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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL BAIL APPLICATION NO. 61 OF 2022

Jimmy Amuzu

.. Applicant

Vs.

Narcotics Control Bureau & Anr.

.. Respondents

.....

Mr. Taraq Sayed a/w Ashwini Achari, Alisha Parekh for the applicant

Mr. A.A. Palkar, APP for the respondent State

Mr. Shreeram Shirsat a/w Ms. Tanvi Mate, Mr. Tanveer Khan, Ms. Karishma Rajesh, Mr. Shekhar V. Mane for the respondent – NCB

.....

CORAM : PRITHVIRAJ K. CHAVAN, J.

RESERVED ON : 2nd FEBRUARY, 2024

PRONOUNCED ON : 5th FEBRUARY, 2024

P.C.

1. The applicant is a Nigerian national, who has been arrested by the respondent – Narcotics Control Bureau (NCB) for allegedly found in possession of 118 grams of Cocaine in violation of Section 8(c) r/w 21(c) and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act).

2. Briefly stated the facts are that a secrete information was

received by the Junior Intelligence Officer of the respondent that the applicant would be coming near Reliance Digital Store, Andheri (W), Mumbai at about 22:30 hours to deliver huge quantity of Narcotic Drugs or Psychotropic Substances. Accordingly, the information was written down and the same was forwarded to the Superintendent, NCB, New Delhi.

3. A raiding team was formed and accordingly around 23:00 hours, a person identical with the description given in the information was found arriving in a white colour Wagon-R Taxi. When he was about to move from the said spot, the raiding team along with a single panch apprehended the applicant. The applicant was explained the reason for his apprehension *inter alia* disclosing the identity of all the members of the raiding team. The applicant was also appraised about the information which the team had i.e. carrying Cocaine by him. The applicant was informed about his search to be conducted and his legal right under Section 50 of the NDPS Act. The applicant was also informed that Mr. Amit Kumar Tiwari, member of the raiding team is also a Gazetted Officer and the search of the applicant will be taken in his presence. The applicant consented to be searched by the said team member.

4. During his personal search, contraband purported to be Cocaine weighing about 118 grams was recovered. The applicant was taken in the custody and his statement under Section 67 of the NDPS Act came to be recorded wherein he admitted his role regarding delivery of the said contraband. He was placed under arrest on 1st December 2020. After investigation, a chargesheet bearing Special Case No.597 of 2021 came to be filed before the Special Court.

5. An application seeking his release on bail by the applicant came to be rejected by the Sessions Court, Mumbai on 25th November 2021.

6. I heard Mr. Sayed, learned Counsel for the applicant and Mr. Shirsat, learned Special Public Prosecutor.

7. Mr. Sayed would invite my attention to the fact that the information received by the Officer of the respondent did not mention the name of the contraband. However, the same information subsequently reveals that it was Cocaine. The Counsel would further argue that the panchanama proceedings drawn by the respondent were in the presence of only single panch witness,

which is in violation of Section 100(4)(5) of the Cr.P.C. Learned Counsel would further argue that there is violation of mandatory provisions of Section 50 and 52A of the NDPS Act.

8. Learned Special Public Prosecutor while strongly objecting release of the applicant on bail contends that the contraband recovered from the applicant is of commercial quantity and the same has been seized strictly in accordance with the procedure provided in the NDPS Act. The applicant has been given due notice under Section 50 of the NDPS Act before effecting his search. Learned Special Public Prosecutor has also strenuously urged to reject the application in view of the underlined object of Section 37 of the NDPS Act. Mr. Shirsat has placed reliance on a judgment of the Supreme Court in case of *State of Kerala Vs. Rajesh and Ors. AIR (2020) 12 SC 122*.

9. Mr. Shirsat would also submit that the applicant had entered into this country with an ill-motive by using forged VISA in view of letter No.DDC-PE/13 dated 17th December 2020. In view of the same, there is every likelihood of repeating similar offences by the applicant in case of his release, who appears to have been involved

in illicit drug trafficking, which would destroy the future and youth of this country. It is also submitted that the applicant belongs to some unknown country since photocopy of his passport which was recovered from his possession at the time of seizure did not confirm that he is a Nigerian national.

10. Seizure memo / panchanama indicates that Amit Kumar Tiwari is the Superintendent of the respondent - NCB, who had directed Junior Intelligence Officer Vaseek Ahmed to constitute a team and act as per law, before conducting a raid. Accordingly, Vaseek Ahmed constituted a raiding team comprising himself and other officials, including Amit Kumar Tiwari. Panchanama further reveals that after intercepting the applicant around 11:00 p.m. on 1st December 2020, who had alighted from a white colour Wagon-R Car, he was informed about the information namely carrying of Cocaine by him. A panchanama reveals that before effecting his search, he was explained about his legal right in Hindi and English languages by Vaseek Ahmed to be searched in the presence of any Magistrate or Gazetted Officer. Thereupon, a notice under Section 50 of the NDPS Act was served upon him. Surprisingly, Notice under Section 50 of the NDPS Act appears to be given to the

applicant on 30th November 2020, which was signed by Vaseek Ahmed on 30th November 2020 itself and there is an endorsement alleged to have been given by the applicant on 30th November 2020 which reads “*I do not want to be searched before Magistrate / Gazetted Officer*”. If the applicant was searched on 1st December 2020, how the Notice under Section 50 of the NDPS Act was served a day before his search? Secondly, if an Officer of the Police or the NCB informs the applicant that he himself is a Gazetted Officer and then appraises him with his right to be searched by other Gazetted Officer or Magistrate, the provisions of Section 50(1) of the NDPS Act are violated in view of the ratio laid down by the Supreme Court in case of **State of Rajasthan Vs. Parmanand and Anr. (2014) 5 SCC 345** 2014 (5) SCC 345. The said view has also been taken by this Court in case of **Ashok Muktinath Pande Vs. The State of Maharashtra** (Criminal Bail Application No. 2105 of 2015) and in case of **Afaque Asif Sayyed Vs. State of Maharashtra** (Bail Application No.1145 of 2015) (Coram : A.S. Gadkari, J.).

