



2025:DHC:478



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% ***Date of decision: 15th January, 2025***+ **BAIL APPLN. 4513/2024****JOSEPH TANOH**

.....Petitioner

Through: Mr. Arjun Sanjay & Mr. Vasu Goyal,
Advocates

Versus

STATE OF NCT OF DELHI

.....Respondent

Through: Ms. Meenakshi Dahiya, Additional
Public Prosecutor for Respondent-
State with Sub Inspector Rajendra
Meena, Anti-Narcotics Squad, West
Distt., Delhi**CORAM:****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****J U D G M E N T (oral)**

1. The Present Bail Application under *Section 483* of the *Bharatiya Nagrik Suraksha Sanhita, 2023* (hereinafter referred to as "BNSS") / *Section 439* of the *Code of Criminal Procedure* (hereinafter referred to as "CrPC"), has been filed on the behalf of the *Petitioner-Mr. Joseph Tanoh* seeking *Regular Bail* in relation to Case bearing No. SC/766/2021 under *Sections 21/29* of the *Narcotic Drugs and Psychotropic Substances Act, 1985* (hereinafter referred to as "NDPS Act"), *Sections 307/186/353/34/471/474* of the *Indian Penal Code, 1860* (hereinafter referred to as "IPC") and *Section 14* of the *Foreigners Act*, in FIR No.



2025:DHC:478



241/2021 registered at Police Station Janakpuri.

2. It is submitted in the Application that the Petitioner has been in judicial custody since 29.05.2021 i.e. for more than 3 years and 6 months.

3. It is averred that as per the FIR No.241/2021, on 28.05.2021, a secret information was received by ASI Rajender Singh that two African nationals namely Mr. Joseph Tanoh and Mr. David, who are in the business of supply of Heroin, were coming to supply the drugs at Major Deepak Tyagi Marg at about 3:30-4:00 a.m. ASI Rajender Singh apprised Inspector Mr. Pramod Kumar (*PW-4*) about this information, who in turn informed ACP (Ops) Mr. Sudesh Ranga (*PW-3*). On the instructions of ACP Sudesh Ranga, the raid was conducted and in the process of apprehension of the accused persons, they allegedly tried running from their scooty. The rider, Mr. Joseph Tanoh, took out a white polythene from the left pocket of his pant and threw it on the footpath, while the pillion rider, David attacked Constable Rakesh, on his upper back with a sharp thing and managed to run away.

4. FIR No. 241/2021 under Sections 186/353/307/34, 471/474 of IPC and Section 21(c) read with Section 29 of NDPS Act and Section 14 of the Foreigner Act, was registered at Police Station Janakpuri, Delhi.

5. The first illegality which arises in the circumstances, is that the directions of raid given by the ACP Sudesh Ranga was completely frivolous and not sustainable. It is submitted that in the Complaint under Section 195 of CrPC, filed by the Prosecution, clearly indicates that the Inspector Pramod Kumar had taken the permission from ACP Sudesh Ranga, to conduct the raid whereas this fact has been completely denied by the ACP in



2025:DHC:478



his cross-examination.

6. PW-2, ACP Sudesh Ranga in his cross-examination, has admitted that he was neither apprised about the secret information before the raid or at the time of search and seizure nor he did give any directions to conduct the raid. Furthermore, he has also stated that the Statement Ex.PW-2/DX1 was not the Statement which he had given to the Investigating Officer; thereby establishing that no permission for conducting the raid was given by any Competent Officer.

7. Moreover, there are major contradictions in the Statement made by Inspector Pramod Kumar under Section 161 of CrPC and his testimony recorded before the learned Trial Court.

8. Furthermore, in the Reply filed by the Respondent/State to the Bail Application filed by the Applicant before the learned Special Judge, it is clearly stated that the permission for raid was taken from the ACP Sudesh Ranga. *It is trite law that only a Gazetted Officer can give directions for the raid under Section 41(2) read with Section 42 of the NDPS Act.* There is clear non-compliance of this Section. Thus, the raid has been conducted without the permission of the Gazetted Officer.

9. Reliance has been placed on State of Punjab vs. Balbir Singh, 1994 SCC (3) 299, wherein it has been held that non-compliance of Section 42 of NDPS Act, is a serious violation that vitiates the entire proceedings under the NDPS Act. Failure to comply with the mandatory provisions render the search, seizure and arrest invalid and the accused is entitled to Bail on this ground itself.



