



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :12.04.2022

Pronounced on :19.04.2022

CORAM:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

Crl.O.P.No.7755 of 2022

Jafarkhan

.. Petitioner/Accused

/versus/

Inspector of Police,
NIB CID,
Kanchipuram.
(Crime No.17/2021)

..Respondent/Complainant

Criminal Original Petition has been filed under Section 439 of Cr.P.C., praying that the petitioner may be enlarged on bail in C.C.No.186 of 2021 on the file of the Principal Special Judge, NDPS Act, Chennai in Crime No.17 of 2021 pending on the file of the Inspector of Police, NIB CID, Kanchipuram District.

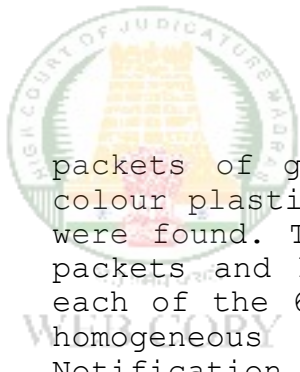
For Petitioner :Mr.T.S.Sasikumar

For Respondent :Mrs.G.V.Kasthuri,
Additional Public Prosecutor

ORDER

The petitioner, who was arrested and remanded into judicial custody on 18.06.2021 for the alleged possession of 24 kgs of Ganja which is an offence punishable under Section 8(c) r/w 20(b)(ii)(C) of NDPS Act in Crime No.17 of 2021, seeks bail.

2.The prosecution has filed final report and the case is posted for cross examination of PW-1. At this stage, the petitioner has moved bail petition alleging that the statutory right to opt for the search before a Gazetted Officer or Judicial Magistrate is not explained properly to the accused in the language known to him, thereby there is a violation of the mandatory procedure laid in Section 50 of the Narcotic Drugs and Psychotropic Substances Act. Further, according to the prosecution, the contraband seized alleged to have been carried by the accused in two bags. In the black colour shoulder bag containing 2



packets of ganja each weighing 4 kgs were found and in the white colour plastic bag with handle 4 packets of ganja each weighing 4 kgs were found. The Seizing Officer has mixed the content of all the six packets and had drawn two samples, instead of drawing samples from each of the 6 packets. The drawing of sample mixing the content as a homogeneous lot is contrary to the procedure laid down in the Notification No.1/1988 issued by the Narcotics Control Bureau, Delhi. As per the dictum laid by the Hon'ble Supreme Court in *Noor Aga -vs- State of Punjab* reported in ((2008)16 SCC 417), this Notification has legal sanction and required to be complied by the Arresting Authorities.

3.The learned counsel for the petitioner to buttress his submission, relied upon the judgments of other High Courts wherein, it is held that if the packets are not identical, not with identical markings and not tested with UN kit with the positive result, on colour test made on the contents of each package, the procedure of mixing the content of suspected packets as one lot and drawing samples without drawing samples from each of the packets will be violation of the guidelines and will deprive the accused person to establish that not all the packets contain prohibited drugs or substances.

4.It is to be noted that neither in the Narcotic Drugs and Psychotropic Substances Act, 1985 nor in the Rules framed thereunder the procedure to draw samples prescribed. Therefore, the Officers are expected to follow the guidelines laid in Notifications No.1/1988 and No.1/1989 as Standing Order of Narcotics Control Bureau. These Notifications order issued by virtue of power conferred under Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 .

5.In the case in hand, admittedly, the seized drug in the packages were mixed and made a homogeneous lot before drawing representative samples. In Notification No.1/1988, dated 15.03.1988, while dealing within the general procedure for sampling storage etc. Section II para 1.7 lays down the following procedure:

"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."

6. In *Pari materia* with the Standing Order No.1/1988, the Central Government issued Standing Order by Notification No.1/1989 dated 13.06.1989, wherein the procedure for sampling and storing reiterated as below in Section II.

"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 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 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 contents of each package given identical results on colour 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 Where after 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 would be necessary and no sample need be drawn.

2.7 If such remainder is 5 or 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 remainder package/container.

2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample 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."

7. In Amani Fidel Chris -vs- Narcotics Control Bureau reported in (MANU/DE/0803/2020), the Hon'ble Delhi High Court, after considering the above two Notifications, concluded that:

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.

8. In Netram v. State of Rajasthan reported (2014(2) WLN 394 (Raj.)) the Jodhpur Bench of Rajasthan High Court at Jodhpur has observed that,

"The Investigating Officer was under an obligation to collect separate samples from each of the gunny bags so that the analysis of the contents of each of the gunny bag could be performed individually. As the seizure officer before drawing the samples, proceeded to mix the contents of the gunny bags without subjecting them to the test by the U.N. Kit, the accused has a right to contend that one of the gunny bags might not have contained contraband poppy straw. If at all the prosecution desired to prove that both gunny bags contained poppy straw, then it was essential for the samples to have been collected



and analysed individually from both the gunny bags or else, the test by U.N. Kit should have been carried out on the material present in both the bags."

9. In *Om Prakash Verma v. State of Uttra Pradesh* dated 11.03.2022, the Allahabad, High Court, while considering the omission to take representative samples from each of the 19 packets and one polythene bag following *Amani Fidel Chris* case (cited supra) and the dictum of *Noor Aga v. State of Punjab* reported in ((2008) 16 SCC 417), granted bail holding that the Standing Order are mandatory in nature.

10. A close examination of the provisions of the Standing Order dealing with sampling instructs the Seizing Officer to mix the content of the packages/containers well and make a homogeneous lot and draw representative samples. If there are multiple packets, normally it is advisable to draw one sample (in duplicate) from each package/container. The expression used are "normally" and "advisable". In the next instruction at Para 2.5 of Standing Order No.1/1989, if the packages/containers are of identical in size and weight, bearing identical markings, then the content may be bunched in lot of 40, in case of Ganja.

11. Therefore, the Standing Order does not rigidly say in all cases representative samples to be drawn from each packages/containers. It says such procedure to be normally followed and the exceptions also laid in the next para i.e 2.5 of Standing Order No.1/1989.

12. It is also to be noted that, even in *Noor Aga vs. State of Punjab* reported in (2008(16) SCC 417) which is referred by the other High Courts in their judgment cited supra, the blatant flouting of the Standing Order alone is termed to vitiate the seizure and not substantial compliance. The following observations made by the Hon'ble Supreme Court in *Noor Aga v. State of Punjab* reported in (2008(16) SCC 417) makes the point clear.

"(125) 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 interference against them to the effect that had such evidence been produced, the same would have gone against the prosecution".



13. Therefore, only after the examination of witnesses, particularly the Officer, who seized the contraband, the Court can come to the conclusion whether there was any error in making a homogeneous lot of all the 6 packets of ganja each 4 kg. Having open this defence for the petitioner to canvass the point at the end of trial, *this Criminal Petition for bail is dismissed.*

-sd/-

19/04/2022

This order, on being produced, be punctually observed and carried into execution by all concerned

TRUE COPY

Sub-Assistant Registrar (Statistics/C.S.)
High Court, Madras - 600 104.

TO

1 THE PRINCIPAL SPECIAL JUDGE
NDPS ACT, CHENNAI.

2 INSPECTOR OF POLICE
NIB CID, KANCHIPURAM.

3 THE SUPERINTENDENT,
CENTRAL PRISON, PUZHAL-II, CHENNAI.

4 THE PUBLIC PROSECUTOR
HIGH COURT, MADRAS.

CC to M/S. T.S.SASI KUMAR Advocate on payment of necessary charges

CRL OP.7755/2022

Date :19/04/2022

CSK 22/04/2022