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

+ BAIL APPLN. 2641/2018 (URGENT)

NABI ALAM alias ABBAS ..... Petitioner

Represented by: Mr.Aldanish Rein, Adv.

Versus

STATE (GOVT OF NCT OF DELHI) .... Respondent

Represented by: Mr.Amit Chadha, APP for  
State.

SI Vinod Gautam PS Crime  
Branch.

**CORAM:**

**HON'BLE MR. JUSTICE SURESH KUMAR KAIT**

**ORDER**

% **15.06.2020**

1. The hearing has been conducted through video conferencing.
2. The present petition has been filed under section 439 Cr.P.C. seeking bail in pursuance to case FIR No.124/17 registered at Police Station Crime Branch for the offences punishable under section 21/29 NDPS Act.
3. The brief facts of the case are that a Secret information came to the office of SI Vinod, Narcotics Cell on 27/07/2017 whereby informed that two people namely Nabi Alam (the present applicant) and Mohd Aakil are indulged into supply of heroine in Delhi which they get from Badaiyu/Bareli and even today they would be supplying a big consignment of heroine at around 2.00 pm to 2.30 pm near red light of Chanakya Place, Uttam Nagar. And if a raid is conducted on time, the accused persons could get caught while giving and taking heroine. Accordingly, a raid team was formed and the accused were apprehended. After a personal search of the accused Nabi

Alam (present applicant), a polythene was recovered from the Pocket of the pant that he was wearing. Inside the polythene there was heroine weighting 250 gms. and like wise from, the other accused 50 gms. of heroine was recovered from his personal search from the pocket of the pant of the accused.

4. On the aforesaid basis , both the accused persons were arrested and booked under NDPS Act and are facing trial.

5. The present petition is filed on the ground that search/recovery made by the police officials from the applicant (accused) of the alleged contraband was not held in accordance with the procedure prescribed under Section 50 of NDPS Act. The prosecution has not followed the mandatory procedure prescribed under Section 50 of the NDPS Act while making search and recovery of the contraband "*Heroine*" from the applicant as the same was not done in the presence of a Magistrate or a Gazetted Officer so as to make the search and recovery of contraband "*Heroine*" from the applicant in conformity with the requirements of Section 50.

6. Learned counsel for the petitioner, in view of the above facts, has relied upon the case decided by Hon'ble Supreme Court in the case of ***Arif Khan @ Agha Khan vs. The State of Uttarakhand*** on 27.04.2018 whereby held as under:

*"First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband "Charas" was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the*

*raiding party, who recovered the contraband "Charas" from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to make search and recovery from the appellant of the contraband "Charas" as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer."*

7. Further relied upon the case of ***Sukhvir Singh vs. State of Punjab*** decided by Punjab and Haryana High Court on 02.05.2018 whereby held as under:

*"In this case, the Applicant is stated to have been coming on foot when he was seen by a police party consisting of one ASI and two Head Constables, who stopped him and enquired about his particulars, and thereafter informed him that the ASI wish to search him, but that he could also opt to get his search conducted in the presence of any Magistrate or Gazetted Officer. Thereafter, the Applicant having agreed to a search by the ASI, and a consent memo having been shown to have been signed and a search conducted, 125 grams of intoxicant power are stated to have been found in a polythene bag in the trouser pocket of the Applicant.*

*11. In the prima facie opinion of this Court, firstly, the Applicant already having been detained by three policemen, there would be no reason for him to be not produced before a Magistrate.*

*Secondly, whether the consent memo was signed under duress or actually voluntarily, would need to be seen by the trial Court, along with all other evidence; and*

*therefore, keeping in view of the ratio of the judgment of the Constitution Bench in Jadejas' case(supra) , to the effect that "in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well", as also the mandate in Arif Khan @ Agha Khans' case (supra), in which case also a consent memo was duly shown to have 10 of 13 CRM-M-6713-2018 and been signed by the accused, but it was still held that the search and recovery by a police official, without production of the accused before a Magistrate, did not fulfil the requirement of Section 50 of the Act; in my opinion, the Applicant is entitled to the concession of bail, especially as he has already been in custody for the past more than 07 months, even as per the custody certificate already on record, with the trial still not near conclusion in the immediate future.*

