



2024:DHC:7768



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

% ***Reserved on : 14th August, 2024***

Pronounced on: 4th October, 2024

+ **BAIL APPLN. 2438/2024**

EMEKA PRINCE LATHPetitioner

Through: Mr. Chetan Bhardwaj and
Ms. Priyal Bhardwaj, Advs.

versus

STATE NCT OF DELHIRespondent

Through: Mr. Amit Ahlawat, APP for the
State SI Rajendra Meena, PS Anti
Narcotics Squad, West Distt.

CORAM:

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. This petition is filed by the petitioner seeking regular bail in FIR No. 391/2022 under section 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 ('**NDPS Act**') and Sections 468/471 Indian Penal Code, 1860 ('**IPC**') and Section 14 of The Foreigners Act, 1946 at PS Tilak Nagar. Petitioner is incarcerated since 8th April 2022. The APP states, on instructions, that out of 23 witnesses, 8 witnesses have been examined so far.

Factual Background

2. As per the case of the prosecution, on 7th April 2022, at about 11:45 PM, secret information was received regarding supply of *heroin* drugs at the office of the Narcotics Squad, West District, Tagore Garden.



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A raiding team was constituted that reached along with the secret informer at *Gali* No. 34, Sant Garh. At around 4:50 PM, petitioner was identified at the instance of the secret informer. On seeing the raiding team, the petitioner tried to escape from the spot i.e. Street No. 34, in front of House No. WZ-119A, Sant Garh, Tilak Nagar and threw one red colour pouch on the stairs of a house. He was apprehended by the police party; the suspected pouch was picked up and checked by their Field-Testing Kit and was found to have 602 gms of *heroin* in it. The recovered contraband was put in a plastic container and taken into police possession. The petitioner was briefed about his legal rights and notice under Section 50 NDPS Act was served. Nothing was recovered from his personal search. Later in the intervening night of 7th and 8th April of 2022 at 12:25 AM, present FIR was registered and petitioner was arrested at 3:10 AM.

3. On 8th April 2022, request under Section 52A(2) NDPS Act, for drawing of samples of seized narcotic drugs, was made before the Magistrate and inventory was made. Subsequently on 11th April 2022, sample of the seized drugs was deposited at FSL Rohini for expert opinion. The chargesheet was submitted and 8 out of 23 witnesses have been examined and the trial is proceeding ahead.

Submissions on behalf of the petitioner

4. Petitioner's counsel made the following submissions, which can be categorized as under:

On the issue of recovery

4.1 The alleged recovery was from the red pouch on the stairs, thrown by the petitioner. It was submitted that it cannot be considered as



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recovery in absence of independent witnesses and no CCTV footage. The same was done in a public place with various nearby local shops; however, no independent witness was produced to support the case of the prosecution in this regard. Besides, there was no service of notice under Section 50 of NDPS Act before searching the alleged pouch. Judgment of Coordinate Bench in *Bantu v State Govt of NCT of Delhi* 2024:DHC:5006 was relied upon.

4.2 As regards the non-compliance of Section 50 of NDPS Act, reliance was placed on the decision of the Supreme Court in *Union of India v Shah Alam & Anr.* 2009 16 SCC 644 which involves the recovery of *heroin* and the Supreme Court held that it was in violation of the provision of Section 50 of NDPS Act on the ground that as per the seizure memo, the accused was subjected to a body search in course of which packets of *heroin* were found in shoulder bags carried by him. The Supreme Court relied on the principle that the search cannot be split up into two parts, Section 50 compliance being required for one and not for the other.

4.3 Petitioner's counsel relied on the chargesheet where it was mentioned that, first the search was made of the pouch which had been thrown and thereafter, a personal search was conducted, for which notice under Section 50 of the NDPS Act was given, but nothing was found in the personal search nor in his house.

Delay in Trial

4.4 Petitioner's counsel points out that petitioner has been incarcerated for 2 years and 4 months, and 8 out of 23 witnesses have been examined so far. Further, that conclusion of trial would take a long time. The petitioner has clean past antecedents and is entitled for bail on this



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account. Reliance was placed by him on the decision of Supreme Court in *Mohd. Muslim alias Hussain v State of NCT of Delhi* 2023 SCC OnLine SC 352, *Dheeraj Kumar Shukla v State of U.P.* 2023 SCC OnLine SC 918 and *Vishwajeet Singh v State of NCT of Delhi* 2024:DHC:1554.

Violation of Standing Order 1/88

4.5 Petitioner's counsel submitted that the contraband was seized on 7th April 2022 around 5:00 PM, but was forwarded to the FSL on 11th April 2022, after a passage of four days, whereas, clause 1.13 of Standing Order 1/88 mandates dispatch to FSL within 72 hours. For this, he relied upon *Noor Aga v State of Punjab & Anr.* 2008 16 SCC 417 & *Laxman Thakur v State Govt of NCT of Delhi* 2022 SCC OnLine Del 4427.

Falsity in case of prosecution

4.6 Firstly, petitioner's counsel submitted that from examination of PW-6 (Ct. Kanshi Ram), it was clear that the Stock Register does not corroborate items carried by the raiding team at the place of incident. The Stock Entry Register at Sr. No.14 only shows that Field Testing Kit was issued to Rakesh on 20th May 2021, whereas, the FIR is dated 8th April, 2022. Ct. Rakesh was not even a witness to the case, thereby, the carrying of laptop, printer, UPS, sealing material and weighing machine by the raiding was a falsity propagated by the prosecution. Reliance was made on testimony of PW-6, who exhibited Stock Entry Register at Sr. No.14, but later in cross-examination said that it was not made in his presence. He further stated that the Field Testing is issued for 18 months.



