



2024:DHC:7583



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

%

Reserved on: 23rd August, 2024

Pronounced on: 01st October, 2024

+

BAIL APPLN. 931/2024 & CRL. M.A. 8129/2024

FRANCIS MARION GEGG

.....Petitioner

Through: Mr. Sumer Singh Boparai, Mr.
Sidhant Saraswat and Mr. Varun
Bhati, Advocates.

versus

CUSTOMS

.....Respondent

Through: Mr. Gibran Naushad, Sr. Standing
Counsel.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. The present Bail Application under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter 'Cr.P.C.') has been filed on behalf of the Applicant seeking Regular Bail in relation to the case bearing S.C. No. 273 of 2023 under Sections 21(c) and 23(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter "NDPS Act").
2. The Applicant has stated that he is a 71 year old citizen of Belize City, Belize with clean antecedents and good moral standing. The Applicant arrived at New Delhi from Doha via Qatar Airways flight No. QR-578 at 02:00 AM and was intercepted by Customs Officers on suspicion and was asked to scan his baggage. The two independent panchas were called and



the accused along with his baggage was taken to the Customs Preventive Room for further verification.

3. The Customs Officer inquired from the accused about his carrying any contraband, to which the accused replied in a negative. Thereafter, a Notice under Section 102 of Customs Act, 1962 and under Section 50 of the NDPS Act was served by the Customs Officer in presence of the panchas. He was informed about requirement of his personal and baggage search and was also apprised of his legal rights that the search could be conducted before a Magistrate or a Gazetted Officer of Customs. The baggage of the accused was searched and an off-white colour powdery substance was recovered from false top and false bottom of the black trolley bag. On the suspicion of the recovered substance being a contraband, the same was kept in transparent poly bags marked A1 and A2 respectively and kept in plastic containers marked X and Y respectively. The total substance recovered weighed 9.950 Kg.

4. The seized substance was tested with the help of a field drug testing kit present at Customs Office and the substance tested positive for "Heroin". After the proceedings, Applicant was taken into custody on 30.10.2022.

5. The Investigating Agency moved for an Application under Section 52-A of the NDPS Act for drawing of samples on 16.11.2022, which was allowed by the Ld. MM on 21.11.2022. The samples so drawn were sent to the Central Revenues Control Laboratory for testing on 05.12.2022 and the Test Report was received on 31.01.2023.

6. On completion of investigations, the Complaint against the Applicant was filed in the court of Ld. Special Judge (NDPS). The statements of the panch witnesses were recorded under S. 67 of the NDPS Act on 06.04.2023,



and the Ld. Special Judge framed Charges under Sections 21 & 23 of the NDPS Act.

7. The *first* Regular Bail Application was filed by the Applicant on 24.01.2024 and the same was dismissed by the Ld. Special Judge vide order dated 27.02.2024. Hence, this Application before this Court.

8. The *Applicant has sought bail on the ground* of non-compliance of Section 50 of the NDPS Act. It is submitted by the Applicant that he was not informed of his right to be searched before the “nearest” Gazetted Officer or Magistrate. In this regard, reliance has been placed on Aabid Khan vs. State (Govt. Of NCT of Delhi), 2023 DHC 8675, and Mohd. Jabir vs. State (NCT of Delhi), Bail Appl. No. 1725/2022. Furthermore, it is submitted that due to non-compliance of section 50 of the NDPS Act, the recovery of the alleged contraband, cannot be the sole basis of conviction.

9. It is submitted that the statement of pancha witnesses recorded to the effect that “*the Pax gave his consent in writing on the body of both the notices itself that his personal and baggage search could be conducted by any Customs Officer in presence of any gazetted officer*”. Even though it is stated that the Applicant had sought presence of gazetted officer, but the statements of the witnesses does not disclose if any gazetted officer was called. Further, the statement is untrustworthy owing to the fact that there is nothing handwritten on the two Notices and the same are typed.

10. The Applicant has alleged that the alleged recovery of the contraband is tainted as there is considerable delay in sending the alleged recovered contraband for sampling in terms of section 52-A of the NDPS Act. The seizure memo dated 30.10.2022 recorded the weight of contraband at 9950 grams while the Order dated 21.11.2022 which allowed the Application filed



2024:DHC:7583



under Section 52-A recorded the weight at 9959 grams, i.e. a difference of total 9 grams. This discrepancy in the weight creates a doubt about the recovery of alleged contraband.

