

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

% Reserved on: 18th January, 2023
Pronounced on: 06th February, 2023

+ **BAIL APPLN. 1213/2022**

MOHD IQBAL ALI Petitioner
Through: Mr. U.A. Khan and Mr. Shahrukh
Khan, Advs. for petitioner.
versus

STATE OF NCT OF DELHI Respondent
Through: Mr. Ritesh Kumar Bahri, APP for
the State with SI Sukhraj Singh,
Crime Branch.

CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. This petition has been filed seeking regular bail in FIR No.19/2019 under Sections 21/25/29 of the NDPS Act registered at PS Crime Branch. The petitioner has been in judicial custody since 30th January, 2019 and was found in possession of 280g of heroin which is a commercial quantity as per the scheduled ought to the NDPS Act. The minimum and maximum sentence which is prescribed for commercial quantity under the NDPS Act is 10 years and 20 years, respectively. In addition to a fine which shall be not less than Rs.1,00,000/- but may extend to Rs.2,00,000/-. The petitioner had preferred the regular Bail Appln. No.652/2020 before this Court and on 20th December, 2021 had moved an application to withdraw the same with liberty to file a fresh bail application before the Ld. Trial Court. Thereafter, a regular bail

application was moved before the Ld. Trial Court but the same was dismissed *vide* order dated 24th March, 2022.

2. As per the case of the prosecution, on 30th January, 2019 the Narcotics Cell received secret information that a person, namely, Mohd. Iqbal resident of Alipur, Delhi is engaged in the supply of heroin in Delhi and NCR. As per the secret informer, it was disclosed that he would come near Nirmal Hriday Church on Ring Road from Majnu Ka Teela to Wazirabad, Delhi between 10:00 pm to 10:30 pm for delivery of heroin. The information was conveyed to senior officers, reduced in writing and a raiding team was constituted. At about 10:10 pm a Hyundai Accent Car bearing No. DL-9-CQ-6394 stopped near Nirmal Hriday Church and the driver of the car came out of the car meeting for someone. On the instance of the secret informer, Mohd. Iqbal, the petitioner was apprehended. A search of his red/cherry colour bag was conducted and 280g of heroin was recovered from the bag. The recovered heroin was seized after taking out samples as per the process. Notice under Section 50 NDPS Act was duly served upon him but he refused to avail his legal rights to be searched before any gazetted officer. On his personal search, nothing was recovered from his possession. Accordingly, the FIR was registered and the investigation was entrusted to SI Jai Prakash. The samples sent to FSL Rohini were checked and the report confirms the presence of diacetylmorphine in the samples. The investigation was completed and charge-sheet was filed and the trial is underway before the Special Judge, NDPS Act, Tis Hazari Courts, Delhi. The Ld. Trial Court on 02nd September, 2019 framed charges under Section 21/29 NDPS Act against the petitioner.

The case is at the stage of prosecution evidence, 4 prosecution witnesses have been examined out of 16 and the trial is underway.

3. The learned counsel for the petitioner has contended in support of the petition that the petitioner was falsely implicated in the case since he was apprehended on the basis of secret information and no notice under Section 50 NDPS Act was served to the petitioner nor was he informed about his legal rights to be searched before checking his cherry colour bag from which 280g of heroin was recovered. The petitioner has relied upon the judgment of *Akhilesh Bharti v. State*, 2020 SCC OnLine Del 306 where a Coordinate Bench of this Court relied upon the judgment of the Hon'ble Supreme Court in *Raju v. State of W.B.*, (2018) 9 SCC 708 where it was held as soon as the search of a person takes place compliance of Section 50 NDPS Act is mandatory. The petitioner is further relying upon the judgment of *Vijaysinh Chandubha Jadeja v. State of Gujarat*, (2011) 1 SCC 609, *Arif Khan v. State of Uttarakhand*, (2018) 18 SCC 380, *State of Rajasthan v. Parmanand*, (2014) 5 SCC 345, *Kamruddin v. State (NCT of Delhi)*, 2022 SCC OnLine Del 3761, *Emeka Emmanuel v. State*, 2022 SCC OnLine Del 4493 with regard to the compliance of Section 50 NDPS Act. The petitioner is also relying upon the judgments titled *Basanth Balram v. State of Kerala*, 2019 SCC OnLine Ker 531, *Surbir Singh v. Customs (Preventive)*, 2018 SCC OnLine Del 11450, *Sunny Khanna v. State*, B.A. No.218/2019, *Deepak Singh v. State*, B.A. No.1854/17, *Kaleem v. Union of India*, B.A. No.73/2021, *Lal Babu v. State of UP*, B.A. No.5914/2021 and *Anjum v. State*, B.A. No.55056/2021, wherein the Hon'ble High Court of Delhi as well as Allahabad High Court has granted regular bail while considering the violation of Section 50 NDPS Act. It was further contended that the