2025:DHC:478



10. The next illegality is non-compliance of Section 50 of the NDPS Act, which mandates that the accused has to be informed of his right to be searched in the presence of nearest Magistrate or a Gazetted Officer. The Police Officials failed to inform the Applicant about his rights and failed to serve *any Notice under Section 50 of the NDPS Act*, before carrying out his search and recovering prohibited substance i.e. 280 grams of Heroin from the white coloured polythene. The Notice under Section 50 of the NDPS Act was served upon the accused only after the alleged recovery was affected. Moreover, the same Officer, ACP Sudesh Ranga, who had given the permission for raid, was called to the spot.

11. The search had already been conducted and the recovery effected before arrival of the ACP at the scene, as is admitted by PW-2, ACP Sudesh Ranga, in his testimony. The search has been carried out in violation of Section 50 of the NDPS Act.

12. The Applicant has placed reliance on the Apex Court decision in S.K. Raju @ Abdul Haque @ Jagga vs. State of West Bengal, (2018) 9 SCC 708 and State of Rajasthan vs. Parmanand, (2014) 5 SCC 345 wherein it is held that Section 50 of the NDPS Act would be applicable where search of a person as well as the bag carried by such person is conducted; the accused has a right of being informed of his rights under Section 50 of the NDPS Act, failure of which invalidates the search and seizure.

13. Reliance has also been placed on decisions of this Court in Vinay vs. State (Bail Appln. 1983/2023) and Akhilesh Bharti vs. State, 2020 SCC OnLine Del 306 in support of Appellant's case. The Appellant has also



2025:DHC:478



relied upon decision in Sukhdev Singh vs. State of Haryana, (2013) 2 SCC 212; Ajit Singh vs. State (Bail Appln. No. 2384/2017, decided on 18.01.2018). Therefore, it is submitted that the Applicant is entitled to grant of Regular Bail.

14. Learned Counsel for the Petitioner has also argued that the accused was arrested on 28.05.2021 and has been in judicial custody for about three years and eight months and out of 24 prosecution witnesses, only 2 witnesses have been recorded till date. There is no likelihood of the trial being completed in near future. Delay in trial vitiates rights of the accused to expeditious trial and impinges on his right to liberty guaranteed under Article 21 of the Constitution of India.

15. It is, therefore, asserted that considering the contraband quantity which is about 280 gms. and also the discrepancies in the entire procedure which creates a doubt about the prosecution story, and the fact that there is delay in conclusion of the trial, the Petitioner is entitled to Bail.

16. Respondent-State *in the Status Report* has submitted that on 28.05.2021 at about 11:30 PM, secret information was received by ASI Rajender in the office of Anti Narcotics Squad, West that two African nationals, namely, Joseph i.e. the Petitioner along with one David, who are drug peddlers shall supply Heroin. At around 03:30 AM, two African nationals came on a scooty and were waiting for someone. When ASI Rajender along with Constable Rakesh tried to stop them, the person who was driving the scooty shouted to his accomplice “*save me.... kill him.. kill him.*” and the pillion rider on the scooty stabbed Constable Rakesh on his



2025:DHC:478



back and escaped from the spot, taking benefit of darkness. In the meanwhile, the person caught by Constable Rakesh threw the polythene packet on the footpath, which was immediately picked up by ASI Rajender Singh and was taken in his possession. The polythene packet was containing 280 gms. of Heroin, which was seized by the police and subsequently the Seizure Memo was prepared.

17. It is further stated that personal search of the accused and of the scooty was conducted before ACP Sudesh Ranga as per the procedure under Section 50 of the NDPS Act, but no contraband was recovered from his possession on his person.

18. It is also stated that during interrogation, accused had disclosed that his absconding accomplice, David had arranged the narcotic substance and only he knew the origin of the same.

19. During further investigation, the Passport of the accused i.e. Passport No. 17AL45299, Visa No. VJ 3900007 and Business Visa No. VJ 3900007 on this Passport, and Passport No. 17AL49384, were sent for enquiry to the Ministry of External Affairs and a Report was received stating, *“This is to inform that this mission issued Indian tourist Visa No. VJ 3900007 on Passport No. 17al45299 to Mr. Tanoh Joseph on 14th June 2017 however the Indian Business visa No. VJ 3900007 on passport No. 17AL49384 was not issued by the Embassy of India at Abidjan”*

20. It is further stated that during investigation, the samples of the contraband were sent for chemical analysis and the Report has been received as *“on chemical, TLC, GC & GC- MS examination: Exhibit ‘A’ was found*



2025:DHC:478



to contain Diacetylmorphine, Acetaminopen, caffeine Dextromethaorphan, Morphine, Acetylcholine and Monodactyl morphine”.