*Consequently, the Applicant in CRM-M-6713-2018, i.e. Sukhvir Singh, shall be released on bail upon him furnishing adequate bail and surety bonds to the satisfaction of the learned trial Court. CRM-7013-2018 in CRA-S-1500-SB-2017."*

8. Also relied upon the case of **Davinder Pal vs. State of Punjab** decided by High Court of Punjab & Haryana on 11.05.2018 whereby granted bail on the following grounds:

*"Without commenting on merits of the case, considering the fact that Applicant is in judicial custody for the last about 11 months; he is not involved in any other case; he is not a previous convict; recovery from the Applicant is slightly higher than the commercial quantity; prosecution is yet to start and also in view of the fact that Applicant is*

*a young person aged about 22 years and there is a possibility that he may improve himself; there are debatable points as there is non-compliance of provisions of Section 50 of NDPS Act, I am of the opinion that Applicant is entitled for concession of regular bail pending trial in view of Section 37 of NDPS Act."*

9. Learned counsel further submits that since the present case is an outcome of a pre-informed raid conducted by the police, the possibility of searching the accused persons before a magistrate or a gazetted officer increases and non-compliance of the same is a serious lacuna in the prosecution case.

10. Moreover, learned counsel has relied upon the orders decided by coordinate benches of this Court which are as under:

- i. Order dated 31.10.2018 in Bail Appln. No.1854/2017 whereby observed as under:-

*"Petitioner contends that the personal search and the alleged recovery of contraband was not made from the appellant in the presence of Gazetted Officer or a Magistrate; hence the entire proceedings against the petitioner is vitiated in view of the judgment of the Supreme Court in **Arif Khan @Agha Khan vs State of Uttarakhand: 2018(6) SCALE 456** which has held that recovery of contraband should be made from the accused in the presence of a Magistrate or a Gazetted Officer and other than this, the proceedings under section 50 NDPS Act, 1985 will render baseless the allegation of recovery of the contraband from the accused.*

*In the aforesaid circumstances, the petitioner is enlarged on bail on his furnishing a personal bond in the sum of Rs.20,000 with surety of the like amount to the satisfaction of the Trial Court concerned."*

- ii. Order dated 25.04.2019 in Bail Appln. No.218/2019 whereby it was observed that:-

*“Learned counsel has placed reliance on the order dated 31st October, 2018 passed by a Bench of coordinate jurisdiction in Bail Application no.1854/2017 titled Deepak Singh vs. State whereby accused was enlarged on bail, when his personal search was not taken in presence of a Magistrate or a Gazetted Officer. Coordinate Bench has also relied on Arif Khan (supra).*

*Keeping in mind the totality of the facts and circumstances of this case, petitioner is admitted to bail, subject to his furnishing a personal bond in the sum of Rs.10,000/- (Rupees Ten Thousand Only) with one surety in the like amount to the satisfaction of the trial court.”*

- iii. Order dated 15.10.2019 in Bail Appln. No.1766/2019 whereby observed as under:

*“3. It is the petitioner’s case that provisions of Section 50 were not complied with. The petitioner disputes that any such offer to be searched in the presence of a Gazetted Officer/Magistrate was made and he had declined the same. The learned counsel appearing for the petitioner further submits that even if it is assumed that an opportunity was granted to the petitioner to be searched before a Magistrate or a Gazetted Officer and he had declined the same, the same would not comply with the requirements of Section 50 of the NDPS Act. He relies on the decision of the Supreme Court in Arif Khan @ Agha Khan v. State of Uttarakhand: 2018 AIR (SC) 2123.*

*6. The petitioner has been in custody since 04.07.2017. The petitioner has raised contentious issues with regard to the applicability of the decision of Arif Khan @ Agha Khan (supra). The grounds raised by the petitioner are substantial. The status report does not indicate any material, which would lead this Court would believe that*

