

गणु गोयल खर्ब
MANU GOEL KHARB
विशेष न्यायाधीश (एन.डी.पी.एस-02)
Special Judge (NDPS-02)
कोर्ट नं. 201, तीसरी मंजिल
Court No. 201, Third Floor
द्वारका कोर्ट (द.प.) नई दिल्ली
Dwarka Courts (S-W), New Delhi

13SC 821/2022
STATE Vs. DHRAMBIR
FIR no. 0274 /2022
P.S. Nazafgarh
U/s. 20/25/29 NDPS Act

22.08.2024

**ORDER ON BAIL APPLICATION OF
APPLICANT/ACCUSED DHARAMBIR**

By this order, I shall decide an application under section 439 Cr.P.C. moved on behalf of the applicant/accused Dhrambir S/o Late Sh Nathu Rai.

Reply to the bail application already filed.

Arguments already heard.

It is stated by Ld. Counsel for applicant/accused that applicant/accused is innocent and falsely implicated in this case and in JC since 21.05.2022. It is further stated that statutory requirement of Section 42 NDPS Act has not been complied with as the person who had received the secret information i.e. SI Vikash Yadav did not reduce the same into writing but the information was reduced into writing by some other officials after SI Vikash Yadav informed about the said secret information to Inspector through telephone. It is further stated that there is non-compliance of section 55 of NDPS Act as all the recovered contrabands/pullandas had to be produced before the SHO whereas only pullanda marked A and H were produced before the SHO and the remaining pullandas were produced before Inspector Ajay Kumar who was not the SHO and as such there is non compliance of Section 55 NDPS Act. It is further stated that



to ensure the transparency in the recovery of contraband, police officers are expected to conduct the search and seizure in the presence of independent witnesses but no such witness has joined in this case. It is further stated that accused was apprehended while he was just outside his rented flat and no CCTV footage was filed while apprehending the applicant or while seizing of the illicit contraband. It is further stated that no photographs and videography of the search and seizure was done by the police officials. It is further stated that earlier applicant/accused was granted interim bail on various occasions and he has not misused the liberty of interim bail granted to him and surrendered timely. It is further stated that applicant/accused has clean antecedents, ready to fulfill all the conditions imposed by this Court. Ld. Counsel for the applicant/accused has relied on (1) *Gulab Rai @ Chetan Vs State (NCT of Delhi) decided on 19.01.2004 by the Hon'ble High Court of Delhi*; (2) *Directorate of Revenue & Anr. Vs Mohammed Nisar Holia in CRL Appeal no. 311 of 2002 decided on 05.12.2007*; (3) *Sarija Banu @ Janarthani @ Janani Vs State decided on 26.02.2004 by Apex Court*; (4) *Nagesh Sharma Vs State, Bail Appl. no. 3185/2022 decided on 28.03.2023*; (5) *S K Raju @ Abdul Haque @ Jagga Vs State of West Bengal decided on 05.09.2018*; (6) *Boota Singh Vs State of Haryana AIR 2021 Supreme Court 1913*; (7) *Sukhdev Singh Vs State of Haryana decided on 13.12.2012*; (8) *Karnail Singh Vs State of Haryana decided on 29.07.2009*; (9) *Krishan @ Babu Vs State Bail Appl no. 2804 of 2023 decided on*



