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

+ **BAIL APPLN. 2230/2024**

UCHENNA LOVEDAY ONONJU

.....Petitioner

Through: Adv Sushma Sharma, Adv Dhruv
Kumar Sharma, Adv Girish Kumar
Sharma, Adv R Sahil, Adv Stuti
Aggarwal, Adv Aayushi Gaur.

versus

THE STATE NCT OF DELHI

.....Respondent

Through: Mr. Aashneet Singh, APP for the
State with SI Sapana Sharma and HC
Gopal Yadav, PS Anti-Narcotics Cell.

CORAM:

HON'BLE MR. JUSTICE ANISH DAYAL

ORDER

28.10.2024

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1. This petition has been filed seeking regular bail in FIR No. 52/2023, registered at PS Mohan Garden under Sections 8/22/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("**NDPS Act**") & Section 14A of the Foreigners Act, 1946.
2. Petitioner has been in custody since 14th February, 2023 and jail conduct is satisfactory.
3. As per the case of the prosecution, based on secret information on 13th February 2023, they intercepted two persons of African nationality namely, the petitioner and one another person 'Bright Johnson', who were residing in Gali No.23, Bhagwati Garden, Jain Road, Mohan Garden, New Delhi.



4. The fact was conveyed to the Inspector of Anti-Narcotics Cell who forwarded the information to the Assistant Commissioner of Police ('ACP') under Section 42 of NDPS Act. A raiding team was prepared who departed at around 06:10 P.M. from the Anti-Narcotics Office, Dwarka. The team arrived at the destination at around 06:30 P.M. Around 06:50 P.M., two African nationals came out of the house and started walking towards Jain Road. They were both intercepted and they revealed their names.
5. At around 07:00 P.M., the ACP, Najafgarh was informed. In the meantime, notice under Section 50 of NDPS Act was served. They refused to be taken to the Gazetted Officer or Magistrate for the purposes of search.
6. At that point of time, petitioner and Bright stated that they stayed at second floor of the house. They were both taken to the second floor. It was noted in the charge-sheet that there was no time to take the warrant.
7. Thereafter, at 07:50 P.M., the ACP, Najafgarh arrived and search was conducted, in which from the pocket of the petitioner, one polythene was recovered which on testing was found to be 'Amphetamine', on weighing it was found to be of 58 grams. The said was seized and resulting proceedings ensued.
8. Counsel for the petitioner points out to the record of the sunset on that day of 13th February, 2023 the sunset has occurred at 06:09 P.M. Accordingly, she states that as per Section 42 *proviso* of the NDPS Act, any search inside the premises post-sunset requires the officer to record reasons for belief and follow the procedure, which has clearly not been done.
9. Counsel for the petitioner also has relied upon the decision in ***Nagesh Sharma v. The State (N.C.T OF DELHI)***, 2023:DHC:2180, where Coordinate Bench of this Court has stated that in relation to contention that



Section 42 of the NDPS Act, non-compliance would be a matter of trial, that the said submission cannot be sustained. Relevant paragraphs are extracted as under:

“23. It could be the contention of the prosecution that there can be no estoppel against statute and law. But, as discussed hereinabove, the Hon’ble Supreme Court, in the pronouncements cited, has clearly spelt out the facts and circumstances with respect to the applicability of Sections 42 & 43 of the NDPS Act. In view thereof, this Court is of the opinion that there has been a prima facie non-compliance of second Proviso to Section 42(1) and therefore an obvious non-compliance of Section 42(2) of the NDPS Act.

24. The contention of the learned APP that the issue of non-compliance of Section 42 or applicability of Section 43 of the NDPS Act would be a matter for trial and the same cannot be determined at this stage cannot be sustained. This Court, for the purposes of granting bail, has to examine the legal issues for the purpose of Section 37 of the NDPS Act. The Hon’ble Supreme Court of India, in Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798, while explaining the term “reasonable ground” in context of Section 37(1)(b)(ii), observed as under:

“6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

7. The expression used in Section 37 (1)(b) (ii)



is “reasonable grounds”. The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

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11. The Court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the Court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the Court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.”

(emphasis added)

10. APP for the State, however, states that these issues are a matter of trial as also notwithstanding the same, the seizure was made outside the house. There is no seizure from the premises and, therefore, further *proviso* would not come into the picture.

11. However, a perusal of the charge-sheet would clearly show that the seizure happened at 07:50 P.M. and there is no indication to state that the seizure was made outside the premises since the Section 50 notice had already been given earlier. Since, the petitioner had refused for being taken



to a nearest Gazetted Officer or nearest Magistrate, the question of holding back the search till much later was not necessary as per the prescribed procedure.

12. Considering these circumstances, at least *prima facie*, the procedure under Section 42 *proviso* of the NDPS Act has not been complied with. Needless to state that these are only *prima facie* assessments and will have to be subject to filtration through trial.

13. There are substantial probable causes for believing that the accused is not guilty of the offence charged and there is nothing on record to suggest that he may commit an offence while out on bail. In view of the above submission of the petitioner's counsel, the Court is inclined to grant bail to the petitioner on the following conditions.

14. In light of the above, and that the trial in the matter is likely to take some time, and it would not be prudent to keep the petitioner behind bars for an indefinite period, this Court finds it to be a fit case for grant of bail to the petitioner. Consequently, the petitioner is directed to be released on bail on furnishing a personal bond in the sum of Rs. 100,000/- with one surety of the like amount subject to the satisfaction of the Trial Court, further subject to the following conditions:

- i. Petitioner will not leave the country without prior permission of the Court.
- ii. Petitioner shall provide permanent address to the Trial Court. The petitioner shall intimate the Court by way of an affidavit and to the IO regarding any change in residential address.
- iii. Petitioner shall appear before the Court as and when the matter is taken up for hearing.



- iv. Petitioner shall join investigation as and when called by the IO concerned.
 - v. Petitioner shall provide all mobile numbers to the IO concerned which shall be kept in working condition at all times and shall not switch off or change the mobile number without prior intimation to the IO concerned.
 - vi. Petitioner will mark presence physically before the concerned I.O. every Friday at 4 P.M, and will be not kept waiting for more than an hour.
 - vii. Petitioner shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses, the complainant/victim or any member of the complainant/victim's family or tamper with the evidence of the case.
15. Needless to state, but any observation touching the merits of the case is purely for the purposes of deciding the question of grant of bail and shall not be construed as an expression on merits of the matter.
16. Copy of the order be sent to the Jail Superintendent for information and necessary compliance.
17. Accordingly, the petition is disposed of. Pending applications (if any) are disposed of as infructuous.
18. Order be uploaded on the website of this Court.

ANISH DAYAL, J

OCTOBER 28, 2024/MK/tk