4.7 Secondly, prosecution's case was that petitioner came from his house to sell the contraband, however, the CDR and mobile extraction report has not been placed on record to prove any communication or location of accused and, therefore, a negative inference must be drawn against the case of the prosecution as per Section 114 Illustration (g) of the Indian Evidence Act, 1872. Reliance in this regard was placed on *Bantu (supra)*.

Non-compliance of Section 50 NDPS Act

4.8 The language of Section 50 NDPS Act mentions that the word 'nearest' has to be made in notice and provision should be complied with in true letter and spirit. Reliance in this regard was placed on *Mohd. Jabir v State of NCT of Delhi* 2023 SCC OnLine Del 1827.

Submissions on behalf of the State

5. APP for the State contended that reliance by petitioner on *Shah Alam (supra)* may not be relevant, in light of Supreme Court's decision in *Ranjan Kumar Chadha v State of Himachal Pradesh* 2023 SCC OnLine SC 1262 relying on *State of Himachal Pradesh v Pawan Kumar* 2005 4 SCC 350, where the Supreme Court held that Section 50 of NDPS Act was not required to be complied with, when the recovery was from bag. Secondly, as regards the sequence of events, the APP submitted that the raid was conducted on 7th April 2020 at 5:00 P.M. and application under Section 52A of NDPS Act was immediately moved on 8th April 2020. There was no delay, as stated in compliance of Standing Order 1/88, which in any case must be used as a guideline. He pointed out to *tehrir* where it was stated that the weighing machine was present. Moreover, 602 gms of *heroin* was seized, which is much above the 250



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gm threshold for commercial quantity. *Thirdly*, that chargesheet mentions that accused did not have a valid passport or visa, when he is alleged to have committed the offence, therefore, he was charged under Section 14 of The Foreigners Act, 1946 and under sections 468/471 IPC.

Submissions in rejoinder

6. To counter reliance placed by APP on **Ranjan Kumar Chadha** (*supra*), petitioner's counsel stated that in **Pawan Kumar** (*supra*) it had been held that, even if the person of accused and the bag of accused has been searched in contravention of Section 50 of NDPS Act and nothing incriminating is recovered from person of accused, Section 50 would have no application. However, Supreme Court in **SK. Raju @ Abdul Haque @ Jagga v State of West Bengal** 2018 9 SCC 708, a decision by a three Judge Bench, held that if a person is searched along with his bag also being searched, benefit of Section 50 of NDPS Act ought to be extended, while conducting the personal search.

7. Reliance in this regard was placed, aside from **Shah Alam** (*supra*), on **State of Punjab v Baldev Singh** 1999 6 SCC 172 & **Sachin Arora v State of NCT of Delhi** 2023:DHC:5808. In **Sachin Arora** (*supra*), when the raiding party tried to apprehend the accused, he ran and sat in the auto, and in anxiety, a black polythene fell from the accused's hand on the road, before the auto could start. The black polythene was picked up which tested positive for *heroin*. It was held by a Coordinate Bench of this Court, relying on the decision of the Supreme Court in **State of Rajasthan v Parmanand & Anr.** 2014 5 SCC 345, that Section 50 of NDPS Act would be attracted in a case where search of person as well as of the bag carried by him is conducted. **Sachin Arora** (*supra*) also took



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note of decisions in *SK. Raju (supra)*, *State of Punjab v Baljinder Singh & Anr.* 2019 10 SCC 473 and *State of Punjab v Baldev Singh (supra)*. Various other decisions were also relied upon. The Court held that the raiding team being aware of the situation, that the polythene was being carried out by the accused, must follow the procedure and cannot split the search into two parts and could not justify not giving notice under Section 50 of NDPS Act.

8. Petitioner's counsel also pointed out to photographs which had been appended along with the application under Section 91 of The Code of Criminal procedure, 1973, for the house from where the petitioner was apprehended. The said photographs show a lock on that property, noting that the house has been locked for many years, there was no access to the same and if the accused was standing inside his house, then the question of the pouch being dropped from the outside does not arise. This would draw a serious doubt on the case as framed by the prosecution. Besides, in the seven hours drill, allegedly carried out by the prosecution, in an area which is fairly crowded with shops, it was surprising that no independent witness had been brought in the picture. Further, the House No. WZ-93 D, Gali No.34, Sant Garh, Tilak Nagar, had a CCTV camera installed, however, no evidence had been collected by the Investigating Officer.

Analysis

9. Counsel for petitioner has effectively raised the following issues in support of the bail petition:

- i. The comprehensive search from the bag as well as the person was done without providing a notice under Section 50 of NDPS Act,



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prior to the search of the bag; it being a composite search, the Section 50 notice was mandated.

- ii. The word '*nearest*' was not mentioned in the Section 50 NDPS notification and therefore, made it infirm and invalid, not in line with the requirements of the provision.
- iii. Submission of the seized contraband to the FSL not within 72 hours was therefore in violation of Standing Order 1/88.
- iv. Prolonged custody of 2 years and 4 months, while only 8 out of 23 witnesses have been examined.
- v. Discrepancies in the Stock Register with respect to Field-Testing-Kit being issued
- vi. Recoveries being made without any independent witness and without videography.

10. Each of the above issues, will be dealt with as under:

11. **Comprehensive search & non-compliance of Section 50 of NDPS**

11.1 As per the case of prosecution, based on a secret information, raid was conducted at the premises in Santgarh at about 4:50 PM; petitioner tried to escape from the spot and threw a pouch on the stairs. He was overpowered, pouch was picked-up and checked through the Field-Testing-Kit and 602 gms of *heroin* was found in it. Contraband was seized. Thereafter, the petitioner was briefed about his legal rights, notice under Section 50 of NDPS Act was served and nothing was recovered from his personal search.



