

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

**CRL. APPEAL 1027/2015& CRL. M.B. 511/2019 &
CRL. M.A. 1660/2020 (Early Hearing)**

Reserved on : 26.02.2020

Decision on : 13.03.2020

IN THE MATTER OF:

AMANI FIDEL CHRIS

..... Appellant

Through: Mr. J.S. Khushwaha, Adv.

Versus

NARCOTICS CONTROL BUREAU

..... Respondent

Through: Mr. Rajesh Manchanda and Mr. R.
Manchanda, Advs.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present appeal is directed against the judgment dated 28.07.2015 passed by the Special Judge whereby the appellant was convicted for the offence under Section 21(c) NDPS Act and was sentenced to undergo RI for 10 years and fine of Rs.1 lac in default whereof to undergo SI for 6 months. It was further directed that after completion of the sentence, the convict be deported to his country.
2. Briefly, the relevant facts as noted by the trial court for the disposal of the present appeal are reproduced as under :-

“... (h) On 01/02/2010 at about 1450 hours IO Sh. G.S. Bhinder received a secret information that one Nigerian national Amani Fidel Chris aged 26 years, height 5.5 feet with curly hair, is indulging in drug trafficking and is

likely to travel through Silyaldah Rajdhani Express, Train no. 2134 and that he is suspected to be carrying a huge quantity of heroin.

(i) The information was reduced into writing and was put up by IO G.S. Bhinder before Sh. Ajay Kumar, Superintendent, NCB and on his instructions a raiding team consisting of Intelligence Officers of NCB namely, Sh. G.S. Bhinder, Sh. Nirbhay Singh, Sh. Pankaj Dwivedi, Sh. Sanjay Rawat, Sh. Vikas Kumar, Smt. Jaswani, Babu Lal and Om Prakash along with driver Rajbir Singh proceeded from NCB office on 01/02/2010 at about 1515 hours in official vehicle and reached railway Station platform no. 12 at about 1600 hours. IO took along with him IO kit and field testing kit.

G) On reaching the platform, IO Sh. G.S. Bhinder introduced himself and the team members to a few public persons and requested them to join the raiding party and on his request, two persons namely Sh. Pinkesh Kumar and Sh. Sher Singh voluntarily agreed to join as independent witnesses to the proceedings. At about 1625 hours while Sh. G.S. Bhinder, IO along with Sh. Nirbhay Singh were waiting at the platform no. 12 near the staircase along with independent witnesses, they noticed one African approaching towards the Rajdhani Express with similar features as mentioned in the secret information. The said person was intercepted by the NCB officials and on enquiry the said African person revealed his name as Amani Fidel Chris and also disclosed that he would be traveling via Siyaldah Rajdhani Express on a valid ticket.

(k) The NCB officers then disclosed their identity and the secret information to the said African person. Thereafter a notice u/s 50 of NDPS Act was served upon the accused. He was also made to understand that he had a legal right to be searched before a Magistrate or a Gazetted Officer but the accused refused to exercise the

said right and informed that any NCB officer could conduct his search.

(l) The accused was carrying one stroller bag of blue colour (make perfect), one black colour pitthu bag (make Adidas) and one laptop bag with laptop (make Dell). Sh. G.S. Bhinder, IO firstly took the search of the stroller bag and on its search it was found containing four brown carton boxes, one hand towel of sky blue colour and one Sunday School Manual (Book) of light pink colour. On opening of the brown carton boxes, they were found containing one door spring machine of Amrit Company in each cartoon which was properly screwed and welded. The machines were opened with the help of vehicle tools and it was found that cavity in each of the spring machine were stuffed with one brown colour packet each i.e. 4 packets in total. On further opening each of the packets, powdery substance was recovered which on testing with the help of field testing kit gave positive for heroin. The total substance recovered from all the machines was mixed properly and weighed with the help of electronic weighing machine and its weight came out to be 1.5 kg. Two samples of 5 grams each were drawn out from the recovered substance and were put in two small zip lock pouches and were then placed inside separate white paper envelopes. The samples were given marks A1 and A2 and the remaining substance was kept in the polythene and converted into a cloth pullanda and was given mark A. The packing material along with stroller bag, hand towel and book Sunday School Manual, were minutely examined and found that a sum of Rs. 21,000/- were hide under the flap in the stroller. Same were also kept in a white enveloped and was given mark A3. The packing material along with stroller bag, towel, handbook were kept in a white synthetic bag mouth of which was tied and was given marked B. All the parcels and the samples were duly sealed and paper slips having dated signature of the IO and both witnesses were pasted on the parcels and the samples. A test memo in triplicate was also

prepared at the spot. All the case property was taken into possession and a panchnama was drawn. Railway ticket was also taken into possession.

