

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

Date of decision: 29th September, 2021

IN THE MATTER OF:

+ BAIL APPLN.351/2020 & CRL.M.As. 12533-35/2021 & 13943/2021
SONIA SHAMRAO NAIK GAONKAR Petitioner

Through Mr. Raghav Sharma, Ms. Mitali
Gupta, Mr. Salvador Santosh Rebello,
and Ms. Anukriti Dua, Advocates

versus

NARCOTIC CONTROL BUREAU Respondent

Through Mr. Ajay Digpaul, CGSC with
Mr.Kamal R Digpaul, Advocate.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The present petition is filed under Section 439 Cr.P.C praying for regular bail in Sessions Case No. 267/ 2018 before the Special Judge, NDPS, Patiala House Court for offences under Section 8, 21, 27A, 29 NDPS Act.

2. Before delving into the bail application, it is necessary to briefly lay down the factual summation of the prosecution's case, they are stated as hereinunder-:

- a) Briefly put the story of the prosecution is that on 22.02.2018, Intelligence Officer Pradeep Singh received secret tip that the Petitioner, travelling by Train from Hazrat Nizamuddin Station, Delhi to Mumbai, was carrying illegal contraband in her baggage. This information was reduced to writing and a team

was assembled headed by Anand Kumar, I.O. left for Hazrat Nizamudidn Railway Station.

- b) At the Railway Station, two lady constables Suman Lata and Sudesh Kumari agreed to join the team as independent witnesses. At the designated time of boarding, the Petitioner was seen & identified by the NCB officials and stopped by them and asked questions about her trip and destination. The Petitioner introduced herself as Sonia Naik, showed them her rail ticket and identification card.
- c) Mr. Anand Kumar, I.O. after ascertaining her details served a Section 50 Notice on the Petitioner and informed her of her rights of being searched by a Gazetted officer or in the presence of Magistrate. The Petitioner replied in writing on the notice that she did not want to be checked in the presence of a G.O./ Magistrate. The I.O. offered his team to be checked by the Petitioner which she declined. A lady officer duly conducted personal searched on her in the presence of an Independent witness. Nothing was found on her body. The lady officer then checked her maroon bag where amongst other things a gray bag with marking of Baby was found to be a decoy and upon tearing open the bag two plastic packets were tied together in a linen cloth, they were found to be a crystalline substance suspected to be illegal contraband. A test of that crystalline substance was done on the spot and it tested positive to be Methamphetamine. She was found to be in possession of 600 grams of Methamphetamine. Seizure of the substance was done in

accordance with the NDPS Rules and seizure *panchanama* was prepared.

- d) On being asked about where she procured the substance the Petitioner told the I.O. that she was given the drugs by Nigerian native a.k.a. Moses Henry and gave his mobile number. A notice u/s 67 of NDPS dated 22.02.2018 was served on the Petitioner to appear before I.O. Vikas Yadav for further enquires. The Petitioner complied and appeared before the I.O. and stated that she is a native of Goa and shifted to Bombay in 2017 for a job in the Film Industry and in Bombay met a Nigerian person namely Cosmos who introduced her to his friend, Oba from Delhi who later became her boyfriend and told her that he was engaged in the Cloth Business. She stated that Oba introduced her to Charles Ezih @ Papa and Moses Henry. It is said that she further stated Charles Ezih, Moses knew the Petitioner was traveling from Delhi to Mumbai and that Moses gave a bag to her at Charles' house in Delhi which was to be given to Cosmos on her arrival in Mumbai. She stated that she did not know the contents of the bag given by Moses to her. It is further stated that Petitioner gave material details such as addresses of the persons which she mentioned in her statement and the same was recorded, reduced to writing and was signed by the Petitioner.
- e) Based on the details about Charles Ezih given in the statement of the Petitioner, steps were taken for conducting search in the residence of Charles Ezih. A team headed by Pradeep Singh, IO

formed a team with an independent witness to conduct a search operation at the residence of Charles Ezih. Charles Ezih on being questioned about the 600gms of Methamphetamine found in possession of the Petitioner, Charles Ezih confirmed that Moses Henry had given the Methamphetamine to the Petitioner. Thereafter, a notice u/s 50 NDPS Act was served on him and no incriminating substance was found in his possession and he was arrested. 180 grams of Cocaine was recovered from his house.

- f) Thereafter, Moses Henry was tracked down after being chased and was taken to Mata Roop Raani Maggo Hospital for treatment for the injuries he had sustained. Search of his house indicated that he was in the process of destroying the narcotic drug in his possession to avoid getting nabbed and two measuring scales were found from there.
- g) Investigation was further done and statements of all witnesses *vis a vis* the arrest, disclosures, discoveries were duly recorded and narcotic samples were sent to CRCL Pusa Road for testing. A report under Section 57 of the NDPS Act 1985 regarding the seizure of the two-baby carrier, weighing machine, torn polythene wet with water was submitted, V.V. Singh Superintendent NCB on 24.02.2018 and a report of the arrest of the Petitioner was submitted too.