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11.2 Reliance was placed on decision of Supreme Court in *Union of India v Shah Alam* (*supra*), *SK. Raju* (*supra*), *State of Rajasthan v Parmanand* (*supra*) and judgment of Coordinate Bench of this Court in *Sachin Arora* (*supra*).

11.3 All these decisions of the Supreme Court have been traversed, analysed and assessed comprehensively by a recent decision of the Supreme Court in *Ranjan Kumar Chadha* (*supra*). In facts of that case, basis a secret information, raiding team confronted a person at a bus stand who was carrying a bag on his shoulder. Search of the bag resulted in recovery of *charas* which was taken into possession. The Trial Court acquitted the accused which was reversed by the High Court of Himachal Pradesh and accused was convicted. Counsel for the convict argued that since search of person of accused as well as luggage in his immediate possession was done, Section 50 of NDPS Act would apply and will have to be complied with; relying on decision *inter alia* in *SK. Raju* (*supra*). The State however, placed reliance on Supreme Court's decision in *State of Punjab v Baljinder Singh* (*supra*). The Supreme Court then went into an extensive analysis of all the previous relevant decisions in this regard including, *State of Rajasthan v Parmanand* (*supra*) (where it was held that if a bag carried by the person and the person is searched, Section 50 of NDPS Act would have application); *State of Punjab v Balbir Singh* 1994 3 SCC 299 (which mandates that if an arrest is made and person is searched, then Section 50 of NDPS Act comes into operation); the Constitution Bench decision in *State of Punjab v Baldev Singh* 1999 6 SCC 172 (where it was held that Section 50 would come into play only in the case of search of a person, as distinguished from the search of any premises); Constitution Bench



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decision of the Court in *Vijaysinh Chandubha Jadeja v State of Gujarat* 2011 1 SCC 609 (which disapproved the concept of substantial compliance with Section 50 and held that, it was mandatory and failure to comply, would vitiate the conviction).

11.4 The Supreme Court in *Ranjan Kumar Chadha* (*supra*) did a threadbare analysis of these decisions and others including, *State of Himachal Pradesh v Pawan Kumar* 2005 4 SCC 350 which held that, the term ‘person’ under Section 50 of NDPS Act, would mean a natural person or a living unit and not an artificial person i.e. a bag or a brief case.

11.5 It would be instructive, therefore, to extract relevant paragraphs as under, of this analysis by the Supreme Court in *Ranjan Kumar Chadha* (*supra*), to appreciate its opinion:

“93. Thus, in *Pawan Kumar* (*supra*) the larger Bench while answering the reference in no uncertain terms stated that “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.”

94. The Court reasoned that a person of varying capacity can carry different items on his or her body but that does not make those items as a part of body. The Court observed, “Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the



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manner in which it was carried like hand, shoulder, back or head, etc.

95. Therefore, Pawan Kumar (supra) concluded that an external article which does not form part of body is outside the ambit of the word “person” occurring in Section 50 of the NDPS Act.

96. What is most important to note in Pawan Kumar (supra) is that the search was not only of the bag, but also of the person of the accused, however, the contraband was recovered only from the bag and not from the person of the accused therein. What we are trying to highlight is that although in Pawan Kumar (supra) the search was of the accused as well as the bag, yet since the recovery of the contraband was only from the bag, this Court took the view that Section 50 would have no application.

...

103. Accordingly, Section 50 was read to be understood as applicable only to the personal search of a person and that would not extend to search of a vehicle or a container or a bag.

104. The language of Section 50 was interpreted to include search in relation to a person and not to a search of premises, vehicles or articles.

...

109. Thus, one view which originated from Dilip (supra) and relied upon in SK. Raju (supra) implied that if a person is searched and along with him or her, his or her bag is also searched, then the benefit of Section 50 should be extended while conducting the personal search of the accused.

110. However, it is pertinent to note that although Pawan Kumar (supra) has been referred to and considered in SK. Raju (supra) yet, the Court in SK. Raju (supra) overlooked the fact that in Pawan Kumar (supra) also the search was not only of the person of the accused but also of his bag. Even in such circumstances, the larger Bench in Pawan Kumar (supra) took the view that Section 50 would not



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apply if nothing incriminating is recovered from the person of the accused. Thus, there is an apparent conflict between the two decisions.”

(emphasis added)

11.6 The Supreme Court then relied upon **Baljinder Singh** (*supra*) to state that, Section 50 would not be applicable, when recovery was made from a bag or a premises. The relevant extracts from the said decision, as noted in **Ranjan Kumar Chadha** (*supra*), are as under:

“111. A three-Judge Bench in the State of Punjab v. Baljinder Singh, (2019) 10 SCC 473 considered the question: —

“8. ...

If a person found to be in possession of a vehicle containing contraband is subjected to personal search, which may not be in conformity with the requirements under Section 50 of the Act; but

the search of the vehicle results in recovery of contraband material, which stands proved independently;

would the accused be entitled to benefit of acquittal on the ground of non-compliance of Section 50 of the Act even in respect of material found in the search of the vehicle?”

112. In the aforesaid case, poppy husk was recovered from the accused's vehicle. This Court, while explaining the object of Section 50 and relying on the Constitution Bench judgment in Vijaysinh Chandubha Jadeja (supra), held that:—

“10. Section 50 of the Act affords protection to a person in matters concerning “personal search” and stipulates various safeguards.