investigating agency also violated their own guidelines contemplated in the Drug Law Enforcement Field Officer's Handbook, NCB Ministry of Home Affairs, Government of India which has been mentioned in the judgment titled as *Shafhi Mohd. v. State of H.P.*, (2018) 2 SCC 801 dated 25.04.2017.

4. The counsel for the petitioner submitted that the petitioner has already been incarcerated for about 4 years in the present case and that the Hon'ble Supreme Court has granted regular bail in commercial quantity cases while considering the period of detention in the case titled *Nitish Adhikary @ Bapan v. State of West Bengal*, SLP (Crl.) No.5769/2022, *Mehmood Kurdeya v. NCB*, Crl. Appeal No.1570/2021 in SLP (Crl.) No.7085/2021, *Gopal Krishna Patra v. Union of India*, Crl. Appeal No.1169/2022, *Shariful Islam @ Sharif v. State of West Bengal*, SLP (Crl.) No.4173/2022, *Chitta Biswas @ Subhas v. State of West Bengal*, SLP (Crl.) No.8823/2019 and *Mohammad Salman Hanif Shaikh v. State of Gujarat*, SLP (Crl.) No.5530/2022. The Punjab & Haryana High Court has also granted regular bail in the case titled *Naib Singh v. State of Haryana*, CRM-M No.29466/2022 dated 15.11.2022 and *Sandeep Singh @ Sonu v. State of Punjab*, CRM-M No.34488/2022 dated 23.11.2022.

5. The Ld. APP on behalf of the State has contended that it is settled law that in NDPS cases that the negation of bail is a rule and granting of bail is an exception which is evident from the rigours of Section 37 NDPS Act. Further, the recovery of 280g of heroin from the bag carried by the petitioner falls under the purview of commercial quantity and bail under Section 439 Cr.P.C. is not made out. Since the recovery was

effected from the bag of the petitioner, there was no question of non-compliance of Section 50 of the NDPS Act. Reliance in this regard was placed on the following judgments:

Narcotics Control Bureau v. Kishan Lal, (1991) 1 SCC 705; *Narcotics Control Bureau v. Mohit Aggarwal*, 2022 SCC OnLine SC 891; *Amit v. State (NCT of Delhi)*, Bail Appln. 2308/2022 (DHC); *Chunni Lal v. State of Rajasthan*, 2000 SCC OnLine Raj 175; *Kalema Tumba v. State of Maharashtra*, (1999) 8 SCC 257; *Anwar v. State (NCT of Delhi)*, 2022 SCC OnLine Del 1684;

6. Without prejudice, the Ld. APP contended that oral notice is sufficient for the compliance of Section 50 NDPS Act as stated by the Hon'ble High Court of Rajasthan in *Chunni Lal* (*supra*) relying on a judgment of the Hon'ble Supreme Court and submitted that violation of any procedural law under the NDPS Act is a subject matter of trial and has to be looked at during the course of the trial.