11. Further, the recovery is suspect since the Investigating Officer in the case did not have any brass seal for his shift, i.e. Shift-B and had to requisition the same from Assistant Commissioner of Shift-A.

12. Moreover, the pancha witnesses had deposed to being present throughout the proceedings, however they have not said anything in regard to the requisitioning of seal, which according to the prosecution was procured by the Assistant Commissioner, Preventive Shift-B, T-3, IGI Airport and then somehow handed over to the present I.O. and then allegedly deposited back with the Assistant Commissioner (Shift-A), T-3, IGI Airport. The version of the pancha witnesses is starkly opposite to the prosecution witnesses inasmuch as it is their case that the seal was already present with the I.O. This discrepancy creates a doubt on the recovery made by the prosecuting agencies and their version of sealing the contraband is not supported by the testimony of pancha witnesses.

13. This leads to the inevitable conclusion that the alleged recovery from the petitioner, is planted and that the accused has been falsely implicated. In this regard reliance has been placed on Kadir vs. State (Govt. Of NCT of Delhi), (2023) SCC OnLine 6146.

14. It is further submitted by the Applicant that the delay of 16 days to comply with sampling procedure, under Section 52-A is an important facet in regard to the reasonable time, for which reliance has been placed on Kashif vs. Narcotics Control Bureau, (2023) SCC OnLine Del 2881.



15. It is further asserted that the prosecution has attempted to portray the present case as one where there is a '*Chance Recovery*' from the applicant / accused; however the same can be seen to be an after-thought and a blatant lie inasmuch as even when the recovery was yet to be made from the applicant / accused, the prosecution had already earmarked a Case No., i.e. C. No. VIII (AP) 10 / P&I/ 3743-B/ Arrival / 2022 concerning the proceedings to be carried out against the petitioner. This fact demonstrates a pre-planned conspiracy between the officers of the prosecuting agency to falsely implicate the applicant / accused. In this regard reliance has been placed on Kamaljit Singh @ Pappu vs. State of Punjab, (2020) 14 SCC 9.

16. The Applicant has further submitted that the Applicant has been in custody since 30.10.2022. The complaint has already been filed on 27.04.2023 and Charges framed on 04.08.2023, the Applicant is not required to be in custody. The Applicant is 71 year old and has been in custody for over 1 year 4 months.

17. The Applicant has submitted that the Ld. Trial Court has wrongly understood the rigors of Section 37 of NDPS Act. In this regard reliance has been placed on Vinod Nagar vs. Narcotics Control Bureau, Bail Appl. No. 3149/2022 decided on 19.02.2024.

18. The Applicant undertakes to abide by any conditions imposed by this Court while granting Bail.

19. **The Respondent in its Status Report** has submitted that the accused had initially started his journey from Johannesburg (JNB) to Doha (DOH) via Flight No. QR-1366 dated 29.10.2022. The accused was carrying one black colour trolley bag, one brown colour trolley bag, i.e. two checked-in bags and one black colour handbag. And on the basis of profiling, he was



stopped and his search was conducted. After recording his statement to the effect that he did not possess any contraband substance, a Notice under section 50 of NDPS Act and another under Section 102 of the Customs Act were served upon him.

20. During the search of his baggage, two packets were recovered, which on the suspicion of being contraband, were emptied into transparent bag (Each plastic container having net weight of goods as 4.975 Kgs (total weight as 5.026 Kgs including weight of pouch as 0.051kgs; collectively weighing 9.950 Kgs). The total weight of goods in each container was 5.382 Kgs including plastic pouch and plastic container. Thus, a total of 9.950 Kgs of white colour powder/granules suspected to be narcotics substance, was recovered from the accused. The recovered substance from the black coloured trolley bag, was kept in two transparent boxes. Thereafter, the substance was tested and the result revealed that the said substance is 'Heroin'. The substance was then seized under section 43(a) of NDPS Act and section 110 of the Customs Act for violation of Section 8 & 23, as these were found to be liable for confiscation under 60 of NDPS Act, read with Section 111 of the Customs Act as the same were brought Into India illegally. Later, statement of the accused was recorded on 13.11.2022 under Section 67 NDPS Act.