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It is only upon fulfilment of and strict adherence to said requirements that the contraband recovered pursuant to “personal search” of a person can be relied upon as a circumstance against the person.

xxx

29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.”

(Emphasis supplied)

113. The Court went on to hold that Section 50 would be applicable only to the personal searches and not to the searches of vehicles or bags. This was in line with the ratio



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laid down in Pawan Kumar (supra) and Baldev Singh (supra). This Court held that: —

“15. As regards applicability of the requirements under Section 50 of the Act are concerned, it is well settled that the mandate of Section 50 of the Act is confined to “personal search” and not to search of a vehicle or a container or premises.

16. The conclusion (3) as recorded by the Constitution Bench in Para 57 of its judgment in Baldev Singh clearly states that the conviction may not be based “only” on the basis of possession of an illicit article recovered from personal search in violation of the requirements under Section 50 of the Act but if there be other evidence on record, such material can certainly be looked into.

17. In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as “personal search” was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid.”

(Emphasis supplied)”

11.7 In reference to High Court’s decision in **Akhilesh Bharti v State** 2020 SCC OnLine Del 306, which relied upon **SK. Raju (supra)**, the Supreme Court in **Ranjan Kumar Chadha (supra)** stated as under:

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“117. It appears that the Delhi High Court laboured under an erroneous impression that in Pawan Kumar (supra) the search was only of the bag and not of the accused. However, at the cost of repetition, we state that in Pawan Kumar (supra) the search was of both the accused as well as the bag which he was carrying. This is evident from para 2 of the judgment in Pawan Kumar (supra) wherein it has been observed as under: —

“2. ... A search of the accused and the bag being carried by him was then conducted and 360 gm of opium wrapped in polythene was found inside the bag...”

(Emphasis supplied)”

11.8 In the final analysis, the following was stated in **Ranjan Kumar Chadha** (supra):

“121. The only idea with which we have referred to the various decisions of this Court starting with Balbir Singh (supra) till Dayalu Kashyap (supra) is to highlight that Section 50 of the NDPS Act has been tried to be interpreted and understood in many ways. As noted earlier, in some of the decisions of this Court, the concept of “inextricably linked to person” was applied. In other words, if the bag, etc. is in immediate possession of the accused and the search is undertaken of such bag, etc., even then, according to those decisions, Section 50 would be applicable. It could legitimately be argued that the interpretation of Section 50 restricting its scope only to the search of a person of the accused would frustrate the object as the apprehension of the person concerned may continue to subsist that he may still be implicated by the police or any other person for more stringent punishment of carrying commercial quantity by getting rid of the rigor of the mandatory provision of Section 50 by implanting the contraband in a vehicle, bag, etc. accompanying the person. What we are trying to convey has been explained in the case of State v. Klein [See : John C. Derrnbachet.al., A Practical Guide to Legal Writing and Legal



Method (1994)]. In the said case, the issue before the U.S. Court was that whether a person can be held guilty for the offence of burglary more particularly when such person did not enter the house per se but tried to steal the object with the help of tree snips. The statute clearly declared that for burglary to happen, the defendant should be physically present. In this case, although the defendant never entered the house, yet he did extend his tree snips through the window. The Court held that, “there is no meaningful difference between the snips and his arm because the penetration by the snips was merely an extension of Klein's person.” Therefore, in the said case, the object which a person was carrying was held to be part of his body. A similar view could also have been adopted while interpreting the term “personal search”. However, in view of plain and unambiguous statutory provision, there is no scope of interpreting Section 50 in any other manner than the interpretation explained in Baldev Singh (supra) and Pawan Kumar (supra).”

...

126. As such, there is no direct conflict between SK. Raju (supra) and Baljinder Singh (supra). It is pertinent to note that in SK. Raju (supra) the contraband was recovered from the bag which the accused was carrying, whereas in Baljinder Singh (supra) the contraband was recovered from the vehicle. This makes a lot of difference even while applying the concept of any object being “inextricably linked to the person”. Parmanand (supra) relied upon the judgment in Dilip (supra) while taking the view that if both, the person of the accused as well as the bag is searched and the contraband is ultimately recovered from the bag, then it is as good as the search of a person and, therefore, Section 50 would be applicable. However, it is pertinent to note that Dilip (supra) has not taken into consideration Pawan Kumar (supra) which is of a larger Bench. It is also pertinent to note that although in Parmanand (supra) the Court looked into Pawan Kumar (supra), yet ultimately it followed Dilip (supra) and took the view that if the bag carried by the accused is



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searched and his person is also searched, Section 50 of the NDPS Act will have application. This is something travelling beyond what has been stated by the large Bench in Pawan Kumar (supra). Baljinder Singh (supra), on the other hand, says that Dilip (supra) does not lay down a good law.

127. In the facts of the present case, there is no scope of applying the ratio of Parmanand (supra) and SK. Raju (supra). At the cost of repetition, we may state that in the case on hand, there is nothing to indicate that the search of the person of the accused was also undertaken along with the bag which he was carrying on his shoulder.

...

131. The aforesaid observations made by the seven-Judge Bench of this Court, more particularly the last three lines referred to above, "These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court." persuade us to say that we must adhere to the principle of law as explained by the Constitution Bench in Baldev Singh (supra) and the larger Bench in Pawan Kumar (supra)."

(emphasis added)

11.9 What is notable in the facts of this present case, is that search was first from the bag which was thrown by petitioner and subsequently, there was search of his person, but Section 50 notice still had been given. This fact is admitted by petitioner as well since there is an argument raised that the notice itself was not properly framed and omitted the word 'nearest' (which issue is dealt subsequently in this judgment).