3. Material on record discloses that the Petitioner was in constant touch with the other accused.

4. The Ld. Special Court in SC No. 267 of 2018, Patiala House vide order dated 17.8.2019 rejected the bail of the Petitioner. The Court while

dismissing the bail reasoned that the Petitioner was caught with narcotics, in commercial quantity, in her possession at a Nizamuddin Railway Station and on her disclosure statements to the I.O., Charles Ezih, another Nigerian national, were arrested and 180gms of Cocaine was found in the possession of Charles Ezih. Further, the Court recorded that, he gave disclosure statements admitting to his guilt in indulging, financing purchasing, trading and selling contraband and that the other accused Moses Henry has been absconding ever since and has been declared a Proclaimed Offender. The Court observed that the Petitioner to be prima facie a case against the petitioner has been made out for the offences she is charged with, and it appears that she had been trafficking commercial quantity of narcotics.

5. The Petitioner approached this Hon'ble Court against the order rejecting bail by Special Court. This Court vide order dated 06.11.2019 in Bail Application 2630 of 2019 allowed the Petitioner to withdraw the application.

6. The Petitioner approached this Court praying to be released on Medical Bail. This Court after going purely through the medical records vide order dated 24.8.2020 granted Medical Bail to the Petitioner for a period of 45 Days. This Court vide order dated 12.10.2020 extended the interim bail of the Petitioner by another two months. This Court on 10.12.2020 re-extended the bail of the Petitioner by two months.

7. Heard both parties and seen the record. Mr. Raghav Sharma, Ld. Counsel appeared for the Petitioner. Mr. Ajay Dignpaul, Ld. Counsel appeared for the Respondent State opposing the bail.

8. The learned counsel for the petitioner contends that the arrest of the petitioner is contrary to the provisions of the NDPS Act. He states that if the

secret information was received by the NCB Officers that a lady is carrying narcotics, despite the information no lady officer accompanied the NCB officials. He further submits that ultimately the petitioner was searched by a lady railway police official. He further states that the incident took place on 22.02.2018, the panchnama was prepared on 22.02.2018 and signed by two lady police officials i.e. Suman Lata and Women Constable Sushila. But, they were examined only much later. He therefore states that this is a violation of Section 67 of the NDPS Act.

9. The learned counsel for the petitioner further states that the accused/petitioner was searched in a toilet inside the train and her bag was not there with her and the possibility of the bag being tampered with cannot be ruled out. The learned counsel for the petitioner states that this is a clear violation of Section 50 of the NDPS Act. The learned counsel for the petitioner states that though the petitioner had waived off the presence of any Gazetted Officer and has said that NCB lady officers can carry out the search. But that does not absolve the duty of the State to fulfill Section 50 of the NDPS Act. The learned counsel for the petitioner places reliance on the judgment of the Supreme Court in Arif Khan v. State of Uttarakhand, (2018) 18 SCC 380. He further places reliance on the judgment of the Supreme Court in Harbeer Singh v. Sheeshpal, (2016) 16 SCC 418, to contend that delay in recording of statements of the prosecution witnesses under Section 161 CrPC, although those witnesses were or could be available for examination when the investigating officer visited the scene of occurrence or soon thereafter, would cast a doubt upon the prosecution case. He further submits that the Petitioner is a educated girl with no criminal

record and has deep roots in the society. He further contends that the petitioner has retracted her statement.

10. The learned counsel for the petitioner places reliance on the observations made by this Court while extending the Bail to the Petitioner and referred to her satisfactory conduct based on which this Court was pleased to grant her two extensions of 60 days each. He submitted that previous Bail conditions imposed by this Court have been scrupulously observed by the Petitioner and that the conduct of the Petitioner in jail has been good. He therefore submitted considering the fact that the chargesheet has been filed, Trial is continuing and that Petitioner would like to continue her academic courses and considering she has a bright future she should be enlarged on bail.

11. *Per Contra*, learned counsel for the State contends that there is no delay in recording the witnesses. He states that seizure was made on 22.02.2018. He states that on the same day notice under Section 67 NDPS Act was given to them for examination on 23.03.2018 and what has been recorded in *panchanama* has been elicited out there. He therefore states that the Courts are only considering the bail of the petitioner and there is no violation of any requirement under Section 67 of the NDPS Act. He would further contend that the judgment of Arif Khan (supra) relied on by the learned counsel for the petitioner has been clarified by a Division Bench of this Court in Nabi Alam v. State (Govt. of NCT of Delhi), **2021 SCC Del 3055**.

