

CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
Criminal Miscellaneous Jurisdiction
Appellate Side

C.R.M 1172 of 2021
Roshan Chowdhury @ Roshan Chaudhury
-Vs.-
The State of West Bengal

With

C.R.M 1218 of 2021
Rafik Rahaman @ Bhuttu
-Vs.-
The State of West Bengal

Before: The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Aniruddha Roy

For the petitioners in
(CRM No. 1172 of 2021)

: Mr. Rajdeep Majumder, Adv.
Mr. Avrojoyti Das, Adv.
Mr. Moyukh Mukherjee, Adv.
Mr. Amit Saha, Adv.
Ms. Shakshi Agarwal, Adv.
Mr. Anirban Banerjee, Adv.

For the petitioner in
(CRM No 1218 of 2021)

: Mr. Sourav Kar, Adv.

For the State

: Mr. Nilay Chakraborty, Adv.
Mr. Tapan Bhattacharya, Adv.

Heard On

: 14.01.2022

CAV on

: 14.01.2022

Judgment On

: 01.03.2022

Arijit Banerjee, J.:-

1. The petitioners and one other accused person were arrested on April 29, 2021. Two packets of Brown Sugar / Heroin weighing about 473 gms and 460 gms respectively, were recovered from the joint possession of the accused persons. The packet weighing 473 gms was marked as Ext. A and samples drawn from that packet were marked as Ext. A1 and Ext. A2 (security samples). Similarly, the packet weighing 460 grams was marked as Ext. B and samples drawn therefrom were marked as Exts. B1 and B2 (Security sample). The weight of each sample was about 5 gms.

2. The petitioners said that the procedure prescribed in Section 52A (2) and (3) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short “the NDPS Act”), was not followed by the Investigating Officer. Hence it would be impossible for the prosecution to prove its case at the trial. The petitioner therefore should be enlarged on Bail.

3. The petitioners said that in terms of the judgment passed by the Hon’ble Supreme Court in the case of ***Union of India v. Mohanlal, (2016) 3 SCC 379***, as soon as the seizure of the contraband goods takes place, Section 52A (2) of the NDPS Act must be complied with. The said sub-section reads as follows:-

“(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] 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,

psychotropic substances, controlled substances or conveyance] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] 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, psychotropic substances, controlled substances or conveyances] 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, substances or conveyances] 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.”

4. The petitioners further said that inventory, photography and certification were not done before any Magistrate, which has vitiated the entire process of seizure.

5. The petitioners also said that on May 26, 2021 the Investigating Officer took out the samples marked as Ext. A and Ext. B from the Malkhana and did an inventory and photography before the Learned 2nd Judicial Magistrate at Jalpaiguri. Thereafter, further samples were taken

and marked as Samples 1 and 1a and Samples 2 and 2a from the two packets respectively. On June 16, 2021 the Investigating Officer sent samples 1(a) and 2(a) to CFSL Kolkata. On June 18, 2021 the said samples were returned by CFSL, Kolkata, with the remark that they were overburdened. On July 26, 2021 the Investigating Officer sent the aforesaid samples 1, 1(a), 2 and 2(a) to CFSL, Bhopal which was received by CFSL on July 27, 2021.

6. The petitioners further argued that this was a case of re-sampling by the Investigating Authority and not a case of merely re-numbering the same samples originally drawn. Re-sampling is not permissible in law.

7. In this connection, the petitioners relied on the following observation of the Hon'ble Apex Court at Paragraph 27 of the judgment in the case of

Thana Sing v. Central Bureau of Narcotics (2013) 2 SCC 590:-

“27. Any requests as to re-testing/re-sampling shall not be entertained under the NDPS Act as a matter of course. These may, however, be permitted, in extremely exceptional circumstances, for cogent reasons to be recorded by the Presiding Judge. An application in such rare cases must be made within a period of fifteen days of the receipt of the test report; no applications for re-testing/re-sampling shall be entertained thereafter. However, in the absence of any compelling circumstances, any form of re-testing/re-sampling is strictly prohibited under the NDPS Act.”