*if the petitioner is released on bail, he would commit an offence which is alleged against him.*

*7. In view of the above, the present petition is allowed and the petitioner is admitted to bail on his furnishing a bail bond in the sum of ₹1 lakh and a surety of the like amount to the satisfaction of the concerned Trial Court. This is also subject to a further condition that the petitioner shall not leave the National Capital Territory of Delhi. He shall also report to the concerned Investigation Officer once every fortnight. It is further clarified that if the petitioner gets involved in any other FIR during the period he is released on bail, the present bail shall stand cancelled.”*

11. In addition to above, learned counsel for the petitioner has also relied upon a case of **Vaibhav Gupta vs. State** decided by this Court vide order dated 20.09.2019 in Bail Appln. No.2014/2019 whereby held as under:

*“Learned counsel appearing on behalf of the applicant submits that after the investigation, the prosecuting agency filed charge-sheet and charges were framed on 13.09.2018 under Sections 20(b) (ii B), 21 (b), 25 of NDPS Act and 25 Arms Act against the applicant.*

*Learned counsel for the petitioner has argued that the compliance of Section 50 of the NDPS Act is mandatory which has not been complied with in the present case.*

*Learned APP appearing on behalf of State submits that the police informed the accused about his right that the search may be conducted before the Magistrate/Gazetted Officer. However, he declined for the same and replied that he was aware of his rights and they can proceed in the absence of Magistrate or the Gazetted Officer. Thus, the Section 50 of the NDPS Act is complied with.*

*However, the Hon’ble Supreme Court in Criminal Appeal No.273/2007, Arif Khan @ Agha Khan vs State of*

*Uttarakhand, decided on 27.4.2019, it is held that the compliance of Section 50 NDPS Act is mandatory and even if the accused has denied the same, still the search has to be conducted in the presence of the magistrate or Gazetted Officer, which is missing in the present case.*

*Since the case is pending for trial, I am of the view that the present case is fit for bail. Accordingly, the applicant shall be released on furnishing personal bond in the sum of ₹25,000/- with one surety of the like amount to the satisfaction of the Trial Court.”*

12. Counsel for the petitioner submits that case of the petitioner is duly covered by the above mentioned judgments/orders, therefore, in the present case also, recovery has not been effected before the Magistrate or a Gazetted Officer, thus, there is non-compliance of Section 50 of NDPS Act which is mandatory failing which recovery is vitiated, therefore, petitioner deserves bail in the present case.

13. Mr.Amit Chadha, learned APP submits that recently coordinate bench of this Court has decided the same issue vide order dated 14.01.2020 in the case of *Innocent Uzoma vs. State* whereby held as under:

*“35. ...., it is no longer res integra that it is mandatory to comply with Section 50 of the NDPS Act. There is also no ambiguity as to manner in which Section 50 of the NDPC Act is required to be complied. Plainly, there is no requirement to conduct the search in the presence of a Magistrate or Gazetted Officer, if the person proposed to be searched did not so desire, after being informed of his right in this regard. The words “if such person so requires” as used in Section 50(1) of the NDPS Act make it amply clear that the person to be searched would be taken before a Magistrate or a Gazetted Officer, only if he so requires.*

*36. In terms of Sub-section (2) of Section 50 of the NDPS*



*Act, the Authorised Officer is empowered to detain the person proposed to be searched until he can bring him before the Gazetted Officer/Magistrate, as referred to in Sub-section (1) of Section 50 of the NDPS Act. The words “such requisition”, as mentioned in the opening sentence of Subsection (2) of Section 50 of the NDPS Act, obviously refers to the person proposed to be searched electing to exercise his right to be searched before a Gazetted Officer / Magistrate.*