7. It is evident from the recovery of 280g of heroin that it is a commercial quantity since it is above 250g which is prescribed for the purpose of being a commercial quantity. The rigors of Section 37 NDPS Act would apply which enumerates the twin conditions of giving the Public Prosecutor an opportunity to oppose and satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty on the offence and not likely to commit an offence while on bail. The primary contention of the petitioner before this Court relates to compliance of Section 50 NDPS Act. It is settled law that compliance of Section 50 NDPS Act is required only when a person is searched and not the bag that he is carrying is searched. Reference in this regard may be

made to *inter alia* ***State of Rajasthan v. Tara Singh***, (2011) 11 SCC 559, ***Jarnail Singh v. State of Punjab***, (2011) 3 SCC 521 and ***Ajmer Singh v. State of Haryana***, (2010) 3 SCC 746. In ***State of Punjab v. Baldev Singh***, (1999) 6 SCC 172 the Hon'ble Supreme Court has held that the requirement of informing the accused about his right under Section 50 comes into existence only when the person accused is to be searched. The earlier decision of the Hon'ble Supreme Court in ***State of Punjab v. Jasbir Singh***, (1996) 1 SCC 288 where it was held that though poppy straw was recovered from the bags of the accused yet he was required to be informed about his right to be searched in presence of a gazetted officer or a magistrate now stands overruled by the decision in ***Baldev Singh (supra)***. In ***Kalema Tumba v. State of Maharashtra & Ors.***, (1999) 8 SCC 257 where heroin was found in the bag belonging to the appellant and not from his person, it was not necessary to make an offer for search and this contention was noted and accepted by the Hon'ble Supreme Court. In view of this settled law, it would not be required to traverse all the cases that the petitioner has cited on the issue of non-compliance of Section 50 NDPS Act since those will not apply to the facts of this case where the recovery was from the bag carried by the petitioner. As also rightly contended by the Ld. APP in ***Chunni Lal (supra)***, the Hon'ble High Court of Rajasthan has held as under:

“7. A compliance of the mandatory provision of S. 50 has also been proved by the above named witnesses i.e. Shyam Sunder P.W. 1, Bhagwanlal P.W. 5, Chandan Singh P.W. 9 and Bhanwar Singh P.W. 11. I have perused the cross-examination made by the defence and there is no reason to discard their testimony. It has been held in Pon Adithan v. Deputy Director, Narcotics Control Bureau (1999 Cri LJ 3663) (supra) that the compliance of S. 50, NDPS Act can

be proved even by an oral testimony which does not suffer from any infirmity or there is no good reason for not accepting the same. In the instant case, besides the oral evidence the prosecution has proved the compliance of S. 50 by proving the memo Ex. P 6 prepared in this regard. It is contended on behalf of the learned counsel that the service of the notice Ex. P 6 regarding the compliance of S. 50 of the NDPS Act is not mentioned in the recovery memo Ex. P 7 which leads to the inference that compliance has not been made and the documents have been prepared lateron. I am unable to agree with this contention because this fact has been mentioned in F.I.R. Exs. P 10 and P 11. In view of the above, e discussion, the contention about the non-compliance of S. 50 of the NDPS Act is untenable.”

(emphasis added)

8. It is noted that there is a line of judgments by the Coordinate Benches of this Court relying upon the directions of the Hon’ble Supreme Court in ***Supreme Court Legal Aid Committee (Representing Under Trial Prisoners) v. Union of India***, (1994) 6 SCC 73, ***Thana Singh v. Central Bureau of Narcotics***, (2013) 2 SCC 603, ***Union of India v. K.A. Najeeb***, (2021) 3 SCC 713 and ***Satender Kumar Antil v. CBI***, (2022) 10 SCC 51 that in appropriate cases an undertrial charged for offences under the NDPS Act who has already undergone about half of the sentence prescribed would be entitled for release on bail in the event the trial is delayed, subject to conditions. However, even assuming that the petitioner’s case was one of those “*appropriate cases*”, the petitioner has not undergone half of the minimum sentence prescribed i.e. 5 years as yet and the trial is already progressing and only 12 witnesses need to be examined and the dates are already scheduled for the month of February, 2023.

9. In the considered opinion of this Court therefore the petitioner is not entitled to bail as he does not cross any of the thresholds, either statutory or those by judicial precedent.

10. In view of the above observations, the petition securing bail is dismissed, at this stage.

11. Needless to state the observations above are purely for the purpose of dealing with the issue of bail and do not reflect the opinion of this Court on merits of the matter.

12. Pending applications are dismissed as infructuous.

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

(ANISH DAYAL)
JUDGE

FEBRUARY 06, 2023/mk