall now determine whether section 50 notice was served upon the applicant and if yes whether the section 50 notice was in accordance with the provisions laid down in NDPS Act.
24. In the present case, it is alleged that section 50 notice was not served upon the applicant. For the same the Id. Counsel for the applicant has relied on the
 - a) discrepancy between the secret information and the notice under section 50,
 - b) violation of section 55 and section 57 as well as
 - c) non-joinder of independent parties

a) Discrepancy between the secret information and the notice under section 50 notice

25. In the present case, the entire case of the prosecution is set up on the secret information. The secret information is produced herein below

Q4 27/01/2020

Norwich Island.

उत्तरी भूतानी

Forwarding to

SI. Dilbagh Singh
No 485710
D. 11/11/1910

“DD No. 7 dated 27.10.2020 Narcotic Cell/OND

SI Dilbagh Singh, No. 4857/D

Receipt of Information from the Informer

Time: 08:15 PM

It is registered at this time that around 07:45 PM, the Secret Informer came to the Office of Narcotic Cell/OND, Delhi and informed me, the SI, that a man named Wasim purchases heroin from a man named Rashid, R/o Bareilly and supplies the same to Md. Jabir, R/o Bhalsawa in Delhi. Furthermore, Jabir will meet Wasim today at Bhalsawa Chowk between 09:30 PM to 11:30 PM to receive his delivery of Heroin. Thereafter, Jabir will go to Bhalsawa with his delivery. I enquired the Informer to my satisfaction before producing him in the Office of Insp. Brijpal at 08:00 PM. I apprised Insp. Brijpal regarding the information received from the Informer who in turn enquired the said Informer to his satisfaction. Thereafter, he telephonically informed the ACP Operation/OND Sh. Ricch Pal regarding the information received at around 08:07 PM at which the ACP gave orders to conduct an immediate raid in order to carry out the necessary legal proceedings. The report regarding the receipt of information has been registered. A

copy of the said report has been separated and handed over to Insp. Brijpal Singh for proceedings U/s 42 NDPS Act.

*Sd/- (Illegible)
SI Dilbagh Singh,
No. 4857/D
(...sic...)"*

26. As is clear from the above, one person namely Wasim was to procure the heroin from one Rashid of Bareilly. As it transpired, that on that day also, Wasim procured the heroin to applicant near Bhalswa Chowk in between 9:30 to 11:30 pm. Even the FIR states that

"at about 7:45 pm, the secret informer came in the office of Narcotic Cell, Outer North District, Delhi and informed SI Dilbag Singh that one person namely Wasim procure the heroin from one Rashid from Bareilly UP and, supply the same in Delhi to one Mohd. Jabir. Today also, Jabir would come near Bhaslwa Chowk in between 9:30 pm to 11:30 pm to take the supply from Wasim and will go to.."

27. However, when the notice U/s 50 were prepared qua both the accused persons, it was mentioned in their notices that both are involved in the sale and purchase of the heroin and both of them have come to Delhi to supply the heroin to other accused persons.
28. The notice served upon the applicant reads as under:

TRUE TYPED COPY

DD no.8

dated 27.10.2020

Narcotic Cell/OND

Notice U/s 50 NDPS Act

आप मुसम्मती मो० जाविर S/O मतकूर n/o D1/764 JJ Colony अलसरा देशी

दिल्ली age 32 years को इस notice के माध्यम से सूचित किया जाता है की

पुलिस के पास इतना है की आप हेरोइन की खरीद फरोकत व सप्लाई नै संश्लिप्त है। और

आज भी आप यहाँ मोके पर किसी को हेरोइन की सप्लाई (खरीद फरोकत) करने आए हैं।

आपके बन्धों से हेरोइन मिलने की रांशावन्ता है। जिसके लिए आपकी तलाशी ली जानी है।

आपका यह खनूनी अधिकार है की आप अपनी तलाशी किसी राजपथित अधिकारी या

मैजिस्ट्रेट के सामने करवा सकते है व अपनी तलाशी से पहले पुलिस पार्टी के सदस्यों व

पुलिस पार्टी की गाड़ी की तलाशी ले सकते हैं।

एक कॉपी प्राप्त हुई

Sd

जाविर

नयाह:

1. Sd
HC Sandeep Kumar
2. Sd
Ot Vinod

Sd
Dilbag Singh
No. 4857/D
Narcotic Cell/OND
Date 27.10.2020

नयाह जाविर

“

TRUE TYPED COPY

DD No. 8

dated 27.10.2020

Narcotic Cell/OND

Notice U/s 50 NDPS Act

Mr. Mohd. Jabir, S/o Matloob, Age 32 years R/o D 1/764, JJ Colony, Bhalsawa Dairy, Delhi, you are hereby informed through this Notice that the Police has received information regarding your involvement in the sale, purchase and supply of heroin and that you have come to this spot to supply heroin (purchase) to someone, even today. You are most likely in possession of heroin for which your search is to be conducted. You have the legal right to get yourself searched in the presence of any Gazetted Officer or Magistrate. You also have the right to search the members of the Police Party and their vehicle before your own search.

A copy was supplied.

Sd/- (In Hindi)
Jabir

Witnesses:

1. Sd/- HC Sandeep Kumar
2. Sd/- Ct. Vinod

Sd/- Dilbagh Singh,
No. 4857/D
Narcotic Cell/OND
Date: 27.10.2020"

29. The FIR is matching the secret information, but the section 50 notice is differs to the FIR and the secret information. The role of the applicant differs in the section 50 notice. As per the FIR and secret information, it was mentioned that the applicant will only collect/purchase heroin from one Rashid Khan. However, in the notice u/s 50, the role of the applicant is more detailed. In the notice under section 50 it was alleged that the applicant was involved in the buying of the contraband as well as the supply. I am not convinced by the argument. The notice is not be read with the mathematical precision and as long as the word purchase/collect is appearing in section 50 notice, I am of the view that there is no material inconsistency to that an extent to render the notice as invalid. The question whether the section 50 is an afterthought can only be decided once the parties are in the witness box.
30. The next argument is that the section 50 notice was prepared in a mechanical order. For this it is also relevant to see the refusal for personal search of both the applicant and the co-accused.

नोटिस प्राप्त किया जिसको पढ़कर मैंने समझ लिया आपने मुझे राजपत्रित अधिकारी व मैजिस्ट्रेट का मतलब समझ दिया है मैं अपनी तलाशी किसी राजपत्रित अधिकारी या मैजिस्ट्रेट के सामने नहीं कराना चाहता और ना ही पुलिस के लोगों व उनकी गाड़ी की तलाशी लेना चाहता हूँ। आप मेरी तलाशी ले सकते हैं।

Sd
जाविर
27.10.2020

गवाह:

1. Sd
HC Sandeep Kumar
2. Sd
Ct Vinod

Sd
Dilbag Singh
No. 4857/D
Narcotic Cell/OND
Date 27.10.2020

“I have received the notice and read over and understood the same. You have made me understand the meaning of Gazetted Officer and Magistrate. I don't want myself to be searched in the presence of any Gazetted Officer or

Magistrate neither want to search the Police personnel and their Vehicle.

You can conduct my search.

