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

Date of decision: 30th JULY, 2024

IN THE MATTER OF:

+ **BAIL APPLN. 1434/2024**

ELOCHUKWU COLLINS

.....Petitioner

Through: Mr. Tanvir Quiser, Advocate.

versus

THE STATE (NCT OF DELHI)

.....Respondent

Through: Ms. Priyanka Dalal, APP for the State.

SI Sapana Sharma, HC Dinesh Kumar, ANC

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The present application under Section 439 Cr.P.C has been filed by the Petitioner for grant of regular bail in FIR No.103/2022 dated 24.01.2022, registered at Police Station Mohan Garden, Delhi for offences punishable under Sections 21/25 of the NDPS Act.
2. The facts of the case reveal that on 24.01.2022, a secret information was received at office of the Anti-Narcotics Cell, Dwarka that a person, namely, Collins who is an African citizen, is involved in peddling of heroin drugs and on the same day i.e., 24.01.2022, he would come to deliver heroin near R-Extension Block, Rahul Chowk, Mohan Garden, New Delhi between 06:15 PM and 06:30 PM. The informer was thoroughly enquired about the information by SI Subhash Chand. The said information was given to a superior officer Vijay Singh Yadav ACP/Operation, Dwarka for seeking



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authorisation under Section 42 of the NDPS Act. He empowered Head Constable Mobin, No 40/DW, PIS No 28960821 to conduct the search and seizure proceedings under Section 42 of the NDPS Act. The information was also lodged in Rojnamcha.

3. A police team under the supervision of SI Subhash Chand comprising one Kartar Singh ASI, 3054/DW, HC Jitender No.489/DW, Ct Pramod No. 2965/DW, Ct Mukesh No. 1692/DW, Ct Hetram No. 640/DW, Ct Praveen No. 1316/DW was constituted. The police team departed from the office of Anti-Narcotics Cell Dwarka at about 05:35 PM vide DD No.08 dated 24.01.2022 along with the informer. They stopped near metro Pillar No.821 at around 05:40 PM wherein HC Mobin requested 4-5 passersby to witness the proceedings but all declined. It is stated that the team further proceeded near H.No. 85, R-Block, Ext. Mohan Garden, near R&M Chowk, New Delhi at 06:05 PM where HC Mobin again requested 4-5 passersby to witness the proceedings but they also refused. It is stated that at around 06:20 PM, an African person was seen approaching on a two wheeler (Honda Activa Scooty of grey color) from inside the street there. The informer indicated towards that person and confirmed his identity as "Collins" and the Applicant accused was then apprehended by HC Mobin with the help of police team by applying reasonable amount of force as the accused person was resisting. On interrogation, the accused revealed his name as Eluchukwu Collins Okafor S/o Okafor (Petitioner hererin) permanent resident of Umaiha, Ihiala, Anambra, Nigeria Aged 34 years. The information was given to Vijay Singh, ACP/Operation Dwarka and Jitender Patel, ACP/Najafgarh. Thereafter, notice under Section 50 of the NDPS Act was served on the Petitioner informing him of his legal rights regarding



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personal search, however, the Petitioner denied to avail of the benefit under Section 50 of the NDPS Act. ACP Jitender Patel arrived around 8:10 PM at the spot. HC Mobin conducted personal search of the Petitioner on the direction of Jitender Patel, ACP/Najafgarh and found polythene bag in his right pajama (Lower) pocket which contained white cream colour crystallized substance. The substance was confirmed as heroine with field testing kit, weighing 270 Grams. On the basis of this, the present FIR No.103/2022 dated 24.01.2022, was registered against the Petitioner at Police Station Mohan Garden, Delhi for offences punishable under Sections 21/25 of the NDPS Act. The Petitioner was arrested on the same day i.e., 24.01.2022 and the police custody of the Petitioner was sought and the police custody of 01 day of the Petitioner was granted by the Court of Ld Duty MM, Dwarka Court on 25.01.2022.

4. During the course of interrogation, the Petitioner revealed that he purchased drugs from one Vecent Joseph but further details of the said person was not provided by the Petitioner. On 25.01.2022, proceedings under Section 52(2)(A) of the NDPS Act were conducted and two samples of 10 Grams each were withdrawn from the seized drugs and the same was sent to FSL, Rohini. The result obtained from the FSL, Rohini confirmed the presence of Diacetylmorphine, 6-Monoacetylmorphine, Acetylcodeine, Codeine, Alprazolam, Acetaminophen and Caffeine in the sample. After completion of investigation, a chargesheet has been filed against the Petitioner for offences punishable under Sections 21/25 of the NDPS Act and Section 14A of the Foreigner Act. Material on record indicates that charges were also framed against the Petitioner for offences punishable under Sections 21/25 of the NDPS Act and Section 14A of the Foreigner Act



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and the matter is pending for evidence on behalf of the prosecution.