11.10 As noted by the Supreme Court in **Pawan Kumar** (supra), the search was both of accused as well as of the bag he was carrying but



since nothing was recovered from his personal search, Section 50 would not apply.

11.11 Taking benefit of this detailed enunciation by the Supreme Court, it is quite clear that the petitioner cannot have the benefit of argument they wish to press in respect of non-compliance of Section 50 NDPS mandate before the bag was searched. Considering that the bag was searched first and it was separate in any event, from his body, the requirement of Section 50 notice would not be necessary and subsequently, when his personal search was done, it was done after having complied with Section 50 notice. The Court therefore, does not find any infirmity, considering that the Supreme Court has conclusively held that the language of the statute has to be read in its plain and unambiguous manner and since Section 50 itself includes the word ‘*in person*’, it would be construed strictly.

12. Mention of word ‘nearest’ in Section 50 NDPS

12.1 Petitioner seeks to rely on decision by Coordinate Bench of this Court in *Mohd. Jabir v State* (2023) (*supra*) which mandated that the word ‘nearest’ must be mentioned in the notice, to ensure complete compliance of Section 50 NDPS Act. Notwithstanding, that the decision in *Mohd. Jabir* (*supra*) is now under challenge before the Supreme Court and the matter is pending, the Court deems it fit to give its own opinion in the matter, on assessment of language of the provision itself.

12.2 Section 50 of NDPS Act prescribes the conditions under which search of persons shall be conducted. It is premised on a search being conducted by an officer authorised under Section 42. It mandates that such search would be made without unnecessary delay before the nearest



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Gazetted Officer [*of any department mentioned in Section 42 i.e. Central Excise, Narcotics, Customs, Revenue Intelligence, or any other department of the Central Government empowered by special order of the government*] or to a nearest Magistrate. The mandate prescribed is to take such a person to the nearest Gazetted Officer or to the nearest Magistrate. This, as per the provision, ought to be accomplished only after the person being searched “*so requires*”. Thus, a requirement has to be ascertained from the person being searched. The provision in itself does not specify as to how that requirement is to be ascertained.

12.3 The decisions in *State of Punjab v Baldev Singh* 1999 6 SCC 172 (*para 25*) seems to suggest that even an oral determination is enough. However, decisions in *Vijaysinh Chandubha Jadeja v State of Gujarat* 2011 1 SCC 609 (*para 24*) seem to mandate that it ought to be in writing. Either way, it is well-settled by *State of Punjab v Baldev Singh* (*supra*) (*para 32*), that compliance of Section 50 is mandatory and not optional. Therefore, what needs to be ascertained is the option to be searched before a Gazetted Officer or Magistrate, and not whether the said Gazetted Officer or Magistrate is the ‘nearest’.

12.4 When the person being searched is asked to exercise the option, they are effectively being told that since the search is a body search, it can be before a Gazetted Officer or a Magistrate in order to obviate and avoid any suspicion of planting narcotics on the person. This conflates with the principle of inviolability of personal space and privacy and the sanctity thereof. The person being searched is, therefore, to be asked, in writing, and has to respond, to be recorded in writing, so that the



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recorded evidence shows that an option has been duly exercised either which way.

12.5 Subsequently, if the option exercised is for a search to be conducted before a Gazetted Officer or a Magistrate, the mandate is to take them to the ‘nearest’ one available, clearly in order to avoid any further distress to a person who has yet not been searched. Therefore, to amplify the requirement of “taking” to a nearest Gazetted Officer or a Magistrate, into the language of the notice itself, omission of which maybe taken as a serious procedural lapse, is in the opinion of this Court, not the correct view. *Mohd. Jabir (supra)*, takes this view only on the particular facts therein that the search was conducted after the option being exercised, by the ACP who formed a part of the raiding party. This Court in *Mohd. Jabir (supra)* was dealing with a situation where the rights of the person searched were compromised or would cast a shroud of doubt if a raiding party member itself becomes the supervisory officer, being gazetted per his rank. Seen from the viewpoint of the person searched, this would introduce an element of being falsely implicated with contraband with no real assurance of independent supervision. In this light, testing on facts in *Mohd. Jabir (supra)*, it could be possible that even if the notice mentioned the ‘nearest’, and the option was exercised, it could still include the Gazetted Officer/ACP or a higher officer who was present at that point.

12.6 A Coordinate Bench of this Court in *Bantu v. State Govt. Of NCT of Delhi* 2024:DHC:5006 has also taken a similar view and considered that omission to mention ‘nearest’ is at best, a procedural issue, and the accused must show prejudice being caused. In any event, a Special



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Leave Petition bearing no.SLP (Crl.) 1173/2024 *State of NCT of Delhi v Mohd. Jabir* against *Mohd. Jabir* (*supra*) is pending before the Supreme Court and, as of 30th August 2024, the matter has been listed for 2nd December 2024.

12.7 Reliance is placed on *Vijaysinh Chandubha Jadeja v State of Gujarat* (*supra*), where it is stated that substantial compliance, short of complete compliance of Section 50, cannot be permitted in law. Considering this view taken by Constitutional Bench of the Supreme Court, in the opinion of this Court, complete compliance has to be made, notice in writing ought to be given, communicated in the language that the person to be searched understands, without a proforma reply typed out, necessitating a written note with signatures of option being exercised by the person searched, and being taken to a nearest Gazetted Officer or Magistrate.

