

IN THE COURT OF SANJEEV KUMAR-II,
SPECIAL JUDGE (NDPS)-02, CENTRAL DISTRICT,
TIS HAZARI COURTS, NEW DELHI

Bail Application No.106/2023

Sessions Case No.54/2022

State v. Sohaib Ali

21.07.2023

Present: Sh. K. P. Singh, Substitute Additional Public
Prosecutor for State.

Ms. Kirtika, proxy counsel for accused-applicant.

This is an application under section 439 of the Code of Criminal Procedure, 1973 moved on behalf of **accused-applicant Sohaib Ali** for grant of bail in case **FIR No. 165/2021** registered at **Police Station, Crime Branch** under **Sections 20 & 29** of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' in short) is fixed for orders.

2. Mr. Aditya Aggarwal, learned counsel appearing for the accused has contended that accused has been falsely implicated in the present case. The accused is in custody since 22.08.2021. There is no compliance of mandatory provisions of Section 50 of the Act as in the present case IO had given option of search before **any** Metropolitan Magistrate or Gazetted Officer in notice under Section 50 of NDPS Act and had not given option for search before **nearest** Metropolitan Magistrate or Gazetted Officer. Learned Counsel has relied upon decision in **Mohd Jabir v. State of NCT of Delhi**, B. A. no.1725/2022 decided by



Hon'ble High Court of Delhi on 28.03.2023. Further, there is delay of 20 days in sending the samples to FSL. Learned counsel has further relied upon decision **Rishi Dev @ Onkar Singh v. State (Delhi Admn.)** decided by Hon'ble High Court on 01.05.2008; **Union of India v. Lalhangliantthangtei**, 2003 GLR 3 176; **Om Prakash v. State of Punjab**, 2010 SCC Online P&H 2630; **Ramji Singh v. State of Haryana**, 2007 RCR Criminal 3 452; **Akhilesh Bharti v. State**, Bail Appln. 973/2019 decided by Delhi High Court on 20.01.2020; **Amina v. State of NCT of Delhi**, Bail Appln. 3805/2022, decided by Hon'ble Delhi High Court on 02.06.2023.

3. On the other hand, learned Additional Public Prosecutor for the State opposed the application contending that case pertains to the recovery of 4.210 kgs of charas from the possession of accused which quantity is commercial in nature and rigors of Section 37 of NDPS Act attracts to the present case.

4. The case of the prosecution is that on 21.08.2021 acting upon a secret information, accused-applicant Sohaib Ali was apprehended and from the bag he was carrying, 4.210 kilograms of charas was recovered, which is a commercial quantity. Therefore twin conditions of section 37 of NDPS Act attracts.

5. In the present case, recovery of the charas was effected from the bag which the accused-applicant was carrying and not in his personal search which was also conducted. Hon'ble Delhi High Court in case of **Akhilesh Bharti** (supra), relying upon several judgments on the point of Section 50 NDPS Act including



State of H.P. v Pawan Kumar, (2005) 4 SCC 350; **State of Rajasthan v. Parmanand & anr.**, Crl. Appeal No. 78/2055 decided by Hon'ble Supreme Court on 28.02.2014; **S. K. Raju @ Abdul Haque @ Jagga v. State of West Bengal**, (2018) 9 SCC 708 and **State of Punjab v. Baljinder Singh & Anr.**, 2019 SCC Online SC 1408 held that Section 50 of NDPS Act would be applicable where contraband has been recovered from the bag etc. and not from personal search which was also conducted. Hon'ble Delhi High Court held / observed as under :-

“25. It is essential to observe that vide the verdict of the Hon'ble three Judge Bench of the Hon'ble Supreme Court dated 05.09.2018 in "SK. Raju alias Abdul Haque alias Jagga Vs. State of West Bengal" (2018) 9 SCC 708, it has specifically been observed to the effect that where merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act, 1985 will have no application but if the personal search of the accused is also conducted, the provisions of Section 50 of the NDPS Act, 1985 would wholly apply. The verdict of the Hon'ble Supreme Court dated 15.10.2019 in "State of Punjab Vs. Baljinder Singh and Another" 2019 SCC OnLine SC 1408 is also a verdict of the Hon'ble three Judge Bench of the Hon'ble Supreme Court in which the personal search of the accused did not result into recovery of any contraband but there was a recovery of contraband effected from the vehicle in which the accused persons were seated with one of them being the driver. Though, the Hon'ble Supreme Court in "State of Punjab Vs. Baljinder Singh and Another" (supra) has observed to the effect that the judgment of the Hon'ble Supreme Court in Dilip's case is not correct and is opposed to the decision to the law laid down by the Hon'ble Supreme Court in Baldev Singh's and other judgments, the observations in the verdict of the Hon'ble Supreme Court in "SK. Raju alia Abdul Haque alias Jagga Vs. State of West Bengal" (supra) dated 05.09.2018 (which are not adverted to in "State of Punjab Vs. Baljinder Singh and Another" (supra) dated 15.10.2019) lay down a fine distinction and in these circumstances thus, where the contraband is recovered from an object which is held by an accused in his hand and the search of the person of such an accused is also conducted which lead to no recovery of any contraband, though, there are recoveries of other



personal assets of a person from his personal search, in view of the judgments of the Hon'ble Supreme Court in "SK. Raju alia Abdul Haque alias Jagga Vs. State of West Bengal" (supra), the non compliance of Section 50 of the NDPS Act, 1985 would prima facie vitiate the recovery."