*Sd/-
Jabir
27.10.2020*

Witness:

- 1. Sd HC Sandeep Kumar*
- 2. Sd Ct. Vinod*

*Sd/-
Dibag Singh
No. 4857/D
Narcotics Cell/OND
Date: 27.10.2020*



नोटिस प्राप्त किया जिसको पढ़कर मैंने समझ लिया आपने मुझे राजपत्रित अधिकारी व मैजिस्ट्रेट का मतलब समझ दिया है मैं अपनी तलाशी किसी राजपत्रित अधिकारी या मैजिस्ट्रेट के सामने नहीं कराना चाहता और ना ही पुलिस के लोगों व उनकी गाड़ी की तलाशी लेना चाहता हूँ। आप मेरी तलाशी ले सकते हैं।

Sd

वसीम खान
27.10.2020

गवाह:

1. Sd
HC Sandeep Kumar
2. Sd
Ct Vinod

Sd
Dilbag Singh
No. 4857/D
Narcotic Cell/OND
Date 27.10.2020

“(I) have received the notice and read over and understood the same. You have made me understand the meaning of Gazetted Officer and Magistrate. I don't want myself to be searched in the presence of any Gazetted Officer or Magistrate neither want to search the Police personnel and their Vehicle. You can conduct my search.

Sd/-
Waseem Khan
27.10.2020

Witness:

1. *Sd HC Sandeep Kumar*
2. *Sd Ct. Vinod*

*Sd/-
Dibag Singh
No. 4857/D
Narcotics Cell/OND
Date: 27.10.2020*

31. A bare perusal of the refusal makes it clear that that both refusals are verbatim and identical. The same raises a suspicion in favor of the applicant and against the respondent that the section 50 notice as well as the refusal were fashioned by the Police authorities in Police Station after arrest and seizure.. However, again whether it was fashioned in the police station or it is a coincidence that both refusals are verbatim and identical can only be decided once the evidence is led and trial has taken place.

b) **Violation of section 55 &57**

32. It is also argued that there is violation of section 55 and section 57 of the NDPS. Section 55 reads as under:

“55. Police to take charge of articles seized and delivered.—An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer

who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.”

33. Hence, as per section 55 NDPS Act, the case property has to be deposited by the officer in-charge (SHO) of the local police station to the Malkhana while affixing his seal but here in the present case, the property was deposited by the first IO SI Dilbag Singh. The same can be seen from the following:



Number of FIR, from whom taken and from what place	Date of deposit and name of depositor	Description of property	Signature of recipient (including person by whom dispatch)
DD No.8A dated 27.10.20 Narcotic Cell/OND FIR No.637/2020 U/s 21/29 NDPS ACT P.S. Bhalswa Dairy	SI Dilbagh Singh No. 4857/D Narcotic Cell/OND Dt. 27/10/20	फर्द मकबूजगी हेरोइन व बैग बारंग काला रुबरु गवाहन जैल जाए मोका नाला रोड भलसवा चौक मुसम्मी वसीम s/o छोटे खान पता गाँव लक्षणीयपुर, हरबंसपुर थाना भजीपुरा, जिला बरेली (up) उम 25 वर्ष की सरसरी तलाशी अमल मे लाई जिसकी तलाशी मे उसके कब्जे से बरामद काले रंग का रेक्सीन पिट्टू बैग जिस पर सफेद रंग से अंग्रेजी मे fasttrack लिखा है व उसी कंपनी का लोगो भी लगा है बैग को लटकाने के लिए दो तनया के प्रिन्ट मे दो पॉकेट है। को लेकर चेक किया जो बैग के अंदर एक पारदर्शी थैली मोमी वजनी जिसका मुह रबड़ बैंड की मदद से बंधा था व जिसमे हल्के भूरे रंग का पॉडर नुमा पदार्थ था बरामद हुआ। बरामदा पाउडर को फील्ड टेस्टिंग किट से चेक करने पर हेरोइन पाया गया। जिसका कुल वजन electronic तराजू पर मय पारदर्शी मोमी थैली 500gm हुआ। बरामदा हेरोइन को उसी पारदर्शी मोमी थैली मे रख कर उसका मुह रबड़ बैंड से बांदकर उसे मार्क-A दिया गया व उसे एक पारदर्शी प्लास्टिक डिबे मे रखकर डिबे को उसके टकनपर मेडिकल टेप लगाकर पुलंदा तयार किया जिसे भी मार्क-A दिया गया। जिसे मैंने सील S.K. से सील किया। व बरामदा काले रंग के रेक्सीन बैग को एक सफेद कपड़े रख कर अलग पुलनदे पारचा तयार	आज दिनांक 28/10/2020 को इस फर्द की हेरोइन को vide RC no .177/21/20 से बदस्त HC rajesh no.1074/ond द्वारा rohini court delhi मे भिजवाई गई। Sd 28/10/20