12.8 In this regard, in *State v Denis Jauregul Mendizabal* 2022:DHC:5752, this Court stressed that Section 50 of the NDPS Act demands strict compliance, including providing notice in the accused's language (the accused was a Spanish National) and involving an independent witness and a Gazetted Officer or Magistrate. The Court found these procedural failures critical, underscoring the need for complete adherence to ensure justice.

12.9 It may be useful to extract a list of requirements envisaged by Section 50 of NDPS Act, as enumerated by the Supreme Court in *Ranjan Kumar Chadha* (*supra*). The relevant portion is extracted as under:



“66. From the aforesaid discussion, the requirements envisaged by Section 50 can be summarised as follows:—

(i) Section 50 provides both a right as well as an obligation. The person about to be searched has the right to have his search conducted in the presence of a Gazetted Officer or Magistrate if he so desires, and it is the obligation of the police officer to inform such person of this right before proceeding to search the person of the suspect.

(ii) Where, the person to be searched declines to exercise this right, the police officer shall be free to proceed with the search. However, if the suspect declines to exercise his right of being searched before a Gazetted Officer or Magistrate, the empowered officer should take it in writing from the suspect that he would not like to exercise his right of being searched before a Gazetted Officer or Magistrate and he may be searched by the empowered officer.

(iii) Before conducting a search, it must be communicated in clear terms though it need not be in writing and is permissible to convey orally, that the suspect has a right of being searched by a Gazetted Officer or Magistrate.

(iv) While informing the right, only two options of either being searched in presence of a Gazetted Officer or Magistrate must be given, who also must be independent and in no way connected to the raiding party.

(v) In case of multiple persons to be searched, each of them has to be individually communicated of their right, and each must exercise or waive the same in their own capacity. Any joint or common communication of this right would be in violation of Section 50.

(vi) Where the right under Section 50 has been exercised, it is the choice of the police officer to decide whether to take the suspect before a Gazetted Officer or Magistrate but an endeavour should be made to take him before the nearest Magistrate.

(vii) Section 50 is applicable only in case of search of person of the suspect under the provisions of the NDPS Act,



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and would have no application where a search was conducted under any other statute in respect of any offence.

(viii) Where during a search under any statute other than the NDPS Act, a contraband under the NDPS Act also happens to be recovered, the provisions relating to the NDPS Act shall forthwith start applying, although in such a situation Section 50 may not be required to be complied for the reason that search had already been conducted.

(ix) The burden is on the prosecution to establish that the obligation imposed by Section 50 was duly complied with before the search was conducted.

(x) Any incriminating contraband, possession of which is punishable under the NDPS Act and recovered in violation of Section 50 would be inadmissible and cannot be relied upon in the trial by the prosecution, however, it will not vitiate the trial in respect of the same. Any other article that has been recovered may be relied upon in any other independent proceedings.”

(emphasis added)

12.10 The Supreme Court premised these conclusions on the specific view that post the information provided to the suspect, the choice exercised by accused has to be put in writing and the matter would not rest with just an oral statement of the suspect. In this regard, the following extract from ***Ranjan Kumar Chadha*** (*supra*) is instructive:

“64. There is no requirement to conduct the search of the person, suspected to be in possession of a narcotic drug or a psychotropic substance, only in the presence of a Gazetted Officer or Magistrate, if the person proposed to be searched, after being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate categorically waives such right by electing to be searched by the empowered officer. The words “if such person so requires”, as used in Section 50(1) of the NDPS Act would be rendered otiose, if the person proposed to be searched



would still be required to be searched only before a Gazetted Officer or Magistrate, despite having expressly waived “such requisition”, as mentioned in the opening sentence of sub-Section (2) of Section 50 of the NDPS Act. In other words, the person to be searched is mandatorily required to be taken by the empowered officer, for the conduct of the proposed search before a Gazetted Officer or Magistrate, only “if he so requires”, upon being informed of the existence of his right to be searched before a Gazetted Officer or Magistrate and not if he waives his right to be so searched voluntarily, and chooses not to exercise the right provided to him under Section 50 of the NDPS Act.

65. However, we propose to put an end to all speculations and debate on this issue of the suspect being apprised by the empowered officer of his right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or Magistrate. We are of the view that even in cases wherein the suspect waives such right by electing to be searched by the empowered officer, such waiver on the part of the suspect should be reduced into writing by the empowered officer. To put it in other words, even if the suspect says that he would not like to be searched before a Gazetted Officer or Magistrate and he would be fine if his search is undertaken by the empowered officer, the matter should not rest with just an oral statement of the suspect. The suspect should be asked to give it in writing duly signed by him in presence of the empowered officer as well as the other officials of the squad that “I was apprised of my right to be searched before a Gazetted Officer or Magistrate in accordance with Section 50 of the NDPS Act, however, I declare on my own free will and volition that I would not like to exercise my right of being searched before a Gazetted Officer or Magistrate and I may be searched by the empowered officer.” This would lend more credence to the compliance of Section 50 of the NDPS Act. In other words, it would impart authenticity, transparency and credit worthiness to the entire proceedings. We clarify that this compliance shall henceforth apply prospectively.”

(emphasis added)



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12.11 There is nothing in the analysis in ***Ranjan Kumar Chadha*** (*supra*) which emphasises on a written notice mentioning ‘nearest’ Gazetted Officer or a Magistrate. In the aforesaid paragraphs, what seems to be the opinion (though the specific issue of the omission of ‘nearest’ was not before the Court), is that basis an oral or written information to the accused about his rights, a no objection/waiver, if any, by the accused has to be taken in writing.