(m) Summon u/s 67 NDPS Act were then issued to the accused and in pursuance of the same, he accompanied the NCB officials to their office and tendered his statement before them admitting his complicity in the present case and further disclosed that the recovered heroin and door machine were procured by him from his girlfriend Ms. Savita and that he himself concealed, sealed and welded the recovered heroin in the cavity of the machine seized from him at his room. He further disclosed that he had sent the drugs earlier outside India three times and that one Sh. Subrato from Kolkata assisted them in sending parcels and also gave telephone numbers of Ms. Savita and Sh. Subrato. One photocopy of an airway bill bearing no. 3168304484 was also recovered from his wallet and he confessed that vide the said airway bill he had sent the parcel to USA on 12/10/2009 through Sh. Subrato by Aramex Courier, Kolkata to USA. The said airway bill was of the same parcel from which 1.2 kg. of heroin had been recovered by the NCB officials on 15/10/2009. The accused also tendered the photograph of Ms. Savita, an election card of Ms. Neha Rai, Photostat copy of airway bill and his member ship card,

(n) The case property along with samples and test memo was deposited with the Malkhana Incharge. Reports under Section 57 NDPS Act with respect to the seizure and arrest were submitted by IOs to the Superintendent Sh. Ajay Kumar.

(o) Based on the disclosure statement of accused, Sh. Ajay Kumar, Superintendent issued a search authorisation warrant in favour of Sh. Pankaj Kumar Dwivedi, IO at about 9:45 p.m. on 1/2/2010 and directed him to conduct the raid at the premises of accused Amani.

On his instructions a raiding team consisting of Intelligence Officers of NCB namely, Sh. Pankaj Kumar Dwivedi, Sh. Akhilesh Mishra, Sh. M.M.S. Bhandari, Sh. Rajbir and other NCB officials along with accused Amani proceeded from NCB office in official vehicle and reached the house of accused i.e. H.NO. E-14A, Third Floor, right side, Gali no. 1, Sant Garh, New Delhi at about 10:45 p.m. On reaching the said house, the IO met Sh. Dilbag Singh and Sh. Bhupinder Singh and disclosed his identity to them and the purpose of their visit and also requested them to join as a public witness to which they agreed. The house was opened by accused himself from the key which he was carrying and on search of the kitchen a welding machine along with welding electrodes was recovered. Panchnama was prepared.

(p) During further investigation, on 19/5/2010 Sh. G.S. Bhinder, IO went to the office of franchise of Aramex in Kolkata to make inquiry about the parcel and to know whereabouts of accused Savita and Subrata Mitra and issued summons u/s 67 of NDPS Act to Ms. Jaya Cladius, booking clerk the Aramex, Kolkata to appear before NCB, Kolkata.

(q) In pursuance of the summons issued to Ms. Jaya Cladius, booking clerk of the Aramex, Kolkata, she presented herself before NCB, Kolkata on 21/5/2010 and on being shown the lady's photograph that had been recovered from the wallet of accused Amani, she informed the NCB officials that two ladies had come to book the parcel in question and that they had disclosed their names as Neha Rai and Nerisa Gurung and the photograph being shown to her is of the lady who had represented herself to be Neha Rai. Ms. Jaya Kladius has also disclosed that the other lady had represented herself to be Nerisa Gurang and had submitted the photocopy of her voter I card as ID document proof alongwith the booked parcel. Ms. Jaya Cladius also produced a photocopy of election I card of Nerisa Gurung that had

been handed over to her at the time of booking of the parcel. She was also shown the proforma invoice and airway bill and she confirmed the same to be the documents that had been prepared by her at the time of booking the parcel. Summons were also issued to the independent witnesses and in pursuance of the same, all of them appeared in the NCB office and tendered their voluntary statements.

