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

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**RESERVED ON –21.08.2023
PRONOUNCED ON – 21.09.2023**

+ **BAIL APPLN. 352/2023**

KENECHUKWU JOSEPH

..... Petitioner

Through: **Mr.Shyam Sunder Aggarwal, Adv.
(through VC)**

versus

THE STATE

..... Respondent

Through: **Mr.Amit Sahni, APP for the State.
SI Panjaj Yadav, Spl.Staff Outer**

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA,J :

1. The present petition has been filed under Section 439 of the Code of Criminal Procedure (Cr.P.C.) for grant of regular bail in FIR bearing No.20/2020 dated 16.01.2020 at PS Paschim Vihar, (West), Delhi registered under Section 21 c of NDPS Act and 14 of Foreigners Act.
2. Facts in brief, as stated in the status report are that on 16.01.2020, a secret information regarding carrying of narcotics substance was received in the office of special staff. Upon receiving the information, a

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team was constituted and at about 07:00 PM a trap was laid down near the service road, DDA ground, Hotel Radisson Blu, Paschim Vihar Delhi. One person was sighted coming from Sunder Vihar side and on the instance of the informer, he was apprehended. Allegedly he was identified as Kenechukwu Joseph s/o Okeke IGA, being a permanent resident of Anambra State, Nigeria, staying at H No. 237, Third Floor, Vipin Garden, Dwarka Mor, Delhi. On searching him one poly bag containing narcotics substance/contraband was recovered from his possession. On checking the narcotics substance by testing Kit, it was found cocaine and the total weight found was 140 grams. Thereafter, two samples of 5 gram each were extracted and both the samples and remnants of 130 grams of cocaine was seized in the case. Subsequently, the present case was registered and investigation of the case was taken up.

3. Further during the course of the investigation, the site plan was prepared. The present accused Kenechukwu Joseph was found permanent resident of Nigeria and no valid documents regarding his stay in India were produced by the accused Kenechukwu Joseph. Thereafter accused Kenechukwu Joseph was arrested in the present case. On 17.01.2020 an application u/s 52 A NDPS Act was moved before the Hon'ble Court of Ms. Neetu Nagar, Ld. MM, Tis Hazari Courts, Delhi wherein two samples of 5 grams each was extracted from the recovered remnants of 130 grams. On checking the weight of both the samples with lid, it was found as 11.3 grams (6.3+5 gm) & 15.6 gm



respectively. The remaining 118.6 gram was also seized and deposited in the malkhana of PS- Paschim Vihar West, Delhi.

4. Learned counsel for the petitioner submits that the accused is entitled to be admitted to bail as he is in custody since 16.01.2020. It has been submitted that the accused is shown to have been arrested on 16.01.2020 from the service road near the Hotel Radisson, Paschim Vihar whereas he was picked up from the dining area of Hotel Radisson, Paschim Vihar where he had gone for dinner along with his three other friends and the petitioner/applicant is falsely framed in the present case. Learned counsel submits that the arrest has been shown at the service road so as to avoid the CCTV coverage of the Hotel Radisson, Paschim Vihar. Learned counsel further submits that there is a contradiction in the case of the prosecution regarding the receipt of the secret information and recording of the DD entry. It has further been submitted that the IO had moved an application for the proceedings under Section 52A of the NDPS Act before the learned M.M. and an inventory was produced and the Hon'ble court has drawn two samples S1 and S2 of 5 grams each from the alleged contraband and the weight of samples drawn in the court without a lid was 11.3 gram (i.e. 6.3 + 5 gram) and 15.6 gram (including the weight of the sample, boxes with lids of pink and blue colour).
5. Learned counsel has also submitted that sample S-1 containing 5 grams of recovered alleged cocaine was deposited in FSL, Rohini vide FSL: SFSLDLH/602/CHEM/190/20 dated 20/01/2020 by Ct. Pawan PIS No.



28080268, PS Paschim Vihar West. It has further been submitted that as per the FSL report dated 19.03.2020, the exhibit sample S1 sent along with the FSL, containing 5 grams of recovered alleged cocaine deposited to FSL, Rohini was weighing 20.47 grams, not 15.6 grams.