21. The Additional Public prosecutor has therefore, argued that the offence is serious and the applicant is a foreign National whose Business isa has been found to be forged. The accused is also a flight risk. Also, the endeavour is being made for expeditious trial. The Bail is thus, opposed.

22. Submissions heard and record perused.

23. The contraband quantity allegedly recovered from the Petitioner is 280 gms. of Heroin, which is commercial quantity. The menace of drug abuse in the society can never be overlooked.

24. Heroin (a hard drug), an opioid, directly impacts the central nervous system, leading to rapid addiction, severe withdrawal symptoms, and has a high propensity for overdose, often resulting in death. It presents a significantly graver threat to public health and individual well-being as compared to cannabis (a soft drug). Moreover, the risk of fatal overdose associated with heroin use is markedly higher. Heroin used on a regular basis has been noted to have major health and lifestyle problems such as collapsed veins and skin abscesses, and in the long term, the effects are seen in the deterioration of the brain's white matter and it also produces high intolerance and physical dependence, thus, proving to be highly addictive.

25. The Apex Court in the case of Ranjan Kumar Chadha vs. State of Himachal Pradesh, 2023 SCC OnLine SC 1262 has observed that *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*



2025:DHC:478



by drug trafficking is often used for illicit activities including encouragement of terrorism. It is therefore, absolutely imperative that those who indulge in this kind of nefarious activities, should not go scot free on technical pleas”.

26. Since the contraband recovered from the Appellant is of commercial quantity, embargo under Section 37 gets attracted. In Union of India vs. Thamisharasi, (1995) 4 SCC 190 it was observed that clause (b) of sub-section (1) of Section 37 of the NDPS Act imposes limitations on granting of Bail in addition to those provided under the Code. The two limitations are: (1) an opportunity to the Public Prosecutor to oppose the Bail application, and (2) satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on Bail.

27. According to the Prosecution, the Appellant was on his scooty and apprehending his arrest, he threw the polythene bag on road, from which 280 gms. of heroin was recovered.

28. ***The first procedural lapse on the basis of which the Petitioner has sought Bail*** is that there was ***non-compliance of Section 42 of NDPS Act***, which mandates that if the Officer has a good reason to think that illegal drugs, substances or property obtained through illegal means are hidden somewhere; certain Government officer has the power to carry out searches and make arrest without a warrant if they believe that a drug related crime has been committed. These officers must be higher in rank than a peon, sepoy or constable and must be authorized by either the Central or State



2025:DHC:478



Government. Section 42 of the NDPS Act further provides that where an officer has taken down information in writing or records reasonable reasons to believe that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence; *he shall within seventy-two hours send a copy thereof to his immediate official superior.*

29. As per the Charge Sheet, the information received was duly conveyed to ACP Sudesh Ranga, who had orally instructed to pursue the secret information. It is stated by Respondent-State that the DD entry was duly recorded in respect of information received and there was compliance of Section 42 of the NDPS Act was duly made.

30. Learned Counsel for the Petitioner has vehemently contended that ACP Sudesh Ranga, who has been examined as PW-2, in his cross-examination has admitted he was neither apprised about the secret information before the raid or at the time of search and seizure nor he gave any kind of instruction to conduct the search. Therefore, assertion of Inspector Pramod Kumar that he had taken due permission from ACP Sudesh Ranga, is not proved, which shows non-compliance of Section 42 of NDPS Act.

31. The issue of non-compliance with the procedural requirements under Section 42 of the NDPS Act at the stage of Bail was considered in Union of India vs. Nawaz Khan, Criminal Appeal No. 1043 of 2021 (Arising out of SLP (Crl) No. 1771 of 2021). In this case, reliance was placed upon Karnail



2025:DHC:478



Singh vs. State of Haryana, (2009) 8 SCC 539 wherein it was *inter alia* held that though the writing down of information on the receipt of it should normally precede the search and seizure by the officer, however, in exceptional circumstances that warrant immediate and expedient action, the information shall be written down later along with the reason for the delay.

