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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 07.04.2021

Pronounced on: 19.04.2021

+ BAIL APPLN. 812/2021

BOBBY COLLIN

..... Petitioner

Through: Mr. Vikas Gautam, Advocate

Versus

NARCOTIC CONTROL BUREAU

..... Respondent

Through Mr. Subhash Bansal, Senior Standing
Counsel with Mr. Raghav Bansal,
Advocate

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. Vide present petition, petitioner is seeking regular bail. He is in custody since 31.03.2015 and is facing trial in SC No. 9164/2016 for allegedly committing offences under Sections 21 & 23 of Narcotic Drugs and Psychotropic Substances Act, 1985 (*henceforth referred to as the "NDPS Act"*).

2. The allegations against the petitioner, as spelt out in the complaint filed by Narcotic Control Bureau (NCB), are that on 29.03.2015, upon receipt of secret and reliable information that a South African national,

namely, Bobby Collins Anagor, having passport No.A02601093, is coming to Delhi from Sao Paolo via Dubai by Emirates Airway Flight No. EK 510 and is suspected to carry narcotic drug and psychotropic substance inside his body and might carry some drug in his baggage. Accordingly, a raiding team was constituted, which reached the IGI Airport, Terminal-3, New Delhi at around 08:30 a.m. Enquiries were made from IGI Airport custom officials as well as Emirates Airways staff with regard to Flight No. EK 510 and on arrival of flight passports of all the passengers were checked. Petitioner having passport No. A02601093 was identified and when he reached at custom counter, the NCB team introduced themselves and the secret information was shared with him. Thereafter, notice under Section 50 of the NDPS Act was served upon the petitioner and procedure prescribed therein was explained to him. He was taken to the CISF room where his baggage was physically examined but nothing incriminating was recovered there-from.

3. As per the prosecution, petitioner was offered tea and snacks at the Airport but he refused to eat and drink and upon enquiry, he disclosed that he was carrying some pellets/capsules of drugs in his stomach and so he does not want to eat and drink anything. Thereafter, Notice under Section 67

of NDPS Act was served upon him and he agreed to accompany the NCB team to their office where he tendered his voluntary statement in his own handwriting, wherein he disclosed having swallowed pellets/capsules of drugs which were in his stomach and requested the NCB team to take him to the hospital as he was feeling uncomfortable due to pellets/capsules of drugs being inside his body for a long time. The NCB team, after following due procedure for search and seizure and collecting necessary items like weighing machine, DD kit, IOs kit etc. reached at Safdarjung Hospital where two persons, namely, Pooran Singh and Rajeshwar Singh, both working at Safdarjung Hospital, voluntarily agreed to become independent witnesses to the search and seizure proceedings.

4. Under the directions of CMO, Safdarjung Hospital, Dr. Kashika proceeded for medical examination of petitioner and after his X-ray and CT scan, it became apparent that small pellets/capsules were concealed inside petitioner's body. Hence, petitioner was admitted in emergency surgical ward for removal of pellets/capsules from his body.

5. On the same day i.e. 29.03.2015 at around 06:30 p.m. petitioner passed out 11 pellets/capsules of drugs from his body during passage of stool. Similarly, at around 08:40 p.m. 10 pellets/capsules; at around 10:05

p.m. 10 pellets/capsules and at about 11:30 p.m. 06 pellets/capsules of drugs were excreted during passage of stool. On the next day, i.e. 30.03.2015 at about 02:00 a.m. again 05 pellets/capsules; at about 04:00 a.m. 05 pellets/capsules; at about 06:00 a.m. 02 pellets/capsules; at about 07:45 a.m. 05 pellets/capsules; at about 08.50 a.m. 03 pellets/capsules and at about 11:00 a.m. 02 pellets/capsules were passed out during passage of stool by petitioner. These pellets/capsules were washed and kept inside a polythene packet.

6. Further, at about 11:40 a.m. to check as to whether all the pellets/capsules have been removed from petitioner's body, his X-ray and CT scan was carried out and it was opined that no further pellets/capsules could be seen inside his body, but he was kept under observations.

7. Thereafter, pellets/capsules, all in oval shape and same size, were washed, counted and found 65 in number. One of the pellets/capsules was cut open and it was found containing some white powdery substance. Upon being tested with the field testing kit, it was found to be cocaine. Similarly, all pellets/capsules were cut open and were found to contain same white powdery substance. A small amount of powder was taken separately from each packet and tested separately with the help of field testing kit and these

were positive for cocaine.

