



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

% ***Date of decision: November 24, 2023.***

+ **BAIL APPLN. 3072/2023**

IRFAN SAIFI @ BONA

..... Applicant

Through: Mr. Gagan Gupta and Mr. Vikas
Rohtagi, Advocates

Versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Ajay Vikram Singh, APP for
the State with SI Abdul Barkat,
ANTT/Crime Branch

CORAM:

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

CRL.M.A. 29429/2023 & CRL.M.A.32256/2023 (both for exemption)

1. Allowed subject to all just exceptions.
2. The applications stand disposed of.

CRL.M.A. 29428/2023 & CRL.M.A. 32255/2023 (to place additional documents on record)

3. The present applications have been filed by the applicant seeking permission to place on record additional facts and additional documents mentioned and annexed with the present application.
4. For the reasons stated in the present applications, the same are allowed and the documents are taken on record.
5. Accordingly, the applications stand disposed of.

BAIL APPLN. 3072/2023

Page 1 of 12



CRL.M.(BAIL) 1291/2023 (for interim bail)

6. The present application has been filed by the applicant seeking interim bail till the final disposal of the bail application in FIR No.108/2021 dated 24.06.2021 registered under Section(s) 21/25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 [**NDPS Act**] at Police Station: Crime Branch, West District, Delhi.

7. Learned counsel appearing for the applicant seeks permission to withdraw the present application and address arguments on the regular bail application.

8. Permission as sought for is granted.

9. The application stands dismissed as withdrawn.

BAIL APPLN. 3072/2023

10. The applicant, vide the present application under Section 439 of the Code of Criminal Procedure, 1973, seeks regular bail in FIR No.108/2021 dated 24.06.2021 registered under Section(s) 21/25 of the NDPS Act at Police Station: Crime Branch, West District, Delhi.

11. As per FIR, information was received from a secret informer on 23.06.2021 at 05:30 PM that the applicant Irfan Saifi@Bona was involved in supply of *heroin* in Delhi. Thereafter, the information was recorded as DD No.0030A dated 23.06.2021 at 06:26 PM and a raiding team was constituted upon directions of the Inspector.

12. The raiding team reached the place as informed by the secret informer and at around 09:10 PM, the secret informer identified a person waiting nearby as the applicant Irfan Saifi@ Bona, who was seen waiting for someone on his red and black colour motorcycle [DL5SCH5653] near



Rasgulla Factory. Upon seeing that the applicant was getting ready to leave, ASI Subhash alongwith Constable Sukhbir caught hold of the applicant Irfan Saifi@Bona. On closer examination, a white coloured polythene was seen tied near the seat of his motorcycle.

13. It is further revealed from the FIR that Notice under Section 50 of the NDPS Act was served on the applicant, and the same was explained to him by the ASI. In pursuance of the mandate of Section 50 of the NDPS Act, ACP Narcotics Cell was informed of the apprehension of the applicant and was requested to come to the place of recovery. The applicant, however, waived his right to search the police party (raiding party) and be searched in presence of a Gazette Officer or Judicial Magistrate.

14. At around 11:10 PM, the ACP Narcotics Cell arrived at the spot and informed the applicant of his legal rights. Upon his directions, the ASI untied the said polythene and its components were tested in the Field-Testing Kit, which were found to be *heroin*, weighing 1 kg and seizure memo therefor was prepared. On further directions of the ACP, search of the person of the applicant was conducted but no contraband was recovered, therefore, a *nil* recovery memo was prepared. Both, the seizure memo and the *nil* recovery memo, were counter-signed by the ACP as a witness. The applicant was arrested and the present FIR came to be registered on a written complaint by the ASI.

15. Learned counsel for the applicant submits that the applicant has been falsely implicated in the present case and has been languishing in jail since 24.06.2021, and his continued incarceration would not serve any



purpose as the investigation was completed and chargesheet was filed way back on 17.12.2021.