5. Learned Counsel appearing for the Petitioner contends that the procedure under Section 42 of the NDPS Act has not been followed in the present case. He states that the informer was not produced before the ACP. He states that the secret information was received by the HC Mobin and not by the Sub-Inspector (SI) and the Assistant Sub-Inspector (ASI) and the same was reduced in writing by HC Mobin and not by the SI or ASI. He states that the informer was also not produced before the SHO and, therefore, the entire procedure is vitiated. He further contends that the recovery is also not proper. He states that the heroin seized from the Petitioner is only 270 grams which is marginally above the threshold limit of commercial quantity which is 250 grams and therefore, this Court must consider the present case to be one for intermediate quantity and not of a commercial quantity. Learned Counsel for the Petitioner further states that the quantity has not been calculated properly. He states that Section 50 of the NDPS Act has not been followed in the present case.

6. *Per contra*, learned APP appearing for the State submits that the procedure under Section 42 of the NDPS Act has been complied with. She states that the ACP has nominated HC Mobin to proceed under Section 42 of the NDPS Act. She states that the information has been recorded by the HC Mobin as mandated under Section 42 of the NDPS Act. She states that the Petitioner was also informed about his rights prescribed under Section 50 of the NDPS Act but the Petitioner refused to avail of the rights under Section 50 of the NDPS Act. She further states that in any event, the search was conducted by HC Mobin after ACP Jitender Patel had come there. She states that the quantity of heroin seized from the Petitioner is 270 grams which is



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commercial quantity and, therefore, bail cannot be granted to the Petitioner under Section 37 of the NDPS Act.

7. Heard learned Counsel appearing for the Parties and perused the material on record.

8. A Bench of five judges of the Apex Court in Karnail Singh v. State of Haryana, (2009) 8 SCC 539, after ironing out the difference of opinion regarding compliance of Section 42 of the NDPS Act, has summarized the law regarding compliance under Section 42 of the NDPS Act. The Apex Court in the said Judgment has observed as under:

"35. In conclusion, what is to be noticed is that Abdul Rashid [(2000) 2 SCC 513 : 2000 SCC (Cri) 496] did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham [(2001) 6 SCC 692 : 2001 SCC (Cri) 1217] hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it



would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official



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superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

(emphasis supplied)

9. Applying the aforesaid law to the facts and circumstances of the present case, this Court is of the opinion that Section 42 of the NDPS Act has been substantially complied with. The secret information was reduced in writing by the HC Mobin who was authorized to do so. The ACP had empowered HC Mobin to proceed ahead under Section 42 of the NDPS Act. A perusal of the status report indicates that the police team left for the spot with the informer who identified the Petitioner. 270 grams of heroin has been recovered from the Petitioner which is commercial quantity. This Court is not inclined to accept the argument of the Petitioner that 20 grams of heroin is a marginal increase and, therefore, the seizure can be said to be of intermediate quantity.

10. It is well settled that the jurisdiction of a Court to grant bail for offences under the NDPS Act in cases of recovery of commercial quantity is circumscribed by the provision of Section 37 of the NDPS Act. Section 37 of the NDPS Act reads as under:-

"37. Offences to be cognizable and non-bailable.-



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(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 [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.]"

11. A perusal of Section 37 of the NDPS Act indicates that bail can be granted only when there are reasonable grounds for believing that the accused is not guilty of an offence and he is not likely to commit any offence when released on bail. The parameters for grant of bail to an accused under Section 37 of the NDPS Act have been laid down in a number of judgments. The Supreme Court in Collector of Customs v. Ahmadalieva Nodira reported as **(2004) 3 SCC 549** has observed as under:

"6. As observed by this Court in Union of India v.



Thamisharasi [(1995) 4 SCC 190 : 1995 SCC (Cri) 665 : JT (1995) 4 SC 253] 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....." (emphasis supplied)

12. In Union of India v. Rattan Mallik reported as (2009) 2 SCC 624, the Supreme Court has observed as under :

"12. It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused



of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz. (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on “reasonable grounds”.

13. *The expression “reasonable grounds” has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence (vide Union of India v. Shiv Shanker Kesari [(2007) 7 SCC 798 : (2007) 3 SCC (Cri) 505]). Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.*

14. *We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the court is not called upon to record a finding of “not guilty”. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is*



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reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail." (emphasis supplied)

13. In State of Kerala & Ors. v. Rajesh & Ors. reported as **(2020) 12 SCC 122**, the Supreme Court has observed as under :-

"19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

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



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grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.”

14. Material on record indicates that the Petitioner is a part of a well organized cartel which deals with the supply of narcotic substances. The Petitioner being a foreign national, there is always a possibility of the Petitioner fleeing away from the clutches of law and further the chances of the Petitioner to commit the same offence again cannot be ruled out. It cannot be said that the Petitioner has not committed the offence. Material on record does indicate the complicity of the Petitioner. Even though the Petitioner has been in custody for about two and a half years, the same is not a ground for grant of bail to the Petitioner. This Court is, therefore, is not inclined to grant bail to the Petitioner.

15. With these observations, the bail application is dismissed, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

JULY 30, 2024

S. Zakir