No. of FIR from whom taken and from what Place	Date of deposit and name of depositor	Description of Property	Signature of recipient (including person by whom dispatch)
DD No. 8A dated 27.10.20 Narcotic Cell/ON	SI Dilbagh Singh No. 4857/D Narcotic Cell/OND	Memo Regarding Seizure Of Heroin And A Black Bag <i>In the presence of the witnesses mentioned hereinafter, the cursory search of Mr. Waseem S/o</i>	Today on 28.10.2020, the heroin mentioned in this memo was sent through HC. Rajesh No.

D FIR No. 637/2020 U/s 21/29 NDPS ACT P.S. Bhalswa Dairy	Dt. 27/10/20	Chhote Khan, aged: 25 Yrs, R/O Village Lakshneeyapur, Harbanspur, PS Bhajipura, Dist. Bareilly (UP) was conducted on the spot i.e, Nullah Road, Bhalswa Chowk. During the search a Black coloured backpack made of rexine whereon words 'Fastrack' were mentioned in English in white colour and there was also a logo of the same brand, there are two pockets on the front two straps of the bag to hang, was taken from his possession and checked. A transparent heavy polythene bag which was tied at the top with the help of a rubber band was found in the bag and containing light brown coloured powder like substance. The powder so recovered was checked with the help of Field Testing Kit and found to be Heroin. The total weight of the same along with the transparent polythene bag was found to be at 500 grams on the Electronic Weighing Machine. The Heroin so recovered was kept in the same transparent polythene bag after tying with the help of the rubber band and assigned mark 'A'. It was	1074/OND to Rohini Court Delhi vide RC No. 177/21/20. Sd/- 28.10.2020
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		<i>kept in the transparent plastic box and the box was converted into a parcel by way of closing its cover with the help of medical tape. Which was also assigned mark 'A'. The same was sealed with the seal of 'SK' by me. The recovered Black coloured rexine bag was separately converted into a parcel with the help of white cloth piece.</i>	
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34. The violation of section 57 NDPS Act is also alleged by the applicant. Section 57 states:

"whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest of seizure to his immediate official superior"

35. In the present case, neither any report qua the seizure nor the arrest of the accused was prepared either by the first IO or by the second IO to their higher officials. No report U/s 57 NDPS was filed along with the charge sheet. This is an admitted fact that during the course of the argument of bail application before the Trial Court, the counsel of the applicant has raised the issue qua the section 57 NDPS Act. Thereafter, in the form of the supplementary charge sheet, the prosecution filed the report U/s 57 NDPS Act on 09.05.2022 before the Trial Court.

36. Although there seems to be prima facie a violation of 55& section 57 of the NDPS act the same would not entitle the Applicant for bail as these are not mandatory conditions.
37. Cumulatively whether all the above grounds show that there was no service of section 50 notice cannot be conclusively said in a bail application under NDPS Act involving commercial quantity. These are all issues which require trial.

c) Non-joinder of independent parties

38. The Drug Law Enforcement Field Officer's Handbook, Narcotics Control Bureau, Ministry of Home Affairs Government of India states the importance of joining of independent witnesses. In case there is lack of independent witnesses, it stresses upon videography:

“Video: A lot of times the witnesses and suspect allege foul play by the search team during the trial proceedings alleging that they were not present at the time of recovery. To avoid such a situation, all recovery and concealment methods should be videographed simultaneously if possible, recording the presence of the owner/occupant of the premises and the witnesses. This acts as a deterrent later during trial proceedings.”

