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

+ BAIL APPLN. 509/2024

JEFFERY ROBERT

..... Petitioner

Through: Mr. Archit Kaushik & Mr.  
Bramhansh Bhardwaj, Advs.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Ritesh Kumar Bahri, APP along  
with SI Jitender Yadav, PS Mohan  
Garden.

**CORAM:**

**HON'BLE MR. JUSTICE VIKAS MAHAJAN**

**ORDER**

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**22.04.2024**

1. The present petition has been filed seeking regular bail in connection with FIR No.141/2022 under Section 21(c) of NDPS Act, 1985 and Section 14A of Foreigners Act registered at Police Station Mohan Garden.
2. The case of the prosecution is that the FIR was registered on the basis of a secret information that one African person will be coming to supply drugs to some unknown person and if the raid would be conducted he could be apprehended with contraband. Accordingly, a raiding party was constituted and the raid was conducted whereby the accused was apprehended with 270 grams of heroin, which is a commercial quantity.
3. The learned counsel appearing on behalf of the petitioner has confined his arguments to the aspect that in the present case the gazetted officer in whose presence search was conducted under Section 50 of the NDPS Act was the same officer, who had empowered the raiding party to conduct the raid. He submits that the Police Officer who himself empowered the raiding



party to conduct the raid cannot be said to be an independent gazetted officer. In support of his contention, reliance has been placed by the learned counsel on the decision of this Court in *Mohd. Jabir vs. State of NCT of Delhi*, (2023) SCC OnLine Del 1827.

4. He submits that it is the case of the prosecution itself that the recovery was made from the left pocket of the Jeans of the accused, therefore, Section 50 of the NDPS Act is clearly applicable. He further submits that since there is a non-compliance of Section 50 of the NDPS Act, the rigours of Section 37 of the NDPS Act will not be applicable. He therefore urges the Court that bail be granted to the present petitioner.

5. *Per contra*, the learned APP for the State has argued on the lines of Status Report. Additionally, he has argued that in case there is any non-compliance of Section 50 of the NDPS Act, the same is an aspect which will be considered by the learned Trial Court at the stage of trial. In support of his contentions, reliance has been placed by the learned APP on the decision of the Supreme Court in *State of Punjab Vs. Baldev Singh*, (1999) 6 SCC 172 as well as on the decision in *Vijaysinh Chandubha Jadeja Vs. State of Gujarat*, CrI.A.943/2005 decided on 29.10.2010.

6. I have heard the learned counsel for the petitioner, as well as, the learned APP for the State and have perused the record.

7. The issue as to whether the ACP who has constituted the raiding team or who himself is a member of the raiding team can be said to be an independent Gazette officer in terms of Section 50 of the NDPS Act is no more *res integra*. A Coordinate Bench of this Court in *Mohd. Jabir (supra)* has observed as under:-



*“42. In the present case, section 50 notice which was served upon the applicant reads as under:*

*“You have the legal right to get yourself searched in the presence of **any** Gazetted Officer or Magistrate.”*

*43. In my opinion, there is illegality in notice served u/s 50 NDPS Act dated 27.10.2020. The section 50 categorically mandates that where the accused requires a search, the search has to be done by nearest azette officer/nearest magistrate.*

*44. However, the section 50 notice served upon the applicant and the co-accused informs incorrectly that they can be searched by any azette information/magistrate. This, in my opinion is where the violation of section 50 lies.*

*45. It is correct that both the accused persons were informed that of their rights regarding personal search but the same was not informed as per the strict provisions of section 50.*

*46. In Ishdan Seikh v. Union of India, 2022 SCC OnLine Cal 1545, a division bench of Calcutta High Court observed:*

*“16. In the present case, the appellants were misled by the incorrect offer given to them that they could be searched by a Gazetted Officer who is a member of the raiding party. A Gazetted Officer who had proceeded to the place of occurrence after entertaining reasonable belief that the accused persons may be carrying narcotic substance cannot be said to be an independent person before whom the law contemplates a search. In this backdrop, acceptance of the offer by the appellants to be searched before an officer who is a member of the raiding party cannot be said to be a voluntary expression of their desire to be searched before such officer. There is a clear misdirection in law in the offer given to the appellants and accordingly they were misled to agree to a search before an officer who was a member of*



*the raiding party. By no stretch of imagination, such acknowledgment on their part can be said to be a voluntary relinquishment of the right enshrined under Section 50 of the NDPS Act.*