6. In case titled as **Mohd. Jabir's** (supra), in para no.42, 43, 44, 45, 47, 50, 51, 53, 56 & 62 Hon'ble High Court observed as under:-

"42. In the present case, section 50 notice which was served upon the applicant reads as under:

"You have the legal right to get yourself searched in the presence of any Gazetted Officer or Magistrate."

43. In my opinion, there is illegality in notice served U/s 50 NDPS Act dated 27.10.2020. The section 50 categorically mandates that where the accused requires a search, the search has to be done by nearest gazetted officer/ nearest magistrate

44. However, the section 50 notice served upon the applicant and the co-accused informs incorrectly that they can be searched by any gazetted information/magistrate. This, in my opinion is where the violation of section 50 lies.

45. It is correct that both the accused persons were informed that of their rights regarding personal search but the same was not informed as per the strict provisions of section 50.

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47. As is clear from the above, the emphasis on the word "nearest" is important since it ensures independence. In deviating from the provisions as laid down in section 50, the IO practiced a third option of having the search conducted by someone who was part of the operation of this particular alleged drug seizure. The IO practiced a third option which is unknown to law.

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50. In my opinion the use of the word "nearest" by the legislature is intentional and has been used to ensure neutrality and independence at the time of search.



14.A. No: 106/2023

FIR No.165/2021

PS: Crime Branch

State v. Sohaib Ali

51. Therefore, it was improper for the IO to suggest in the notice under section 50 that “any” Gazetted Officer can be called.

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53. In the present case, not giving the word “nearest” it due meaning and importance, would make the word “nearest”, a surplusage, which cannot be the intention of legislature in drafting section 50.

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56. In the light of the above judgments and facts, I am of the view that the applicant's alleged refusal that he is unwilling to be searched is irrelevant. The notice u/s 50 NDPS act itself is faulty in law. Therefore, it cannot be said that accused's unwillingness to be searched in front of an officer who is a member of the raiding team is a voluntary expression of their desire for giving up their right to be searched. The notice of section 50 served to the applicant clearly violates the law and is a misdirection. As a result, I am of the opinion that the applicant was misled into believing that his search was to be before any gazetted officer and not the nearest. Further the fact was conducted before ACP Rich pal is far from an independent search as ACP Rich pal was part of the raiding team.

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62. Hence the notice u/s 50 is will amount to no notice in the eyes of law.”

7. Hence, as per the judgment of **Mohd. Jabir** (supra) if at the time of giving notice under Section 50 of NDPS Act accused is informed his legal right to get himself searched in the presence of **any** Gazetted Officer or Magistrate and not in the presence of **nearest** Gazetted Officer or Magistrate, then this is in violation of mandatory provisions of Section 50 of the NDPS Act and said notice amount to no notice in the eyes of law. On the said violation, Delhi High Court had granted bail in commercial



quantity observing that rigors of section 37 of NDPS Act would not be an obstacle in the release of the accused.

8. In the present case, perusal of the copy of notice under section 50 of NDPS Act shows that in said notice words '**any** Gazetted Officer or Magistrate' has been used and words '**nearest** Gazetted Officer or Magistrate' have not been used. Hence, as per decision in **Mohd. Jabir** (supra), this is in violation of mandatory provisions of Section 50 of the NDPS Act and said notice amount to no notice in the eyes of law. Further, accused-applicant is not stated to be involved in any other case under NDPS Act. Hence, this Court is of the view that there are reasonable grounds for believing that the **accused-applicant Sohaib Ali** is not guilty of the offence as alleged and that he is not likely to commit any offence while on bail. Hence the twin conditions under Section 37 of NDPS Act are satisfied. Hence, **I am inclined to grant bail to the accused-applicant Sohaib Ali on furnishing personal bond in the sum of Rs.25,000/- with one surety in the like amount** and subject to the following conditions that:-

- i) That accused-applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
- ii) That accused-applicant shall not leave India without the previous permission of the Court; and
- iii) That accused-applicant shall not commit an offence similar to the offence of which he is accused.

Application stands disposed of.



9. Copy of order be given dasti to learned counsel for accused-applicant and be communicated to accused-applicant in Jail also through Jail Superintendent.

— sd —
(Sanjeev Kumar-II)
Special Judge (NDPS)-02
Central District, Tis Hazari Courts,
Delhi /21.07.2023



विशेष न्यायाधीश एन.डी.पी.एस.-02 (केन्द्रीय)
Special Judge-NDPS-02 (Central)
तीस हजारी न्यायालय, दिल्ली
Tis Hazari Courts Delhi