21. It is a matter of record that all procedural formalities had been complied with by the Department as per law, which has also been noted in the Order dated 27.02.2024 passed by the Ld. Special Judge (NDPS), Delhi. Further, the accused has been apprehended with a substantial quantity of narcotics. i.e., 9.950 Kgs of Heroin, there are independent witnesses who have witnessed the search and recovery proceedings, and there is sufficient



evidence against the accused, besides the Statement under Section 67 of the NDPS Act, 1985. The embargo of Section 37 of the NDPS Act, 1985 would apply in the light of settled precedents .

22. The *learned counsel for the Respondent* has vehemently opposed the bail and that if the Applicant is admitted on bail, then he may abscond and not be available for trial.

23. The learned counsels for the both the parties have filed written submissions on similar lines.

24. ***The learned counsel for the Applicant has argued*** that there is non-compliance of Section 52A of NDPS r/w Standing Order 1/88 and any infraction of the procedure so laid down would have to be considered at the time of grant of bail. He has placed reliance on *Amina vs. State of NCT of Delhi*, Bail Appl. No. 3805 of 2022.

25. He has further argued that such delay would inure to the benefit of the Accused person.

26. Further argument is made qua discrepancy in the weight of the Contraband seized being a matter of great importance while dealing with a Bail Application, and reliance has been placed on *Kadir (Supra)*. It is submitted that when the seized contraband was brought before the court after a delay of 16 days, there was a difference of 9 grams in the seized contraband.

27. It is further argued that the search of the bag and the personal of the Applicant was illegal and in contravention of Section 50 of NDPS Act as the Applicant was not informed about his right to be searched by the nearest Magistrate and the same is violative of Section 50 as there was no independent Gazetted Officer at the time of search, and search conducted in



the presence of allegedly gazette officer who was part of the raiding time, is not sufficient compliance of Section 50 of NDPS Act for which reliance has been placed on State of Rajasthan vs. Parmanand, (2014) 5 SCC 345. The learned counsel has placed reliance on Aabid Khan vs. State Govt. of NCT of Delhi, 2023:DHC:8675 and Mohd. Jabir (Supra). It is argued that the Applicant is entitled to be released on bail on the sole ground of non-compliance of Section 50 of NDPS Act.

28. It is further argued by the learned counsel for the Applicant that the Prosecution's reliance on State of H.P. vs. Pawan Kumar, (2005) 4 SCC 350, to argue that the rigours of Section 50 of NDPS do not apply as the recovery was made from the bag of the Applicant and not his Person, is not tenable as there is divergence on this issue in Namdi Francis vs. Union of India, (1998) 8 SCC 534, and S.K. Raju alia Abdul Haque alias Jagga vs. State of Bengal, (2018) 9 SCC 708, wherein the Hon'ble Apex Court held that rigours of Section 50 of NDPS Act would be attracted as soon as search of a person takes place irrespective of whether contraband is recovered from the person or the bag of the detainee. In National Insurance Company Limited vs. Pranay Sethi, (2017) 16 SCC 680, the Constitution Bench of Apex Court held that in view of conflicting views taken by benches of same strength of the Apex Court, the High Court is bound by the decision which is prior in time i.e. Namdis Francis (Supra) is the law.

29. It is argued by the learned counsel that the allegation of chance recovery is completely false. Furthermore, in view of the violations of the Procedure established by the statute, the rigours of Section 37 of NDPS Act will melt down, as has been held in Kashif (Supra), Tamir Ali vs. Narcotics Control Bureau, (2023) SCC OnLine Del 3015 and Amina (Supra).



30. **Submissions heard.**

31. The Applicant is a 71 year old foreign citizen and was caught in possession of 9.950 Kgs of Heroine at the IGI Airport.

32. The Applicant has sought to argue that the mere fact that the documents already had the File Number mentioned on the documents, posits to the fact that he has been falsely implicated in the case and that this is not a case of *chance recovery or else the File number could not have been generated at the initial stage itself.*

33. The Respondent has explained the mention of the Case No. in print by stating that whenever a suspect is intercepted at the Airport, a Complaint number is generated and if there is no recovery of contraband or other prohibited substance, then the file is closed and in cases of recovery, Charge sheet is filed in Court after due investigation.