*17. Crux of the safeguard enshrined in Section 50 of the NDPS Act is that an accused should be made aware of his right to be brought before a Magistrate or a Gazetted Officer prior to a personal search. Such offer may be oral or in writing but the terms of the offer must be clear, unequivocal and not create confusion in the mind of an accused with regard to the lawful requirements prior to the search in any manner whatsoever.”*

*47. As is clear from the above, the emphasis on the word “nearest” is important since it ensures independence. In deviating from the provisions as laid down in section 50, the IO practiced a third option of having the search conducted by someone who was part of the operation of this particular alleged drug seizure. The IO practiced a third option which is unknown to law.*

*48. The ACP was the part of the raiding team and it was on his direction the entire investigation was initiated, could not be called an independent officer. He was after all the Gazetted Officer who had proceeded to the place of occurrence after entertaining reasonable belief that the accused persons may be carrying narcotic substance and hence cannot be said to be an independent person before whom the law contemplates a search under NDPS.”*

(emphasis supplied)

8. A perusal of the cross-examination of Constable Rakesh who was examined as PW4 shows that ACP Jitender Patel, the Gazetted Officer who was called by the IO for search of accused under Section 50 of the NDPS Act, was the same Police Officer who had empowered the raiding team to conduct the raid. Regard being had to the view taken by this Court in ***Mohd.***



*Jabir (supra)*, the ACP in whose presence the search of the present accused was conducted cannot be said to be an independent Gazetted Officer.

9. Since the quantity of the contraband involved is commercial in nature, therefore, for the purpose of deciding as to whether the twin conditions of Section 37 of the NDPS Act are satisfied, the issue viz. non-compliance of Section 50 of the NDPS Act can be examined and considered by this Court for recording its satisfaction about the existence of reasonable grounds for believing that the accused is not guilty of the offence charged. The Hon'ble Supreme Court in *Union of India Vs. Shiv Shanker Kesari, (2007) 7 SCC 798* has held as under:

*“7. The expression used in Section 37(1)(b)(ii) is “reasonable grounds”. The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.*

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*11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.”*

10. *Prima facie*, there is a non-compliance of Section 50 of the NDPS



Act, in as much as the search of the petitioner / accused is not in the presence of an independent Gazetted Officer. This by itself is sufficient ground to record satisfaction that the petitioner / accused is not guilty of the offence charged.

11. It is also the submission of the learned counsel appearing on behalf of the petitioner that the petitioner does not have any criminal record, which position is not disputed by the learned APP, on instructions from the IO who is present in Court.

12. Considering the aforesaid circumstances in entirety, this Court is of the opinion that the present petitioner has made out a *prima facie* case for grant of regular bail. Accordingly, the petitioner is enlarged on regular bail subject to his furnishing a Personal Bond in the sum of Rs. 50,000/- and one Surety Bond of the like amount to the satisfaction of the Trial Court/CMM/Duty Magistrate, further subject to the following conditions:-

- a) The petitioner shall not leave the NCR without permission of this Court and shall ordinarily reside at the address as per prison records/as mentioned in the petition;
- b) Petitioner shall surrender his Passport, if any, before the Trial Court at the time furnishing bail bond/surety bond.
- c) Petitioner shall appear before the learned Trial Court as and when the matter is taken up for hearing.
- d) The petitioner shall furnish to the IO/S.H.O P.S: Mohan Garden, a cell-phone number on which the petitioner may be contacted at any time and shall ensure that the number is kept active and switched-on at all times; further, the petitioner shall report to the IO/S.H.O. P.S: Mohan Garden on every Saturday at 11.00 A.M. and



he shall be released by the IO/S.H.O. P.S: Mohan Garden not later than 01.00 P.M.

e) The petitioner shall not contact, nor visit, nor offer any inducement, threat or promise to the complainant or any of the prosecution witnesses or other persons acquainted with the facts of the case. The petitioner shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial.

13. The petition stands disposed of.

14. It is clarified that any observation made herein-in-above is only for the purpose of deciding the present bail application and same shall not be construed as an expression of opinion on the merits of the case.

15. Copy of the order be forwarded to the concerned Jail Superintendent for necessary compliance and information.

16. Order *dasti* under signatures of the Court Master.

17. Order be uploaded on the website of this Court.

**VIKAS MAHAJAN, J**

**APRIL 22, 2024**

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