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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 7th May, 2021

Decided on: 6th July, 2021

+ BAIL APPLN. 1416/2021 & CRL.M.A. 6684/2021 (interim bail)

ARVIND YADAV IN JC THROUGH HIS PAIROKAR

..... Petitioner

Represented by: Mr. Trideep Pais, Sr. Adv. with Mr.
Devashish Chauhan, Mr. Sanya
Kumar, Mr. Shashwat Dhyani, Mr.
Shashwat Singh, Advs.

versus

GOVT OF NCT DELHI THROUGH STANDING COUNSEL

..... Respondent

Represented by: Mr. Amit Gupta, APP for State with
SI Arvind Kumar, PS Cr.Br.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By BAIL APPLN. 1416/2021 the petitioner seeks regular bail in case FIR No. 61/2019 under Sections 21/25/29 of the NDPS Act registered at PS Crime Branch and in the alternative interim bail on the ground of his ill-health.
2. Learned counsel for the petitioner contends that immediately after the registration of the FIR an application under Section 91 Cr.P.C. was filed before the Court for making the mobile phone call records of the petitioner, co-accused and the members of the raiding party available, which would

show that on the date of incident i.e. 14th March, 2019 all the mobile phones including that of the petitioner, co-accused and raiding team were switched off for a particular period of time. The petitioner was in fact picked up from his house and falsely implicated in this case. The manner in which recovery is sought to be made from the petitioner is highly improbable and clearly shows that the petitioner has been falsely implicated. No public witness has been associated with the recovery. There is non-compliance of Section 52-A of the NDPS Act on which ground alone the petitioner is entitled to be released on bail in terms of the decision of the Supreme Court reported as (2016) 3 SCC 379 titled as 'Union of India Vs. Mohanlal and Anr.' which decision has been followed by this Court. Reliance is also placed on the decision of the Division Bench of the Calcutta High Court in CRL.A. 543/2008 Nirmal Kumar Jana Vs. State of West Bengal.

3. As regards the interim bail on medical grounds is concerned, it is contended that the petitioner is suffering from various respiratory ailments including asthma and was treated at Central Jail Hospital Mandoli for the same where he was prescribed various medications. Due to incarceration of the petitioner, wife of the petitioner has been physically and mentally affected. The wife of the petitioner is suffering from severe osteoporosis, depression and had to undergo a hip surgery and needs support. The petitioner was granted interim bail vide order dated 22nd April, 2020 which was extended from time to time. The interim bail of the petitioner was further extended and on completion thereof he surrendered on 31st March, 2021.

4. Learned APP for the State has taken this Court to the facts stated in the FIR. He further states that pursuant to the order of this Court, the status

report also notes the CDR analysis and copies of the CDRs have been annexed as Annexure-A which clearly show that the petitioner was in regular contact with the co-accused Mohan Rai Arora @ Monu on his mobile No. 8860127771. There were as many as 7 calls between the petitioner and the co-accused between 7.10 PM to 11.22 PM on 14th March, 2019. The petitioner's CDR shows that on 14th March, 2019 at 11.32 PM the petitioner was at the spot from where he was apprehended along with the co-accused Mohan Rai Arora at 11.35 PM by the raiding team led by ASI Ashok Kumar. Thus, no case for false implication is made out by the petitioner and the contention raised by the petitioner cannot be gone into in this bail application unless the witnesses have explained the facts in their cross-examination. Contention of learned counsel for the petitioner that Section 52-A NDPS Act has not been complied with and hence petitioner is entitled to bail is also incorrect. Section 52-A of the NDPS Act is applicable for the final disposal of the narcotic drugs and psychotropic substance during trial or at the appellate stage. The purpose of Section 52-A is for safe disposal and destruction of the seized narcotic drugs and psychotropic substance so as to eliminate the chances of recycling of the same. Reliance of learned counsel for the petitioner on the decision in Union of India Vs. Mohanlal & Anr (supra) is misconceived and has no application to the facts of the present case. Further, the petitioner has also not made out any case for grant of interim bail as there is no medical report of the petitioner showing that his condition is deteriorating due to asthma. Further, the wife of the petitioner was operated in September, 2020 and no further surgery is required to be done. The recovery of 400 gms of cocaine from the search of the vehicle DL-8C-AQ-9099 in which the appellant along with the co-

accused Mohan Rai Arora had arrived at the spot is commercial in nature as per the NDPS Act. Further, the petitioner has transferred a sum of ₹8 lakhs from his account to the account of co-accused Srikant Ranganathan for travelling abroad.