39. In the present case, understandably it would have been difficult to join any public person during the search seizure and other proceeding at the spot since it was late at night. However, the raiding team has also not conducted any videography during the search and seizure.
40. However, merely because independent witnesses were not present or no videography was recorded, the conclusion cannot not be drawn that accused was falsely implicated. This has been so observed in

CRIMINAL APPEAL NO. 1605 OF 2021 (ARISING OUT OF SPECIAL LEAVE PETITION (CRIMINAL) NO. OF 8425 OF 2021) titled as 'Kallu Khan V State of Rajasthan'.

41. Now coming to the second question, whether the notice u/s section 50, if served, was in accordance with the provisions laid down in NDPS Act. Section 50 states:

"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 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.

(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 (2 of 1974).

(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.”

42. In the present case, section 50 notice which was served upon the applicant reads as under:

*“You have the legal right to get yourself searched in the presence of **any** Gazetted Officer or Magistrate.”*

43. In my opinion, there is illegality in notice served U/s 50 NDPS Act dated 27.10.2020. The section 50 categorically mandates that where the accused requires a search, the search has to be done by nearest gazetted officer/nearest magistrate
44. However, the section 50 notice served upon the applicant and the co-accused informs incorrectly that they can be searched by any gazetted information/magistrate. This, in my opinion is where the violation of section 50 lies.
45. It is correct that both the accused persons were informed that of their rights regarding personal search but the same was not informed as per the strict provisions of section 50.
46. In *Ishdan Seikh v. Union of India*, 2022 SCC OnLine Cal 1545, a division bench of Calcutta High Court observed

“16. In the present case, the appellants were misled by the incorrect offer given to them that they could be searched by a Gazetted Officer who is a member of the raiding party. A Gazetted Officer who had proceeded to the place of occurrence after entertaining reasonable belief that the accused persons may be carrying narcotic substance cannot be said to be an independent person before whom the law contemplates a search. In this backdrop, acceptance of the offer by the appellants to be searched before an officer who is a member of the raiding party cannot be said to be a voluntary expression of their desire to be searched before such officer. There is a clear misdirection in law in the offer given to the appellants and accordingly they were misled to agree to a search before an officer who was a member of the raiding party. By no stretch of imagination, such acknowledgment on their part can be said to be a voluntary relinquishment of the right enshrined under Section 50 of the NDPS Act.

17. Crux of the safeguard enshrined in Section 50 of the NDPS Act is that an accused should be made aware of his right to be brought before a Magistrate or a Gazetted Officer prior to a personal search. Such offer may be oral or in writing but the terms of the offer must be clear, unequivocal and not create confusion in the mind of an accused with regard to the lawful requirements prior to the search in any manner whatsoever.”

47. As is clear from the above, the emphasis on the word “nearest” is important since it ensures independence. In deviating from the provisions as laid down in section 50, the IO practiced a third option of having the search conducted by someone who was part of the operation of this particular alleged drug seizure. The IO practiced a third option which is unknown to law.

48. The ACP was the part of the raiding team and it was on his direction the entire investigation was initiated, could not be called an independent officer. He was after all the Gazetted Officer who had proceeded to the place of occurrence after entertaining reasonable belief that the accused persons may be carrying narcotic substance and hence cannot be said to be an independent person before whom the law contemplates a search under NDPS.
49. In *State of Rajasthan v. Parmanand*, (2014) 5 SCC 345, the Hon'ble Supreme court observed as follows:

*19. We also notice that PW 10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before the nearest gazetted officer or before PW 5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW 5 J.S. Negi by PW 10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to the nearest Magistrate or the nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW 10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW 5 J.S. Negi, the Superintendent, **who was part of the raiding party**. PW 5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW 5 J.S. Negi, the search would have been vitiated or not. But PW 10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW 10 SI Qureshi is vitiated.*