(r) Both the samples (mark A1) i.e. one pertaining to the parcel searched at the office of Aramex India Pvt. Ltd. and second pertaining to parcel which was recovered from accused at railway station along with test memos were sent to the CRCL, New Delhi for testing and as per report of the Chemical Examiner, both the samples gave positive for diacetylmorphine i.e. heroin. After receiving the report of the Chemical Examiner the present complaint was filed.”

3. The appellant was charged along with two other co-accused persons Savita @ Neha Rai and Subrata Mitra who were declared proclaimed offenders and the trial proceeded only against the present appellant. The prosecution examined a total of 15 witnesses in support of its case. The appellant, at the time of recording of his statement under Section 313 Cr.P.C., denied the prosecution case.

4. Learned counsel for the appellant has rested his case only on the point that the respondent committed an illegality while drawing samples from the seized substance. He has submitted that as per the case of the prosecution, the recovery was made from a ‘stroller bag’ which had four carton boxes carrying door spring machines. The cavity of the spring machine was found stuffed with a brown colour packet. In all, four packets were seized. The officials after recovering the contraband from the four packets transferred

the contents of the four packets in separate white polythene and mixed it. Two representative samples of 5 grams each were drawn which were later sent to CRCL for analysis. It was contended that transferring the contents of all the four packets into one and then drawing the sample has caused serious prejudice to the appellant as it cannot be ascertained that all the four packets were containing the alleged narcotic substance i.e., heroin. It was contended that individual samples from each of the four packets ought to have been drawn and in this regard has placed reliance on the decision of a coordinate bench of this Court in Charlse Howell @ Abel Kom v. N.C.B. (Delhi) reported as **2018(3) JCC [Narcotics] 153**.

5. Per contra, learned counsel for the respondent submitted that by mixing the contents of the four packets, no prejudice has been caused to the appellant as prior to mixing, the individual samples were drawn from each packet separately and tested with the 'field testing kit'. All the samples tested positive for heroin. In support, he has relied upon the decision of State of Punjab v. Baljinder Singh reported as **2019 (14) SCALE 226**.

6. I have heard learned counsels for the parties and have gone through the case records.

7. The present case involves two recoveries. The first recovery was dated 15.10.2009 which was made from the office of a courier company namely Aramex India Pvt. Ltd. however, the same was disbelieved by the trial court as the recovery of airway bill from the appellant was held to be doubtful. The prosecution has not challenged the aforesaid finding.

8. The second recovery was dated 01.02.2010 when the appellant was apprehended at Platform No.12, New Delhi Railway Station and from the

search of his 'stroller bag', recovery of 1.5 kg of heroin was made. Subsequently, the appellant also got recovered a welding machine of make 'Bajaj' and one pack of welding rods from the kitchen of his house which was used to conceal the contraband in the door spring machines found hidden in the appellant's 'stroller bag'.

9. To prove the second recovery, the prosecution had examined Ajay Kumar (PW3), G.S. Bhinder (PW2), Sanjay Rawat (PW5), Pankaj Kumar Dwivedi (PW7) and Babulal (PW6). The statement of the accused recorded under Section 67 NDPS Act was proved by G.S. Bhinder and Pankaj Kumar Dwivedi. The chemical analysis reports with respect to the samples were proved by R.P. Singh (PW10) and Dr. Raj Kumar (PW13). To prove the recovery of the welding machine from the house of the appellant, the prosecution examined Pankaj Kumar Dwivedi, Akhilesh Kumar Mishra (PW4), M.M.S. Bhandari (PW9), Dilbagh Singh (PW11) and Bhupender Singh (PW14). Dilbagh Singh was the landlord of the appellant and Bhupender Singh is the landlord's son.

10. The investigation began with a receipt of a secret information by G.S. Bhinder at about 1450 hours on 01.02.2010 that the present appellant was indulged in drug trafficking and was likely to travel on Rajdhani Express and was suspected to be carrying huge quantity of heroin. The information was reduced into writing and put up before Ajay Kumar, Superintendent NCB, who proved the same as Ex. PW2/10. The authorisation to take necessary action in favour of G.S. Bhinder was proved as Ex. PW2/11.

