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

Reserved on: 21.05.2021
Pronounced on: 31.05.2021

+ **BAIL APPLN. 500/2021**

MOHAMMAD AKBARPetitioner

Through: Mr.Amjad Khan, Advocate

Versus

STATERespondent

Through: Mr. Amit Chadha, Additional Public
Prosecutor for State

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. Petitioner, who is accused in FIR No. 117/2019, registered at Special Cell, New Delhi for the offences under Sections 21/25/29 of *Narcotic Drugs and Psychotropic Substances Act, 1985* (henceforth referred to as “*NDPS Act*”), is seeking bail by this petition. In the alternative, a prayer is made to release him on interim bail for 45 days.

2. The case of the prosecution is that on 17.07.2019, upon receipt of secret information, a raiding team was constituted and after collecting IO bag, field testing kit, electronic weighing machine and official brass seal of "SPL CELL NDR 38", the raiding team headed towards ISBT/Majnu Ka

Tila and when they further received secret information that Deepak with his associates will assemble at 12:30 PM under Ashram Flyover, they reached there and tried to join two public witnesses, who refused to join the proceedings due to their own compulsions.

3. At around 12:30 PM two cars bearing registration number DL3C BE 1152 & DL3C AA 8369 came at the place of information, whose drivers came outside and started talking to each other and as the secret informant gave signal, the raiding party apprehended both the drivers. They disclosed their entity as Dheeraj @ Deepak and Rais Khan. Both admitted that they were carrying heroin with them. From the cavity of their cars, contraband of 30 kg. each i.e. total 60 kg. was recovered. Thereafter, the contraband was seized, samples were drawn, marking were done, *rukka* was prepared, the case property was sent to the Special Cell and samples were sent to FSL for analysis. Both the drivers/accused- Dheeraj @ Deepak and Rais Khan were arrested. Upon disclosure of accused Dheeraj @ Deepak, a search was conducted at House No. 483, Gali No. 21 Zakhir Nagar, Okhla, Delhi on 18.07.2019 and from the said house contraband of 60 kg was recovered and three persons, namely, Vakeel Ahmad @ Rahul, Rhamat Gul Shinwari & Akhtar Mohamad were apprehended and two pistols were also recovered &

seized from the said house. In addition, recovery of 30 kg. of contraband was affected from the car of Vakeel Ahmad.

4. On the disclosure of Rehmat Gul Shinwari, two more persons namely Mohammad Akbar (present petitioner) and Neda Mohammad were arrested on 22.7.2019 from JM Cool House Pvt. Ltd, Kondli, Sonapat, Haryana. Both these persons revealed that they were carrying heroin from Afghanistan through Atari border, secretly hidden in card board cartons of dry fruit. This information was conveyed to Sh. Lalit Mohan Negi, ACP/NDR, for compliance of Section 50 of NDPS Act.

5. Thereafter, in the presence of ACP Lalit Mohan Negi, in compliance of Section 50 NDPS Act, accused persons disclosed that contraband is hidden in cartons bearing special mark of "105", filled with Raisin. At their instance, two polythene packets were recovered embedded in discreet manner; between the side layers of the cardboard. On further opening of these recovered packets, it found containing brown substance, in the form of paste. Similarly, all the cartons were checked with the help of staff and a total number of 102 cartons on which "105" were written were found. Each carton was containing two transparent polythene packets, containing suspicious contraband. These cartons were segregated from other raisin

boxes and marked. On one-by-one checking of both polythene packets, present in cartons with the help of field-testing kit, it confirmed as "heroin" in each polythene packet, as purple colour appeared with reagents 'A-1' and 'A-2'. After that, two samples of 50 gm each were taken out from both polythene packets and each kept in separate small transparent plastic container and 408 sample *pulandas* were prepared with the help of doctor's tape and marked. The remaining packet exhibits were also marked (parent bag) containing total heroin weighing 29.15 kg and were kept in a separate plastic container and *pulanda*. All the exhibits were sealed and the seal was returned after completion of procedural formalities. During search of Cool House located at Sonapat, Haryana, further recovery of approximately 49.55 kg. of contraband was made, which was embedded in card box cartons containing dry fruits bearing special marking, mentioned above.