6. Learned counsel further submitted that as per the testimony of PW3 namely Dr. Adesh Kumar, Scientific Officer (Chemistry), FSL, it came to the knowledge of the court that 7.6 grams of contraband was utilized for conducting the test whereas the court has withdrawn 5 gram of the contraband as sample which was sent to FSL and FSL sent the remaining sample back along with Ex.S-1 which was weighing approx. 13.11 grams. It has been submitted that whereas the sample withdrawn from the court weighed 15.6 grams (including weight of sample, boxes with lids of pink and blue colour). Learned counsel submits that this shows that the sample deposited before the FSL was tampered with the intention to implicate the petitioner. Learned counsel further submitted that the property was brought before the trial court for the first time on 30.09.2022 at the stage of recording of evidence of PW-4 namely SI Dipender Singh (Complainant).
7. Learned counsel also submitted that the contraband was brought before the learned trial court in the large container marked as C with the seal of “NK” but as per the order sheet of the Ms. Neetu Nagar, MM, Mahila Court, THC before whom the entire proceedings U/s 52A NDPS Act was conducted, it was marked as C with the seal of “NN”, which clearly indicates that the entire recovery is tampered and



manipulated. Learned counsel lastly submitted that the petitioner is in custody for the last three years and only four out of 11 witnesses have been examined and as the trial is not likely to be completed soon and in view of same the petitioner may be admitted to bail.

8. Learned APP for the State has vehemently opposed the bail application on the ground that in the present case, the accused was found in possession of 140 grams of cocaine which is a commercial quantity and therefore the rigor of Section 37 of NDPS Act is applicable. Learned APP further submitted that the accused is not a resident of India and does not have any permanent address in India, therefore in case he is released on bail, the petitioner may abscond and may not be available for trial. It has further been submitted that questions of sampling and tampering can only be seen and assessed during the trial.

9. I have considered the submissions and carefully perused the record. section 37 of the NDPS Act provides as under:

37. Offences to be cognizable and non-bailable.

(1)Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)

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

(b)no person accused of an offence punishable for 2[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 sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]

10. Bare perusal of Section 37 of NDPS Act makes it clear that before enlarging the accused on bail the court has to record a satisfaction that there are reasonable grounds for believing that he is not guilty of such an offence and that the accused is also unlikely to commit any offence after being released from jail.
11. The Hon'ble Supreme Court in **Supdt., Narcotics Control Bureau, Chennai v. R. Paulsamy, (2000) 9 SCC 549** held as under:

“6. In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the Public Prosecutor unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only offence regarding compliance with Sections 52 and 57 have been pre-judged by the learned Single Judge at the stage of consideration for bail. The minimum which learned Single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned Single Judge during bail stage regarding the compliance with the formalities mentioned in those two sections.



12. In *State of Punjab v. Balbir Singh (1994) 3 SCC 299* with regard to the defect in sampling, the Apex court has inter alia held that Sections 52 and 57 come into operation after the arrest and seizure under the Act. It was further inter alia held that if there is any violation of these provisions, then the Court has to examine the effect of the same and while determining whether the provisions of the act to be followed after the arrest or search are directory or mandatory, it will have to be kept in mind that the provisions of vii creating public duty are generally speaking directory.
13. The apex court further held that if there is no such strict compliance of any of these instructions, it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. The test laid down was of prejudice and the failure of justice. The Apex court held that mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution.
14. It is also pertinent to mention in *Bipin Bihari Lenka vs. NCB, 2022 SCC OnLine 1160*, the coordinate bench of this court has *inter alia* held that alleged prejudice caused to the applicant on account of non-compliance of sampling procedure would have to be established during the course of trial.
15. It is pertinent to mention that though In *Ahmed Hassan Muhammed v. The Customs, 2021 SCC OnLine Del 486*, a coordinate bench of this



Court granted bail to the applicant therein, *inter-alia*, on the ground that proper procedure for sampling was not followed. However, that case is distinguishable from the present facts and circumstances of the case as in that the I.O had mixed all the packets and thereafter sent them to FSL for examination.