8. Since all 65 pellets/capsules were of same size, packaging, texture, colour and property, these were mixed properly and homogenously and were transferred into a transparent polythene packet and upon weighing, it came out to be 1.320 kg. Two samples of 5 gram each were drawn and put inside two separate zip lock pouches, which were again put inside two separate white colour paper envelopes and were marked. The packing material of 65 polythene pellets/capsules in which recovered cocaine was wrapped, were put inside a separate polythene packet. The transparent packet containing cocaine and the polythene packet containing packaging material were put together and further kept and stitched in a white marked cloth and tied with plastic *sutli* and were marked. The entire proceedings of search and seizure were concluded in a cordial manner, following due procedure of law.

9. Subsequently, petitioner was arrested on 31.03.2015 and after completion of investigation, the complaint under Section 21/23 of NDPS Act was filed before the learned trial court on 28.09.2015. The learned trial court vide order dated 30.03.2016 framed the Charge under Section 21(c) and 23 (c) of NDPS Act and proceeded the trial.

10. This Court is informed that trial is in progress and out of 17

prosecution witnesses, 13 witnesses have been examined, three witnesses have been dropped and, thereby, only one witness remains to be examined.

11. At the hearing, learned counsel for petitioner submitted that petitioner is behind bars since the day of his arrest and trial shall take long time to conclude and, also that the prosecution case suffers from material and procedural infirmities. He submitted that the samples were not individually drawn from 65 pellets/capsules allegedly recovered from the stomach of petitioner and the samples sent to Central Revenues Control Laboratory (CRCL) were not the representative samples of contraband allegedly seized from 65 samples and, also that conditions stipulated under Section 67 of NDPS Act have not been complied with.

12. Reliance was placed upon decision dated 13.03.2020 of this Court in CrI.A.1027/2015, titled as *Amani Fidel vs. Narcotic Control Bureau* to submit that where more than one container/package is found, respondent is required to draw sample from each of the individual package/container and test each of the sample with the field testing kit and if the package/container is identical in shape, then a lot of 10 or 40 container/package may be prepared and thereafter, each package/container in particular lots are drawn, mixed and sent for testing.

13. It was further submitted that NCB officials did not comply with the instruction 1/88 dated 15.03.1988 of Narcotic Control Bureau, relevant paras of which relied upon read as under:-

“1.5 Place and time of drawal of sample Samples from the Narcotic Drugs and Psychotropic Substances seized must be drawn on the spot of recovery, in duplicate, in the presence of search (Panch) witnesses and the person from whose possession the drug has been recovered, and mention to this effect should invariably be made in the panch nama drawn on the spot.

1.6 Quantity of different drugs required in the sample The Quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the cases of Opium, Ganja and Charas/Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.

1.7 Number of samples to be drawn in each seizure case-

(a) In the case of seizure of single package/container one sample in duplicate is to be drawn. Normally it is advisable to draw one sample in duplicate from each package/container in case of seizure of more than one package/container.

(b) However, when the package/container seized together are of identical size and weight, bearing identical markings and the contents of each package give identical results on colour test by U.N. kit, conclusively indicating that the packages are identical in all respect/the packages/container may be carefully bunched in lots of 10 packages/containers may be bunched in lots of 40 such packages such packages/containers.

For each such lot of packages/containers, one sample in duplicate may be drawn.

(c) Where after making such lots, in the case of Hashish and Ganja, less than 20 packages/containers remains, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

(d) If it is 5 or more in case of other drugs and substances and 20 or more in case of Ganja and Hashish, one more sample in duplicate may be drawn for such remainder package/containers.

(e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot."

(emphasis added)

14. It was further submitted that para materia standing orders 1/88, is the standing order No.1/89 dated 13.06.1989 issued under Sub Section 1 of Section 52A of NDPS Act by the department of Revenue, Ministry of Finance, Government of India, as Section 2 thereof provides general procedure for sampling, storage etc. of seized narcotic, which read as under:-

“SECTION II- GENERAL PROCEDURE FOR SAMPLING, STORAGE ETC.”

2.1 All drugs shall be properly classified, carefully, weighed and sampled on the spot of seizure.

2.2 All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witness (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.