8. The petitioners further submitted that the list of articles seized in the charge sheet does not mention anything with regard to Exts. 1 and 1(a), 2 and 2(a).

9. Learned Counsel for the State submitted that samples were drawn initially on the spot and were marked as Exts A1 and A2, B1 and B2. Each such sample weighed about 5 gms. Such samples were kept in the Malkhana.

10. The Investigating Officer produce the accused persons before the Chief Judicial Magistrate, Jalpaiguri on April 30, 2021, when they were remanded to 4 days of police custody. On May 1, 2021, the Investigating Officer sent a prayer to the Special Judge under the NDPS Act through Special Messenger, for inventory, photography and issuance of certificate of correctness as contemplated in Section 52A (2) of the NDPS Act. The Special Messenger reported back that the court was closed due to pandemic. Request was again made to the Special Judge on May 6, 2021 and May 18, 2021. On May 24, 2021, Learned Chief Judicial Magistrate, Jalpaiguri, appointed Learned Judicial Magistrate, 2nd Court, Jalpaiguri for complying with the requirements of Section 52(A)(2) of the NDPS Act. On May 26, 2021, inventory and photography was done before the said Judicial Magistrate who also issued certificate of correctness. The samples were collected in front of the Judicial Magistrate as per Section 52A (2)(c) of the NDPS Act and were marked as 1(a) and 2(a). Such samples were taken out from the mother packets marked as Exts. A and B respectively which had been produced before the Learned Magistrate. After samples were drawn from the mother packets, they were returned to the Malkhana where they are still lying. The

samples taken at the spot at the time of seizure and marked as A1 and A2, and B1 and B2 were at all material times kept and are still kept in the Malkhana. Those samples were never sent to CFSL Kolkata CFSL Bhopal.

11. The representative samples marked as Exts. 1(a) and 2(a) were sent to CFSL Kolkata first and after being returned due to the said laboratory being overburdened, were sent to CFSC Bhopal on July 26, 2021. The laboratory and Bhopal received such samples on July 28, 2021. The CFSL submitted its report which is dated August 30, 2021.

12. Learned Counsel submitted that the delay in complying with the requirements of Section 52A was due to the second wave of Covid-19 pandemic which disrupted working of the Courts. There was no delay, laches or breach of any statutory provision on the part of the prosecution as would entitle the petitioners to an order of bail.

13. We have considered the rival contentions of the parties. From the seizure list it appears that on April 29, 2021, two packets containing contraband items, weighing 470 gms and 460 gms respectively, were recovered from the joint possession of the petitioners and one Jul Hoque. After drawing samples from the two packets, the mother packets and the samples were kept in the Malkhana.

14. On May 1, 2021 the officer-in-charge of the new Jalpaiguri police Station sent a request to the Court of the Learned Special Judge under NDPS Act for compliance of section 52A(2) of the NDPS Act. On May 6, 2021 again such a request was made. On both the dates the Court was not available. We must bear in mind that that was the time when the second wave of Covid-19 had spread its wings.

15. Ultimately, pursuant to the request of the officer-in-charge made on May 24, 2021, on May 26, 2021, the Special Court issued the necessary certificate under Section 52A of the NDPS Act. It appears that on that date the mother packets and the samples which had been drawn therefrom on the date of the seizure were produced before the Magistrate.

16. Samples were again taken from the mother packets and marked 1(a) and 2(a). This was done in front of the Magistrate. These samples were sent to the Kolkata CFSL. Due to Overburdening, the Kolkata CFSL returned the sample to the Investigating Officer who then forwarded the same to Bhopal CFSL. The report has been received from the Bhopal CFSL confirming that the samples are contraband Narcotic Drugs.

