

IN THE HIGH COURT AT CALCUTTA
CRIMINAL MISCELLANEOUS JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE HARISH TANDON**
And
The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.M 1761 of 2021

Manotosh Ghosh
Vs.
The State of West Bengal

For the Petitioner:	Mr.Sudipto Maitra, Adv., Mr. Syed Shahid Imam, Adv., Mohammad Khairul, Adv., Ms.Shaika Khan, Adv.
For the State:	Mr. Saswata Gopal Mukherjee, Ld.PP, Mr. Sanjoy Bardhan, Adv., Ms. Manisha Sharma, Adv.

With
CRM 3207 of 2021

Soham Kumar Yadav @ Kush Kumar Yadav & Anr.
Vs.
The State of West Bengal

For the Petitioner:	Mr.Sudipto Maitra, Adv., Mr. Syed Shahid Imam, Adv., Mohammad Khairul, Adv., Ms. Shaika Khan, Adv.
For the State:	Mr. Saswata Gopal Mukherjee, Ld.PP, Mr. Sanjoy Bardhan, Adv., Mrs. Baishakhi Chatterjee, Adv.

With

CRM 3754 of 2021

**Asim Mridha @ Asim Mritha @ Asim Midha
Vs.**

The State of West Bengal

For the Petitioner: Mr. Sekhar Kr. Basu, Sr. Adv.,
Mr. Soubhik Mitter, Adv.,
Ms. Rajnandini Das, Adv.,
Ms. Arushi Rathore. Adv.

For the State: Mr. Y.J Dastoor, Ld. A.S.G.,
Mr. Phiroze Edulji, Adv.,
Ms. Anamika Pandey. Adv.

Heard on: September 27, 2021.

Judgment on: October 08, 2021.

BIBEK CHAUDHURI, J. : –

The petitioners in abovementioned two cases prayed for their release on bail under Section 439 of the Code of Criminal Procedure. Though the facts of the abovementioned two cases are little different, but in view of similar questions of law being involved in both the cases, we prefer to take up both the applications together for hearing and propose to dispose them by passing the following order:-

Facts CRM 1761 of 2021

Accused Monotosh Ghosh was arrested on 24th May, 2020 while possessing codeine mixture above commercial quantity by the Police attached to Habra P.S. The contraband articles were seized by S.I Pratik

Basu observing all formalities. Subsequently, investigation culminated in filing charge-sheet under Section 21(b)(ii)(c) of the Narcotics Drugs and Psychotropic Substance Act, 1985 (NDPS Act for short).

It is alleged by the petitioner that she he was falsely implicated in this case. The case record reveals that the arresting officer didnot follow mandatory provisions of search and seizure of narcotics substance as per the provisions of the NDPS Act. Therefore, he is entitles to be released on bail.

CRM 3207 of 2021

The petitioners were apprehended by Police at a place, named, village Akchhar within Gangarampur P.S while they were trying to flee away riding on a motor cycle. The on duty Police Officer conducted search and found 650 nos. of Yuba tablets from their joint possession. Since no Executive Magistrate was available at the time of search and seizure, I.C Gangarampur P.S was requested to be present at the time of search and seizure of contraband articles. Accordingly, those tablets were seized in presence of I.C Gangarampore P.S. According to the petitioner, nothing was seized from them. They are cloth merchants. Charge-sheet has been submitted against them. The investigating authority did not comply with the mandatory requirement of search and seizure contained in Section 42 of the NDPS Act. Therefore, they are entitled to bail.

CRM 3754 of 2021

The petitioner was arrested by the officers attached to the Narcotics Control Bureau (NCB) in connection with case no. N53/2021 on the basis of a complaint to the effect that on 7th April, 2021, NCB, Kolkata Zonal Unit received an information that one Susanta Dey @ Ravi and one Manik Das were carrying ganja above commercial quality by a vehicle bearing no. WB 25J- 4944. The said contraband articles would be stored in the house of Susanta in order finally to deliver the same to the petitioner. The NCB personnel under the Leadership of the Superintendent, NCB, KZU conducted raid in order to work out the said information and apprehended two persons, namely, Susanta Das @ Ravi and Swapan Biswas (driver) who were engaged in unloading sacks full of contraband and storing them in the house of Swapan. They conducted search and seizure in respect of the contraband articles in presence of independent witnesses and arrested the abovenamed two accused persons. Subsequently, the house of Manik Das was raided but no contraband article was recovered. A notice under Section 67 of the NDPS Act was served upon the petitioner. His house was searched but no incriminating article was found from his house. However, he was arrested only on the basis of the statement of the co-accused which is inadmissible in evidence. The petitioner has prayed for bail on the ground of his long incarceration.

SUBMISSION ON BEHALF OF THE PETITIONER

Mr. Sudipta Moitra, Learned Advocate appearing on behalf of the petitioner of CRM no. 1761 of 2021 submits that clause (c) of sub-Section (2) of Section 52A of the NDPS Act mandatorily enjoins a duty upon the Officer notified under sub-Section (1) to prepare an inventory of seized narcotics drugs or psychotropic substance relating to their description, quality, quantity, mode of packing, marks, numbers or such identifying particulars for the purpose of

- (a) Certifying the correctness of the inventory as prepared; or
- (b) Taking, in the presence of such Magistrate, photographs of such drugs or 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.