6. On the next day i.e. 23.07.2019, accused Neda Mohammad revealed that he works for Mr.Baba Jaan, who is residing in Afganistan, in connivance with Ahmed Shah @ Nawab. He further revealed that another person, namely, Ahmad Shah Alokozai @ Hazi @ Nawab is also working with him and accordingly, after compliance of Section 42 of NDPS Act, Ahmad Shah Alokozai @ Hazi @ Nawab was arrested on 23.7.2019 from

Lajpat Nagar, but nothing was recovered from his possession. However, admitted that he works for Baba Jan, who is residing in Afganistan and also disclosed that a consignment of heroin has already reached at Nhava Sheva Port, Mumbai. He also disclosed that Baba Jaan manages racket of contraband in Afghanistan, whereas another person, namely, Tifle Naukhez, a resident of Okhla, Delhi, manages racket of contraband in Delhi. Both are the kingpins in their country. He revealed that he acts as a coordinator between Tifle Naukhez & Baba Jaan.

7. Upon receipt of this information, on 26.7.2019 search was conducted at JWC Hub, Logistic Part, Shirdhon, Panvel, Maharashtra and a total number of 264 jute bags containing approximately 130 kg. of heroin were recovered imbibed/soaked therein.

8. Pertinently, a total of approximately 329.55 kg. of contraband was recovered in this case and main accused namely Tifal Nau Khez @ Tifaley was arrested for allowing his premises & vehicles for illegal trafficking of contraband.

9. There are total nine accused in the FIR in question and name of petitioner appears at serial No.7 in the charge sheet. Petitioner is in custody since the date of his arrest on 22.07.2020.

10. At the hearing, learned counsel for petitioner submitted that the trial court's order dated 61.01.2021 rejecting petitioner's bail application, has been passed in a callous manner as a mouth piece of prosecution evidence. Learned counsel submitted that petitioner is an Afgani national, who does not know English or Hindi and understands only Afgani and he has been illegally arrested in this case without following the due procedure of law prescribed under the provisions of NDPS Act.

11. It is submitted that petitioner in judicial custody has been facing serious medical problems i.e. '*critical grandular hypospadias and urinary tract infection*' and is required to undergo surgery at the earliest. However, the learned trial court while dismissing petitioner's bail application has completely ignored his medical condition.

12. Further submitted that allegedly recovery of 49.55 kg of heroin has been made from godown/factory JM Cool House Private Limited, Kundli, Sonapat, however, nothing has been recovered from the person of present petitioner. The investigation in the present case has been conducted in complete violation of Sections 42 and 50 of NDPS Act inasmuch as the Investigating Officer had informed the ACP/NDR about Section 50 of NDPS Act, instead of Section 42 of NDPS Act, as the prosecution case is

silent about it.

13. Reliance was placed upon decision of Hon'ble Supreme Court in ***Kishan Chand Vs. State of Haryana 2013 (1) AD (SC) 39*** wherein it is observed that *“provisions like Section 42 and 50 of the Act are the provisions which require exact and definite compliance as opposed to the principle of substantial compliance. Once there is total non-compliance and these provisions being mandatory in nature, the Prosecution case must fail”*.

14. Learned counsel for petitioner further submitted that even the accused/petitioner was neither informed about his legal rights to be searched in the presence of Gazzeted Officer/Magistrate, nor any public witness was asked to join the investigation, which is in clear violation of Statutory provisions of Section 100 of Cr.P.C.

15. Learned counsel next submitted that the notice under Section 50 of NDPS Act was served upon the petitioner in language English, whereas petitioner is a Afgan national and no language interpreter was called to explain him the provisions of Section 50 of the Act and it is so evident from the Notice under Section 50, which does not bear thumb impression of petitioner. Whereas petitioner was made to mark his thumb impression on all the documents prepared by the Investigating Officer at the spot, which

castes doubt upon the prosecution case and entitled the petitioner to bail.

16. In support of above submissions, reliance was also placed upon decisions of Hon'ble Supreme Court in *Vijaya Sinh Chandubha Jadeja Vs. State of Gujrat AIR 2011 SC 77* and *State of Rajasthan Vs. Parmanand and Anr. (2014) 5 SCC 345* in support of petitioner's case.

17. Lastly, it was submitted that not only there is non-compliance of mandatory provisions of NDPS Act but also the fact that no contraband has been recovered from the person of petitioner and that the only material against him is disclosure of co-accused. Thus, there are enough reasons to fatal the case of prosecution.

18. The afore-noted submissions advanced by learned counsel for petitioner were vehemently controverted by learned Additional Public Prosecutor for State, who submitted that petitioner is a member of large syndicate who are involved in the illegal trafficking of contraband across this country. Learned Additional Public Prosecutor drew attention of this Court to various parts of charge sheet to show the chain of events via which petitioner came into picture in the present case. Attention of this Court was also drawn to the statement of Rehmat Gul Shinwari, on whose disclosure petitioner was apprehended along with co-accused Neda Mohammad and

49.55 kg of heroin was recovered.