5. Briefly, the case of the prosecution in the above-noted FIR is that on 14th March, 2019 at about 9.45 PM a secret information was received by ASI Ashok Kumar in the office of Narcotics Cell, Crime Branch that two persons namely Arvind and Monu residing in Munirka along with their associate Srikant are indulging in supply of wholesale and retail cocaine in Delhi and they would come to supply cocaine to someone between 11.00 PM to 12.00 midnight near the office of SDM Geeta Colony and if a raid is conducted the accused can be caught with cocaine. The secret informer was produced before the then Inspector Narcotics Cell at about 10.00 PM who on inquiry informed the ACP Narcotics Cell telephonically and after reducing the information in writing vide D.D. No. 26 at 10.20 PM the raiding party departed for the spot vide D.D. No. 27 at 10.35 PM after taking I.O. bag, field testing kit, electronic weighing scale in a private vehicle driven by Constable Pankaj along with the informer and reached the spot at 11.00 PM near the office of SDM, Geeta Colony, Delhi. At about 11.30 PM one silver colour Scorpio vehicle No. DL-8C-AQ-9099 was seen coming from Pusta road side towards SDM Office with two persons sitting in it. On the secret informer identifying the person sitting, the vehicle was intercepted and the two persons were apprehended. The two persons revealed their names as Mohan Rai Arora @ Monu and Arvind Yadav.

6. On search of the vehicle a black colour polythene packet was recovered from the dash board of the car. The black colour polythene

contained two transparent polythene packets containing white colour powdery substance, which on testing by the field testing kit was found to be cocaine. Samples were drawn from both the packets and necessary formalities of seizing the sample and the contraband was done. Before personal search of the two accused were carried out, they were duly informed of their legal right to be searched in the presence of a Gazetted Officer or Magistrate and that they could search the members of the Police party and Police vehicle, which offer they declined. Written notices under Section 50 NDPS Act were also served to which they replied in their own hand-writing and signed the same. The vehicle Scorpio used for transportation of the contraband was also seized by a separate seizure memo and the above-noted FIR was registered. The third accused who was involved along with the petitioner, namely, Srikant Ranganathan was also subsequently arrested and supplementary charge-sheet filed in this regard.

7. As per the FSL report “on Chemical, TLC & GC-MS examination, exhibit A-1 and B-1 were found to contain cocaine 22.9 % and 59.4 % respectively. Copy of the CDR of the petitioner has also been placed on record which shows the location of the petitioner at the time of arrest near the SDM office, Preet Vihar and that he was in continuous touch with the co-accused Mohan Rai.

8. Case of the petitioner in this petition is that the petitioner was abducted between 6.30 PM to 7.30 PM from near his house at Munirka from where the applicant's car Mahindra Scorpio bearing registration No. DL-8C-AQ-9099 was driven by two Police officials with the applicant in the rear seat and another Police official drove a Hyundai Santro car behind them. The petitioner was first taken to PS Kotwali, Crime Branch and from there to

Geeta Colony where he was falsely implicated. To claim this, the petitioner states that his mobile phone was switched off at 7.21 PM and was switched on only at around 11.00 PM whereas according to the State there are as many as 7 calls between the applicant and co-accused Mohan Rai between 7.10 PM to 11.22 PM on 14th March, 2019 and at 11.30 PM the applicant was present at the spot. The issue of false implication raised by the petitioner cannot be inferred in the manner petitioner desires this Court to do, as this would be a matter to be considered by the Trial Court after the prosecution has led its evidence and the material witnesses has been cross-examined on this aspect.

9. Learned counsel for the petitioner further contended that in the road certificate initially the word heroine was noted which was cut out and cocaine was added and the D.D. entry does not note that the raiding party took along with them the field testing kit. The fact that there is cutting on the road certificate where initially word heroine was used and the field testing kit was not taken are issues which do not go to the root of the matter warranting grant of bail.

10. As regards contention of learned counsel for the petitioner in relation to Section 52-A of the NDPS Act is concerned, in Union of India Vs. Mohanlal & Anr (surpa) Supreme Court noted:

“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 has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10-5-2007 and the other dated 16-1-2015 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 Standing Order No. 1 of 1989 states that samples must be taken from the seized contraband 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.

14. Section 52-A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

“52-A. 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 substances, 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 substances 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 drug or psychotropic substance 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 sub-section (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 the correctness of the inventory so 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.

(3) When 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 1872) 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, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

15. *It is manifest from Section 52-A(2)(c) (supra) 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-sections (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. Mr Sinha, learned Amicus Curiae, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification, etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the entire exercise, which as at present gets neglected for a variety of reasons. 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 52-A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions.

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30.3. Cases in which the proceedings are still pending before the Courts at the level of trial court, appellate court or before the Supreme Court: In such cases the heads of the department concerned shall ensure that appropriate applications are moved by the officers competent to do so under Notification dated 16-1-2015 before the Drugs Disposal Committees concerned and steps for disposal of such narcotic drugs and psychotropic and controlled substances and conveyances taken without any further loss of time.

