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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 16th April 2025

Pronounced on: 28th April, 2025

+ BAIL APPLN. 3146/2024

DAVID MWANZA

.....Petitioner

Through: Mr. J.S. Kushwaha & Ms.
Tanya Kushwaha, Advocates

versus

DIRECTORATE OF REVENUE INTELLIGENCE

....Respondent

Through: Mr. Satish Aggarwala, Sr. SC
with Mr. Gagan Vaswani,
Advocate

CORAM:

HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

RAVINDER DUDEJA, J.

1. This is an application filed on behalf of petitioner/accused David Mwanza under Section 483 of Bhartiya Nagarik Suraksha Sanhita, 2023 ["**BNSS**"] for the grant of regular bail in SC No. 260/2023, arising out of DRI/DZU/34/ENQ-22/2022 under Sections 21/23/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ["**NDPS Act**"].

2. Briefly stated, the facts of the present case are that acting upon an intelligence/information, a team of DRI Officers intercepted petitioner David Mwanza and co-accused Donalia Phiri in the Arrival Hall of Terminal-3, IGI Airport, when they had arrived from Lusaka



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to Addis Adaba and from there to Delhi on 16.12.2022. They were served with notices under Section 50 NDPS Act and under Section 102 & 103 of the Customs Act. They were apprised of their legal right that their personal search and baggage search could be conducted in the presence of a Magistrate or a Gazetted Officer of Customs. They gave their consent in writing that their personal search and baggage search would be conducted by DRI Officers in the presence of Gazetted Officer of Customs. They also gave consent for the conduct of their medical examination/X-Ray.

3. The personal and baggage search of the petitioner and co-accused led to recovery of two blocks of white coloured powder tightly wrapped with thin polythene concealed in a thin layer of soap material appearing as a soap bar. The collective weight of the soap bars was around 510 grams.

4. During the course of proceedings at IGI Airport, petitioner and co-accused passed out/ejected 69 oval shaped thin plastic capsules containing white coloured powder substance that were ingested by them in their stomach by swallowing. Out of 69 capsules so recovered, 33 capsules were passed out by the present petitioner/accused, while the other 36 capsules were passed out by co-accused Donalia Phiri. The powder from one capsule from each lot was tested with Field Testing Kit, that gave positive result for Cocaine/Methaqualone. The white coloured substance was scratched from the soap bars and on testing with the Field Testing Kit, it also gave positive result for Cocaine/Methaqualone.

5. Petitioner and co-accused were produced before the Duty



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Magistrate and vide order dated 16.12.2022, the Duty Magistrate directed the Chief Medical Officer, RML Hospital to conduct their medical examination.

6. Under their medical supervision, 9 more capsules were recovered from the petitioner and 6 capsules were recovered from the co-accused by way of natural motion/purging out on 17.12.2022. 19 more capsules were recovered from co-accused Donilia Phiri by way of motion/purging out on 18.12.2022. Petitioner was arrested on 20.12.2022. Upon completion of investigation, charge sheet was filed by DRI under Section 21/23/29 of the NDPS Act before the Special Judge.

7. Petitioner filed bail application before learned Special Judge but the same was dismissed vide order dated 05.06.2024.

8. Learned counsel for the petitioner argues that petitioner is a national of Zambia and has been in judicial custody for the last more than two years and has been falsely implicated in the present case. It has been submitted that the manner of picking the samples was not as per rules as the samples were not taken out from the individual capsule separately but the sample was drawn from the entire mixing. It is further submitted that notices under Section 50 of NDPS Act and Section 102 & 103 of the Customs Act are defective. They were neither issued nor served. The notices along with replies were typed and just signatures of the petitioner were taken on the replies. It is further submitted that respondent failed to obtain permission from the court before taking them to hospital for extraction of the drugs from the abdomen of the petitioner. It is submitted that trial may take long



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time to conclude; petitioner has clean antecedents and that he will abide by all the terms and conditions that may be imposed by the Court.

9. Bail application has been opposed by the learned Special Prosecutor, appearing for the DRI. Respondent has filed reply to the bail application. Learned Special Prosecutor submits that petitioner was apprehended with commercial quantity of narcotics substance/contraband. It is stated that all the mandatory compliances including service of notice, drawing of samples in the presence of the learned Magistrate, medical examination of the petitioner etc. were made by the DRI as per law. It is further contended that the alleged non-compliance of Section 52-A NDPS Act cannot be the ground of bail, rather, the same is a matter of trial. He further submits that notices were duly served and received by the petitioner, so much so, he replied to the notices served upon him. In any case, he submits that notice under Section 50 NDPS Act was not even required as the recovery was not from his personal search but from his body. It is argued that the allegations are grave and serious in nature, and therefore, petitioner is not entitled for the grant of bail.

10. Petitioner and co-accused conspired to smuggle the contraband by concealing the same in their body. The contraband in the form of ingested capsules and soap bars was identified as Cocaine/Methaqualone and between the two accused, they were carrying 1557 gms. of Cocaine, far exceeding the commercial quantity, threshold of 100 gms. under the NDPS Act. Consequently, the rigours of Section 37 of the NDPS Act would be attracted in the present case. Section 37



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of NDPS Act reads as under:-

“[37. Offences to be cognizable and non-bailable.—

(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. While considering the bail application under Section 37 NDPS Act, the Court has to bear in mind the provisions of Section 37 of the NDPS, which are mandatory in nature. The recording of finding as mandated in Section 37 is sine qua non 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 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. 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:



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(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.”

12. The contraband was being carried by the petitioner surreptitiously by ingesting the contraband, which clearly suggests that he was consciously facilitating the illegal trade of contraband. The same is sufficient to prima facie establish the conscious position under the NDPS Act. With regard to the compliance under the Act, 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



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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”.

13. Similarly, in the case of **Khet Singh vs. Union of India [(2002)**



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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”.

14. The documents placed on record prima facie reveal that notice under Section 50 of NDPS Act and under Section 102 & 103 of the Customs Act were served to the petitioner and he even gave reply to such notices. The record further indicates that the Investigating Officer had taken the petitioner to RML Hospital with the permission of the court for screening/scanning to confirm the presence of contraband in his body. Hence, it is not a case where no such permission was obtained before taking the petitioner to the hospital for Extraction of the drugs.

15. 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. The length of the period of his custody or filing of the charge sheet and commencement of the trial by itself is not a consideration that can be treated as a persuasive ground for granting relief to the petitioner under Section 37 of the NDPS Act.

16. The allegations, no doubt, are grave and serious in nature. The recovered quantity of contraband is way above the commercial



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quantity of Cocaine. Hence, keeping in view the entire facts and circumstances and the nature and gravity of allegations and in view of bar under Section 37 NDPS Act, I am not inclined to grant bail to the petitioner.

17. The petition is dismissed. However, it is made clear that observations made in this order are only for the purpose of disposal of the bail application and shall not come in the way while deciding the case on merits.

RAVINDER DUDEJA, J.

April 28, 2025

RM/AK