19. Learned Additional Public Prosecutor further submitted that the accused under the *modus* used to hide the contraband/heroin in the containers carrying raisins and as per Bill of Lading, the petitioner was the exporter. The person in whose name the raisins, used as a shield to disguise the contraband, order placed was identified as *Charan Singh* who is running his business at Mahavir Nagar, Tilak Nagar, Delhi. He was examined and his role found only limited to procuring the raisins only. Moreover, the importer has also clarified regarding the exporter and he has confirmed that present petitioner is the exporter.

20. Further submitted that the search and seizure of the contraband was carried out after following due procedure prescribed under various provisions of NDPS Act and in the presence of public witness/store keeper.

21. Next submitted that the total recovery affected in this case is 329.55 kg and there-being huge commercial quantity, bar of Section 37 of the Act would come into play and on this ground alone, the petition deserves dismissal.

22. Further submitted by learned Additional Public Prosecutor that two co-accused, namely, Ahmed Shah Alokozai and Neda Mohammad, who

were granted interim bail have jumped their bail, are absconding and have been declared proclaimed offender by the trial court. Similarly, if petitioner, who is also a Afgan national, if released on bail, there is every possibility of his absconding from the judicial process of law.

23. Lastly, Additional Public Prosecutor for State submitted that the reliance placed upon decisions in *Vijaysinh Chandubha Jadeja* and *State of Rajasthan (Supra)* is of no assistance to the case of petitioner, as necessary compliance under the provisions of NDPS Act has cautiously been made in this case. Thus, learned Additional Public Prosecutor for State submitted that this petition deserves to be dismissed.

24. This Court had heard the rival contentions urged by both the sides at length and perused the material placed on record.

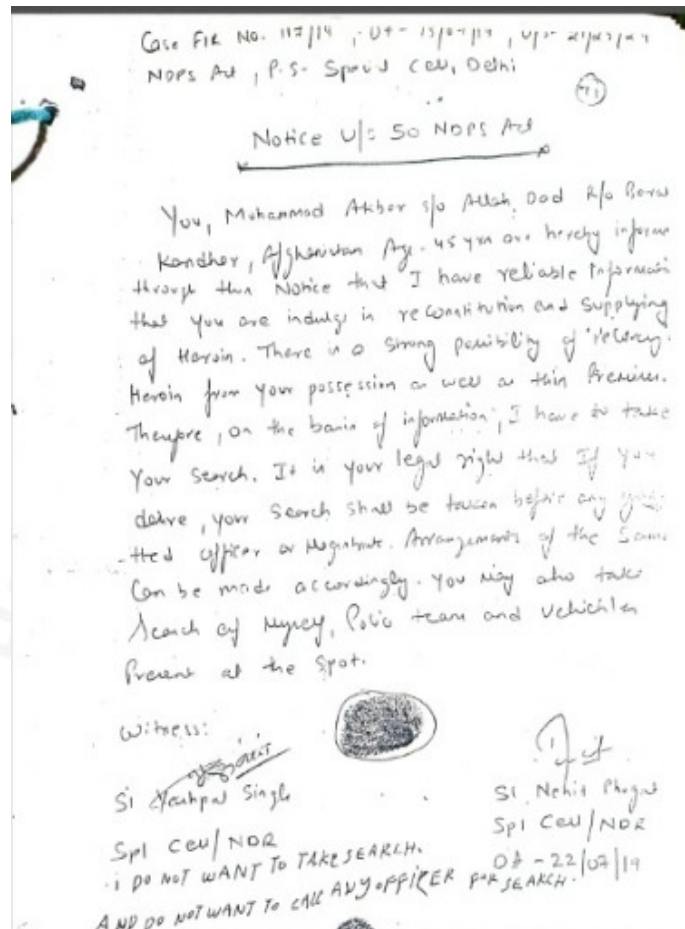
25. It is not in dispute that petitioner along with co-accused Neda Mohammad, was arrested on 22.7.2019 from JM Cool House Pvt. Ltd, Kondli, Sonapat, Haryana and further, on their disclosure, 49.55 kg. heroin was recovered from the said place. After conclusion of investigation, charge sheet in this case was filed and charge under Sections 21/25/29 of NDPS was framed against the petitioner. However, petitioner has not challenged the order of charge.