11. *Prima facie*, it seems that the applicant was already detained on 30th November 2020 itself and subsequently a formality of panchanama appears to have been completed on 1st December

2020. Be that as it may.

12. A Division Bench of this Court in case of **Dharmaveer Lekhram Sharma Vs. State of Maharashtra** reported in 2001(5) BCR (Cri) 9 in para 8 held that inclusion of police Officers who are also gazetted officers in the raiding party is obvious. However, mentioning of the fact while appraising the accused regarding their right as contemplated under Section 50 of the NDPS Act suggests, by necessary implication, that the accused were discouraged in obtaining search by an independent authority. That the possibility of misleading the accused cannot not be ruled out in this regard. This is indeed violation of Section 50(1) of the NDPS Act.

13. A bare look at the panchanama / seizure memo would reveal that after making aware the applicant about his legal right under Section 50 of the NDPS Act, he was appraised that one of the member of the raiding team namely Amit Kumar Tiwari is also a Gazetted Officer and his search would be taken in his presence.

14. Sub-section (3), (4) and (5) Section 100 of the Cr.P.C. read thus :-

100. Persons in charge of closed place to allow search –

(1)

(2)

(3) *Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.*

(4) *Before making a search under this Chapter, the officer or other person about to make it shall call upon **two or more independent and respectable inhabitants of the locality** in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.*

(5) *The search shall be made in **their presence**, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.”*

15. Sub-section (4) of Section 100 of the Cr.P.C. mandates that before making a search, the officer or person about to make it shall call upon “**two or more independent and respectable inhabitants**” of the locality. Admittedly, **there is only one panch witness**. The argument of the learned Special Public Prosecutor that due to Covid pandemic at the relevant time, they could not arrange for another panch, cannot be accepted at this stage as it would have its impact on the authenticity of the search of the applicant alleged to have

been found in possession of commercial quantity of contraband.

16. At this stage, it would be apposite to place reliance on a judgment of the Supreme Court in case of **Opto Circuits (India) Pvt. Ltd. Vs. Axis Bank** (arising out of Criminal Appeal No.102 of 2021) wherein it has been held that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner alone and in no other manner. In view of this salutary principle, in the instant case, non-compliance of the same would definitely create some doubt about the authenticity of the whole exercise carried out by the respondent. The power which is to be exercised in a particular manner alone, failing which it would fall foul of the requirement of complying with due process under law.

17. Learned Counsel for the applicant would also invite my attention to one more glaring discrepancy, in the sense, the seizure panchanama *qua* the contraband dated 1st December 2020 reveals weight of contraband as 118 grams (including the weight of polythene). However, during the proceedings under Section 52A of the NDPS Act, when the same was weighed it came to be 100, 103, 52 and 103.3 grams, thereby showing a significant difference

of around 18 grams more. The Counsel would argue that in view of the said discrepancy, tampering with the alleged contraband cannot be ruled out. The aforesaid facts would, therefore, give rise to a reasonable ground for believing that the applicant is perhaps not guilty of such offence. However, as regards his likelihood of committing any offence while on bail can be taken care of by imposing strict stringent conditions.

18. No doubt, the apprehension expressed by the learned Special Public Prosecutor as regards entry of the applicant in this country on the basis of forged VISA cannot be brushed aside lightly. Nevertheless, the concerned Agency of the Central Government would look into the aspect and take necessary steps in that regards, that itself would not be a ground for continuing the detention of the applicant ever since his arrest on 1st December 2020.

19. *Dehors* merits of the case and in view of various pronouncements referred to hereinabove, I am persuaded to release the applicant on bail *albeit* imposing certain conditions, which would take care of the apprehension expressed by the learned Special Public Prosecutor.

20. Consequently, the following order is expedient :-

ORDER

- (a) The application is allowed.
- (b) The applicant be released on executing a P.R. bond in the sum of Rs.50,000/- with one or two solvent sureties in the like amount to the satisfaction of the Special Court in Special Case No.597 of 2021 for the offence punishable under Sections 8(c), 21(c) and 29 of the NDPS Act.
- (c) The applicant shall not leave the jurisdiction of the Special Court until conclusion of the trial.
- (d) The applicant shall report the office of the NCB, Mumbai on first Saturday of every month between 10.00 a.m. to 1.00 p.m. till the conclusion of the trial.
- (e) The applicant shall not tamper with the evidence or attempt to influence or contact any of the witnesses or persons concerned with this case.
- (f) The applicant shall furnish his latest place of residence and contact details forthwith to the respondent and the Special Court. In case of change of residential address or cell number (contact details), the

same shall be forthwith informed to the respondent as well as the Special Court.

(g) The applicant shall attend the trial scrupulously unless exempted.

(h) In case of two consecutive defaults either in attending the respondent or the trial Court or in case of breach of any of the aforesaid conditions, the prosecution shall be at liberty to seek cancellation of his bail.

21. The application stand disposed of in the aforesaid terms.

(PRITHVIRAJ K. CHAVAN, J.)