16.11.2023; (10) Thomas Karketta Vs State Crl.A 1555/2011 decided on 01.09.2015; (11) State of NCT of Delhi Vs Palgiri Siddique Crl.A 20 of 2020 decided on 27.01.2020; (12) Prithvi Pal Singh @ Munna Vs State 2000 III AD Delhi 181; (13) Kishan Chand Vs State of Haryana Criminal Appeal no. 1375 of 2008 decided on 13.12.2012 by Apex Court; (14) Mohd. Masoom Vs State, Crl. A. 1404/2011 decided on 09.04.2015; (15) Vinod Yadav Vs State Bail Application no. 3124 of 2023 decided on 25.04.2024 decided by Hon'ble High Court of Delhi (16) Ram Prakash Vs State Crl.A. 1363 of 2014 decided on 10.12.2014; (17) Bantu Vs State Govt of NCT of Delhi, 2024:DHC:5006; (18) Mohd. Mintoo Vs State GNCT Delhi, 2024:DHC:5010; (19) Madhuri Chauhan Vs State of NCT of Delhi, 2024:DHC:5008; (20) Sovraj Vs State Govt of NCT of Delhi, 2024:DHC:5009; (21) Sukhvinder Singh Vs State Govt of NCT of Delhi, 2024:DHC:5004; (22) Kanchaman Yonjan Vs State, 2024:DHC:5007; (23) Ankit Sagar Vs State (Govt. of NCT of Delhi) 2024:DHC:5174; (24) Gopal Dangi Vs State NCT of Delhi, 2024:DHC:5175; (25) Shivam Vs State Govt of NCT of Delhi, 2024:DHC:5161; (26) Rizwan Vs State NCT of Delhi, 2024:DHC:5180 and (27) Rafique Khan Vs NCB, 2024:DHC:5176. It is prayed that applicant/accused be granted bail.

Ld. Addl. P.P. for the State has opposed the bail application stating that the allegations against the



applicant/accused are serious in nature as he has been apprehended with Ganja in commercial quantity. Ld. Addl. P.P. for the State has relied on the judgment of **Surender Kumar Vs State of Punjab** delivered by Hon'ble Supreme Court of India and submitted that mere failure to join the independent witnesses is not sufficient to throw the entire prosecution case, if there is otherwise sufficient evidence on record to support the prosecution case.

The accused/applicant is facing trial for the charges under Section 20(b) (ii) (C), Section 25 of NDPS Act, 1985 read with section 29 NDPS Act as he was found in possession of 63.600 Kg of Ganja.

The ground taken by the Ld. Defence counsel for non joining of independent witnesses at the time of recovery and not conducting videography and photography of the search and seizure is concerned, it is suffice to mention that it is settled proposition of law that mere non joining of public witnesses would not be sufficient to doubt the prosecution case if there are otherwise sufficient material to prove the case against the accused. The impact of non joining of the public witnesses can be adjudicated only after the examination of the other witnesses which is yet to be done in the present case.

As per the case of prosecution, secret information was received by SI Vikas Yadav on 21.05.2022 around 10:40 PM that accused Jitender would be coming to supply Ganja. The said information was telephonically shared by SI Vikas Yadav with



Inspector AATS who further informed the same to the Senior Officers. As per the charge-sheet, the secret information received by SI Vikas Yadav was reduced into writing by W/Ct. Pooja Jangid and not by SI Vikas Yadav himself.

At this stage, it is necessary to reproduce Section 42 (1) of NDPS Act which reads as under:

"42. Power of entry, search, seizure and arrest without warrant or authorisation.—(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe



may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector;

Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

"42 (2) Wherein officer takes down any information in writing under Sub-Section (1) or records grounds for his belief under the proviso thereto, he shall within 72 hours send a copy thereof to his immediate official superior."

It is also a part of the chargesheet that the present applicant/accused Dharambir was arrested subsequent to the disclosure of the co accused Jitender. SI Vikas neither recorded the secret information on 21.05.2022 at the time when he received the same nor did he write it down anytime thereafter.