26. Pertinently, trial has commenced and while considering the bail application of petitioner, this Court is not required to analyse the minute details of this case, but has to only *prima facie* find out whether there are grounds to believe that necessary and mandatory compliance of various provisions prescribed under the NDPS Act has been made or not.

27. The first and foremost objection to the case of prosecution, raised by counsel for petitioner is that investigation in the present case has been conducted in complete violation of Section 50 of NDPS Act. It is also pleaded that no language interpreter was called to explain him the provisions of Section 50 of the Act and it is so evident from the Notice under Section 50, which does not bear thumb impression of petitioner. Attention of this Court was drawn to the copy of Notice under Section 50 of the Act (Annexure P-3) served upon the petitioner to show that it did not bear signatures of petitioner and contents thereof were in language English and the petitioner was not explained about his legal rights.

28. The learned Additional Public Prosecutor for State refuted the claim of petitioner while placing on record another copy of Notice under Section 50 of the Act served upon the petitioner to show that the original in the record of prosecution bears the signatures of petitioner, which can be seen as

under:-



29. A perusal of above image refutes the claim of petitioner that Notice under Section 50 does not bear his signatures or thumb impression.

30. Further, learned Additional Public Prosecutor for State had also shown this Court a copy of statement of SI Nehit Phogat, recorded in Inner Diary, who was present with the team at J.M.Cool House Pvt. Ltd., where seizure and arrest proceedings were conducted. This statement records the role attributed to the petitioner in the present case. It is noted therein that

petitioner along with his co-accused Nida Mohd. had visited the J.M.Cool House Pvt. Ltd during day time but since they were not having the e-bill, therefore, out pass was not issued in their favour. It also categorically notes that the accused persons were made aware of their rights at the time of serving of notice under Section 50 of NDPS Act but they refused to avail that opportunity. It also notes that accused Rahmat Gul, at whose instance these two accused, including petitioner were apprehended, explained them about their legal rights and he only on their behalf replied to the notice under Section 50 of the Act.

31. The afore-noted contents of statement of SI Nehit Phogat, recorded in Inner Diary *prima facie* supports the case of prosecution inasmuch as it shows that accused Rahmat Gul had played the role of translator /interpreter for the petitioner and other accused.

32. So far as the plea of prosecution that since total recovery affected is 329.55 kg, which is commercial quantity, therefore, bar of Section 37 of the Act would apply, the provisions of Section 37 of NDPS Act read 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 2[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.]”

33. In the case in hand, learned Additional Public Prosecutor for State has strenuously opposed the present petition for release of petitioner on bail on the ground that huge commercial quantity of contraband i.e. 329.55 kg. has been recovered in this case and petitioner is a part of large syndicate and the modus in which the contraband travelled in the country casts a doubt upon his credibility. This Court is informed that two co-accused Ahmed Shah Alokzai and Neda Mohammad, who were granted interim bail, are absconding and have been declared proclaimed offender by the trial court. Petitioner is also a Afgan resident and if he is released on bail, there is every likelihood that he will abscond from trial. Moreover, as per embargo put under Section 37 of the Act, petitioner is not entitled to bail in the present

case. In addition, this Court finds that at this stage, evidence and material on record is not required to be pre-judged and parties can establish their case during trial.

34. As far as the plea of petitioner that no public witness was involved during search and seizure proceedings and also at the time of personal search of petitioner, the stand of prosecution is that these proceedings were conducted in the presence of store keeper of the godown and also that the recovery was made from godown and not from the personal search of petitioner. These are disputed questions which can be answered only after the witnesses are examined and hence, this Court refrains to comment upon it.

35. The further plea of petitioner that he is suffering from '*critical grandular hypospadias and urinary tract infection*' and requires medical attention, however, no document like medical prescription etc. is placed before this Court. Accordingly, this Court is of the considered opinion that it would be appropriate to direct the Jail Authorities concerned to ensure that petitioner is provided necessary medical treatment in Jail and if his health condition requires any urgent treatment or surgery and the same is not available in Jail Hospital, it be provided from any other Government

Hospital, in custody.

36. With directions as aforesaid, the present petition is accordingly dismissed while making it clear that any observation made herein shall not have a bearing on the case of either side.

37. A copy of this order be transmitted to the Trial Court and Jail Superintendent concerned for information and compliance.

MAY 31, 2021

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HIGH COURT OF PUNJAB



**(SURESH KUMAR KAIT)
JUDGE**