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

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Date of decision: 22.05.2025

+ BAIL APPLN. 512/2025

JOHN OHA @ JACK

.....Petitioner

Through: Mr. Abhishek Gautam, Mr.
Amar Phogat, Mr. Vikram
Tiwary and Mr. Akshay
Gautam, Advocates.

versus

THE STATE GOVT. OF NCT OF DELHIRespondent

Through: Mr. Aman Usman, APP with SI
Jitendra Yadav, P.S.Mohan
Garden.

CORAM:-**HON'BLE MR. JUSTICE RAVINDER DUDEJA****JUDGMENT (ORAL)****RAVINDER DUDEJA, J.**

1. This is a petition under Section 483 read with Section 528 BNSS, 2023 filed on behalf of the petitioner in case FIR No.124/2023 under Section 8/21/25/29 NDPS Act and under Section 14A of Foreigners Act.

2. Learned counsel for the petitioner has submitted that police did not comply with the mandatory provision under Section 42(2) of NDPS Act. It is submitted that the secret information was neither taken down in writing nor sent to superior officers. It is argued that non compliance of provision of Section 42 NDPS Act is fatal to the prosecution case and in this regard he places reliance on the decision of a Coordinate bench of this Court in the case of *Victo Vecent Joseph*



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vs. The State of NCT of Delhi, Bail Appln. 2570/2024.

3. Learned counsel further submits that the police has not complied with the mandatory provisions of Section 50 of the NDPS Act in as much as no notice under Section 50 of the NDPS Act was given to the petitioner merely on the ground that he was only wearing an underwear at the time when he was apprehended.

4. It is further submitted that no photography or videography of recovery has been made which is essential and in this regard he places reliance on the decision of the Coordinate bench of this Court in the case of *Seema vs. State NCT of Delhi, Bail Appln. 3391/2024*.

5. He further states that the applicant has been in custody for the last about two years and has no criminal antecedents and, therefore, is entitled to be enlarged on bail.

6. The bail application has been opposed by learned APP arguing that the necessary compliance was made under Section 42 NDPS Act before conducting the raid. According to him the mandatory compliance was made prior to the registration of the FIR and applicant was arrested subsequently on the basis of further secret information and, therefore, there was no requirement of making fresh compliance of Section 42 NDPS Act. He further submits that the alleged contraband was not recovered from the person of the applicant and, therefore, there was no requirement to give notice under Section 50 of the NDPS Act to the present applicant. He further states that the police had no opportunity to make the arrangement for the videography or photography as the same was not feasible under the circumstances the recovery was affected from the present applicant. He places reliance



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on the judgment of *Chidi Berr Nwayoga @ James vs. State* dated 24.08.2022, 2022, *Crl.A.1087/2017*.

7. Learned APP has further submitted that within a short period of time since after the filing of the chargesheet, 6 witnesses out of 25 witnesses have already been examined. Applicant is a flight risk being a foreigner who was staying in the country without any passport or VISA in his possession. It is submitted that there is a recovery of 300 grams of Heroin from the packet thrown by the applicant and the applicant has not been able to overcome the rigors of Section 37 of the NDPS Act. He states that otherwise also there is a presumption in favour of the acts done by the public servant and, therefore, under the facts and circumstances no ground is made out for grant of bail.

8. I have considered the rival submissions and have perused the record.

9. As per the prosecution version, on 28.04.2023, co-accused Benjamin was apprehended on the basis of secret information and on the search of his bag, 276 grams of heroine was recovered. Upon interrogation, he disclosed that he used to buy the contraband from his friend John Oha @ Jack (petitioner herein).

10. On 22.05.2023, a secret informer came at Anti-Narcotics Office and gave information that petitioner will be going to deliver illegal drugs at Union Bank, Chander Vihar Nala around 5.00 - 5.30 pm and if raid is conducted, he can be caught red handed.