In the case of *State of Punjab Vs. Balbir Singh MANU/SCC/0436/1994*, it was held in para 11 as follows :

"11 But there are certain other embargoes envisaged under Sections 41 and 42 of the NDPS Act. Only a Magistrate so empowered under Section 41 can issue a warrant for arrest and search where he has reason to believe that an offence under Chapter IV has been committed so on and so forth as mentioned therein. Under sub-section (2) only a



Gazetted Officer or other officers mentioned and empowered therein can give an authorization to a subordinate to arrest and search if such officer has reason to believe about the commission of an offence and after reducing the information, if any, into writing. Under Section 42 only officers mentioned therein and so empowered can make the arrest or search as provided if they have reason to believe from personal knowledge or information. In both these provisions there are two important requirements. One is that the Magistrate or the officers mentioned therein firstly be empowered and they must have reason to believe that an offence under Chapter IV has been committed or that such arrest or search was necessary for other purposes mentioned in the provision. So far as the first requirement is concerned, it can be seen that the Legislature intended that only certain Magistrates and certain officers of higher rank and empowered can act to effect the arrest or search. This is a safeguard provided having regard to the deterrent sentences contemplated and with a view that innocent persons are not harassed. Therefore, if an arrest or search contemplated under these provisions of NDPS Act has to be carried out, the same can be done only by competent and empowered Magistrates or officers mentioned thereunder.

"12. Nand Lal v. State of Rajasthan is a case where a police head constable and a station house officer were not empowered to carry out investigation and it was contended that the whole investigation was illegal and consequently the trial was vitiated. The Rajasthan High Court held that for launching the prosecution or for initiating the proceedings under the Act, the authority doing so must have a clear and unambiguous power. In Bhajan Singh v. State of Haryana it was observed that only officers empowered under the Act can take steps regarding entry, search, seizure and arrest and that the relevant provisions of the Act are mandatory. In Umrao v. State of Rajasthan' it was held that the search made by a police constable without jurisdiction and investigation made by an officer not empowered, vitiate the trial. In Shanti Lal v. State of



Rajasthan it was similarly held that search and arrest made by SHO who was not authorised under the Act, were illegal.

Further, it has been held by Hon'ble High Court of Delhi in Bail Appl no. 3840/2023 titled as *Gulab Rai @ Chetan Vs State NCT of Delhi* decided on 19.01.2024:-

"6. The undisputed facts are that while the first information was received by IIC Amit but it was only Inspector Rakesh Duhan who had reduced the information into writing which is contrary to the provisions of Section 42 of NDPS Act and the binding dictum of the Supreme Court in Mohammed Nisar Holia (Supra). It has been held in the said case by the Supreme Court that officer who first receives information is bound to reduce the same in writing and not the person who hears about it. Relevant observations of Hon'ble Supreme Court are as follows :

"19. In the instant case, the statutory requirements had not been complied with as the person who had received the first information did not reduce the same in writing. An officer who received such information was bound to reduce the same in writing and not for the person who hears thereabout...

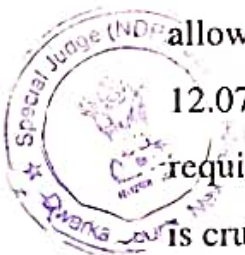
*7. In Sarija Banu and Another v. State through inspector of police, 2004 SCC OnLine SC 264, the Supreme Court observed that compliance with Section 42 of NDPS Act is mandatory and this is a relevant fact which should have engaged the attention of the Court below while considering the bail application. Following the said judgment, the Bombay High Court in **Rajaram Kadu (supra)**, observed as under:-*

"9. I have perused the FIR and other documents which form part of the charge sheet and which have been annexed with the application. As far as submission with regard to the discrepancy in the C.A.Report and de-sealing of the articles is concerned, I am of the opinion that the said issue will be the matter of evidence and can be raised



during the course of trial. As far as non compliance with Section 42 of the Act is concerned, it can be seen that the information was received by Police Naik Bhagwat Saudane. The FIR does not indicate that he had reduced the information into writing or provided any copy of the information to his superior officer. The statement of API Divekar also does not indicate that he had reduced the information into writing or forwarded the same to his superior officer. However, the prosecution is relying upon the entries made by Senior P.I.Sable of Ulhasnagar in the station diary to show the compliance of Section 42. That cannot be considered to be the compliance of Section 42 of NDPS Act. The point which is canvassed by learned counsel for Applicant is that the person who had received the information had not forwarded it to the superior officer and there is nothing on record to indicate that any such information was forwarded in writing. It is, therefore, rightly contended that there is non compliance of Section 42(2) of NDPS Act. As observed by the Apex Court in the case of Sarija Banu (supra), the issue with regard to non compliance of Section 42 of NDPS Act can be considered at the stage of bail. I have also perused the decisions of this Court relied upon by learned advocate for Applicant wherein this Court had granted bail for non compliance of Section 42 of NDPS Act."

