

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

CRM No. 9010 of 2021
Debashish Tarafder @ Lata
Vs.
The State of West Bengal

With

CRM (NDPS) 127 of 2022
Rohan Islam & Ors.
Vs.
The State of West Bengal

For the Petitioner in CRM No. 9010 of 2021	: Mr. Sekhar Kumar Basu, Sr. Adv. Mr. Antarikhya Basu Ms. Madhumita Basak Mr. Sayan Mukherjee Mr. Pratik Ghosh
For the Petitioner in CRM (NDPS) 127 of 2022	: Mr. Sekhar Kumar Basu, Sr. Adv. Mr. Diptangshu Basu
For the State in CRM No. 9010 of 2021	: Mr. Swapan Banerjee Mr. Suman De
For the State in CRM (NDPS) 127 of 2022	: Mr. Sanjay Bardhan Mr. Suman De
Heard on	: March 10, 2022
Judgement on	: March 24, 2022

DEBANGSU BASAK, J.:-

1. Two applications for bail being CRM No. 9010 of 2021 and CRM (NDPS) 127 of 2022 have been heard one after the other. We have decided to dispose of both the applications of bail by this common judgement and order in view of the fact that the issues involved in both the applications for bail are similar.

2. Learned Senior Advocate appearing for the petitioner in CRM No. 9010 of 2021 (hereinafter referred to as the “first petition” for the sake of convenience) has submitted that, on May 16, 2021, a mini truck was intercepted by the police. The truck had three occupants including the petitioner. The petitioner was neither the owner of the vehicle nor did he have any nexus with the incident but he was unfortunately robed into the police case. He has submitted that the police did not proceed against the owner of the truck. He has submitted that the petitioner is languishing in custody in excess of two hundred days. The police had filed charge sheet without the forensic chemical report.

3. Learned Senior Advocate appearing for the petitioner in the first petition has submitted that, the police acted in violation of the provisions of Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985. He has relied upon **2016**

Volume 3 Supreme Court Cases 379 (Union of India vs Mohan Lal) and submitted that, the mandatory requirement of identification of the contraband seized, its quantity and quality, mode of packing, marks and other identifying particulars which are relevant under the Act of 1985 have not been done. He has contended that, the police did not make any prayer before the learned Judge or the Magistrate for preparing and making inventory as envisaged under the Act of 1985. According to him, since the police did not adhere to the procedure as has been prescribed under the mandatory provisions of Section 52A of the Act of 1985, the petitioner should be enlarged on bail.

4. So far as the other ground for obtaining bail of the petitioner is concerned, learned Senior Advocate appearing for the petitioner in the first petition has submitted that, he is not pressing the ground of infraction of Section 42(2) of the Act of 1985 in the facts of the present case.

5. Learned advocate appearing for the State in the first petition has submitted that, commercial quantity of narcotics was seized from the joint possession of the petitioner. The police had submitted its charge sheet. He has referred to the order dated June 18, 2021 passed by the learned Court. He has submitted that the police is yet to receive the chemical analysis report. He

has contended that on December 21, 2021 the police prayed for extension of time.

6. Learned advocate appearing for the State in first petition has relied upon the order dated **August 26, 2020** passed in **CRM 4858 of 2020 with CRAN 3056 of 2020 (In Re : Rabiul Sardar @ Robiul Sardar)**, order dated **December 24, 2020** passed in **CRM 9162 of 2020 (In the matter of: Ananda Sarkar & Ors.)**, the judgement and order dated **March 12, 2021** passed in **CRM 464 of 2021 (Md. Kalim vs. State of West Bengal)**, the order dated **September 9, 2021** passed in **CRM 2095 of 2021 (In the matter of: Jagannath Niriki & Others.)** and the judgement and order dated **October 8, 2021** passed in **CRM 1761 of 2021 with CRM 3207 of 2021 with CRM 3754 of 2021 (Manotosh Ghosh vs. The State of West Bengal)** and contended that the steps required to be taken under Section 52A of the Act of 1985, are post seizure steps. The same does not invalidate the seizure nor does the same have any effect on the Articles seized.

7. Learned Senior Advocate appearing for the petitioner in CRM(NDPS) 127 of 2022 (hereinafter referred to as the “second petition” for the sake of convenience) has submitted that, since the police had filed the report of the Central Forensic Laboratory

with the jurisdictional Court, the ground of violation of Section 52A of the Act of 1985 is not available in the facts of that case.