34. This ground as agitated by the Applicant, does not reflect any prior manipulation by the Agency nor does it lead to any conclusion of false implication, in the light of explanation given by the respondent.

35. The Applicant has sought to argue that there is non-compliance of Section 52A of the NDPS Act as there was an increase in weight of the contraband by 9 grams from 9.950 Kg to 9.959 Kg, the benefit of which must be given to him.

36. The Supreme Court in the case of State of Punjab v. Balbir Singh, (1994) 3 SCC 299, observed that the sampling procedure established in Section 52 and 57 of the NDPS Act *which come into operation after the arrest and seizure under the Act*, must be adhered ***but if there is no strict compliance of the same, that by itself cannot render the acts done by the officers of the respondent as null and void, if there is sufficient material***



against the accused. It was observed that “*the provisions of these two sections contain certain procedural instructions for strict compliance by the officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these officers null and void and at the most 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. Therefore, it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice.*” A flaw in the sampling procedure may affect, if anything, the probative value of the evidence. The Court further observed that *the provisions are directory in nature*; therefore, the Court is bound to examine the prejudice which shall be caused to the petitioner and consequent failure of justice due to non-compliance. It was further observed that “*However, a mere noncompliance or failure to strictly comply by itself will not vitiate the prosecution.*”

37. Section 52A of the Act by itself does not place any specific time limit for sampling and application to the magistrate to be carried out. The Applicant has placed reliance on Standing Order 1/88 to read a time limit into the sampling process. Standing Order 1/88 has been repealed now by the Narcotics Drugs and Psychotropic Substances (Seizure, Storage, Sampling and Disposal) Rules 2022 as per Rule 29 of the said Rules.

38. A minor discrepancy in the weight of the contraband, as is the case at hand, does not shake the roots of the case of prosecution, as has been noted by the Allahabad High Court in Chhotey Lal vs. Union of India (NCB), CrI. Misc. Bail Application No. 6298/2020 and in Kavinder Kumar vs. Union of India (NCB), CrI. Misc. Bail Application No. 1347/2022. The discrepancy of



9 grams, when the entire quantity of the contraband seized is 9950 grams may be attributable to environmental factors especially moisture. Moreover, the discrepancy in weight of the contraband seized is a matter of trial as has been held in a plethora of cases Rajesh Sharma vs. State of Rajasthan, 2024 SCC OnLine Raj 485, Bettanayaka vs. State of Karnataka, 2020 SCC OnLine Bom 4543, Ratanlal Kharadi vs. State of M.P., 2019 SCC OnLine MP 6083, and recently by this court in Ravina Kumari vs. State of NCT of Delhi, Bail Appln. 1256/2024 decided on 20.09.2024.

39. The argument qua violation of Section 50 of the NDPS Act has also been made to essentially claim that the search was illegal. So far as the issue of applicability of Section 50 of the NDPS Act is concerned, there are two aspects of the same. Firstly, whether Section 50 of the NDPS Act was not complied with, and secondly, whether Section 50 could at all be made applicable to the case on hand.

40. The law in regard to compliance of mandate of Section 50, about the phrase ‘search any person’ has been traversing on either side of proposition as to whether it refers only to recovery from the person or includes the bag which he may be carrying.

41. The Supreme Court in State of Punjab vs. Baldev Singh, (1999) 6 SCC 172, held that Section 50 of NDPS Act applies to search of a person as distinguished from search of any premises etc. and observed as follows:

“12. On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of person during the normal course of investigation into an offence or suspected offence and on completion of that



search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.”

42. Thereafter, in Pawan Kumar (Supra) the Apex Court was considering a situation where the contraband was seized from the bag of the Applicant and not his person. It was held that Section 50 is not applicable when the search is made of the bag being carried by the person. Further, it has been held that the phrase ‘search any person’ as described in Section 50 would not include the bag which was being carried by the individual and therefore, recovery of narcotics from the bag of the accused would not attract the provisions of Section 50 of the NDPS Act. The Court 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.