50. In my opinion the use of the word “nearest” by the legislature is intentional and has been used to ensure neutrality and independence at the time of search.
51. Therefore, it was improper for the IO to suggest in the notice under section 50 that “any” Gazetted Officer can be called.
52. *In Nathi Devi v. Radha Devi Gupta*, (2005) 2 SCC 271, the Hon’ble Supreme Court observed:

13. The interpretative function of the court is to discover the true legislative intent. It is trite that in interpreting a statute the court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When the language is plain and unambiguous and admits of only one meaning, no question of construction of statute arises, for the Act speaks for itself. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the court must look at the statute as a whole and consider the appropriateness of the meaning in a particular

context avoiding absurdity and inconsistencies or unreasonableness which may render the statute unconstitutional.

14. It is equally well settled that in interpreting a statute, effort should be made to give effect to each and every word used by the legislature. The courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted except for compelling reasons such as obvious drafting errors. (See State of U.P. v. Dr. Vijay Anand Maharaj [AIR 1963 SC 946 : (1963) 1 SCR 1] , Rananjaya Singh v. Baijnath Singh [AIR 1954 SC 749 : (1955) 1 SCR 671] , Kanai Lal Sur v. Paramnidhi Sadhukhan [AIR 1957 SC 907 : 1958 SCR 360] , Nyadar Singh v. Union of India [(1988) 4 SCC 170 : 1988 SCC (L&S) 934 : (1988) 8 ATC 226 : AIR 1988 SC 1979] , J.K. Cotton Spg. and Wvg. Mills Co. Ltd. v. State of U.P. [AIR 1961 SC 1170] and Ghanshyamdas v. CST [AIR 1964 SC 766 : (1964) 4 SCR 436] .)

53. In the present case, not giving the word “nearest” it due meaning and importance, would make the word ‘nearest’, a surplusage, which cannot be the intention of legislature in drafting section 50.
54. The factum independence is also stressed in Drug Law Enforcement Field Officer's Handbook, wherein it is stated:

“The team should reach the locality where the target premises is situated well before the strike time and arrange two respectable independent residents in the area willing to witness the search proceedings. To ensure people agree to be a part of these proceedings, the DLEO should use a mixture of tact, gentle persuasion and legal necessity to convince people to cooperate with the law. In dire necessity, the DLEO can issue a legal notice to persons requiring them to act as witnesses. Refusal to do so when asked in writing, without reasonable cause, is an offence under Section 187 IPC read with Section 100 Cr.P.C. Once witnesses are identified, the DLEO should explain to them the purpose of the search without divulging specific details and ask them to accompany him to the target premises”

55. The sanctity of the above-mentioned Field Officer's Handbook was discussed by the Hon'ble Supreme Court in the case titled as *Shafhi Mohammad v. State of H.P.*, (2018) 2 SCC 801.
56. In the light of the above judgments and facts, I am of the view that the applicant's alleged refusal that he is unwilling to be searched is irrelevant. The notice u/s 50 NDPS act itself is faulty in law. Therefore, it cannot be said that accused's unwillingness to be searched in front of an officer who is a member of the raiding team is a voluntary expression of their desire for giving up their right to be searched. The notice of section 50 served to the applicant clearly violates the law and is a misdirection. As a result, I am of the opinion that the applicant was misled into believing that his search was to be before any gazetted

officer and not the nearest. Further the fact was conducted before ACP Rich pal is far from an independent search as ACP Rich pal was part of the raiding team.