11. G.S. Bhinder, IO deposed that on 01.02.2010 at 1600 hrs, he along with the raiding team reached Platform No. 12 where the appellant was

asked for his identity and on confirmation of his name, a notice under Section 50 of NDPS Act was served upon him and he was explained about his legal rights to be searched before a Magistrate or a gazetted officer. On appellant's refusal, a search was carried out. The appellant was carrying a blue coloured 'stroller bag' of make 'Perfect', a black colour shoulder bag of make 'Adidas' and a laptop bag of make 'Dell'. On opening the 'stroller bag', it was found stuffed with four brown carton boxes. The carton boxes contained door spring machines. The said machines were cut open with the help of vehicle tools which were brought from the NCB vehicle. On opening the spring machine, a cavity was found containing one brown colour packet. All the four spring machines had a similar cavity containing one brown colour packet. In all, four brown colour packets were found. On opening the packets, they were found containing some powdery substance. The samples were separately drawn from each packet and all the samples when tested with the 'field testing kit', gave positive result for heroin. The substance in all the four packets was similar in colour and texture. The contents of all the four packets were transferred in a separate white polythene which when weighed with an electronic weighing machine totalled 1.5 kg. Two samples were drawn and taken in small zip locked pouches separately which were further kept in two separate envelopes and were sealed with the help of white paper slip containing dated signature of the appellant, G.S. Bhinder, Pinkesh Kumar and LTI of Sher Singh. The paper slip was pasted on both the envelopes and sealed with the seal of NARCOTICS CONTROL BUREAU DZU 1. The remaining recovered substance was kept in white marking cloth which was stitched and sealed after affixing paper slip signed by the appellant, G.S. Bhinder, Pinkesh

Kumar and LTI of Sher Singh. It was further sealed with the wax seal of NARCOTICS CONTROL BUREAU DZU 1. The case property along with samples, test memo forms and contraband were deposited with the Store Keeper and seal was handed over to Seal Incharge. Ajay Kumar, Superintendent, put his signatures on the seal movement register in presence of the aforesaid witnesses. A report under Section 57 of NDPS Act (Ex. PW3/5) was submitted.

12. To the similar effect are the testimonies of other members of the raiding team.

13. The manner of drawing a sample of narcotics has been laid down in Standing Order 1/88 dated 15.03.1988 issued by the Narcotics Control Bureau. The relevant paras of the Standing Order are reproduced 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 is recovered, and mention to this effect should invariably be made in the panchnama 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. Pari materia with Standing Order 1/88 is the Standing Order No.1/89

dated 13.06.1989 issued under subsection (1) of Section 52A of NDPS Act by the Department of Revenue, Ministry of Finance, Government of India. Section (II) provides for general procedure for sampling, storage and reads 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. In view of the stringent provisions of the NDPS Act, the issue to be considered is whether the procedure specified under the Standing Orders can be flouted.

16. A combined reading of paras of the Standing Orders would show that where more than one container/package is found, the respondent is required to draw a sample from each of the individual container/package and test each of the sample with the 'field testing kit'. It is further provided that if the container/packages are identical in shape, size and weight then lots of 10 or 40 containers/packages may be prepared and thereafter representative

samples from each container/package in a particular lot are to be drawn, mixed and sent for testing.

17. Mixing of the contents of container/package (in one lot) and then drawing the representative samples is not permissible under the Standing Orders and rightly so since such a sample would cease to be a representative sample of the corresponding container/package.

18. In the present case, four packets containing suspicious powdery substance were found concealed in a 'stroller bag'. On testing with the 'field testing kit', the powder in each packet tested positive for heroin. The I.O., without weighing the contents of each individual packet, mixed the powder from all the 4 packets in one polythene bag and then drew the sample from the mixture.

19. In the opinion of this court, the respondent ought to have adopted the procedure outlined in Para 2.4 of the Standing Order 1/89 [or para 1.7(a) of Standing Order 1/88] by drawing sample (in duplicate) from each of the 4 packets separately and then sending the samples for testing.

20. Going by the submission of learned counsel for the respondent that the procedure in para 2.5 [or para 1.7(b) of Standing Order 1/88] was to be followed and the four packets were to be considered as one lot, even then the contents of all the four packets ought not to have been mixed with each other. Instead, in terms of Para 2.8 [or para 1.7(e) of Standing Order 1/88], representative samples (in duplicate) from each individual packet ought to have been taken. Once representative samples were drawn from each individual packet, then such representative samples were to be mixed together to make a composite whole, out of which a further sample was to be

drawn as a representative sample of this “lot of four packets”. The Standing Order nowhere provides that the contents of all the containers/packages are to be mixed, which has been done in the present case.