In the instant case, it is clear from the copies of documents which the petitioner received under Section 207 of the Code of Criminal Procedure that samples of the alleged seized contraband articles were not taken in presence of the Magistrate and there is no certification issued by the jurisdictional Magistrate to such effect. Thus, non-compliance of provisions of Section 52A of the NDPS Act vitiates the search and seizure and detention of the petitioner on the basis of illegal search and seizure is not warranted. In support of his argument, he relies on a decision of the Division Bench of this Court in the case of **Munna Nai vs. The State, 1997 Cri.L.J 4553 (Cal)**. On the self same score, Mr. Moitra also refers to

the decisions of the Hon'ble Supreme Court in the case of **Gorakh Nath Prasad vs. State of Bihar, AIR 2018 SC 704 and Kuldeep Singh vs. State of Punjab, 2011 Cri.L.J 2672 (S.C).**

Learned Advocate for the petitioners in CRM 3207 of 2021 has adopted the submission made by Mr. Moitra, learned Counsel for the petitioner in CRM 1761 of 2021. It is further submitted by him that the petitioners were apprehended on 17.08.2020 on the allegation of having joint possession of 650 nos. of Yuba tablets. As per the prosecution case, the said contrabands were seized by police immediately after apprehension of the petitioners. But the Inspector-in-Charge of Gangarampur P.S made a prayer before the jurisdictional Magistrate way back on 23rd September, 2020 for fixing a date for certification of correctness of inventory, photograph and samples of seized articles. The learned Magistrate fixed 6th November, 2020 for certification of inventory and sample. According to the learned Counsel for petitioners, requirement of Section 52A is not a mere formality. It requires to be done at the earliest after seizure of narcotics substance. When certification was made by the learned Magistrate after about three months from the date of seizure of contrabands, compliance of Section 52A becomes suspect.

Mr. Sekhar Kumar Basu, learned Senior Advocate on behalf of the petitioner in CRM 3754 of 2021 submits that the petitioner was arrested on the basis of the statement made by the co-accused persons. The prosecution strongly relies upon call details report (CDR) between the petitioner and principal accused persons, but in the event CDRs are not

retrieved, the same cannot be used against the petitioner. No incorporating material was seized from him. Therefore, he should be released on bail.

PER CONTRA

Mr. Saswata Gopal Mukhapaddhay, learned Public Prosecutor on the other hand submits that Section 52A of the NDPS Act has no bearing with regard to the procedure of search and seizure of the contraband. The said section stipulates a provision for disposal of seized narcotic drugs and Psychotropic substance having regard to the hazardous nature, the vulnerability to theft, substitution, constraint of proper storage space etc. It is further submitted by the learned Public Prosecutor that for non-compliance of Section 52A of the NDPS Act, no prejudice is caused against the accused. Referring to a decision of this Court in the case of **Abdul Hossain Mahammad vs. Department of Customs (CRA No.488 of 2016) decided on 27th February, 2020**). The learned Public Prosecutor submits that non-compliance of Section 52A of the NDPS Act does not entitle the petitioner to get a favourable acquittal. It is submitted by him that judgment in Abdul Hossain Mahammad (supra) was passed in appeal.

At the stage of consideration of prayer for bail, the Court cannot go through such question which requires to be decided on the basis of evidence adduced by the parties.

With regard to non-compliance of Section 42 of the NDPS Act, it is submitted by the learned Public Prosecutor that applicability of Section 42 may be under question in CRM 3754 of 2021 as against accused Susanta De @ Rabi. Section 42 is invocable only if search is made by police officer or authority concern, upon prior information. When such information or intimation or knowledge comes to the notice of the Investigating Officer in course of regular patrolling or investigating of some other offence, it is necessary to follow the conditions incorporated in Section 42.

The learned Public Prosecutor also relies on paragraph 16 of the decision of the Hon'ble Supreme Court in **Surinder Kumar vs. State of Punjab, (2020) 2 SCC 563** which states as follows:-

In **State (NCT of Delhi) v. Sunil** reported in **(2001) 1 SCC 652**, it was held as under.

“It is an archaic notion that actions of the Police Officer, should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents made by the Police. At any rate, the Courts cannot start with the presumption that the police records are untrustworthy. AS a presumption of law, the presumption would be the other way that official acts of the Police have been regularly performed is a wise principle of presumption and recognized even by the Legislature”.

In respect of CRM 1761 of 2021 it is submitted by the learned Public Prosecutor that search and seizure of contraband substance, having been made at a public place by the empowered officer, Section 43 is attracted and therefore, compliance with Section 42 is not required. In support of his contention he relies on the decision of the Hon'ble Supreme Court in the case of **Mohan Lal vs. State of Rajasthan** reported in **(2015) 6 SCC 222**. It is further submitted by him that the decisions of Munna Nai (supra), Gorakh Nath (supra) and Kuldeep Singh (supra) are not applicable at the stage of consideration of applications under Section 439 of the Cr.P.C.