2.3 The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in cases of opium, ganja and charas (hasish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages /containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4 In the case of Seizure of a single package/container, one sample (in duplicate) shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.

2.5 However, when the packages/containers seized together are of identical size and weight, bearing identical markings and the content of each package given identical results on color test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of 10 packages/ containers/ except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.

2.6 Whereafter making such lots, in the case of hashish and ganja, less than 20 packages/containers remain, and in the case of other drugs, less than 5 packages/containers remain, no bunching will be necessary and no sample need to be

drawn.

2.7 If such remainders are more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such a reminder package /container.

2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample are in equal quantity is taken from a package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

2.9 The sample in duplicate should be kept in heat sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should bear the S.No. of the package(s)/ containers from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope which should also be sealed and marked 'secret-drug sample/ Test memo' is to be sent to the chemical laboratory concerned.

3.0 The Seizing officers of the Central Government Departments, viz., Customs, Central Excise, Central Bureau of Narcotics, Narcotics Control Bureau, Directorate of Revenue Intelligence etc. should dispatch samples of the seized drugs to one of the Laboratories of the Central Revenues Control Laboratory nearest to their office depending upon the availability of test facilities. The other Central Agencies like BSF, CBI and other Central Police Organizations may send such sample to the Director, Central Forensic Laboratory, New Delhi. All State Enforcement Agencies may send samples of seized drugs to the Director/Deputy Director/Assistant Director of their respective State Forensic Science Laboratory.

3.1 After sampling, detailed inventory of such packages /containers shall be prepared for being enclosed to the panchanama. Original wrappers shall also be preserved for evidentiary purposes.”

(emphasis added)

15. Reliance was also placed upon Hon'ble Supreme Court decision in ***Union of India Vs. Bal Mukund & Ors. (2009) 12 SCC 161***, wherein standing instructions No.1/88 have been referred. Further, reliance was also placed upon Hon'ble Supreme Court decision in ***Noor Aga Vs. State of Punjab & Anr. (2008) 16 SCC 417*** wherein sanctity of standing orders 1/89 was considered.

16. Besides, reference was made to examination and cross examination of public witness PW10 Puran Chand, in whose presence contraband of each capsule was tested and panchnama was prepared, to submit that this witness in his cross-examination has stated that only 55 capsules were tested in his presence and that no writing work was done. He has further stated that capsules were not handed over to the doctors at any point of time, whereas the stand of NCB is that the capsules were in the safe custody of doctor from 29.03.2015 till 31.03.2015, and thereafter, these were given by the doctor to the officer concerned. According to petitioner, the deposition of this witness

falsify the case of respondent/NCB. Reliance was also placed upon deposition of PW3 Ajay Sharma, Assistant Chemical Examiner, CRCL, Delhi in support of petitioner's case.

17. It was further submitted that procedure prescribed under Section 50 of NDPS Act has not been complied with, as no Gazetted Officer/Magistrate was called at the time of search and even notice under Section 50 contained overwriting on the reply of petitioner. Further submitted that despite knowing that petitioner was concealing narcotic in his stomach and NCB own admission that petitioner felt discomfort, he was first taken to NCB office for recording of statement and thereafter, hospital. No record or name of the doctor in whose presence these capsules were ejected at different intervals of time and in whose custody capsules remained from 29.03.2015 till 31.03.2015 and even discharge summary is silent on this aspect. The *Panchnama* prepared for seizure of contraband does not mention the name of the medical officer or doctor or Chief Medical Officer and none of these witnesses have been cited by respondent/NCB. Moreover, petitioner had retracted from his statement at the first available opportunity.

18. Reliance was also placed upon decision of Hon'ble Supreme Court in *Tofan Singh Vs. State of Tamil Nadu 2020 SCC OnLine SC 882*. In

addition, reliance was also placed upon decision of this Court dated 04.02.2021 in Bail Appln. 3491/2020, titled as ***Gopal Das Vs. NCB***; order dated 25.01.2021, in Bail Appln. 4165/2020, titled as ***Ashwani @ Sonu Vs. The State***; order dated 16.03.2020, in Bail Appln.191/2020, titled as ***Uruakpa Ahmed @ Baba Don Vs. State***. Further, reliance is placed upon decision of a Coordinate Bench of this Court dated 28.05.2015 in CrI.A. 1113/2011, ***Edward Khimani Kamau Vs. The Narcotic Control Bureau***.

