

Raj Kumar vs State (Nct Of Delhi) on 13 December, 2023

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ BAIL APPLN. 3179/2023
RAJ KUMAR

Throug

STATE (NCT OF DELHI)
Through:

CORAM:
HON'BLE MR. JUSTICE SAURABH BANERJEE

ORDER

% 13.12.2023

1. The present bail application has been filed by the applicant under Section 439 Code of Criminal Procedure, 1973 seeking regular bail in FIR No.164/2021 dated 24.06.2021 under Section(s) 21/29/61 of the Narcotic Drugs and Psychotropic Substances Act, 1985 [NDPS Act] and Section 14 of the Foreigners Act, 1946 at P.S. Special Cell, Delhi.

2. As per FIR, SI Vikas Kumar, complainant herein, had been legally intercepting two mobile numbers, being 9990590106 and 9560849108, which were known to belong to a syndicate of drug smugglers. The intercepted calls revealed that the numbers belonged to one, namely Banto. Accordingly, a Confidential Informant was made aware of the developments, and asked to further unearth the entire plot. The Confidential Informant informed that Banto was planning to procure a large quantity of heroin, from a person of foreign origin residing in Vipin This is a digitally signed order.

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3. The said information was recorded by SI Vikas Kumar and Inspector Vivekanand Pathak was informed about the same. The Inspector, after his satisfaction, conveyed the said information to ACP/Spl.Cell/NR Jasbir Singh, through telephone. The latter directed SI Vikas Kumar to take necessary action as per law and also authorized to conduct raid, search and seizure. The same was recorded vide DD No.28A dated 23/06/2021. Copy of the DD entry and the confidential information recorded was put up before Inspector Vivekanand Pathak in compliance of Section 42 of the NDPS Act, who forwarded these documents to the ACP.

4. A raiding party, led by SI Vikas Kumar, laid a trap near Goyal Hospital, Chander Vihar, Delhi

where Banto and her husband, namely Raj Kumar, the applicant herein, arrived on a Scooty [DL-12-SK-3375] at about 02:55 PM and thereafter two African Nationals arrived at the spot on a blue colour Scooty No. DL-4S-CW-6296 and one African National arrived on a different Scooty No. DL-9S-BE-6716 and they stopped near Banto. Thereafter, pillion rider of the blue Scooty handed over a white colour polythene to the applicant herein, and Banto handed over a green colour polythene to the pillion rider of blue Scooty. The applicant handed over the white coloured polythene to Banto. Seeing this, the raiding team surrounded them and tried to overpower them. During the scuffle, driver of blue Scooty was able to escape from the spot, however, the other four persons were apprehended.

5. The apprehended persons were informed about the identity of the police officers and also the secret information. Notice of Section 50 of the NDPS Act was served upon the four apprehended persons and ACP Jasbir This is a digitally signed order.

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6. A further recovery of 2 kgs and 1.5 kgs of heroin was made from the Scooty of Anim Pascal and John, respectively. Lastly, samples were prepared, labelled and the present FIR came to be registered.

7. Learned counsel for applicant submits that the applicant has been falsely implicated in the present case as his involvement comes forth only in the disclosure statement of the co-accused, which is in not admissible in light of the judgment of the Hon'ble Supreme Court in Tofan Singh vs. State of Tamil Nadu (2021) 4 SCC 1. He further submits that the Notice of Section 50 of the NDPS Act served upon the applicant is improper as the word „nearest is missing. In this regard, he places reliance on the judgment dated 28.03.2023 of a Co-ordinate Bench of this Court in BAIL APPLN.1725/2022 titled Mohd. Jabir vs. State of NCT of Delhi.

8. Arguendo, learned counsel for applicant submits that though heroin was recovered from the wife of the co-accused, the personal search of the applicant was also conducted on an improper Notice of Section 50 of NDPS Act, thereby vitiating the recovery made. Learned counsel for applicant places reliance on S.K. Raju@ Abdul Haque@ Jagga vs. State of West Bengal (2018) 9 SCC 708, where the Hon'ble Supreme Court held that the mandate of Section 50 of the NDPS Act would come into play even in cases of a composite search i.e., both of the bag and of the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/12/2023 at 20:56:00 person of the accused, but not if only the bag is searched and not, per se, the person of the accused. In this regard he also places reliance on Akhilesh Bharti vs. State 2020 SCC OnLine Del 306.

9. Notice was issued and the Status Report was called for.

10. Learned APP appearing for the State opposes the application in light of heinousness of the offence and severity of punishment. He submits that the applicant who is part of an international drug syndicate, is inextricably linked to the present offence. He also submits that the Scooty [DL-12-SK-3375], is in the name of son of the applicant. Moreover, a mobile phone, used in the commission of the offence, was recovered from the possession of the applicant. Lastly, he submits that in light of commercial quantity of contraband being recovered, Section 37 embargo will also ply.

11. This Court has heard the learned counsel for the applicant and the learned APP for the State and perused the documents on record including the Status Report and the judgments relied on by the counsel(s).

12. Latest Nominal Roll was called from the concerned Jail authorities. As per the Nominal Roll, the conduct of the applicant is „Satisfactory and he is pending trial in one other FIR.

13. Before adverting to the merits involved and deciding the contentions raised by the learned counsel for the applicant, the primary issue for consideration before this Court is qua the statutory Notice of Section 50 of the NDPS Act, more particularly qua the requirement and relevancy thereof. Since much turns on that, especially as it goes into the root of the matter, it is crucial for the ongoing proceedings.