11. Based upon such information, raiding team took positions in the nearby area. At about 5.00 pm, two Nigerian Nationals were seen coming from the side of Paschim Vihar on a white colour Scooty. The



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informer identified the person driving the Scooty as appellant John. Effort was made to stop them but upon seeing the police, appellant sped away his Scooty. They were chased by the police and after covering some distance, appellant left the Scooty and threw a black colour polythene on the roadside and jumped into the Nala, which was flowing just besides the road. The pillion rider threw a white colour plastic colour polythene and he too jumped into the Nala. The Nala was covered by concrete cement and wall. Petitioner and the pillion rider hid themselves inside the Nala. When efforts to bring them out failed, fire brigade, PCR, CAT Ambulance and JCB were pressed into service. The concrete cement wall covering the Nala was broken with the help of JCB. On hearing the sound of JC machine, initially, both persons came out from the concrete cement wall, but after seeing the police party, they again hid themselves below the concrete cement wall.

12. HC Sandeep and HC Sushil were then sent inside the Nala with oxygen cylinders. They took out the petitioner and pillion rider Mohamadu Abaka.

13. On checking the black colour polythene thrown by the petitioner, it was found to be containing 300 grams of heroine. The white colour plastic polythene bag thrown by the co-accused Mohamadu Abaka was also containing 300 grams of heroine. The Scooty of the petitioner was seized and further investigation was conducted.

14. As per Section 42(1) of the NDPS Act, if the empowered Officer has prior information given by any person, it must necessarily



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be taken down in writing. Such empowered Officer, under Proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. Charge sheet records that ACP, Operation was informed about the raid and he gave permission, which could not be reduced into writing because of shortage of time, but information was later sent to superior officer. ACP, Operation was also present at the spot during the search and seizure proceedings. If there is total non-compliance with this provision, it affects the prosecution case, and to that extent, the permission is mandatory. But if there is a delay, whether it was undue or whether the same has been explained or not, is always a question of fact in such cases.

15. Admittedly, no notice under Section 50 of the NDPS Act was served upon the petitioner. The alleged recovery was effected from a polythene bag thrown by the petitioner while being chased by the raiding party. In the case of **Kalema Tumba Vs. State of Maharashtra, reported in (1999) 8 SCC 257**, where 2 kgs of heroin was recovered from a bag belonging to the accused, it was argued that since the requirements under Section 50 were not complied with, the contraband recovered in the course of the search was inadmissible. The Apex Court, while rejecting this argument and relying on **State of Punjab Vs. Baldev Singh (1999) 6 SCC 172**, held that Section 50 does not apply to the search of a bag belonging to the accused. The relevant paragraph is as under:-

“4. ... As rightly pointed out by the High Court search of baggage of a person is not the same thing as search of the person himself. In State of Punjab v. Baldev Singh, this Court has held that the requirement of informing the accused about his right under Section 50 comes into existence only when person of the accused is to be



searched. The decision of this Court in *State of Punjab v. Jasbir Singh*, wherein it was held that though poppy straw was recovered from the bags of the accused, yet he was required to be informed about his right to be searched in presence of a Gazetted Officer or a Magistrate, now stands overruled by the decision in *Baldev Singh's case (supra)*. If a person is carrying a bag or some other article with him and narcotic drug or the psychotropic substance is found from it, it cannot be said that it was found from his "person". In this case heroin was found from a bag belonging to the appellant and not from his person and therefore it was not necessary to make an offer for search in presence of a Gazetted Officer or a Magistrate.

(Emphasis supplied)."

16. Admittedly, contraband was not recovered from the person of the accused. The contraband has been allegedly recovered from the polythene bag thrown by the petitioner. Thus, the contention regarding non-compliance of Section 50 of NDPS Act is without any substance.

17. The Hon'ble Supreme Court in the case of **Narcotics Control Bureau Vs. Kashif, Criminal Appeal No. 5544/2024**, summarized the law of NDPS in Para No. 39, which is extracted below:-

"39. The upshot of the above discussion may be summarized as under:

(i) The provisions of NDPS Act are required to be interpreted keeping in mind the scheme, object and purpose of the Act; as also the impact on the society as a whole. It has to be interpreted literally and not liberally, which may ultimately frustrate the object, purpose and Preamble of the Act.

(ii) While considering the application for bail, the Court must bear in mind the provisions of Section 37 of the NDPS Act which are mandatory in nature. Recording of findings as mandated in Section 37 is sine qua non is known for granting bail to the accused involved in the offences under the NDPS Act.