21. The object of not mixing the contents of container/packages with each other can also be inferred from Paras 2.9 and 3.1 of Standing Order 1/89 where it is stated that “Both the envelopes should bear the S.No. of the package(s)/containers from which the sample has been drawn” and “After sampling, detailed inventory of such packages/containers shall be prepared for being enclosed to the *panchnama*”.

22. The sanctity of the Standing Order 1/89 came for consideration before the Supreme Court in Noor Aga v. State of Punjab reported as **(2008) 16 SCC 417**, where the facts before the Court were that 1.4 kg heroin was found concealed in a cardboard container carrying grapes. It was held as under:-

“87. Perseverance of original wrappers, thus, comes within the purview of the direction issued in terms of Section 3.1 of the Standing Order No. 1 of 1989. Contravention of such guidelines could not be said to be an error which in a case of this nature can conveniently be overlooked by the Court. We are not oblivious of a decision of this Court in Chief Commercial Manager, South Central Railway, Secunderabad and Ors. v. G. Ratnam and Ors (2007) 8 SCC 212 relating to disciplinary proceeding, wherein such guidelines were held not necessary to be complied with but therein also this Court stated: (SCC p.222, para 23)

23. In the cases on hand, no proceedings for commission of penal offences were proposed to be lodged against the respondents by the

investigating officers.

88. *In Moni Shankar v. Union of India and Anr. (2008) 3 SCC 484* , however, this Court upon noticing *G. Ratnam (supra)*, stated the law thus:

15. It has been noticed in that judgments that Paras 704 and 705 cover the procedures and guidelines to be followed by the investigating officers, who are entrusted with the task of investigation of trap cases and departmental trap cases against the railway officials. This Court proceeded on the premise that the executive orders do not confer any legally enforceable rights on any persons and impose no legal obligation on the subordinate authorities for whose guidance they are issued.

16. We have, as noticed hereinbefore, proceeded on the assumption that the said paragraphs being executive instructions do not create any legal right but we intend to emphasise that total violation of the guidelines together with other factors could be taken into consideration for the purpose of arriving at a conclusion as to whether the department has been able to prove the charges against the delinquent official.

It was furthermore opined: (Moni Shankar case., SCC p. 493, para 23)

“23.....It may be that the said instructions were for compliance of the Vigilance Department, but substantial compliance therewith was necessary, even if the same were not imperative in character. A departmental instruction cannot

totally be ignored. The Tribunal was entitled to take the same into consideration along with other materials brought on record for the purpose of arriving at a decision as to whether normal rules of natural justice had been complied with or not.”

89. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-a-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in State of Kerala and Ors. v. Kurian Abraham (P) Ltd. (2008) 3 SCC 582 following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan (2004) 10 SCC 1 held that statutory instructions are mandatory in nature.

91. Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”

(emphasis added)

23. In Union of India & Ors. v. Bal Mukund & Ors. reported as (2009) 12 SCC 161, the Supreme Court while referring to the Standing Instruction

1/88, held as follows :-

*“36. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction No. 1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that PW-7 had taken samples of 25 grams each from all the five bags and then mixed them and sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. **It was a requirement in law.**”*
(emphasis added)

24. Earlier, in Gaunter Edwin Kircher v. State of Goa, Secretariat Panaji, Goa reported as **1993 3 SCC 145**, the accused was found in possession of 2 cylindrical pieces of charas which were found to be 7 gram and 5 grams respectively. The investigating agency sent only one piece weighing 5 grams for chemical analysis while neither the second piece weighing 7 grams nor any of its part was sent for chemical analysis. The Supreme Court held that both the pieces ought to have been sent. It was held as follows :-

“5. ... As already mentioned only one piece was sent for chemical analysis and P.W.1, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it cannot be presumed or inferred that the substance in the other piece weighing 7 gms. also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychotropic substances and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused. In view of the evidence of P.W.1 it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms. was recovered from the accused. The failure to send the other piece has given rise

to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law.”

25. A coordinate Bench of this Court in Basant Rai v. State reported as **(2012) 191 DLT 403**, under somewhat similar circumstances where the accused was found carrying a polythene bag containing 8 smaller polythene bags having brown colour substance and the investigating officer took small pieces of charas from each packet, mixed the same and drew two sample parcels which were sent to FSL for analysis, while allowing the appeal of the accused, held as under:

“25. After hearing both the learned counsel for parties and going through the Trial Court Record, I find force in the submission of learned counsel for appellant. Admittedly, the samples were drawn after breaking small pieces from 08 of the polythene bags which were allegedly kept in a green coloured bag by the appellant in his right hand. The 10 prepared two samples of 25 grams each after taking a small quantity from each of the slabs.