Although, PW2 Ct. Pooja has already been examined and discharged and no question was put to her regarding the information recorded by her vide DD no. 5 dated 21.05.2022 but the application under section 311 Cr.P.C. filed by the present applicant for re-examination of PW2 has already been allowed by the Hon'ble High Court of Delhi vide order dated 12.07.2024 with the observation that compliance with procedural requirement interalia as contained in Section 42 of the NDPS Act is crucial and therefore mandatory.



The next ground taken is the non compliance of 55 NDPS Act as all the pullandas of the recovered case property were not produced before the SHO concerned and the case property was also not deposited in the malkhana by the SHO concerned. *In the Bail Appl. no. 1725/2022 titled as Mohd. Jabir Vs State of NCT of Delhi delivered by Hon'ble High Court of Delhi*, regarding the violation of section 55 and 57 of NDPS Act, it is observed as :

"33 Hence, as per Section 55 NDPS Act, the case property has to be deposited by the officer Incharge (SHO of local Police Station) to the malkhana while affixing his seal but in the present case, the property was deposited by IO SI Dilbagh Singh "

Adverting to the present case, the photocopy of the malkhana register bear the name of depositor of the case property as ASI Topesh Yadav but at the same time it is also mentioned in the case property register that the pullandas were counter sealed by the seal of AK and same has also been deposed by the SHO concerned during his deposition as PW3.

The last ground taken by the Ld. Counsel for the accused is delay in trial. Accused in the present case was arrested on 22.05.2022 has been in JC for more than two years.

There are total 19 prosecution witnesses and 03 prosecution witnesses have been examined in the present case.

In the judgment of *Rabi Prakash Vs The State of Odisha in Special Leave to Appeal (Crl.) no.(s) 4169/2023 dated*

13.07.2023 Hon'ble Supreme Court of India has held:-



3. We are informed that the trial has commenced but only 1 out of the 19 witnesses has been examined. The conclusion of trial will, thus, take some more time.

4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent – State has been duly heard. Thus, the 1 st condition stands complied with. So far as the 2 nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.

The present applicant/accused **Dharambir S/o Late Sh. Nathu Rai** has already remained in custody for more than two years. The evidence is mostly documentary in nature and there is no likelihood of the accused's tempering the evidence or influencing the witnesses.

Keeping in view the above facts and for the aforesaid reasons, the applicant/accused **Dharambir S/o Late Sh. Nathu Rai** is admitted to bail, subject to furnishing personal bond and surety bond in the sum of Rs.1,00,000/-, and subject to the following conditions:

- (i) that he will not tamper with evidence;
- (ii) that he will not influence or coerce witnesses;
- (iii) that he will not leave the country without permission of the trial court and
- (iv) that he will join the investigation as and when called.



(v) that the applicant/accused shall provide his mobile number to the investigating officer concerned which shall be kept in working condition at all times.

(vi) that the applicant shall not switch off or change the same without prior intimation of the court, during the period of bail.

(vi) that in case the applicant/accused changes his address he will inform the IO concerned and court.

(vii) that the applicant/accused shall not indulge in any criminal activity during the bail period.

Application is accordingly disposed of.

Put up on date already fixed i.e. 26.09.2024.

Copy of this order be sent to the Jail Superintendent concerned. Copy of this order be also given dasti to the parties concerned.

True copy
b.1
22.08.24



(MANU GOEL KHARB)
SPECIAL JUDGE (NDPS)-02
DWARKA COURTS, NEW DELHI

22.08.2024
विशेष न्यायाधीश (न.प.स.-02)
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