16. Similarly, in ***Ram Bharose v. State (Govt. of NCT of Delhi)*** vide order dated 05.08.2022 passed in BAIL APPLN.1623/2022, the coordinate bench of this court granted bail to the applicant where all the contents of the recovered contraband were mixed together before samples were drawn. It was *inter alia* held that the procedure adopted was not in consonance with the Standing Operating Procedure in Standing Order 1/88 dated 15.03.1988.
17. The similar view was taken in ***Laxman Thakur v. State (Govt. of NCT of Delhi)***, 2022 SCC OnLine Del 4427. However, these cases are respectfully distinguishable on the present facts and circumstances of the case.
18. In ***Shailender v. State NCT of Delhi*** vide order dated 03.08.2022 passed in BAIL APPLN.3508/2021, the coordinate bench of this court rejected bail while *inter alia* holding that the procedural lapse has to be determined during the course of the trial and not in a proceeding for grant of bail.
19. Similarly, in ***Arvind Yadav v. Govt. of NCT of Delhi Through Standing Counsel***, 2021 SCC OnLine Del 3619, the coordinate bench of this court *inter alia* held as under:



“13. By this petition, petitioner seeks bail on the ground of noncompliance of Section 52A of the NDPS Act, however, in view of the fact that the trial does not stand vitiated by drawing the samples at the spot in the absence of a Magistrate for being sent to FSL analysis for filing a appropriate charge-sheet before the Special Court for ascertaining the nature of contraband and whether the sanctity of drawing the samples was vitiated for the non-presence of the Magistrate would be an issue to be seen during the course of trial, hence this Court finds no ground to grant bail to the petitioner on this ground.”

20. In **Sunny v. State (Govt. of NCT of Delhi)**, vide order dated 15.03.2023 passed in BAIL APPLN. 3054/2022 wherein the coordinate bench of this court has *inter alia* held as under:

“8. Thus, admittedly there was confusion in the procedure of drawing samples and per Arvind Yadav (supra) even if samples were drawn at the spot would not vitiate the trial, hence any violation thereof could never be the sole basis for grant of bail. Such discrepancy in rules was even noted by the Hon’ble Supreme Court in Mohan lal (supra) and accordingly fresh Rules were notified vide gazette notification dated 23.12.2022, thus the compliance of Standing Order 01/1989 prior to the notification (supra) perse would not be a ground to grant bail. Hence purely on this ground, I am not inclined to grant bail to the petitioner.”

21. Similarly, in **Quentin Decon v. Customs** the coordinate bench of this court vide order dated 31.05.2023 passed in BAIL APPLN. 71/2022, *inter alia* held as under:

27. As noted above, the Hon’ble Supreme Court, in Balbir Singh (supra) observed that the provision of Section 52 of the NDPS Act is directory in nature. It was further held that non-compliance of the said provision, in itself, cannot render the actions of the investigating officers as null and void. It would



have to be demonstrated that in the facts and circumstances of a particular case, whether such non-compliance caused prejudice to the accused and resulted in failure of justice. It was further held that if there is no proper explanation for non-compliance, then the same will have an effect on the case of the prosecution and the Courts will have to appreciate the evidence and material placed on record in the case in order to determine the issue. Whether non-compliance of rules could be a ground for grant of bail, especially in cases involving a commercial quantity, where the twin conditions of Section 37 of the NDPS Act would required to be satisfied , will have to be examined considering the nature of violation of such standing procedure and consequences thereof.

28. It has been pointed out on behalf of the prosecution that the aforesaid standings order are more in the nature of guidelines with respect to drawl of samples and non-compliance thereof, without showing prejudice, cannot be a ground for bail, especially in cases involving commercial quantity. It has also been submitted that prejudice caused, if any, would have to be established at trial during recording of evidence and examining necessary witnesses.

22. Coming to the facts of the present case, the plea of the learned counsel for the petitioner that the defect in the withdrawal of the sample and the contradiction pointed out regarding the weight of the sample, FSL reports and seal, I consider that all these issues are the matter of trial and will have to be examined during the course of trial before the learned Special Judge. It goes without saying if there is found to be contradiction or tampering, it will have an adverse effect on the case of the prosecution.



23. In the view of the same, I consider that the petitioner is not entitled to be admitted to bail. The present bail application is, therefore, dismissed.

DINESH KUMAR SHARMA, J

SEPTEMBER 21, 2023

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