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."

11. As noted by the Hon'ble Supreme Court Standing Order 1 of 1989 deals with the procedure to be followed while conducting the seizure of the contraband while the other two Standing Orders dated 10th May, 2007 and

16th January, 2015 deal with the disposal and destruction of the contraband and do not add to the earlier Standing Order which prescribe for seizure at the time of recovery and has no effect on the first Standing Order. Supreme Court further noted that the claim of most of the States were that no samples were drawn at the time of seizure and sealing of the case property and Directorate of Revenue Intelligence was the only agency which claimed that samples are drawn at the time of seizure. Thus there was no uniform practice or procedure being followed by the States or Central agencies in the matter of drawing samples. It is in the light of these facts referring to Section 52A of the NDPS Act which deals with the disposal of the seized narcotic drugs and psychotropic substances that the Supreme Court noted that after the seizure of the narcotic drug or psychotropic substance is made the officer in-charge will as soon as possible prepare an inventory of such narcotic drugs or psychotropic substance containing the details relating to their description, quantity, quality, mode of packaging, marks, identifying particulars etc. and thereafter file an application to the Magistrate for drawing of the samples. In para-17 of the report Supreme Court further noted that considering the provisions of Section 52A (4) of the NDPS Act which provides that samples to be drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52A would constitute primary evidence for the purpose of the trial. Hence the question of drawing of samples at the time of seizure which often takes place in the absence of a Magistrate does not fall into the scheme of the Act.

12. Section 52A was inserted by the Amendment Act of 1989 w.e.f. 29th May, 1989. The provision relates to the disposal of the seized narcotic drugs and psychotropic substance and Section 52A (1) provides that the Central

Government may have regard to hazardous nature of any narcotic drugs or psychotropic substance, their vulnerability to their substitution, constraints of proper storage space or any other relevant consideration by notification published in the Official Gazette, specify the narcotic drugs or psychotropic substance which may as soon as after their seizure be disposed of by such officer. Thus the provision relates to disposal of the drug after the same is seized so as to rule out substitution, misuse and being hazardous. It is not unknown that applications under Section 52A NDPS Act are also filed at the stage of appeal seeking permission of the Court to dispose of the narcotic drugs and psychotropic substance. The procedure prescribed under Section 52A NDPS Act and as ordained by Supreme Court in Mohan Lal (supra) is required to be mandatorily followed however, the issue in the present case is whether non-compliance of this procedure which is applicable for disposal of the narcotic drugs and psychotropic substances would vitiate the trial in case immediately on seizure samples are drawn in the absence of a Magistrate even before they are deposited in the malkhana for being sent to FSL to seek a report as to the nature of the contraband for the purposes of filing the charge-sheet. The decision in Mohan Lal (supra) does not canvas that the procedure followed by the investigating agencies like the Directorate of Revenue Intelligence which takes samples on the spot resulted in an illegality so as to vitiate the trial. Conscious of the complicity of the matter, Supreme Court in para 18 of the report in Mohan Lal (supra) noted that 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 Supreme Court thus directed the Central Government to re-examine the matter and take suitable steps in the above direction. Needless to note that till date no further amendments to the statutory provision or by rescinding the Standing Order has been brought out.

13. By this petition, petitioner seeks bail on the ground of non-compliance of Section 52A of the NDPS Act, however, in view of the fact that the trial does not stand vitiated by drawing the samples at the spot in the absence of a Magistrate for being sent to FSL analysis for filing a appropriate charge-sheet before the Special Court for ascertaining the nature of contraband and whether the sanctity of drawing the samples was vitiated for the non-presence of the Magistrate would be an issue to be seen during the course of trial, hence this Court finds no ground to grant bail to the petitioner on this ground.

14. As regards the prayer of the petitioner seeking interim bail on the ground that his wife is suffering, the petitioner has enclosed copy of the discharge summary of his wife Ms.Rekha Yadav, who had been advised cervicotrochanteric fracture right hip for which the surgery was performed in September, 2020 and as per the report received the patient has already recovered from the injury and the surgery and is stable. Further the petitioner has surrendered on 31st March, 2021 and thus had adequate time to take care of his wife. As regards the petitioner's medical condition is concerned, the documents on record do no suggest any immediate medical treatment or hospitalization. Thus this Court finds no ground to grant interim bail as well to the petitioner.

15. Petition is dismissed.

16. Order be uploaded on the website of this Court and a copy of this order be sent to Superintendent Jail for information of the petitioner.

(MUKTA GUPTA)
JUDGE

JULY 06, 2021
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