8. Learned advocate appearing for the State in the second petition has adopted the submissions made on behalf of the State in the First Petition.

9. In the first petition, the police had arrested two persons, one of them being the petitioner, with commercial quantity of Phensedyl, Codeine Phosphate Cough Linctus on May 17, 2021. The owner of the vehicle had been arrested on August 2, 2021. The police had taken sample of the narcotics seized and marked them as exhibit 'A1' and 'A2'. The police had sent exhibit 'A1' for expert opinion to the State Drugs Control & Research Laboratory, for opinion. The State Drugs Control & Research Laboratory had submitted its expert opinion on February 9, 2022 stating that the sample exhibit 'A1' was positive for the presence of Codeine Phosphate. The police had submitted an application before the Court for inventory under Section 52A. The Court had fixed March 7, 2022 for inventory. The police had submitted charge-sheet on October 30, 2021 under Section 21(C) of the NDPS Act. The police had also submitted a supplementary charge-sheet on February 11, 2022 under Section 21(C) of the Act of 1985 against four accused persons including the petitioner.

10. Since learned Senior Advocate appearing for the petitioner in the second petition had given up the point of infraction of Section 52A of the Act of 1985 and did not pray for bail on such aspect, we refrain ourselves from dealing with the facts of the second petition in details. Suffice it to say that commercial quantity of narcotics was seized from the joint possession of the petitioners therein.

11. Section 52A of the Act of 1985 as has been referred to by the parties to the proceedings is 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 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) 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 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 or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

12. **Mohanlal (supra)** has considered Section 52A of the Act of 1985. It has observed as follows:-

“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.”

13. **Rabiul Sardar @ Robiul Sardar (supra)** has considered **Mohanlal (supra)**. The Co-ordinate Bench has observed that the procedure engrafted in Section 52A of the Act of 1985 is a post seizure exercise to ensure prompt destruction of narcotics substances so that seized material may not be misused. Failure to comply with such requirement does not affect the legality of seizure which precedes such exercise. Impact of its failure, therefore may be assessed in the course of trial in the light of the other materials on record including the possibility of physical production of seized materials during trial. The same view has been expressed in **Ananda Sarkar & Ors. (supra)** and **Jagannath Niriki & Others. (supra)**.

14. **Md. Kalim (supra)** has observed that in the facts of that case, the sampling was effected in strict consonance with the provisions of Section 52A of the Act of 1985. **Manotosh Ghosh (supra)** has held that the question as to whether Section 42 or 52A of the Act of 1985 had been complied with or not is a

question of fact which is required to be decided at the time of trial.

15. Section 52A has to be understood and construed in the context of the statement of objects and reasons of the Act of 1985 and the statement of objects and reasons of Act of 1989. Section 52A has been introduced into the statute by the Act 2 of 1989 with effect from May 29, 1989. One of the objects of the Act 2 of 1989 is to provide for pretrial disposal of seized goods. Section 52A has laid down the procedure for disposal of seized narcotic drugs and psychotropic substances. The legislature being conscious of and having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage, space and other relevant consideration, has provided for disposal of the same prior to the conclusion of the trial. The seized contraband is a vital piece of evidence. If the same is allowed to be destroyed prior to the trial, without suitable mechanism being provided for the evidence value of the seized goods at the trial, the same will affect the result of the trial. Section 52A of the Act of 1985 has taken care of such situation.

16. Once the procedure as has been laid down under Section 52A of the Act of 1985 is followed for the purpose of preparation of the inventory, the photographs of the contraband seized and

any list of samples drawn under sub-section (2) and certified by the Magistrate the same shall become primary evidence in respect of the offence alleged. It has facilitated the treatment of such evidence as primary evidence. It has overridden the provisions of the Indian Evidence Act, 1872 and the Criminal Procedure Code for such purpose. In absence of Section 52A and in particular Section 52A(4) of the Act of 1985 mandating the legal fiction of the specified evidence noted therein to be primary evidence, it would have required the prosecution to not only preserve the seized contraband till the conclusion of trial but also introduce a number of witnesses to prove the same fact at the trial which Section 52A(4) of the Act of 1985 otherwise allows the prosecution to establish.