12.12 The endeavour, as stated in para 64(vi) of the requirements enunciated in ***Ranjan Kumar Chadha*** (*supra*) would then require that the endeavour would be made to take suspect to nearest Gazetted Officer or nearest Magistrate. It is also important to note that the Supreme Court in requirement at para 64(iv) indicates that the Gazetted Officer or a Magistrate must be independent and in no way connected to the raiding party. In the opinion of this Court, the requirements laid down in ***Ranjan Kumar Chadha*** (*supra*) are instructive, applicable and serve as useful guideposts for the prosecution agencies to comply. Therefore, in light of the above discussion, the contention of petitioner relating to omission of ‘nearest’ cannot be accepted and would not serve to *prima facie* absolve him.

13. Delay in submission of the seized contraband to the FSL

13.1 Petitioner’s counsel relied on ***Kashif v NCB*** 2023:DHC:3438, a decision by a Coordinate Bench of this Court, which relied on Clause 1.13 of the Standing Order 1/88, to hold that reasonable time to move an application for sample collection depends on facts and circumstances of each case. It was stated that it was ‘desirable’ that an application under



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Section 52A be made within 72 hours or near about the said time frame. In the facts of *Kashif (supra)*, application under Section 52A was filed after 51 days from the period of seizure therefore, the Court held that it was in violation of Section 52A and benefit of bail would be given to accused.

13.2 In the facts of this case, seizure was made on 7th April 2022 and on 8th April 2022 request was made under Section 52A for drawing of samples of the contraband. Subsequently, on 11th April 2022, samples were deposited with FSL, Rohini for expert opinion. This, by no means would be an unreasonable delay considering that post seizure, FIR was registered in the intervening night of 7th and 8th April 2022 and application being moved under Section 52A and samples being sent to FSL on 11th April 2022, within about 4 days, would amount to acceptable compliance. Even if the accused has to show that serious prejudice has been caused on this account of one day's delay at best, this would be a matter of trial and at this stage *prima facie* cannot be concluded, that this would give benefit to the accused or dent the case of the prosecution.

13.3 The Court would like to draw attention to Order dated 2nd November 2023 in Criminal Appeal No. 2027 of 2012 titled *Jagwinder Singh v State of Punjab*, where the Supreme Court held as under:

“8. Further, the delay in sending the sample for FSL report, in our considered view, is not fatal to the prosecution case. In any case, orders have been obtained from the Jurisdictional Magistrate for undertaking the said exercise which has attained finality.”

(emphasis added)



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14. Prolonged custody and delay in trial

14.1 Undoubtedly, the petitioner is incarcerated for about 2 years and 4 months and trial is still in progress, and only 8 out of 23 witnesses have been examined so far. Needless to state, there is no standard guideline to assess as to what would be the period of custody that should be considered as '*prolonged*'; each case would have to be seen in its own facts and circumstances. Especially when no other factor, as contended by petitioner would give him benefit under Section 37 of the NDPS Act to overcome the prescribed threshold.

14.2 The Supreme Court has consistently held in various decisions that bail on ground of undue delay in trial is unfettered by rigors by Section 37 NDPS where there is prolonged custody even in cases of commercial quantity. In this regard the decisions of ***Rabi Prakash v State of Odisha*** 2023 SCC OnLine SC 1109 (recovery of 247 kgs of *ganja* and applicant had been in custody for more than three and a half years), ***Dheeraj Kumar Shukla v State of U.P.*** 2023 SCC OnLine SC 918 (seizure of about 65 kgs of *ganja* and the petitioner was in custody for about two and a half years), ***Man Mandal & Anr. v State of West Bengal*** 2023 SCC OnLine SC 1868 (seizure which was commercial in nature and the petitioner had been incarcerated for about two years), ***Badsha Sk. v State of West Bengal*** 2023 SCC OnLine SC 1867 (seizure of 100 bottles of Phensedyl Cough Syrup, 100 ml. each, containing Codeine Phosphate, the petitioner had been in custody for about 2 years 4 months) and ***Mohd. Muslim alias Hussain v State (NCT of Delhi)*** 2023 SCC OnLine SC 352 (recovery of 180 kg of *ganja* and applicant was in custody for over 7 years and 4 months), are relevant.



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14.3 Coordinate benches of this Court have also considered the principles set out by the Supreme Court and granted bail in ***Gurpreet Singh v State of NCT of Delhi*** 2024 SCC OnLine Del 696 wherein a seizure of 26.790 kgs of *ganja* was done and only 2 witnesses had been examined, having been in custody for three and a half years, the petitioner was granted bail; in ***Ramesh Kumar v D.R.I.*** 2024 SCC Online Del 5304, where recovery of 457 kgs of *ganja*, the petitioner having been in custody for about three and a half years, the Court in relying upon these principles laid out by the Supreme Court granted bail; in ***Gopal Dangi v State*** 2024 SCC OnLine Del 4825, a case of recovery of 260 kgs of *ganja* and only one witness having been examined and the petitioner having been in custody for about 2 years, was granted bail.

14.4 In SLP (Crl) 4648/2024 titled ***Ankur Chaudhary v State of Madhya Pradesh*** order dated 28th May 2024, it was held by the Supreme Court as under:

“It is to observe that failure to conclude the trial within a reasonable time resulting in prolonged incarceration militates against the precious fundamental right guaranteed under Article 21 of the Constitution of India, and as such, conditional liberty overriding the statutory embargo created under Section 37(1)(b) of the NDPS Act may, in such circumstances, be considered.”

(emphasis added)

14.5 What may be relevant to weigh in balance in the present case, is the nature of the contraband seized. Most of the decisions cited above, giving benefit of bail for prolonged custody, seem to be cases



where *ganja* was involved and were based on their own peculiar facts. Though this cannot be formulaic, the analysis serves as a guidepost.