43. Similarly, in Sarjudas and Anr. vs. State of Gujarat, (1999) 8 SCC 508, where the contraband was recovered from a bag hanging on the scooter, the Supreme Court held that there was no mandate of informing the person to be searched of his right under Section 50 of NDPS Act, for this was not a case where the person of the accused was searched and narcotic drug was found from his person.

44. Further, in S.K. Raju alias Abdul Haque alias Jagga (Supra) the search was conducted of the bag as well as the trousers of the accused and it was held that the search amounted to search of his person and thus, compliance of Section 50 was necessary.

45. The Supreme Court recently in Ranjan Kumar Chadha vs. State of Himachal Pradesh, 2023 SCC OnLine SC 1262, has sought to adhere to the principle of law as explained by the Constitution Bench in Baldev Singh (supra) and the larger Bench in Pawan Kumar (supra).



46. In view of the above discussed judgements, it is clear that Section 50 is not applicable in the facts of the case as the search was of the Applicant's baggage and not his person, and that too in a public place.

47. The Applicant has placed reliance on Namdi Francis (Supra) wherein the Apex Court held that rigours of Section 50 would apply if the recovery of the contraband was made from a handbag being carried by a person as it would tantamount to search of a person. However, Section 50 would not be attracted if the search of the article lying somewhere else and is not on the person himself is conducted, for the simple reason that it is not on the person. In the case of Liyaqat Ali vs. Union of India & Ors., (2008) 17 SCC 757 the Apex Court has held Namdi Francis (Supra) to be *per incuriam*. The judgement therefore, does not come to the assistance of the Applicant.

48. In any case, admittedly the facts of this case disclose that the Applicant was served with a Notice Section 50 of the Act. The qualms were merely regarding the missing "nearest" from the Notice, but the same cannot be gone into at the stage of deciding Bail Application, for it is a matter of trial.

49. It is pertinent to note that the total quantity of contraband recovered in this case is of commercial quantity and thus, embargo of Section 37 of the NDPS Act is applicable.

50. The petitioner in order to get the bail under Section 37 of the NDPS Act, 1985 has not only to prove that he is not guilty but also that he is not likely to commit the offence. The parameters for grant of bail to an accused under the NDPS Act have been provided in various cases by the Hon'ble Supreme Court. The Supreme Court in Collector of Customs vs. Ahmadali Nodira, (2004) 3 SCC 549 has observed as under:



*“6. As observed by this Court in Union of India v. Thamisharasi, (1995) 4 SCC 190, clause (b) of sub-section (1) of Section 37 imposes limitations on granting of bail in addition to those provided under the Code. **The two limitations are: (1) an opportunity to the Public Prosecutor to oppose the bail application, and (2) satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail.***

*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...***

51. Further, in State of Kerala vs. Rajesh, (2020) 12 SCC 122, the Hon’ble Supreme Court while discussing the expression ‘reasonable grounds’ 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.”

52. The recovery in this case is of 9,950 grams of *Heroin*, which is a commercial quantity. Consequently, the embargo under Section 37 of NDPS Act is attracted in this case.

53. Considering the overall facts and circumstances of the case, and that the recovery of commercial quantity of narcotic substance was affected from the Applicant, this Court cannot persuade itself to believe that there are reasonable grounds to believe that he is not *prima facie* guilty of the alleged offence under NPDS Act. Moreover, it is the nature of the contraband seized which further weighs against any benefit that were to accrue to the Applicant. Heroin (a hard drug), an opioid, directly impacts the central nervous system, leading to rapid addiction, severe withdrawal symptoms, and has a high propensity for overdose, often resulting in death. It presents a significantly graver threat to public health and individual well-being as compared to cannabis (a soft drug). Moreover, the risk of fatal overdose associated with heroin use is markedly higher. Heroin use on a regular basis has been noted to have major health and lifestyle problems such as collapsed veins and skin abscesses, and in the long term, the effects are seen in the deterioration of the brain's white matter and it also produces high intolerance and physical dependence, thus, proving to be highly addictive.



2024:DHC:7583



54. Furthermore, the Applicant being a foreign national can prove to be a flight risk, especially when the alleged offence involves a large quantity of contraband.

55. Therefore, in view of the above discussion, no ground for bail is made out and the Bail Application is dismissed along with pending applications if any.

56. In view of the facts of the case, the trial court is directed to expedite the trial.

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 01, 2024