17. In an adversarial proceedings involving criminal liability, the prosecution has to establish beyond all reasonable doubt, its case, in a court of law. The prosecution has to lead evidence to establish its case. Evidence which the parties lead before a court of law is governed by the provisions of the Indian Evidence Act, 1872. Section 52A(4) of the Act of 1985, has mandated that, a Court trying an offence under the Act of 1985 shall treat the inventory, the photographs of narcotic drugs and substances and any list of samples drawn under sub-section (2) and certified by

the Magistrate as primary evidence in respect of such offence. Compliance with Section 52A of the Act of 1985 liberates the prosecution from the requirement of Section 45 of the Indian Evidence Act, 1872 amongst others.

18. However, the absence of compliance with the procedure prescribed under Section 52A(4) of the Act of 1985 will, ipso facto, not vitiate the entire proceedings and would not be fatal to the case of the prosecution. The Supreme Court in **1998 volume 7 Supreme Court Cases 270 (Jagdish Budhroji Purohit vs. State of Maharashtra)** has recognized that, in a given set of facts, an accused can be convicted even if the Chemical Examination Reports are ignored.

19. In absence of compliance with the procedure under Section 52A(4) of the Act of 1985, the prosecution is not non-suited. The prosecution still has the opportunity to establish its case by leading evidence under the provisions of the Indian Evidence Act, 1972 to establish the offence. In such a scenario the seized contraband may have to be preserved till the end of trial. The evidence so led has to be evaluated on the parameters of law governing the same for the purpose of considering whether the accused was guilty of the offence as charged or not.

20. In any event, the infraction if there be any of Section 52A(4) of the Act of 1985 has to be evaluated at the time of trial and not otherwise. As has been noted by the Co-ordinate Benches in ***Rabiul Sardar @ Robiul Sardar (supra), Ananda Sarkar & Ors. (supra), Jagannath Niriki & Others. (supra)*** and ***Manotosh Ghosh (supra)***, the procedure prescribed under Section 52A of the Act of 1985 is a post seizure exercise and that failure to comply with such procedure does not affect the legality of the seizure.

21. Learned Senior Advocate appearing for the petitioner in the first petition has highlighted the observations of ***Mohanlal (supra)*** made in paragraph 17 therein to the effect that there was no provision in the Act of 1985 that mandates taking of samples at the time of seizure to contend that in the facts of the first petition, samples were not taken as prescribed under Section 52A of the Act of 1985.

22. With respect, such contention of the petitioner in the first petition cannot be accepted in the facts of the first petition, since, the records have materials to establish otherwise. Samples of the contraband had been taken by the police. The police had sent one batch of such samples to the State Drugs Control & Research Laboratory for expert opinion. State Drugs Control & Research

Laboratory vide their opinion dated February 9, 2022 had stated that the samples were positive for the presence of Codeine Phosphate which is a narcotic. The police had applied to the jurisdictional Court for inventory, sampling certificate and disposal of the seized contraband. The jurisdictional Court had passed an order directing steps for inventory, sampling certificate and disposal of seized contraband under Section 52A of the Act of 1985 to be taken immediately on receipt of the chemical analysis report. On receipt of the chemical analysis report from State Drugs Control & Research Laboratory, the police had submitted a supplementary charge-sheet dated February 11, 2022 with the jurisdictional Court. The police had also applied for inventory under Section 52A of the Act of 1985 before the jurisdictional Court. On such application, the jurisdictional Court had passed an order fixing March 7, 2022 for the purpose of making inventory in terms of Section 52A of the Act of 1985.

23. In the factual matrix obtaining in the first petition and for the purposes of considering the prayer for bail made on such basis, we need not enter into the arena of deciding the issue of infraction of Section 52A, if there be any at this stage and leave the same to be decided at the trial, if raised.

24. In both the petitions, commercial quantity of narcotics had been recovered from the possession of the petitioners. The petitioners have failed to overcome the restrictions under Section 37 of the Act of 1985. In view of the discussions above, we find no merit in the two applications for bail. We are unable to grant bail to any of the petitioners.

25. CRM 9010 of 2021 and CRM (NDPS) 127 of 2022 are rejected. Case diaries in the two proceedings be returned.

[DEBANGSU BASAK, J.]

26. I Agree.

[BIBHAS RANJAN DE, J.]