*37. This also is in conformity with the scheme that makes it amply clear that if the person proposed to be searched requires that search be conducted before a Gazetted Officer or a Magistrate, the authorised officer is required to take such person to the nearest Gazetted Officer/Magistrate. In terms of Sub-section (3) of Section 50 of the NDPS Act, a Gazetted Officer or a Magistrate may discharge any person brought before him/her, if he/she finds no reasonable grounds for conducting such search. Sub-section (5) and (6) were introduced in Section 50 of the NDPS Act by virtue of the Narcotics, Drugs and Psychotropic Substances (Amendment) Act, 2001 enacted on 27.09.2001 and came into effect from 02.10.2001. The said Subsections provided option to the authorised officer to search a person notwithstanding the said persons (suspect) requiring to be searched before a Magistrate/ Gazetted Officer. However, the authorised person could do so only if the conditions as specified under Sub-section (5) of Section 50 of the NDPS Act were met, that is, if it is not possible to take the person to be searched to the nearest Gazetted Officer/Magistrate without the possibility of the person being searched parting with the possession of any narcotic drugs, psychotropic substance or any controlled substance or article or document. In terms of Sub-section (6) of Section 50 of the NDPS Act, the authorised officer is also required to record reasons for his belief that necessitated him to search the suspect without taking him to the nearest Gazetted Officer or Magistrate. Such reasons are*

*required to be recorded within seventy two hours of the search being conducted and a copy of the same is required to be sent by the authorised officer to his immediate official superior. Given the scheme of Section 50 of the NDPS Act, it is difficult to accept that notwithstanding that a suspect must be searched only before a Magistrate/Gazetted Officer, even though he does not so require, after he is apprised of his rights in this regard.*

*44. It is relevant to note that in Arif Khan (supra), the Supreme Court had referred to the decision of the Constitution Bench in Vijaysinh Chandubha Jadeja (supra) and observed that the search and recovery of the contraband made from the appellant in that case, did not satisfy the mandatory requirements of Section 50 of the NDPS Act, as enunciated by the Supreme Court in Vijaysinh Chanduba Jadeja (supra). It is, thus, apparent that the Court did not accept the prosecution's case that the provisions of Section 50 of the NDPS Act were complied with.*

*45. In the facts of the present case, the prosecution has established that the appellant was apprised of his right to be searched before a Magistrate or a Gazetted officer but he did not require that his search be conducted before the said persons.”*

14. In addition to above, learned APP submits that in case of Anil Sharma vs. State in Bail Appln. No.127/2019 decided on 08.11.2019 and in Bail Appln. No.1493/2019 decided on 19.08.2019 whereby the view taken in the aforesaid judgments is that accused will be explained his rights available to him under section 50 NDPS Act and if at any s0tage, he declined to avail his rights then in that case, compliance of section 50 is complete. In the present case also, admittedly section 50 has been complied with. The applicant/accused has been apprised about his rights, however, he declined

for the search to be effected in the presence of Magistrate or Gazetted Officer. Therefore Search was conducted by the IO itself. Thus, there is no merit in the present case and the same deserves to be dismissed.

15. Order dated 14.01.2020 passed by Hon'ble Mr. Justice Vibhu Bakhru in the case of *Innocent Uzoma (Supra)* and order dated 20.09.2019 passed by this Court in Bail Appln. No.2014/2019 are contradictory to each other and in addition to the above, judgments referred by the counsel for petitioner and learned APP held different opinion on the same issue. Therefore, in the interest of justice, I request the Hon'ble the Chief Justice to constitute a bench to decide the issue raised in the present petition.

16. Accordingly, let this petition be listed before the Hon'ble Chief Justice for passing an order on administrative side to constitute a bench.

17. I hereby make it clear that by referring the issue to the larger bench by this Court shall not make an embargo for filing interim application, if so advised and if the application is filed, the same will be considered and decided on merits of the application.

18. Since the petitioner/accused is in JC since 27.07.2017 and has completed almost 3 years' incarceration, therefore, I request the Hon'ble the Chief Justice to constitute the bench as early as possible so that the issue raised in the present petition is finally decided.

19. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through email.

**SURESH KUMAR KAIT, J**

**JUNE 15, 2020/ab**