14.6 In this case, there has been seizure of 602 gms of *heroin* from the petitioner, which has been suitably documented, sampled and checked, being much above the threshold of 250 gms for commercial quantity. In this regard, observations of the Supreme Court in ***Ranjan Kumar Chadha*** (*supra*) are relevant and extracted under:

“129. It has been observed in Baldev Singh (supra) that drug abuse is a social malady. While drug addiction eats into the vitals of the society, drug trafficking not only eats into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to some United Nation Conventions which the Government of India has ratified. It is, therefore, absolutely imperative that those who indulge in this kind of nefarious activities should not go scot-free on technical pleas which come handy to their advantage in a fraction of second by slight movement of the baggage, being placed to any part of their body, which baggage may contain the incriminating article.”

(emphasis added)

15. Independent witness

15.1 Petitioner’s counsel has contended that there was no independent witness or videography at the time of seizure, particularly when the raiding party was coming basis an ‘information’ and the house from where seizure was made, was in a crowded area with surrounding market. Reliance in this regard was placed on decision of a Coordinate



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Bench of this Court in ***Bantu v State of Govt. of NCT of Delhi*** 2024:DHC:5006 which necessitated the requirement of independent witness and videography, particularly in cases of public places and/or in crowded areas. However, the APP for the State has pointed out to the decision of the Supreme Court in ***Jagwinder Singh*** (*supra*) where it has been held otherwise, and the relevant paragraph of which is extracted as under:

“7. We find no merit in this appeal. Law does not require only an independent witness to prove a charge attracting the provisions of NDPS Act. As was rightly held by the Courts below, there is procedural compliance with respect to arrest, seizure and recovery. PW-3 is competent to undertake the exercise of gathering evidence and, in any case, PW-7 who himself is a gazetted officer was very much present. The recovery was also made from the car. The views expressed by the Courts below that non-filling of the CFCL form at the site where the arrest and recovery was made would not vitiate the case as it constitutes a part of procedural law.”

(emphasis added)

15.2 The Supreme Court has therefore, reiterated that these are procedural issues and may not necessarily require independent witnesses to be present at that stage.

15.3 It has been noted in various judgments including the Supreme Court, that witnesses do not sometimes agree to join in matters related to seizure, considering that they fear the prolonged process, that they would get involved in. Further, in ***Baldev Singh v State of Haryana*** 2015 17 SCC 554 it has been held in para 9, that there is no legal proposition that testimonies of officials uncorroborated by independent witnesses cannot be relied upon/accepted. Even in ***Bantu*** (*supra*) and ***Sovraj*** (*supra*) the



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Court has effectively held that absence of independent witnesses may have an effect on prosecution's case during trial, however, the benefit cannot be denied to accused at the stage of bail. To the contrary it has been held in ***Mohd. Jabir*** (*supra*) that it could not be concluded that accused was falsely implicated merely due to absence of independent witness or videography. There cannot be any quarrel with the fact that presence of independent witness and videography would be desirable and would give substantial credence to the prosecution's case. However, simply if independent witnesses have been unable to join, the prosecution agency cannot hold their hands and not seize the contraband being carried by a person. Seizures are made in all kinds of circumstances and they cannot be disbelieved merely on the basis that no independent witness was present. Needless to state, that the prosecution is required to put its house in order, in order to ensure that each step by them during seizure is buttressed and supported by adequate evidence, which ensures that no allegation of false implication can survive and subsist. Aside from this, reference can be made to Section 114(e) of the Indian Evidence Act, 1872, which is extracted as under:

"114. Court may presume existence of certain facts.—The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

...

(e) that judicial and official acts have been regularly performed;

...



as to illustration (e)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances...”

16. Discrepancy in the stock register

16.1 Regards the counsel for petitioner’s contention that the stock register shows that Field-Testing-Kit was issued in 2021 and is issued for only 18 months and therefore, there would be discrepancy in the prosecution’s case that they were present with a Field-Testing-Kit at the time of raid, are issues which have to be necessarily filtered in the trial. At this stage, it would be difficult to give benefit of doubt to the accused for the purpose of considering Section 37 NDPS Act threshold.

16.2 Petitioner’s contention that the raiding team was carrying laptop, UPS, printer, sealing material and weighing machine is a falsity, are issues of facts depending on documents before the Trial Court, as well as, examination of witnesses, some of which are yet to be examined and the Court cannot form a *prima facie* opinion at this stage regarding this issue.

Conclusion

17. The grounds which have been taken by petitioner are frequently asserted by other accused as well, in bail petitions under NDPS Act and therefore, a slightly detailed and comprehensive analysis has been presented. This is also in context of the fact that there are varying decisions of Coordinate Benches of this Court, on some of these issues.

18. In view of the above discussion and analysis, the Court is unable to reach a conclusion that the threshold under Section 37 of NDPS Act has been overcome by petitioner and is unable to grant him benefit of bail at this stage. Needless to state, that if the trial does not proceed



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expeditiously and there is prolonged custody, petitioner shall be at liberty to move a fresh bail application at a subsequent stage.

19. The observations made in the judgment are purely for the purposes for assessing the bail of petitioner and shall have no bearing on merits of the matter, i.e. the case of either the prosecution or the accused.

20. Petition is accordingly dismissed, along with pending applications, if any.

21. Judgment be uploaded forthwith on the website of this Court.

**(ANISH DAYAL)
JUDGE**

OCTOBER 04, 2024/sm/na