

IA No. 1/23
STATE Vs. OBINNA AUGUSTIN NDUBUBA
FIR No. 243/22
PS- MEHRAULI

11.07.2023

Present :- Sh. Inder Kumar, Ld. Addl. PP for State.
Ld. Counsel for the applicant / accused.

This is an application u/s 439 Cr.PC for grant of regular bail moved on behalf of accused Obinna Augustin Ndububa.

1.0 It has been argued by the Ld. Counsel for the applicant / accused that he is innocent and the alleged recovery of contraband was planted upon him. It has further been argued that standing order 1/88 and 1/89 were violated as the samples were not drawn at the spot. It has further been argued that the application u/s 52A NDPS Act for drawing samples was filed after a delay of 16 days and the sampling before the Ld. MM was also defective as the minimum quantity of 5gms was not drawn by way of each sample. It has also been pointed out by the Ld. Counsel that at the time of recovery the contraband was described to be light brown in colour whereas, at the time of proceedings u/s 52A NDPS Act, the same has been recorded as yellow in colour. Ld. Counsel further argued that the word “nearest” has not been mentioned in the notice u/s 52A NDPS Act rendering it invalid. It has been argued that due to non compliance of standing orders as well as mandatory provisions of the

NDPS Act, the bar of Section 37 NDPS Act stands lifted and the accused is entitled to be released on bail. In support, Ld. Counsel has relied upon the following judgments:

- 1) ***Mohd. Muslim @ Hussain Vs. State (NCT of Delhi)***, Spl. Leave Petition (Crl.) No. 915 of 2023 decided on 28.03.2023 by the Hon'ble Supreme Court.
- 2) ***Mohd. Jabir Vs. State of NCT of Delhi***, Bail Appln. No. 1725/2022 decided on 28.03.2023 by the Hon'ble Delhi High Court.
- 3) ***Kashif Vs. Narcotics Control Bureau***, Bail Appln. No. 253/2023 decided on 18.05.2023 by the Hon'ble Delhi High Court.
- 4) ***Union of India Vs. Mohanlal & Anr.***, in Crl. Appeal No. 652/12 decided on 28.01.2016 by the Hon'ble Supreme Court.

2.0 On the hand Ld. Addl. PP opposed the application on the ground of severity of allegations.

3.0 Submissions heard. Record perused.

4.0 As per the allegations appearing in the chargesheet, acting on a secret information, a raiding team was constituted which intercepted the accused and from the possession of the accused 272 gms of heroin was recovered which falls in commercial category.

4.1 The Hon'ble Supreme Court in ***Union of India Vs. Mohanlal & Anr., in Crl. Appeal No. 652/12 decided on 28.01.2016,***

had directed that to process of drawing of samples has to be in the presence and under the supervision of the Magistrate. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not arise.

4.2 In the present case, the drawing of samples u/s 52A was done under the supervision of the Ld. MM and as such the argument of the Ld. Counsel that the samples were not drawn at the spot does not hold ground in view of the decision in *Mohanlal's case (supra)*.

4.3 Regarding the argument that there was several days delay in drawing the sample and sending the same to the lab, thereby giving rise to possibility of tampering, I am of the opinion that the prosecution needs to be afforded an opportunity to produce evidence to show that the sanctity of the sample was not disturbed and the same remained intact throughout. The same can be done only at the stage of evidence and not earlier. Further, regarding the discrepancy in the colour of the contraband recorded in the seizure memo and in the proceedings u/s 52A NDPS Act as well as the other inconsistencies pointed out by Ld. Counsel, I am of the opinion that the same are a matter of trial and it would not be proper to pre-judge the same without allowing evidence to be led.

4.4 The allegations against the accused are grave in nature. He was found in possession of commercial quantity of heroin. The accused is

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a foreign national and he also did not possess any valid documents including visa and passport. I am opinion that the accused is not entitled to be released on bail. Hence, **the bail application of accused Obinna Augustin Ndububa is dismissed.**

The application is disposed off accordingly.

Copy of the order be given dasti.

Copy of the order be sent to Jail Superintendent via email.

(Gaurav Gupta)
Special Judge-NDPS/ASJ (South)
Saket Courts/11.07.2023