16. He further submits that in cases of search of the *person* of the accused and of *his vehicle* being carried out, Section 50 Notice is mandatory, in light of the judgment of the Hon'ble Supreme Court in ***S.K. Raju@ Abdul Haque@ Jagga vs. State of West Bengal*** (2018) 9 SCC 708. Therefore, in view of the mandatory Notice under Section 50 of the NDPS Act being improper and unlawful, embargo of Section 37 of the NDPS would not apply.

17. He further submits that the Notice served on the applicant under Section 50 of the NDPS Act was improper and ambiguous as word '*nearest*' was not used as mandated. As regards the same, he placed reliance on ***Vijaysinh Chandubha Jadeja vs. State of Gujarat*** (2011) 1 SCC 609 and on a judgment dated 28.03.2023 of a Co-ordinate Bench of this Court in BAIL APPLN.1725/2022 titled ***Mohd. Jabir vs. State of NCT of Delhi***.

18. *Arguendo*, he also submits that despite filing of chargesheet in December 2021, examination of prosecution witnesses has not even started. Thus, it is reasonable to conclude that trial is likely to take time and in cases of such significant delay, grant of bail cannot be fettered by Section 37 of the NDPS Act. In this regard, he placed reliance on ***Mohd. Muslim alias Hussain vs. State (NCT of Delhi)*** 2023 SCC OnLine SC 352 and ***Gurmito vs. Central Bureau of Investigation*** 2022 SCC OnLine Del 2316.

19. Lastly, the learned counsel for the applicant also submits that



despite the applicant being involved in 12 other FIRs, he has pleaded guilty in only one, has been acquitted in one another and one of them has been compounded qua him, while 9 other FIRs still pending trial and the applicant is on bail in all of them.

20. Notice was issued and the Status Report was called for.

21. Learned APP appearing for the State opposes grant of regular bail to the applicant in light of the nature of the offence alleged and the severity of punishment involved. He submits that applicant is a *Bad Character* of Police Station Nihal Vihar, Delhi and has been previously involved in as many as 13 FIRs, which includes cases of robbery, snatching, theft and MV Theft, amongst others. He further submits that the contraband seized being of commercial quantity, the embargo of Section 37 of the NDPS Act finds applicability. He also submits that compliance of the statutory mandate of Section 50 is a matter of trial, and the fact that the applicant was found at the spot, recovery of 1 kg *heroin* from the applicant was made and the motorcycle belonged to the applicant, are sufficient for the embargo of Section 37 of the NDPS Act to come into play.

22. This Court has heard the learned counsel for the applicant and the learned APP for the State and perused the Status Report as also the judgments and other documents on record.

23. As per the Nominal Roll requisitioned from the concerned Jail Authorities, the applicant has been in judicial custody since 26.06.2021 and his conduct has been '*Unsatisfactory*'. Further, the applicant is on bail and is pending trial in as many as 11 other FIRs.



24. Before advertng to the merits involved and deciding the contentions raised by the learned counsel for the applicant, in the opinion of this Court, the primary issue for consideration before this Court is qua the requirement and relevancy of the statutory Notice of Section 50 of the NDPS Act as the same plays an integral part in adjudication of the present application. For a better appreciation of Section 50 of the NDPS Act, the relevant excerpt thereof is reproduced 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. ...”*

(emphasis supplied)

25. Considering the aforesaid provisions of Section 50 of the NDPS Act and the factual matrix involved, it is clear that this Court is required to adjudicate as to whether a composite search of the *person* and the *vehicle* of the applicant comes within the ambit of “... *to search any person* ...”, thereby mandating issuance of Notice under Section 50 of the NDPS Act.

26. In *S.K. Raju (supra)*, while dealing with the provision of Section 50 of the NDPS Act, the Hon’ble Supreme Court (*three-Judge Bench*) has specifically observed that the said provision would come into play even in cases of there being a composite search i.e., both of the bag and of the person of the accused. *However*, it would not come into play, if only the bag is searched and not, *per se*, the *person* of the accused.

27. Similarly, in *State of Himachal Pradesh vs. Pawan Kumar* (2005) 4 SCC 350, also rendered by a Three-Judge Bench of the Hon’ble Supreme Court, it has been held that the term “*person*” under Section 50



would mean a natural person or a living unit and not an artificial person i.e. a bag or a briefcase. In fact, in para 10, it has also been categorically held as under:-

“10. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being...”