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14. In S.K. Raju (supra), while dealing with the provisions of Section 50 of the NDPS Act, the Hon'ble Supreme Court (three-Judge Bench) has specifically observed that the said provisions would come into play even in cases of there being a composite search i.e., both of the bag and of the person of the accused. However, it would not come into play, if only the bag is searched and not, per se, the person of the accused.

15. Similarly, the Hon'ble Supreme Court (three-Judge Bench) has once again in State of Himachal Pradesh vs. Pawan Kumar (2005) 4 SCC 350 held that the term "person" under Section 50 would mean a natural person or a living unit and not an artificial person i.e. a bag or a briefcase.

16. Thereafter, the Hon'ble Supreme Court in State of Punjab vs. Baljinder Singh (2019) 10 SCC 473 (three-Judge Bench), after taking due note of the practical situation on hand involving the provisions of Section 50 of the NDPS Act and dealing with the earlier law laid down from time to time, has once again held that the statutory mandate of serving a Notice of Section 50 of the NDPS Act on the accused would be applicable only to the search of the person of the accused, and its ambit cannot be extended to the search of bag, conveyance, etc. of the said accused person.

17. More recently, the Hon'ble Supreme Court in *Than Kunwar v. State of Haryana* (2020) 5 SCC 260 has held as under:

"22. Having regard to the judgment by the three-Judge Bench, which directly dealt with this issue, viz., the correctness of the view in *Dilip* (supra) reliance placed by the appellant on para 16 may not be available. As already noticed, we are not oblivious of the observation which has been made in the other three-Judge Bench judgment of this Court in *SK. Raju* (supra), which it appears, was not brought to the notice to the Bench This is a digitally signed order.

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18. As per the facts involved herein, admittedly, search of both the person and the polythene carried by the co-accused were conducted, but contraband was recovered only from the polythene and not the person, per se. Thus, in view of the aforesaid settled position of law discussed hereinabove, no compliance of the provisions of Section 50 of the NDPS Act were required.

19. Consequently, being mindful of the aforesaid situation on hand in the present proceedings, the issue qua the impropriety and ambiguity of the Notice under Section 50 of the NDPS Act served upon the applicant herein, does not require adjudication, especially as the said Notice under Section 50 of the NDPS Act was not required to be served upon the applicant. Therefore, *Mohd. Jabir* (supra) being inapplicable to the facts of the present case, this Court need not deliberate thereupon.

20. Furthermore, the present proceedings are based on factors other than the disclosure statement of a co-accused as not only specific role has been assigned to the applicant in the FIR, he has also been arrested from the spot. As such, at this stage, this Court can safely draw the conclusion that the applicant cannot be said to be on the date and time of the commission of offence. More so, whence the Scooty involved is said to be in the name of the applicant's son and a mobile phone involved, which This is a digitally signed order.

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21. Since the quantity of the contraband recovered is commercial, the embargo of Section 37 of the NDPS Act is applicable. This is a factor sufficient for rejection of grant of bail to the applicant, at this stage. Reliance in this regard is placed upon Narcotics Control Bureau vs. Mohit Agarwal 2022 SCC OnLine SC 891, wherein it is held as under:

"18. In our opinion the narrow parameters of bail available under Section 37 of the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe that he is not guilty of the offence alleged against him, for him to have been admitted to bail. The length of the period of his custody or the fact that the charge- sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act."

22. Significantly, no reasonable cause is made/ can be deduced qua, both the presence of the applicant and the definite role assigned to him, at this stage. Further, the recovery of commercial quantity of the contraband from the applicant also cannot be denied. Bearing in mind the aforesaid factors and in the light of the fact that issuance of Notice of Section 50 of the NDPS Act was not required, its impropriety and ambiguity is insignificant, especially, at this stage, whence this Court is dealing with granting bail to the applicant.

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23. One of the factors to be considered in a case for grant or refusal of bail is for the Court to look into the nature of the case, the seriousness thereof and the severity of the punishment involved, not to lose sight of the fact that the individual rights and interests has to be counter-balance with that of the rights and interests of the society at large. This is primarily as this Court while granting bail to any accused has to take into account and consider the essential factors as laid down by the Hon'ble Supreme Court in Prasanta Kumar Sarkar vs Ashis Chatterjee (2010) 14 SCC 496; State of Uttar Pradesh vs Amaramani Tripathi (2005) 8 SCC 21 and Deepak Yadav vs State of Uttar Pradesh (2022) 8 SCC 559, wherein it has been held as under:-

a. whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

- b. nature and gravity of the accusation;
- c. severity of the punishment in the event of conviction;
- d. danger of the accused absconding or fleeing if bail is granted;
- e. character, behaviour, means, position and other circumstances of the accused;
- f. likelihood of the offence being repeated;
- g. reasonable apprehension of the witnesses if bail is granted;

and

h. danger, of course, of justice being t
bail.

24. Considering the factual matrix and circumstances enumerated hereinabove as well as the existing legal position, the aforesaid factors do not make out a case for granting bail to the applicant, even though the This is a digitally signed order.

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25. Accordingly, the present application is dismissed.

26. Needless to say, the observation made, if any, on the merits of the matter are purely for the purposes of adjudicating the present application and shall not be construed as expressions on the merits of the matter.

SAURABH BANERJEE, J DECEMBER 13, 2023/akr This is a digitally signed order.

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