(iii) The purpose of insertion of Section 52A laying down the procedure for disposal of seized Narcotic Drugs and Psychotropic Substances, was to ensure the early disposal of the seized contraband drugs and substances. It was inserted in 1989 as one of



the measures to implement and to give effect to the International Conventions on the Narcotic drugs and psychotropic substances.

(iv) Sub-section (2) of Section 52A lays down the procedure as contemplated in sub-section (1) thereof, and any lapse or delayed compliance thereof would be merely a procedural irregularity which would neither entitle the accused to be released on bail nor would vitiate the trial on that ground alone.

(v) Any procedural irregularity or illegality found to have been committed in conducting the search and seizure during the course of investigation or thereafter, would by itself not make the entire evidence collected during the course of investigation, inadmissible. The Court would have to consider all the circumstances and find out whether any serious prejudice has been caused to the accused.

(vi) Any lapse or delay in compliance of Section 52A by itself would neither vitiate the trial nor would entitle the accused to be released on bail. The Court will have to consider other circumstances and the other primary evidence collected during the course of investigation, as also the statutory presumption permissible under Section 54 of the NDPS Act.”

18. In the case of **State of H.P. Vs. Pirthi Chand and Another (1996) 2 SCC 37**, the Hon’ble Supreme Court while following the observations made by the Constitution Bench in **Pooran Mal** case, held as under: -

“4. It is to be seen whether the accused has been afforded such a right and whether the authorized officer has violated the mandatory requirement, as a question of fact, has to be proved at the trial. In *Pooran Mal v. Director of Inspection (Investigation)* [(1974) 1 SCC 345: 1974 SCC (Tax) 114] a Constitution Bench of this Court had held that power of search and seizure, is, in any system of jurisprudence, an overriding power of the State for the protection of social security and that power is necessarily regulated by law. A search by itself is not a restriction on the right to hold and enjoy property, though seizure is a temporary restriction to the right of possession and enjoyment of the property seized. However, the seizure will be only temporary and limited for the purpose of the investigation. The power of search and seizure is an accepted norm in our criminal law envisaged in Sections 96 to 103 and 165 of the Criminal Procedure Code, 1973 (for short “the Code”). The Evidence Act permits relevancy as the only test of admissibility of evidence. The evidence obtained under an illegal search and seizure does not exclude relevant evidence on that ground. It is wrong to



invoke the spirit of the Constitution to exclude such evidence. The decisions of the American Supreme Court spelling out certain constitutional protections in regard to search and seizure are not applicable to exclude the evidence obtained on an illegal search. Courts in India refuse to exclude relevant evidence merely on the ground that it is obtained by illegal search and seizure. When the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search and seizure is not liable to be shut out. Search and seizure is not a new weapon in the armoury of those whose duty it is to maintain social security in its broadest sense. If the safeguards are generally on the lines adopted by the Code, they would be regarded as adequate and render the restrictions imposed as reasonable measures.

5. It would be seen that the organised traffic in contraband generates deleterious effect on the national economy affecting the vitals of the economic life of the community. It is settled law that illegality committed in investigation does not render the evidence obtained during that investigation inadmissible. In spite of illegal search property seized, on the basis of said search, it still would form basis for further investigation and prosecution against the accused. The manner in which the contraband is discovered may affect the factum of discovery but if the factum of discovery is otherwise proved then the manner becomes immaterial”.

19. Similarly, in the case of **Khet Singh vs. Union of India [(2002) 4 SCC 380]**, this Court after considering number of earlier decisions held that:

“16. Law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected likely to have been tampered with or interpolated during the course of such search or seizure, then, it could be said that the evidence is not liable to be admissible in evidence”.

20. Admittedly, no photography/videography of recovery has been made. The Coordinate Bench of this Court in the case of **Bantu Vs.**



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State of (NCT of Delhi), MANU/DE/4519/2024, emphasized the need for videography/photography at the time of recovery. The operative portion of the said judgment reads as under:-

“81. Realizing the need of changing time, the legislature has now passed the Bharatiya Nagarik Suraksha Sanhita („BNSS“). The practice of photography and videography has now been made mandatory. Even though it is contended that, at the relevant time, the same was not mandatory, it cannot be denied that the Courts have, time and again, discarded the prosecution's story and had emphasized on the importance of independent witnesses and additional evidence in the form of audiography and videography when the same can easily be obtained due to advancement of technology.