28. Thereafter, recently, the Hon’ble Supreme Court in ***State of Punjab vs. Baljinder Singh*** (2019) 10 SCC 473 (*three-Judge Bench*), after taking due note of the practical situation on hand involving the provisions of Section 50 of the NDPS Act and dealing with the law laid down by the Hon’ble Supreme Court from time to time, has held that the statutory mandate of serving a Notice of Section 50 of the NDPS Act on the accused would be applicable only to the search of the *person* of the accused, and its ambit cannot be extended to the search of bag, conveyance, etc. of the said accused person.

29. Interestingly, the facts involved in ***Baljinder Singh (supra)*** were such wherein, although, the personal search of the accused did not result in recovery of any contraband, it was held that even in case of no such recovery, the same could not be relied upon for want of compliance of Section 50 of the NDPS Act, *however*, qua the search of the vehicle and recovery of contraband therefrom, non-compliance of Section 50 of the NDPS Act, will be inconsequential. It was further held therein that no benefit of non-compliance of Section 50 of the NDPS Act qua ‘*personal search*’ can be extended so as to invalidate the effect of recovery from the search of the vehicle. It was held that any such interpretation would be



directly in the teeth of ***State of Punjab vs. Baldev Singh*** (1999) 6 SCC 172, where a Constitutional Bench of the Hon'ble Supreme Court recognising the much needed balance between the policy of the NDPS Act and the fundamental rights, specifically held as under:-

“57.(3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;”

30. It is noteworthy that the Hon'ble Supreme Court in ***Baljinder Singh (supra)*** has duly considered ***Dilip vs. State of M.P.*** (2007) 1 SCC 450, one of the initial pronouncements rendered by a Division Bench of the Hon'ble Supreme Court, wherein it was held as under:-

“12. Before seizure of the contraband from the scooter, personal search of appellants had been carried out and, admittedly, even at that time the provisions of Section 50 of the Act, although required in law, had not been complied with.

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15. Indisputably, however, effect of a search carried out in violation of the provisions of law would have a bearing on the credibility of the evidence of the official witnesses, which would of course be considered on the facts and circumstances of each case.

16. In this case, the provisions of Section 50 might not have been required to be complied with so far as the search of scooter is concerned, but, keeping in view the fact that the persons of the appellants were also searched, it was obligatory on the part of PW 10 to comply with the said provisions. It was not done.”

31. In light of the aforesaid discussion, it can be safely inferred that the ratio of the judgment passed by the Hon'ble Supreme Court in ***Baljinder Singh (supra)*** is in line with its earlier verdict in ***Baldev Singh (supra)***



(*Constitutional Bench*). This is despite the fact that the Hon'ble Supreme Court in *Baljinder Singh (supra)* has not considered its earlier pronouncement in *S.K. Raju (supra)*. However, the same is not material in the existing facts and circumstances, as they stand now.

32. Additionally, the Hon'ble Supreme Court has once again recently in *Than Kunwar v. State of Haryana* (2020) 5 SCC 260 has held as under:

“22. Having regard to the judgment by the three-Judge Bench, which directly dealt with this issue, viz., the correctness of the view in Dilip (supra) reliance placed by the appellant on para 16 may not be available. As already noticed, we are not oblivious of the observation which has been made in the other three-Judge Bench judgment of this Court in SK. Raju (supra), which it appears, was not brought to the notice to the Bench which decided the case later in Baljinder Singh (supra). We notice however that the later decision draws inspiration from the Constitution Bench decision in Baldev Singh (supra). We also notice that this is not a case where anything was recovered on the alleged personal search. The recovery was effected from the bag for which it is settled law that compliance with Section 50 of the Act is not required.”

