

**IN THE COURT OF SH. AJAY PANDEY
ADDITIONAL SESSIONS JUDGE 04
PATIALA HOUSE COURTS: NEW DELHI.**

State Vs. Gurnam Singh and Ors.

SC no. 306/17

FIR no. 19/17

PS: Special Cell

15.12.2018

File taken up today on bail application of accused
Chukwama Celestine Okwuma.

Present:- Sh. S.K. Kain, learned Addl. PP for the State.

Sh. Sumit Sarna, learned counsel for accused
Chukwama Celestine Okwuma.

**ORDER ON BAIL APPLICATION OF ACCUSED
CHUKWAMA CELESTINE OKWUMA:-**

1. Reply to bail application filed.
2. Arguments on bail application heard.
3. It is argued by learned Addl. PP for State that
accused is involved in conspiracy for drug trafficking.
4. Learned defence counsel has pointed out that

accused has been arrested on disclosure statement of co-accused persons and upon his own disclosure statement during his custody in some other case.

5. Learned defence counsel has also pointed out that recovery from co-accused persons is vitiated against accused due non-compliance of section 50 NDPS Act.
6. No previous conviction is alleged against accused.
7. In the present case the only allegation against accused is about conspiracy in supply of drugs to co-accused persons i.e. Gurnam Singh and Dilbagh Singh. The search, seizure and recovery from co-accused persons is vitiated for non-compliance of section 50 NDPS Act, as respective search of both accused persons was conducted in the absence of any Gazetted Officer or Magistrate despite the IO having prior information about the recovery of drugs from them.
8. In the case of Arif Khan @ Aga Khan (supra), the Hon'ble Apex Court 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 (emphasis supplied).

9. In the present case also, by a bare reading of charge-sheet it emerges that co-accused persons were never produced before any Magistrate or Gazetted Officer and the search of the narcotic substance, from them was not made in presence of any such Magistrate or Officer. It is further clear from the charge-sheet that none of the police officials of the raiding party, who recovered the contraband was a

gazetted officer. In view of the ratio laid down by the Apex Court, they were not empowered to make search and recovery from the co-accused persons except in presence of Magistrate or Gazetted officer. The search and recovery of contraband from the possession of co-accused persons is therefore not in conformity with the requirements of section 50 NDPS Act. The court cannot expect that during the trial of the case the prosecution can prove that the search and recovery was made in compliance of section 50 NDPS Act, in presence of any Magistrate or a Gazetted Officer. In the list of witnesses filed along with the charge-sheet there is no witness who can prove this fact. The entire case of the prosecution to be proved against accused persons is narrated in the charge-sheet. There is not an iota in the entire charge-sheet to suggest that the mandate of section 50 NDPS Act in the light of the judgment of the Apex Court in the case of Aga Khan (supra), was complied with.

10. The ratio laid down by Hon'ble Supreme Court in Arif Khan @ Aga Khan (supra) was followed by Hon'ble High Court of Delhi in **Crl. Appeal No. 658/2017 in its judgment pronounced on 13.11.2018 in the case of Dharambir Vs State** and it was held that once a notice

u/s 50 NDPS Act is served upon the accused, section 50 NDPS Act is applicable even when recovery is not made from body search of accused. In the case of **Gurtej Singh Batth Vs State, Crl. A. 39/2015**, Hon'ble High Court of Delhi held as under:-

26. *Apropos **Arif Khan (supra)**, the contention of Mr. Aggarwala, is that the said judgment had not applicability, as the recovery had taken place, not from the person of the appellant, but from his baggage. This submission, too, has no force, in view of the law laid down by the Supreme Court in **Dilip v. State of Madhya Pradesh, (2007) 1 SCC 450** and **State of Rajasthan v. Parmanand, AIR 2014 SC 1384** which hold that, where the search of the baggage of the accused (from which the contraband was recovered) takes place alongwith the search of his person, Section 50 applies with full force. I may mention, here that I have, in my judgment in **Dharambir v. State, 2018 SCC OnLine Del 12305** also dealt with this aspect of the matter.*

27. *Once Section 50 of the NDPS Act, is treated as applicable, **Arif Khan (supra)** clearly applies, resulting in the present proceedings being vitiated additionally for the*

*reason that the search and recovery did not take place in the presence of a Magistrate or a Gazetted Officer. The requirement of consent, from the appellant, for being searched by the members of the raiding team, would be irrelevant, in view of the law laid down in **Arif Khan (supra)**.*

11. Hence, in view of the law laid down by the Hon'ble Supreme Court, as followed by Hon'ble High Court of Delhi, once section 50 NDPS Act was invoked by the IO, the search and seizure in the absence of gazetted officer or Magistrate is in violation of the procedure laid down and the proceedings stand vitiated. Hence, it is rightly submitted by learned Sh. Sarna, that the accused has able to come out of the bar u/s 37 NDPS Act.

12. There is no previous conviction alleged against him.

13. In the facts and circumstances of the case, accused is admitted to bail on the following terms and conditions:-

1. He shall furnish personal bond in the sum of Rs.1.00/- lakhs with one surety in the like amount.
2. He would present himself on each and every date of hearing and would not be attempting to delay the case, if in

exceptional circumstances he seeks his exemption he would duly instruct his counsel for proceeding further with the case.

3. He shall not call or visit or approach or intimidate directly or indirectly any of the prosecution witnesses except to call the IO of the case, if required.

4. He will not leave India without prior permission of the court.

5. IO is directed to open LOC against accused Chukwama Celestine.

14. At request of learned Sh. Kain, copy of order be given dasti to him.

(Ajay Pandey)

Addl. Sessions Judge-04

New Delhi District, Patiala House Courts

New Delhi/15.12.2018