82. This legislative enhancement is designed to ensure a more transparent and accountable approach in investigation. BNSS, with its comprehensive emphasis on technological integration, heralds a transformative era in criminal justice, promoting a system that is not only transparent and accountable but also fundamentally aligned with the principles of fairness and justice.

83. Photography and videography are universally accepted as the best practices for better erudition and appreciation of the evidence. The same ensures that the prosecution is able to better document the recovery during the investigation. BNSS stipulates that the proceedings of search and seizure shall be recorded through any audio - video means preferably through a mobile phone. As noted above, these days mobile phones are handy with almost everyone especially, in a metropolitan city like Delhi.”

21. The legal position laid down in the Case of Bantu (*supra*), has been reiterated by the Coordinate Benches of this Court in **Bail Application No. 2219/2024, titled Sanjeev Kumar Vs. State and Bail Application No. 3391/2024, Seema Vs. State (NCT of Delhi)**.

22. It is undisputed that the use of technology enhances efficacy and transparency of the police investigation and assurance fairness. Therefore, ideally, every effort should be made by the investigating agency to use technological means in aid of investigation. However, there may be situations where audio/video recording may not be



feasible like the present case. Although, the raid was conducted based upon prior information, the manner in which the recovery was affected and petitioner was apprehended made videography almost impossible. The primary focus in such circumstances is to apprehend the culprit. Petitioner was apprehended after a chase, with the assistance from other agencies like fire brigade etc. Addressing with a similar issue, the Coordinate Bench of this Court in the case of **Chidi Berr Nwayoga @ James Vs. State, 2022 DHC 3208**, thus held:-

“13. Contention of learned counsel that since no videography was shot nor any CCTV footage collected, the case of the prosecution be disbelieved deserves to be rejected. In case the Police officers had parked their cars or made arrangements for videography in advance there was a likelihood of the appellant and the co-accused coming to know about the proposed raid and thus the likelihood that they would not have gone ahead with the transaction at that place cannot be ruled out thereby making the entire action of the raiding team futile.”

23. Videography of the recovery from the petitioner would have been extremely difficult, and therefore, the absence of videography/photography is not fatal in the facts and circumstances of the present case.

24. The recovery from the petitioner is of 300 grams heroine, which falls in the category of commercial quantity. Consequently, the rigours of Section 37 of the NDPS Act would be attracted in the present case. The provisions of Section 37 of the NDPS Act are mandatory in nature. The recording of finding as mandated in Section 37 is *sine qua none* for granting bail to the accused involved in the offences under the said Act. The twin conditions provided in the said Section are (i) satisfaction of the Court that there are reasonable grounds for



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believing that accused is not guilty of the alleged offence and (ii) he is not likely to commit an offence while on bail. Both these conditions are cumulative and not alternative. Petitioner tried to run away on seeing the police officials, so much so, he threw the polythene containing the contraband and jumped into the Nala and with great effort could be taken out from the said Nala, coupled with the fact that he is a foreign national, staying in India, without requisite documents. Based on such conduct, it cannot be said that he is not likely to commit an offence while on bail.

25. In my view, the narrow parameter of bail available under Section 37 of the Act has not been satisfied in the facts of the present case. Petitioner has not been able to overcome the twin hurdle of Section 37.

26. Accused is stated to be in custody for the last about two years. Learned APP submits that in a short period of one year and three months since after the filing of the charge sheet, prosecution has been able to examine 6 witnesses out of 25, cited by the prosecution, and therefore, trial is going at a good pace.

27. Merely because, accused has been in custody since last about two years, cannot be regarded as a sufficient ground for grant of bail under Section 37 of the NDPS Act, in the facts and circumstances of the present case.

28. The allegations are grave and serious in nature. Hence, keeping in view the entire facts and circumstances, the nature and gravity of allegations, severity of punishment and in view of the bar under Section 37 NDPS Act, I am not inclined to grant bail to the petitioner.



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29. The petition is therefore dismissed.

RAVINDER DUDEJA, J.

MAY 22, 2025

IB/RM

