

Onyekachi Anya Friday vs The State (Nct Of Delhi) on 26 March, 2025

* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved: 20.03.2025
Pronounced: 26.03.2025

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BAIL APPLN. 2349/2024, CRL.M.A. 19782/2024

ONYEKACHI ANYA FRIDAYPetitioner

Through: Mr. Tanvir Quiser, Advocate.

versus

THE STATE (NCT OF DELHI)Respondent

Through: Ms. Manjeet Arya, APP for
State with SI Rajender Singh,
Special Staff/SED.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

JUDGMENT

1. The present application under Section 439 of the Code of Criminal Procedure, 1973 (CRPC) has been filed seeking the grant of Regular Bail in FIR No.245/2023, registered at Police Station Kalkaji, New Delhi for the offences under Section 22/25 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). FACTUAL MATRIX

2. The case of the prosecution is that on 15.06.2023, at around noon, the Office of the Special Staff / South East District received information that a Nigerian National who supplies drugs in the area of Govindpuri Extension, Kalkaji, would come near Gopala Dairy, Govindpuri Extension around 2 P.M. to deliver MDMA Drugs and that if he was apprehended at the said time, he would be caught with the contraband in possession. On receiving this information, the Inspector Special Staff telephonically informed the ACP Pradeep Kumar, Kalkaji, New Delhi. The ACP then informed the concerned SI and a team comprising 5 members (the raiding party) and the secret informer reached the spot where the petitioner was to be apprehended.

3. The raiding party was in a private vehicle and one of the members of the party, HC Pyare Lal, was disguised in a civil dress. The SI, at the spot where the petitioner was to be apprehended, disclosed the secret information to 4 or 5 different public persons so that they could join the proceedings, however, none of these people agreed and they left without disclosing their name or address. Soon after, at around 2:45 P.M., the informer pointed out the petitioner, who was in Gali No.6 riding a brown Scooty.

4. On being apprehended, the petitioner was asked about the language that he was conversant with, or him being aware of the English language. He was then informed in English that the raiding party had information that he possessed MDMA Drugs and that due to this reason, his search would be conducted. He was also informed that it was his legal right to have his search conducted before a

Gazetted Officer or Magistrate and that he could search the raiding party if he wished to do so. Notice under Section 50 of the NDPS Act was thereafter read over to the petitioner, who refused to get his search conducted before any Gazetted Officer/Magistrate and further refused to search the police party. The said refusal was made in his handwriting and then he signed the notice in his handwriting as well.

The circumstances surrounding the apprehension were conveyed to the ACP telephonically, who then came to the spot to join the investigation. The petitioner was thereafter searched on the instructions of the ACP and a polyethene packet was recovered from the right pocket of his jeans. On testing the substance inside this packet using the testing kit, it was found to be MDMA Drug. The packet was then weighed and was found to be 8 grams. On search of the Scooty, nothing was found in the said Scooty.

5. A rukka was then prepared at the spot for the offences under Section 22/25 of the NDPS Act, which was handed over to HC Parvesh, who then took a photocopy of the seizure memo and sealed Exhibit Mark-X to Police Station Kalkaji, where the aforementioned FIR came to be registered. The petitioner was thereafter arrested and taken to the Police Station. The petitioner also made a disclosure statement before the Police, stating that he was residing at Flat No.RZ 447/A, Gali No.14, Tughlakabad Extension and that he used to supply drugs from there. On the basis of this disclosure statement and on obtaining a warrant from the ACP, PS Kalkaji, a raid was conducted at the rented accommodation of the petitioner. This raid was conducted in the presence of the flat owner and the crime team. During this raid, 205 grams of contraband was recovered from the accommodation of the petitioner, along with Rs.71,590/- in cash and three mobile phones.

6. During the course of the investigation, a copy of the special report was sent to the Inspector Special Staff and the ACP on the same day, regarding the recoveries made from the petitioner. On the next day, that is 16.06.2023, the Metropolitan Magistrate carried out the sampling of the recovered contraband. Once the investigation was completed, a copy of the Charge-sheet was filed by the IO in the concerned Court.

7. The petitioner thereafter preferred a bail application before the learned Additional Sessions Judge, South East District, Saket Court, New Delhi (ASJ), which came to be dismissed by the learned ASJ on 10.04.2024, leading to the filing of the present application. SUBMISSIONS ON BEHALF OF THE PARTIES

8. The learned counsel submitted that the safeguards of Section 50 of the NDPS Act have not been complied with as the petitioner was not informed about his right to be searched before the „nearest Gazetted Officer or Magistrate and his signatures were not obtained on the offer of the notice under Section 50. Further, he stated that the seizure memo does not bear the signatures of the ACP, which creates a doubt whether the ACP had reached the spot and supervised the investigation as allegedly stated by the respondent. Had that been the case, he would have appended the signatures on the seizure memo. The learned counsel relied on the decision of this Court in Jeffery Robert vs State of NCT of Delhi in Bail Application 509/2024

9. The learned counsel for the petitioner submitted that the 205 grams of contraband recovered from the rented accommodation of the petitioner cannot be attributed to him as the said rented accommodation was not in exclusive possession of the petitioner and therefore, special knowledge under Section 106 of the Indian Evidence Act, 1872 cannot be attributed to the petitioner.