57. Hence the notice not under the mandate of section 50 question that now arises is whether invalid notice vitiates recovery.
58. In this regard it may be relevant to refer to the observations of the Constitution Bench in *Vijaysinh Chandubha Jadeja v. State of Gujarat*, (2011) 1 SCC 609, wherein the Bench held there must be strict compliance of [Section 50](#) of the NDPS Act. The Bench held as follows:-

"29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section

in Joseph Fernandez [(2000) 1 SCC 707 : 2000 SCC (Cri) 300] and Prabha Shankar Dubey [(2004) 2 SCC 56 : 2004 SCC (Cri) 420] is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh case [(1999) 6 SCC 172 : 1999 SCC (Cri) 1080] . Needless to add 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. It would neither be possible nor feasible to lay down any absolute formula in that behalf.

59. The Bench rejected the idea of substantive compliance with regard to [Section 50](#) holding as follows :-

"31. We are of the opinion that the concept of "substantial compliance" with the requirement of [Section 50](#) of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez and Probha Shankar Dubey is neither borne out from the language of sub-section (1) of [Section 50](#) nor it is in consonance with the dictum laid down in Baldev Singh case. Needless to add 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. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

60. Hence as has been held by the above judgment, section 50 is to be mandatorily complied. There is no concept of substantial compliance. In the present case, conditions under section 50 have been violated and the procedure established has not been followed. The same give rise to reasonable grounds for granting bail.
61. This court in BAIL APPLN. 1231/2022 titled EMEKA EMMANUEL vs THE STATE, has granted bail when there was not substantially complied with.

“I am of the view that the judgment of “Mohd. Rahis Khan vs. State” is squarely applicable. The Section 50 of the NDPS Act has to be complied with both, not only substantially but fully, as it is a mandatory requirement. 9. The Hon’ble Supreme Court as well as this Court has clearly opined that in case Section 50 of the NDPS Act is not complied with, the applicant is entitled to bail.”

62. Hence the notice u/s 50 is will amount to no notice in the eyes of law.
63. As regards other offences against the applicant, the applicant has been granted bail in the other offence wherein heroin was recovered.
64. Therefore in my considered opinion, the basic requirements of Section 50 of the NDPS Act not having been complied with in the instant case, in view of which, I am satisfied rigours of section 37 would not be an obstacle in the release of the applicant.
65. Moreover, it is also to be seen that the Applicant is in judicial custody since 27.10.2020 in the present case and the conclusion of the trial will take time.
66. This court in *Gurmito v. CBI, 2022 SCC OnLine Del 2316*, has held that that speedy trial forms an intrinsic part of Article 21 of the Constitution and the denial of same may be a ground for bail in certain circumstances/conditions.

“19. Prima Facie, it appears that the accused is not guilty of the offence. If she is part of a criminal conspiracy as per section 29 of the Act, the same needs to be decided in the trial, where the intricacies of the alleged crime can be delved into deeper by the trial court and the guilt or liability, if any, can be decided, after the trial. However, at this stage, if bail is denied without any

possibility of the trial concluding anytime soon, would be infringing upon her right guaranteed under Article 21 of the Constitution.”

67. Hence, I am of the view the applicant should be enlarged on bail on the following conditions:

- (a) The applicant shall furnish a personal bond in the sum of Rs. 50,000/- (Rupees Fifty Thousand Only) each with 01 surety in the like amount, to the satisfaction of the Trial Court;
- (b) The applicant shall not leave the country and if the applicant has a passport, he shall surrender the same to the Trial Court;
- (c) The applicant shall furnish to the IO/SHO concerned his cellphone number on which the applicant may be contacted at any time and shall ensure that the number is kept active and switched-on at all times;
- (d) The applicant shall drop a Google pin location from his mobile phone to the IO concerned so as to show his whereabouts everyday;
- (e) The applicant shall not indulge in any act or omission that is unlawful, illegal or that would prejudice the proceedings in pending cases, if any;
- (f) The applicant or his family members/relatives/friends will not contact or try to intimidate the complainants/victims or their family or tamper with any of the evidence in anyway.

68. The application along with any other application stands disposed of accordingly.

JASMEET SINGH, J

MARCH 28th, 2023

Click here to check corrigendum, if any