33. Now, advertent to the facts involved in the present proceedings, this is a case wherein, *admittedly*, nothing was recovered upon the alleged personal search and the recovery was effected from the polythene found hanging to the hook on the left side of the motorcycle of the applicant. Thus, in view of the settled law as discussed hereinabove, it is clear that compliance with the provisions of Section 50 of the NDPS Act being not required is not called for. Consequently, being mindful of the aforesaid situation on hand in the present proceedings, the issue qua the impropriety and ambiguity of the Notice under Section 50 of the NDPS Act served upon the applicant herein, does not require adjudication, especially as the said Notice under Section 50 of the NDPS Act was not required to be served upon the applicant. In any case, at this stage, when this Court is



dealing with grant of bail to the applicant, and the issue being a matter of trial, this Court need not deliberate upon the law laid down in ***Vijaysinh Chandubha Jadeja (supra)*** and ***Mohd. Jabir (supra)*** as reliance placed thereon by the learned counsel for the applicant is misplaced.

34. Further, by calling upon the Court to adjudicate the issue qua the impropriety and ambiguity of the Notice under Section 50 of the NDPS Act, the applicant is calling upon this Court to prejudge something prior to the trial thereon, without giving a fair chance to the prosecution to establish its case, as this Court cannot be privy to “*Putting The Horse Before The Cart*”. The same is against the very tenets of law qua granting bail. Reliance in this regard is placed upon the judgment dated 23.11.2021 passed by a Co-ordinate Bench of this Court in BAIL APPLN. 3248/2021 titled ***Naveed Ummer Sheikh vs. Narcotic Control Bureau***, wherein it was held as under:-

“11. ... The entire procedural defect in this regard would be tested when the evidence is led in this case and this is not the stage where any opinion can be given in favour or against the manner in drawing the samples. The recovered quantity is a commercial quantity hence bar of section 37 applies. In these circumstances, no ground for bail is made out.”

35. In any event, the recovered quantity of the contraband is a commercial quantity, and hence the bar under Section 37 of the NDPS Act is applicable, which, in the aforesaid circumstances, is sufficient for rejection of the application, at this stage. This Court finds able support from the judgment passed in ***Narcotics Control Bureau vs. Mohit Agarwal*** 2022 SCC OnLine SC 891, wherein it is held as under:

“18. In our opinion the narrow parameters of bail available under Section 37 of the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has



successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, for him to have been admitted to bail. The length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act.”

36. Significantly, no reasonable cause is made/ can be deduced qua, both the presence of the applicant and the definite role assigned to him at this stage. Further, the recovery of commercial quantity of the contraband from the applicant also cannot be denied. Bearing in mind the aforesaid factor, and in the light of the fact that issuance of Notice of Section 50 of the NDPS Act was not required, its impropriety and ambiguity is insignificant, especially, at this stage, whence this Court is dealing with grant of bail.

37. In fact, the other factors discussed hereinabove, in the alternate, themselves are sufficient to deny regular bail to the applicant, at this stage. This is primarily as this Court while granting bail to any accused has to not only take note of but also consider the essential factors as laid down by the Hon'ble Supreme Court in ***Prasanta Kumar Sarkar vs Ashis Chatterjee*** (2010) 14 SCC 496; ***State of Uttar Pradesh vs Amaramani Tripathi*** (2005) 8 SCC 21 and ***Deepak Yadav vs State of Uttar Pradesh*** (2022) 8 SCC 559, wherein it has been held as under:-

- a. whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
- b. nature and gravity of the accusation;
- c. severity of the punishment in the event of conviction;
- d. danger of the accused absconding or fleeing, if released on



bail;

e. character, behaviour, means, position and standing of the accused;

f. likelihood of the offence being repeated;

g. reasonable apprehension of the witnesses being influenced; and

h. danger, of course, of justice being thwarted by the grant of bail.

38. Taken collectively, the aforesaid factors are themselves sufficient for this Court to deny bail to the applicant at this stage, as despite the burden squarely lying upon the prosecution to prove the guilt of the applicant beyond reasonable doubt, it all depends on the outcome of trial.

39. Considering the factual matrix and circumstances enumerated hereinabove as well as the legal position as it stands, the present application is dismissed.

40. Needless to say, the observation made, if any, on the merits of the matter are purely for the purposes of adjudicating the present application and shall not be construed as expressions on the merits of the matter.

SAURABH BANERJEE, J.

NOVEMBER 24, 2023

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