10. The learned counsel submitted that there was a violation of Section 57 of the NDPS Act as the recovery from the petitioner was made on 15.06.2023, however, he was only produced before the Magistrate the next day, that is, 16.06.2023 and the application for drawing the sample was also made on the next day.

11. Additionally, no strict compliance of Section 52A of the NDPS Act was made as the report does not mention the recovery made from the rented accommodation of the petitioner and only states the recovery made from the person of the petitioner, when he was apprehended. In light of this lacuna in procedure, the learned counsel submitted that the bail application of the petitioner be allowed.

12. Strenuously opposing the bail application, the learned APP appearing on behalf of the state submitted that the Charges have been framed against the petitioner. He submitted that the stand of the petitioner that he was residing with other people at his rented accommodation is incorrect as the petitioner was residing alone in the rented room, as per a statement made by the landlord of the premises.

13. The learned APP submitted that during the investigation, the petitioner revealed certain names of his accomplices. However, the said accomplices have not been found till date. Further, the FSL report of the contraband was also carried out and the result shows that "On chemical TLC, FTIR, UV-VIS & GC-MS examination: (i) Exhibits „S- 1 , „S-3 , „S-4 & „S-5 was found to contain Methamphetamine.; (ii) Exhibit „S-2 was found to contain Cocaine, Lidocaine, Caffeine and Phenacetin".

14. Concluding her submissions, the learned APP submitted that the petitioner belongs to another nation and therefore he may not appear before the learned Trial Court and jump bail. As the accomplice of the petitioner is still absconding and evading arrest, the petitioner may misuse his liberty and reengage in similar criminal activities. ANALYSIS

15. Having perused the record and heard the arguments advanced by the learned counsel for the petitioner as well as the learned APP for the state, the first issue this Court may deal with is whether Section 50 of the NDPS Act was complied with. We may begin by noting the observations made by the Supreme Court in its decision in Ranjan Kumar Chadha vs the State of Himachal Pradesh 2023 SCC OnLine SC 1262, which reads as under:

66. From the aforesaid discussion, the requirements envisaged by Section 50 can be summarized as follows:--

(i) Section 50 provides both a right as well as an obligation. The person about to be searched has the right to have his search conducted in the presence of a Gazetted

Officer or Magistrate if he so desires, and it is the obligation of the police officer to inform such person of this right before proceeding to search the person of the suspect.

(ii) Where, the person to be searched declines to exercise this right, the police officer shall be free to proceed with the search. However, if the suspect declines to exercise his right of being searched before a Gazetted Officer or Magistrate, the empowered officer should take it in writing from the suspect that he would not like to exercise his right of being searched before a Gazetted Officer or Magistrate and he may be searched by the empowered officer.

(iii) Before conducting a search, it must be communicated in clear terms though it need not be in writing and is permissible to convey orally, that the suspect has a right of being searched by a Gazetted Officer or Magistrate.

(iv) While informing the right, only two options of either being searched in presence of a Gazetted Officer or Magistrate must be given, who also must be independent and in no way connected to the raiding party.

(v) In case of multiple persons to be searched, each of them has to be individually communicated of their right, and each must exercise or waive the same in their own capacity. Any joint or common communication of this right would be in violation of Section

(vi) Where the right under Section 50 has been exercised, it is the choice of the police officer to decide whether to take the suspect before a Gazetted Officer or Magistrate but an endeavour should be made to take him before the nearest Magistrate.

(vii) Section 50 is applicable only in case of search of person of the suspect under the provisions of the NDPS Act, and would have no application where a search was conducted under any other statute in respect of any offence.

(viii) Where during a search under any statute other than the NDPS Act, a contraband under the NDPS Act also happens to be recovered, the provisions relating to the NDPS Act shall forthwith start applying, although in such a situation Section 50 may not be required to be complied for the reason that search had already been conducted.

(ix) The burden is on the prosecution to establish that the obligation imposed by Section 50 was duly complied with before the search was conducted.

(x) Any incriminating contraband, possession of which is punishable under the NDPS Act and recovered in violation of Section 50 would be inadmissible and cannot be relied upon in the trial by the prosecution, however, it will not vitiate the trial in

respect of the same. Any other article that has been recovered may be relied upon in any other independent proceedings.

(Emphasis Supplied)

16. In view of the aforesaid guidelines and the facts of this case what becomes apparent is that the raiding party has complied with all the requisite requirements of Section 50 of the NDPS Act applicable to it. Therefore the argument of the petitioner that Section 50 of the NDPS Act was not complied with does not hold any favor. Further, it is the plea of the petitioner that he was not informed about his right to be searched before the „nearest Gazetted Officer or Magistrate. In a recent decision, the Apex Court in the case titled State of NCT of Delhi vs Mohd. Jabir 2024 SCC OnLine SC 4374, while overturning a decision of this Court, clarified the position of law in this regard. The same reads as under:

5. It is obvious that the intent behind the provision is to ensure that the person about to be searched is made aware of the option to be taken before a third person other than the one who is conducting the search. Use of the expression "nearest" refers to the convenience as the suspect is to be searched. Delay should be avoided, as is reflected from the use of the word "unnecessary delay" and the exception carved in sub-section (5) to Section 50 of the NDPS Act. Nothing more is articulated and meant by the words used, or the intent behind the provision.