32. In Karnail Singh (supra), it was further held that the compliance with the requirements of Sections 42 (1) and 42 (2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. However, in special circumstances involving emergent situations, these requirements may get postponed by a reasonable period, that is, after the search, entry and seizure. The Apex Court emphasized that while total non-compliance with requirements of subsections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42.

33. The Apex Court in Karnail Singh (supra) further held,

“To illustrate, if any, delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of



2025:DHC:478



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

34. The Coordinate bench of this court also in Gurjeet Singh vs. State of NCT of Delhi Bail Appln. 2209/2022 vide Order dated 07.09.2022, *inter alia* held that the affect of non-compliance, if any, of any mandatory provision by the Investigating Officer, any irregularity or illegality committed at the time of making of the seizure memo, etc. is essentially a matter of trial and cannot be looked into in detail at this stage for grant of Bail unless there is any glaring irregularity which will make the seizure itself illegal.

35. Pertinently, in the Chargesheet it has been expressed that due compliance of the procedure prescribed under Section 42 of the NDPS Act was followed. At the stage of grant of Bail, the evidence of the witnesses cannot be considered in isolation, when other Prosecution witnesses are yet to be examined. Such minute scrutiny into the isolated statement of a witness, without considering the entire case, cannot be agitated as a ground for Bail. *Prima facie* at this stage no conclusion of there being non-compliance of Section 42 of the NDPS Act, can be drawn, the benefit of which should ensure to the accused.

36. ***The second ground agitated by the Appellant for grant of Bail*** is that there is ***non-compliance of Section 50 of the NDPS Act***, inasmuch as no prior intimation was given to the accused about his right of conduct of



2025:DHC:478



search in the presence of a Gazetted officer.

37. In the case of State of Punjab vs. Baldev Singh, (1999) 6 SCC 172 has observed that if any Officer on the basis of an information, without any prior permission as contemplated under the provisions of the NDPS Act, makes a search or cause arrest of a person during the normal course of investigation into an offence or suspected offence as provided under the provisions of CrPC; and on completion of such search, a contraband under the NDPS Act is recovered, the requirement of Section 50 of the NDPS Act is not attracted and the question of complying with the requirements thereunder would not arise.

38. Also in State of H.P. vs. Pawan Kumar, (2005) 4 SCC 350 the Apex Court was considering a situation where the contraband was seized from the bag of the Applicant and not his person, held that Section 50 is not applicable when the search is made of the bag being carried by the person. Further, it has been held that the phrase “*search any person*” as described in Section 50 would not include the bag which was being carried by the individual and therefore, recovery of narcotics from the bag of the accused would not attract the provisions of Section 50 of the NDPS Act. The Court held that the term “*person*” under Section 50 of the NDPS Act would mean a natural person or a living unit and not an artificial person i.e., a bag or a briefcase.

39. In the present case, it cannot be overlooked that at the time the accused was apprehended, he had already thrown the bag on the road. As per the Prosecution, ACP Ranga was called to the spot in whose presence,



2025:DHC:478



further search was conducted. At this stage, there cannot be minute scrutiny about the correctness of the procedure alleged to have been not followed and it can be considered only during trial.

40. *The third ground on which the Bail is sought by the Petitioner is that there is delay in trial.* The plea of delay in trial and prolonged incarceration has been recognized by the Apex Court as an inalienable right under Article 21 of the Constitution of India, but it cannot have universal application. The assessment of prolonged custody and delay in trial has to be assessed in the facts and circumstances of the given case.

41. The Applicant herein is an African national. On verification, *no Business Visa was found to have been issued on his Passport.* In the given circumstances, it cannot be said that there is no fraud played by him. Moreover, as per the Prosecution, there was another co-accused along with the Petitioner when he was apprehended, who was allegedly knowing the source from where drugs were being procured by them, who managed to escape and has not been apprehended and has been declared a *Proclaimed Offender.*

42. In light of the aforesaid discussion and considering the serious allegations against the Petitioner, it cannot be concluded that the Petitioner is not guilty of committing offence or that he is not likely to commit the same in near future.

43. Finding no grounds for Bail, the present Petition is accordingly dismissed.



2025:DHC:478



(NEENA BANSAL KRISHNA)
JUDGE

JANUARY 15, 2025

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BAIL APPLN. 4513/2024

Page 14 of 14