12. Mr. Digpaul submitted that the Petitioner was found in the possession of 600 Gms. of Methamphetamine which is a commercial quantity. This was recovered from her baggage where it was kept clandestinely in a bag marked

as 'Baby Carrier'. He argued that the punishment prescribed under the provisions the Petitioner is charged with is minimum rigorous imprisonment for ten years which could be extended till 20 years. He argued that the NDPS Act is a special law with a uni-directional objective to curb the menace of drugs and narcotics in the country and society and therefore the trite criminal law principles of presumption of innocence and prosecution to bear the burden of proof stands nullified in the face of express provisions in Section 35 and Section 54 of NDPS Act which presume mental and possessory guilt until the contrary is proven.

13. Mr. Digpaul submitted that although the statement given by Petitioner under Section 67 has been retracted, but the statement has led to arrest of two Nigerians residing in Delhi Charles Ezih and during search proceedings at his house 180 Gms of Cocaine was found in his possession, and Moses Henry Oyendu from whose house 660 Gms of Methamphetamine was seized. Her statement, he argued, led to unearthing of a nexus of persons who have been involved in illicit narcotic trading, the two others have been declared Proclaimed Offender and the search for them is ongoing. He argued that in the complaint it has been stated that the other accused Charles Ezih & Moses Henry Oyendu have been living in India illegally as their Visa is expired and their Passports were ingenuine & fabricated.

14. A perusal of the record indicates that the Petitioner was traveling from Delhi to Bombay by Train from Hazrat Nizamuddin Railway Station when she was intercepted by officials of the NCB on a secret tip and served a notice under Section 50 NDPS Act and she was informed of her rights available under Section 50 of the NDPS Act and was given an option to be searched before a Gazetted Officer or a Magistrate but the petitioner waived

off her right under Section 50 of the NDPS Act and had agreed for search by any NCB lady officer. Accordingly, two lady railway police officials had been requested to conduct the search. The Petitioner after being taken into custody disclosed that she got the contraband from Moses Henry Onyendu when she was at the house of Charles Ezih, this was later recorded by the NCB under Section 67 NDPS Act. Based on this statement, the NCB conducted search from the house of Charles Ezih and Henry Onyendu and at both the places large commercial quantities of Methamphetamine and Cocaine respectively were seized along with measuring scales. One accused is still yet to be nabbed and has been declared a Proclaimed Offender. The Petitioner has retracted her statement later given to NCB on 22.6.2018, however, the retraction of statement is a non issue now since the disclosure statement has resulted in the discovery of other accused persons in whose possession copious quantity of contraband which has furthered the probe into finding the link of its origin and tracing the head of the drug cartel/network. There appears to be a prima facie evidence that the Petitioner was in the possession of 600Gms of Methamphetamine at Nizamuddin Railway Station on 22.2.2018.

15. The reliance made by the learned counsel for the petitioner on Harbeer Singh (supra) is misplaced and would not apply at this juncture. He contend that the delay in recording the statement under Section 161 Cr.P.C need not to be considered at this juncture and it is a matter of trial. In any event, even the notice to the witnesses were given on the very same day and they were asked to give their statements on 23.03.2018.

16. The learned counsel for the petitioner has placed reliance on the judgment of the Supreme Court on para 20 of the judgment of the Supreme Court in Arif Khan (supra). The said para reads as under:

"20. Their Lordships have held in Vijaysinh Chandubha Jadeja [Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609 : (2011) 1 SCC (Cri) 497] that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the police officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorised officer to make the suspect aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a gazetted officer or a Magistrate. (See also Ashok Kumar Sharma v. State of Rajasthan [Ashok Kumar Sharma v. State of Rajasthan, (2013) 2 SCC 67 : (2013) 1 SCC (Cri) 829] and Narcotics Control Bureau v. Sukh Dev Raj Sodhi [Narcotics Control Bureau v. Sukh Dev Raj Sodhi, (2011) 6 SCC 392 : (2011) 2 SCC (Cri) 981].)"

17. A Division Bench of this Court has considered the issue of waiver of Section 50 and the observation made in Arif Khan (supra) and it has observed as under:

"21. Coming now to the emphasis placed on behalf of the applicant/accused on the judgment rendered by the

Supreme Court in Arif Khan @ Agha Khan (supra), the question that needs to be considered is whether that decision is an authority for the proposition that notwithstanding the person proposed to be searched has, after being duly apprised of his right to be searched before a Gazetted Officer or Magistrate, but has expressly waived this right in clear and unequivocal terms; it is still mandatory that his search be conducted only before a Gazetted Officer or Magistrate.