The learned Public Prosecutor also refers to the orders passed by a Coordinate Bench in CRM 9162 of 2020 dated 24th December, 2020. It is observed by a Coordinate Bench in the aforesaid order that Section 52A of the NDPS Act enjoins mandatory destruction of seized narcotic substance and use of certificate issued by appropriate magistrate as prima facie proof in lieu of physical production of seized articles. Such procedure has been declared mandatory in **Union of India vs. Mohanlal, (2016) 3 SCC 379**. The Coordinate Bench also observed that the procedure engrafted in Section 52A is a post seizure exercise to ensure prompt destruction of narcotic substance so that seized material may not be misused.

Mr. Y.J. Dastoor, learned Additional Solicitor General, on the other hand draws our attention upon the mobile phone call details to show that on the date of occurrence and immediately prior and also subsequent to the occurrence, series of phone calls were exchanged between the

petitioner and the arrested accused persons. The call details prima facie show that the petitioner was involved in a deep rooted conspiracy in dealing with narcotic substances.

DECISION

Having heard the learned Counsels for the petitioners and the State and on careful perusal of the case diary in respect of the above mentioned cases separately we feel it necessary to clarify at the outset that we are inclined to have a detailed exercise as to the applicability and due performance of the conditions imposed in Sections 42, 43 and 52A of the NDPS Act in view of the conflicting orders passed by the Coordinate Benches of this Court. In CRM 3068 of 2021 vide order dated 9th August, 2021, this Court refused to grant bail to the accused/petitioner on the ground of conspiracy considering the call details between the petitioner with the principal accused. A Coordinate Bench vide order dated 17th July, 2021 in CRM 10765 of 2020 granted bail to the accused relying on the judgment by the Hon'ble Supreme Court in the case of **Tofan Singh vs. Tamil Nadu (2020) SCC Online 882**. Relying on Tofan Singh (supra) another Coordinate Bench granted bail to the accused vide order dated 21st December, 2020 in CRM 8145 of 2020. Again in CRM 2829 of 2020 a Coordinate Bench vide order dated 20th October, 2020 refused the prayer for bail on the basis of call details between the petitioner and other accused persons soon before the incident.

In respect of CRM 3754 of 2021, we have come across call details report between the petitioner and the principal accused. It is true that the calls between the petitioner and the principal accused were not retrieved by the Investigating Officer therefore the nature of conversation between them cannot be ascertained.

At this stage the question that is required to be adjudicated upon is as to whether failure on the part of the Investigating Officer in retrieving the call details should be taken as a ground for granting bail to the accused or not. In **Union of India through Narcotics Control Bureau, Lucknow vs. Md. Nawaz Khan (Criminal Appeal No.1043 of 2021 arising out of SLP (Crl) No.1771 of 2021)**, judgment delivered on 22nd September, 2021, the Hon'ble Supreme Court was pleased to hold that CDR analysis of the said mobile number used by the respondent indicates that the respondent was in regular touch with the other accused persons who were know to him. In this case also it is prima facie established from the call details report (CDR) that the petitioner was in constant touch with the principal accused person. This circumstance is crucial while considering the application for bail of the petitioner in CRM 3754 of 2021, having regard to the provisions of Section 37 of the NDPS Act. There is no scope to take a contrary view from the ratio laid down in Tofan Singh (supra) that a statement recorded under Section 67 of the NDPS Act is not admissible in evidence, but even without considering the statement recorded under Section 67 of the NDPS Act, call details report is one of

the prima facie grounds on petitioner's involvement in the offence under Section 20(B)(2)(C)/29 of the NDPS Act.

In respect of CRM 1761 of 2021 we are of the considered view relying on the decision of the Hon'ble Supreme Court in Md. Nawaz Khan (supra) that the contention that Section 42 of the NDPS Act was not complied with his prima facie misplaced. The materials in case diary reveals that the accused was arrested with codeine mixture above commercial quantity on 25th May, 2020 on that date itself the sample was taken in presence of the learned Chief Judicial Magistrate, Barasat for scientific examination. Moreover, the accused was arrested from Jaygachi Bus Stand and compliance of Section 42 of the NDPS Act is not at all necessary. Under the facts and circumstances of the case Section 43 of the NDPS Act is applicable. Moreover, the question as to whether Section 42 or 52(A) of the NDPS Act was complied with or not is a question of fact which requires to be decided at the time of trial.

On the same reason we do not find any merit in CRM 3207 of 2021. It is also a question of fact as to whether substantial delay in taking inventory, photograph and samples of seized articles as contemplated in Section 52A of the said Act would vitiate the trial or not. This question can only be decided during trial on the basis of evidence on record.

CONCLUSION

For the reasons stated above CRM 1761 of 2021, CRM 3207 of 2021 and CRM 3754 of 2021 are rejected and prayers for bail of the petitioners are refused.

I agree,

(Harish Tandon, J.)

(Bibek Chaudhuri, J.)