8..... Section 50 casts an obligation on the police officer to apprise the person intended to be searched that under Section 50, he is required to be searched only before a Gazetted Officer or a Magistrate. The requirement is that the authorized officer must make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate. We are satisfied that in the present case, there is compliance with the said provision.

17. Coming to the next argument of the petitioner, which is that the rented accommodation was not in exclusive possession of the petitioner and even if any recovery was affected from the said premises, it cannot be solely attributed to the petitioner.

18. To refute the said submission the learned APP drew the attention of this Court to the statement of the landlord of the rented premises recorded under Section 161 of the Cr.P.C and contended that the petitioner was the exclusive tenant of the room from wherein the contraband was recovered. This Court does not find merit in the submission of the learned counsel for the petitioner that apart from the petitioner, there were others who had access to the room as the landlord, in his statement under Section 161 of the Cr.P.C, has informed the IO of the case that he was owner of the house bearing No. H.No. RZ 447/A, Gali No. 14, Tuglakabad Extension, Govindpuri and that he has given separate rooms in said accommodation on rent to various tenants.

19. Coming to the next ground, the learned counsel for the petitioner has vehemently urged that in the report prepared under Section 57 of the NDPS Act, only the alleged recovery from the person of

petitioner has been shown and the said report is silent with respect to the alleged recovery from his tenanted premises. The learned APP has brought to the notice of this Court, apart from the report dated 15.06.2023, another report dated 16.06.2023, which mentions the recovery of 8 gm of MDMA Drug from the right front pocket of blue colored jeans worn by the petitioner and consequent to his disclosure statement, a further recovery of 205 gms of contraband from his tenanted accommodation at H.No. RZ 447/A, Gali No. 14, Tuglakabad Extension.

20. Furthermore, there is no merit in the submission made on behalf of the petitioner that the presence of the ACP at the spot was doubtful as the seizure memo does not bear his signatures. A perusal of the seizure memo shows that the recovery of the contraband has been affected in the presence of HC Vipin, HC Parvesh, one Arvind Kumar resident of RZ-443/A, Gali No. 15, Tuglakabad Extension, Govind Puri and it also bears the signatures of IO SI Phool Singh.

21. Needless to say, at this stage, there cannot be minute scrutiny about the correctness of the procedure alleged to have been followed at the time of seizure and recovery, which can be only be considered during trial. Merely, because the seizure memo lacks the signatures of the ACP, it cannot be doubted at this stage as to whether the ACP was not present at the spot or not.

22. It was next submitted on behalf of the petitioner that even though the petitioner was arrested on 15.06.2023, the application for drawing the sample was made on the next day. Since the sampling was not conducted at the time of recovery, which is clear violation of Section 52A of the NDPS Act.

23. To appreciate the said argument contended on behalf of the petitioner, it is apposite to place reliance on the Judgment in Narcotics Control Bureau vs Kashif, 2024 SCC OnLine SC 3848, wherein the Supreme Court has observed as under:-

"(39).The upshot of the above discussion may be summarized as under:

XXXX XXXX XXXX

(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."

24. In Union of India vs. Mohan Lal (2016) 3 SCC 379, the Supreme Court observed that the Scheme of the Act in general and Section 52A in particular, does not provide any time for making an application for drawing of samples and certification. While there is no scope for prescribing or reading a time frame into the provision, an application for sampling and certification ought to be made without undue delay.

25. In the present case, 8 gms of MDMA Drug from the person of the petitioner and 205 gms of the contraband from his rented accommodation was recovered and seized on 15.06.2023, the application for sampling was moved on the next day, that is, 16.06.2023. Therefore, the delay in drawing the sample as alleged by the petitioner may not come to his benefit at this stage.

26. The nominal roll dated 02.09.2024 placed on record shows that the petitioner is in custody with effect from 15.06.2023 and since then, the Chargesheet has been filed, the Charges have been framed and the trial is underway. Thus, it cannot be said that there is a delay of any nature which would entitle the applicant to bail. There are serious charges of carrying commercial quantity of contraband against the petitioner. The learned Trial Court has rightly observed that embargo of Section 37 of the NDPS Act is applicable in the present case as commercial quantity of alleged contraband has been recovered from the petitioner and that there is nothing before the Court to suggest that the petitioner is not likely to commit a similar offence in the future, if released on bail.

27. In the light of the aforesaid, there is no ground for grant of bail to the petitioner and the bail application along with the pending application is, therefore, dismissed.

SHALINDER KAUR, J MARCH 26, 2025/SU/FRK Click here to check corrigendum, if any