22. In this behalf, it is necessary to consider the observations of the Hon'ble Supreme Court in Arif Khan @ Agha Khan (supra), the relevant paragraphs of which decision are being extracted hereinbelow:—

“18. What is the true scope and object of Section 50 of the NDPS Act, what are the duties, obligation and the powers conferred on the authorities under Section 50 and whether the compliance of requirements of Section 50 are mandatory or directory, remain no more res integra and are now settled by the two decisions of the Constitution Bench of this Court in State of Punjab v. Baldev Singh [State of Punjab v. Baldev Singh, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] and Vijaysinh Chandubha Jadeja [Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609].

19. Indeed, the latter Constitution Bench decision rendered in Vijaysinh Chandubha Jadeja (supra) has settled the aforementioned questions after taking into considerations all previous case law on the subject.

20. *Their Lordships have held in Vijaysinh Chandubha Jadeja that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the police officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorised officer to make the suspect aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a gazetted officer or a Magistrate.”*

23. A plain reading of the above extracted paragraphs leads to but one inescapable conclusion that their Lordships of the Hon'ble Supreme Court whilst following the ratio of the decision of the Constitution Bench in Vijaysinh Chandubha Jadeja (supra) held that the same has settled the position of law in this behalf to the effect that, whilst it is imperative on the part of the empowered officer to apprise the person of his right to be searched only before a Gazetted Officer or Magistrate; and this requires a strict compliance; the Hon'ble Court simultaneously proceeded to

reiterate that, in Vijaysinh Chandubha Jadeja (supra) “it is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act”. In this view of the matter, the reliance placed by counsel for the applicant/accused on the decision of the Supreme Court in Arif Khan @ Agha Khan (supra), in our respectful view does not come to his aid.”

18. Grant or rejection of bail under the NDPS Act is governed by Section 37 of the NDPS Act. The Supreme Court in State of Kerala V. Rajesh, (2020) 12 SCC 122, has reiterated the principles on which bail can be granted under the NDPS Act.

“19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that

the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

21. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a sine qua non for granting bail to the accused under the NDPS Act.” (emphasis supplied)

19. A three-judge bench of the Supreme Court in Collector of Customs v. Ahmadaliev Nodira, (2004) 3 SCC 549, succinctly referred to what the limitations on the exercise of power under Section 37 NDPS are as follows:

*“7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. **The conditions are cumulative and not alternative.** The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case at hand the High Court seems to have completely*

overlooked the underlying object of Section 37. It did not take note of the confessional statement recorded under Section 67 of the Act”

20. The Supreme Court in State of M.P. v. Kojad, (2001) 7 SCC 673, embarked to elucidate as to why bail conditions under the NDPS are stringent to the extent of being severe & uncompromising, it held as follows:

*“5.....The purpose for which the Act was enacted and the menace of drug trafficking which it intends to curtail is evident from its scheme. A perusal of Section 37 of the Act leaves no doubt in the mind of the Court that a person accused of an offence, punishable for a term of imprisonment of 5 years or more, shall generally be not released on bail. **Negation of Bail is the rule and its grant an exception under sub-clause (ii) of clause (b) of Section 37(1). For granting the bail the Court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section(1) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for.**”*

(emphasis supplied)

21. On a careful reading of the facts and its juxtaposition with the arguments advanced, it is clear that the Petitioner on 22.02.2018 was found in the possession of Methamphetamine and the same has been verified by conducting a chemical test of the sample of the seized material. The

disclosure statement has lead to the arrest of two Nigerian accused in whose possession narcotics was found. It has also been discovered by the NCB that these two accused were living illegally in India on fake passports. Material on record discloses that the petitioner is a part of a network which deals in supply/sale of Narcotics. This is evident from the subsequent recoveries of Narcotics from foreign nationals. The clean & tidy track record of the Petitioner does not absolve her from being in possession of 600 Gms of Methamphetamine. An uneducated person may claim no knowledge of the substance found in his/her possession and may raise a defense of the substance being planted on them but being a highly educated person, there is greater presumption that carrying large quantities of narcotics is a crime and that it would entail consequences in law which could be harsh and irrevocable. The quantity recovered from the Petitioner is commercial quantity. For the said reasons, the Petitioners case doesn't fall within the twin parameters of Section 37 of the NDPS Act.

22. For the aforesaid reasons this Court is not inclined to grant bail to the Petitioner. The petition is dismissed along with the pending application(s).

23. Before parting, this Court deems fit to clarify that none of the observations in this order may tantamount to a comment on the merits of the case. The Trial Court is directed to ignore this order while considering the case in Trial.

SUBRAMONIUM PRASAD, J

SEPTEMBER 29, 2021/Rahul