17. In the facts and circumstances aforesated, we are of the prima facie view that the provisions of Section 52A of the NDPS Act have been substantially complied with. The seizure was on April 29, 2021. Starting from May 1, 2021, the Investigating Officer tried to have the provisions of Section 52A (2) complied with by the concerned Magistrate. There was no lack of diligence or effort on his part. Due to the pandemic, the concerned Court was not available. The exercise could be completed only on May 26, 2021. The samples that were drawn in front of the Magistrate were sent to Bhopal CFSL. The samples that were drawn on the date of seizure and the mother packets were at all material times lying and still lying in the concerned Malkhana. Those samples were never sent for Forensic examination. Prima facie, we do not find any gross infraction of Section 52A(2) of the NDPS Act.

18. The case of ***Thana Singh, (supra)*** relied upon by Learned Advocate for the petitioners would not have any application in the facts of this case. In that case the Hon'ble Apex Court observed that requests as to re-testing/re-sampling shall not be entertained under the NDPS Act as a matter of course and in the absence of compelling circumstances, any form of re-testing/re-sampling is strictly prohibited under the NDPS Act. In the present case at hand, there was no re-testing or re-sampling. The sample that was drawn in front of the Magistrate was sent to the forensic laboratory and testing was done only once. The Learned Counsel for the petitioners relied on an order of a coordinate bench passed on December 1, 2020, in CRM 8037 of 2020. In that case the sample was not drawn in the presence of a Magistrate. That was found to be a gross irregularity and primarily on that ground the petitioners were enlarged on bail. That is not the case here. The sample that was tested was drawn in front of the Magistrate in this case. ***(In the matter of: Md. Jalil @ Jang).***

19. The petitioner also relied on a decision of a coordinate bench delivered on January 22, 2020, in FMA 337 of 2020. In that case a writ petition was filed before the Learned Single Judge challenging a charge sheet. The writ petition was dismissed. In appeal, the Division Bench observed as follows:-

“A Small number of opium or poppy saplings were recovered from the petitioner's land. It is the admitted position that procedure under Section 52(A) of the Narcotic Drugs and Psychotropic Substances Act, 1985 was not followed. The consequence of such procedure not being followed is that the commission of the offence can never be established. In such a

situation, there is no need to subject the accused to a trial or for the meaningless trial to be undertaken at all.”

20. Having observed as above, the Division Bench quashed the charge sheet. The facts of that case were different from the facts of the present case. In that case the procedure prescribed under Section 52A of the NDPS Act was not followed at all. In our case, there was compliance with the provisions of Section 52A, albeit belatedly, and the delay according to us was for valid reason.

21. In the case of ***Union of India v. Mohanlal, (Supra)***, in paragraph 31 of the reported judgement, certain directions were given by the Hon’ble Supreme Court. The relevant direction was as follows:-

“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”.

We are of the view that such direction has been carried out. The delay of about 25 days in carrying out such direction has been sufficiently explained by the State.

22. The object of Section 52A (2) of the NDPS Act it appears to be to protect an accused person from being falsely implicated. It is to ensure that the correct sample taken from the articles seized from the accused is sent for chemical testing. That is why the legislature has required the sample to be drawn in front of a Magistrate, photographs to be taken and a certificate of correctness to be issued by the Magistrate. This was all done, although there had been delay in doing so for which, in our view, adequate explanation has been furnished by the prosecution. *Prima Facie*, it does not appear that the petitioners have been deprived of the protection that the legislature contemplated for persons accused under the provisions of the NDPS Act by introducing Section 52A (2) of the Act.

23. Commercial quantity of contraband items was recovered from the joint possession of the petitioners. The restrictions Under Section 37 of the NDPS Act would be attracted. We *prima facie* do not find breach of the provisions of Section 52A of the NDPS Act.

24. We make it clear that all observations made in this order are *prima facie* and only for the purpose of deciding these bail applications. Such observations shall have no bearing at the final trial. It will be open to the petitioners to urge all points that were argued before us, at the trial.

25. The applications for bail being C.R.M no. 1172 of 2021 and C.R.M no. 1218 of 2021 are dismissed.

26. Urgent certified website copy of this judgment, if applied for, be supplied to the parties upon compliance of necessary formalities.

(ANIRUDDHA ROY, J.)

(ARIJIT BANERJEE, J.)