19. The aforesaid submissions advanced by learned counsel for petitioner were vehemently opposed by learned standing counsel for NCB who submitted that petitioner is a foreign national and is facing trial for illegal trafficking of contraband drugs in huge commercial quantity and if released on bail, there is every likelihood of his jumping the bail.

20. Learned Standing Counsel for NCB submitted that during search, procedure prescribed under Section 50 of NDPS Act was fully complied with and the seizure and drawn of sample from the recovered substance was done in accordance with Section 67 of NDPS Act. He further submitted that the learned trial court keeping in mind the recoveries made from petitioner and also bar of Section 37 NDPS Act, has rightly dismissed his application for bail.

21. Reliance was placed upon decision of **Punjab & Haryana High Court** dated **06.07.2015** in **CRA No. 826-DB of 2009**, titled as *Sucha Singh & Anr. Vs. State of Punjab*. Reliance was also placed upon decision in *State of Kerala & Ors. Vs. Rajesh & Ors. (2020) 12 SCC 122* to submit that the Hon'ble Supreme Court has categorically interpreted the mandate and rigors of Section 37 NDPS Act and denied bail to the accused person.

22. Further submitted that guidelines enumerated in the Standing Order No.1/88 and 1/89 have been complied with and there is no violation as alleged by the petitioner. He further submitted that however, these are internal advisory guidelines of the department for guidance purpose and are not gazetted notified and hence, these guidelines cannot be interpreted as a Statute of law.

23. Learned standing counsel submitted that trial is in progress and only one prosecution witness remains to be examined and at this fag end of trial, the present petition deserves to be dismissed.

24. The rival contentions raised by both the sides have been heard at length and material placed on record has been perused.

25. It has been categorically stated in the complaint in question that notice under Section 50 of the NDPS Act was issued to the accused Bobby Collins

Anagor by Sh. B.L.Bairwa, IO, NCB and he was also explained of his legal rights that if he desires his search can be conducted before a Magistrate or a Gazetted officer to which he denied and also wrote the same on the Notice under Section 50 of the NDPS Act. It is further noted that Sh.CSK Singh, IO offered their personal search to petitioner, to which also he refused. Thereafter, petitioner was taken to the CISF room where his baggage was physically examined but nothing was recovered from his personal search.

26. With regard to compliance under Section 67 of the Act, it has been averred in the complaint that once the accused/petitioner disclosed carrying pellets/ capsules in his stomach, he was served with notice under Section 67 of the Act, on which he requested the NCB officers to take him to NCB office to enable him to tender his voluntary statement. Petitioner recorded his voluntary statement in his own handwriting in which he accepted having swallowed pellets/capsules of drugs and requested to take him to hospital.

27. It is further averred in the complaint that all the pellets/capsules recovered from the stomach of petitioner were found to be 65 in number. They all were in oval shape and same size. One of the capsules was cut open and found to contain white powdery substance and when it was tested with the field testing kit, it gave positive result for cocaine. Similarly, all the

pellets/ capsules were cut open and all found to contain white powdery substance. A small amount of powder was taken separately from each packet and tested separately with the help of field testing kit which gave results for cocaine. Since all the recovered cocaine from 65 capsules were of same size, packaging, texture, colour and property, they were transferred to a polythene packet and weighed. It came out to be 1.320 kg, out of which two samples of 5 gms each were drawn and put inside two zip lock pouches. The process was completed in the presence of CSK Singh, Investigating Officer and two independent witnesses and after completion of other necessary procedure, the sample so obtained and marked was sent to the Chemical Examiner, CRCL.

28. Pertinently, the petitioner has approached this Court when only one prosecution witness remains to be examined and trial is at the fag end. During the course of hearing, learned counsel sailed this Court through examination and cross-examination of witnesses PW-3 and PW-10 to point out various infirmities in the prosecution case. Prosecution evidence is yet to be concluded and testimonies of other witnesses are not before this Court, hence, it would not be worthwhile to scrutinize the statements of these two witnesses in piecemeal. Furthermore, in what way and manner the

prosecution failed to follow the procedure prescribed under the Act, can be established by the petitioner during his evidence in defence. The pleas so urged before this Court can also be agitated before the trial court at the time of final arguments.

29. In the aforesaid view of the matter, without going into the merits of the case, this petition is accordingly dismissed.

(SURESH KUMAR KAIT)
JUDGE

APRIL 19, 2021

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