26. Though the settled law is that if it is not practicable to send the entire quantity then sufficient quantity by way of samples from each of the packets of pieces recovered should be sent for chemical examination. Otherwise, result thereon, may be doubted.’

27. For example, if the 08 packets were allegedly recovered from the appellant and only two packets were

having contraband substance and rest 6 packets did not have any contraband; though all may be of the same colour, when we mix the substances of all 8 packets into one or two; then definitely, the result would be of the total quantity and not of the two pieces. Therefore, the process adopted by the prosecution creates suspicion. In such a situation, as per settled law, the benefit thereof should go in favour of the accused. It does not matter the quantity. Proper procedure has to be followed, without that the results would be negative.”

26. Similarly, another coordinate bench of this court in Edward Khimani Kamau v. The Narcotics Control Bureau reported as **2015 SCC OnLine Del 9860** held that transferring the powder of 9 packets into one polyethene and taking two samples and sending one sample to CRCL caused serious prejudice to the case of the appellant as it could not be ascertained whether all the nine packets contained heroin or not.

27. Recently, in Charlse Howell (Supra), 166 polythene strips, allegedly containing heroin, were found stitched in two *lehngas*. After mixing the substance from all the polythene strips, the samples were sent to CRCL for analysis. While allowing the appeal, it was held that the samples were drawn contrary to the Standing Order 1/88. It was held that the sample was not representative in nature and the test report could not be said to represent the character of entire quantity of powder contained in all 166 polythene strips.

28. To the similar effect is the view of other High Courts in Netram v. State of Rajasthan reported as **2013 SCC OnLine Raj 2892**; Ghewar Ram v. State of Rajasthan reported as **2007 (2) Cr.LR (Raj) 1695**; Jaswinder Singh and Ors. v. State of Punjab reported as **(2013) 1 RCR (Cri) 257**; Buta Singh v. State of Punjab reported as **2017 SCC OnLine P&H 3566** and Chinku

Gupta v. State of U.P. reported as **2018 (3) ACR 2714**. The reliance placed by learned counsel for the respondent on the decision in Baljinder Singh (supra) is of no avail as the captioned case discussed the scope of Section 50 of the NDPS Act, which is not an issue in the present case. Similarly, the reliance placed on the decision in Sonam Bahadur Gurung v. Union of India passed in **C.R.A. No.462 of 2006** decided on 09.09.2009 is again of no help to learned counsel for the accused as in the captioned case, it was observed that the evidence on the method of drawing sample was lacking.

29. Looking at the issue from the aspect of Section 52A of NDPS Act, it is seen that sub-section (2)(c) provides a procedure to be followed by the I.O. where an application is required to be filed before the Magistrate for the purpose of allowing to draw the samples from the seized substance. Section 52A prior to the Amendment Act 16 of 2014 read as follows: -

“52A. Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substance, their vulnerability to theft substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substance or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drugs or psychotropic substances has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered

under Section 53, the officer referred to in subsection (1) shall prepare an inventory of such narcotic drugs or, psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of,-

(a) Certifying correctness of the inventory so prepared; or

(b) Taking, in the presence of such Magistrate, photographs substances and certifying such photographs as true; or

(c) Allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in request of such offence.”

30. Although in Gurbax Singh v. State of Haryana reported as **(2001) 3 SCC 28**, the Supreme Court held Section 52 of NDPS Act to be directory

but still gave a word of caution that the provisions cannot be ignored by the Investigating Officer. While acquitting the accused for not following the procedure prescribed, it was held as under:

9. ... In our view, there is much substance in this submission. It is true that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, IO cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In the present case, IO has admitted that seal which was affixed on the muddamal article was handed over to the witness PW 1 and was kept with him for 10 days. He has also admitted that the muddamal parcels were not sealed by the officer in charge of the police station as required under Section 55 of the NDPS Act. The prosecution has not led any evidence whether the chemical analyser received the sample with proper intact seals. It creates a doubt whether the same sample were sent to the chemical analyser. Further, it is apparent that the IO has not followed the procedure prescribed under Section 57 of the NDPS Act of making full report of all particulars of arrest and seizure to his immediate superior officer. The conduct of panch witness is unusual as he offered himself to be a witness for search and seizure despite being not asked by the IO, particularly when he did not know that the substance was poppy husk, but came to know about it only after being informed by the police. Further, it is the say of the Panch witness that muddamal seal used by the PSI was a wooden seal. As against this, it is the say of PW 2 SI/IO that it was a brass seal. On the basis of the aforesaid evidence and faulty investigation by the prosecution, in our view, it would not be safe to convict the appellant for a serious offence of possessing poppy husk."

