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

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Reserved on: 10.05.2024
Pronounced on: 30.05.2024+ **BAIL APPLN. 774/2024**

AFAAQ KHAN

..... Petitioner

Through: Mr. J.P. Singh, Mr. Vikrant
Singh and Ms. Kushama Rani,
Advs.

versus

THE STATE NCT OF DELHI

..... Respondent

Through: Mr. Manoj Pant, APP for the
State with Ms. Heena George
and Mr. Ranbir Singh,
Advocates.**CORAM:****HON'BLE MS. JUSTICE SWARANA KANTA SHARMA****JUDGMENT****SWARANA KANTA SHARMA, J.**

1. The present application under Section 439 of the Code of Criminal Procedure, 1973 ('*Cr.P.C.*') has been filed on behalf of the applicant, in case arising out of FIR No. 121/2020, registered at Police Station Crime Branch, for offences punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('*NDPS Act*').

2. Briefly stated, facts of the case are that an information was



received at P.S. Crime Branch, Delhi, on 20.08.2020 regarding a person named Guddu, who used to indulge in illegal dealings of narcotic substance. It was also revealed that Guddu would come near the SDM Office, Nandnagri, to deliver narcotic substance, and if a raid is conducted, he can be apprehended. Accordingly, a trap was laid down on the intervening night of 20-21.08.2020, and at about 12:20 am, the accused persons, including the present applicant/accused Afaaq Khan were apprehended. After service of notice under Section 50 of NDPS Act, narcotic substance i.e. *heroin*, weighing about 300 grams was recovered from the possession of the applicant, which was delivered to him by co-accused Guddu Khan. After conclusion of investigation, chargesheet was filed in the present case.

3. Learned counsel for the present accused/applicant argues that the applicant has been falsely implicated in the case. It is argued that no recovery has been affected from the present applicant/accused. It is argued that there has been no compliance with Section 50 of NDPS Act as in the notice under Section 50, the word 'nearest' is missing and further the accused had refused to get his search conducted in the presence of any gazetted officer or a magistrate, then the gazetted officer was not required to be called, and in this case, ACP was called on the spot therefore the same in breach of the provisions of Section 50. It is further stated that even the factum of recovery of commercial quantity of *heroin* is doubtful since the recovered substance was sent to FSL after a delay of 08 days. It is also argued that the present applicant has been in judicial custody for more than four years. Thus, it is prayed that the present applicant be



released on bail.

4. *Per contra*, learned APP for the State argues that the present applicant/accused was apprehended from the spot, and the quantity recovered from the present applicant/accused i.e. total 300 grams of *heroin* is commercial in nature, and therefore, bar of Section 37 of NDPS Act is applicable in this case. Therefore, it is prayed that the present bail application be dismissed.

5. This Court has heard arguments addressed by learned counsel for the applicant and learned APP for the State, and has perused the material placed on record.

6. In the present case, the contention of learned counsel for the applicant, that the recovery was not effected from the present applicant has no merit, since both the accused persons were arrested from the same spot itself. A perusal of the FIR reveals that the Police Officer, who had apprehended the accused at the spot, had mentioned in the FIR itself, that the co-accused Guddu Khan had taken out black polythene from the right side pocket of his bag, and had given it to the present applicant/accused. Therefore, to state that no recovery was effected from the present applicant has no merit, at this stage.

7. As regards the contention of learned counsel for the applicant that since the applicant had refused to get himself searched in the presence of any Gazetted Officer or Magistrate, the Investigating officer should not have called the Assistant Commissioner of Police at that spot, the record reveals that a notice under Section 50 was served to both the accused persons, they had refused to exercise their legal right by getting searched from a Gazetted Officer or Magistrate,



and in the meantime, the ACP had come to the spot and in his presence, the search was conducted. As rightly pointed out in the impugned order, the ACP is not a witness for notice under Section 50 or recovery of the contraband. The ACP was at the spot, to supervise the proceedings, and since there is no bar on the presence of any senior officer at the spot, this cannot be a ground for release of the present accused on bail. As far as the contention regarding sending the samples of contraband to FSL after 08 days is concerned, this Court is of the opinion that this is a matter of trial as to what will be the consequence of such delay.

8. As regards the application of Section 37 of NDPS Act is concerned, it will be relevant to refer to the observations of the Hon'ble Apex Court in case of *Narcotics Control Bureau v. Mohit Aggarwal* 2022 SCC OnLine SC 891, which read as under:

"10. The provisions of Section 37 of the NDPS Act read as follows:

"37. Offences to be cognizable and non-bailable.- (1) Notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974) -

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless -

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. (2) The limitations on granting of bail specified in clause

(b) of subsection (1) are in addition to the limitations under



the Criminal Procedure Code, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.

14. To sum up, the expression "reasonable grounds" used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail..."

9. The recovery in this case is of 300 grams of *heroin*, which is a commercial quantity and embargo under Section 37 of NDPS Act is attracted in this case. At this stage, when the applicant has been arrested at the spot receiving the narcotic substance from the co-accused and both of them were apprehended together from the spot itself, and further that the FSL report has supported the prosecution case, the twin conditions under Section 37 of NDPS Act are not satisfied.

10. Considering the overall facts and circumstances of the case, and that the recovery of commercial quantity of narcotics substance was affected from the present applicant/accused from the spot, this Court cannot persuade itself to believe that there are reasonable grounds to believe that he is not *prima facie* guilty of the alleged offence under NPDS Act. Therefore, in view of the above discussion, no ground for bail is made out.

11. Accordingly, the present bail application stands rejected.

12. It is however clarified that nothing expressed herein shall



tantamount to an expression of opinion on merits of the case.

13. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

MAY 30, 2024/A