31. The apparent conflict in the manner of drawing a sample as provided

in Section 52A(2)(c) of NDPS Act on one hand and the Standing Order 1/89 on the other hand came to be considered by the Supreme Court in Union of India (UOI) v. Mohanlal and Ors., reported as **(2016) 3 SCC 379** where it was held as under:

“Seizure and sampling:

12. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government have in exercise of that power issued Standing Order No. 1/89 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10.05.2007 and the other dated 16.01.2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of the Standing Order 1/89 states that samples must be taken from the seized contrabands on the spot at the time of recovery itself. It reads:

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 witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.

13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics

Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the States or the Central agencies in the matter of drawing of samples. This is, therefore, an area that needs to be suitably addressed in the light of the statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regarding the true position as regards drawing of samples.

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15. It is manifest from Section 52A(2)(c) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered Under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has

to be certified by him to be correct.

17. 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 in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with Sub-section (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction.

19. ... There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and Section 52-A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that an application for sampling and certification ought to be made without

undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by Sub-section (3) of Section 52A ...

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31. To sum up we direct as under:

31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading “seizure and sampling”. The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order...”

(emphasis added)

32. In the opinion of this court, the procedure adopted by the respondent in the present case for drawing samples neither conforms to the procedure prescribed under Section 52A of NDPS Act nor under the Standing Orders. At the cost of repetition, the respondent neither filed any application before the Magistrate for drawing the samples under his supervision nor followed the procedure of drawing a representative sample outlined in paras 2.4 or 2.5 read with 2.8 of the Standing Order 1/89.

33. Resultantly, this court is of the view that the samples sent to the CRCL were not the representative samples. Besides, by mixing the contents of all the 4 packets before drawing any sample not only the sanctity of the

case property in the individual packet was lost but also the evidence as to how much each individual packet weighed. In reaching the aforesaid conclusion, I also draw support from the decisions in Shajahan v. Inspector of Excise (DB) reported as **2019 SCC OnLine Ker 3685** Kulwinder Kumar v. State of Punjab, reported as **2018 SCC OnLine P&H 1754** and Santosh Kumar v. The State of Bihar passed in **Criminal Appeal (SJ) No.158/2016** decided on 30.08.2019.

34. Additionally, it is noted that the two independent public witnesses namely Sher Singh and Pinkesh Kumar, who participated in the raid proceedings and put their LTI and signatures respectively on various documents prepared on the spot were not examined during the trial. As already stated above, in the present case, the prosecution alleged two different recoveries from the appellant out of which, the first recovery was disbelieved by the trial court and the present appeal relates only to the second recovery.

35. Although in the present case, I.O. Sh. G.S. Bhinder, who had initially received the secret information also conducted the subsequent investigation and thus vitiated the whole prosecution in terms of the decision in Mohan Lal v. State of Punjab reported as **(2018) 17 SCC 627** but no benefit could accrue to the appellant on this account in view of the subsequent decisions of the Supreme Court in Varinder Kumar v. State of Himachal Pradesh reported as **2019 SCC OnLine SC 170** and Surinder Kumar v. State of Punjab reported as **(2020) 2 SCC 563** vide which the applicability of the decision in Mohan Lal (supra) was made prospective.

36. Having gone through the facts of the case and exposition of law

referred above, I am of the considered view that the prosecution has failed to prove its case against the appellant beyond reasonable doubt. Consecutively, the appeal succeeds and the appellant is acquitted. His bail bonds are cancelled.

37. Accordingly, the appeal is disposed of along with the pending applications.

38. A copy of this order be immediately communicated to the concerned Jail Superintendent and the trial court.

(MANOJ KUMAR OHRI)
JUDGE

MARCH 13, 2020
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