

IN THE HIGH COURT OF DELHI AT NEW DELHI

Order reserved on: 13.07.2022

Order delivered on: 03.08.2022

+ BAIL APPLN. 3508/2021

SHAILENDER

..... Petitioner

Through: Mr.Kundan Kumar, Mr.Ankit and
Mr.Saheb-e-Alam, Advocates.

versus

STATE NCT OF DELHI

..... Respondent

Through: Ms.Rajni Gupta, APP for the State
with SI Amit, P.S.: Hauz Qazi.

CORAM:

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

ORDER

ANOOP KUMAR MENDIRATTA, J

1. This is an application under Section 439 Cr.P.C. for grant of bail in FIR No.0007/2021 under Section 21/61/85 of NDPS Act registered at PS: Hauz Qazi, Delhi.

2. In brief, as per the case of the prosecution, on 13.01.2021, a secret information was received in the office of Narcotics Squad, Central District, Kamla Market, Delhi by SI Ravinder that one Shailender is involved in the supply of heroin and would come to supply huge quantity of heroin near Deen Dayal Upadhyaya Market Gate between 11:30PM & 12:30AM and in case raid is conducted, he can be apprehended. The said information was conveyed by SI Ravinder to senior officers and was reduced into writing

vide DD No.11 dated 13.01.2021. As per the directions of the senior officers, a raiding party was constituted and proceeded to the place of information. About 11:55PM, the petitioner was apprehended. Notice under Section 50 NDPS Act was served upon the petitioner and search was conducted in presence of ACP (Operations). During search, a black coloured bag containing 24 polythene packets of pink colour substance were recovered from the possession of the petitioner. The same were checked with the help of Testing Kit and found to be heroin. The packets weighed 4 Kgs. 800 grams Accordingly, FIR No.0007/2021 under Section 21 of NDPS Act was registered at PS: Hauz Qazi.

During the course of investigation, two samples were taken from the recovered substance by SDM, Karol Bagh as per proceedings under Section 52A NDPS Act. Further, as per FSL report, the samples were found to contain Diacetylmorphine (13.8%), monoacetylmorphine and trimethoprim.

3. Learned counsel for the petitioner submits that the petitioner has been falsely implicated and was lifted from Rithala Naala nearby Rithala Metro Station about 5:00-6:00 PM on 13.01.2021 by the raiding team. It is further urged that in view of the same, the Call Detail Records were requested to be preserved and analysed and an application in this regard had been moved before the learned Trial Court under Section 91 of NDPS Act on behalf of the petitioner. It is also urged that upon inquiry by the senior officers, investigation of the case was transferred from District Narcotic Cell to PS: Hauz Qazi. The sampling procedure adopted by the prosecuting agency is further stated to have vitiated the entire proceedings.

It is further contended that the contents of 24 packets allegedly

recovered were put into one packet and thereupon the samples were drawn against the mandate of observations of the Hon'ble High Court of Delhi in ***Basant Rai vs. State*, 2012 (3) JCC 138 (Narcotics), Crl. Appeal No.909 of 2005 passed on 02.07.2012**. It is also urged that at the best, only a case for recovery of 200 grams could be made out in view of improper sampling procedure, which does not fall within the 'commercial quantity'. Reliance is further placed upon the judgments passed in ***Gaunter Edwin Kircher vs. State of Goa, Scretariat, Panji, Goa*, 1993(2) SCR 337; *Javed A. Bhat vs. UOI*, 2007 Crl.L.J. 3145; *Ahmed Hassan Muhammed vs. The Customs*, 2021(2) JCC 1187 and *Pardeep Kumar Gupta vs. State of Delhi*, BAIL APPLN 2865/2020** decided by High Court of Delhi on 15.01.2021.

4. On the other hand, the application has been vehemently opposed by the learned APP for the State. It is submitted that the contentions raised by learned counsel for the petitioner disputing the conduct of raid and recovery is baseless. It is further submitted that the presence of SI Ravinder at Rithala was in pursuance of investigation of another FIR No.192/19 under Section 20/61/85 of NDPS Act registered at PS: Kamla Market, Delhi. It is pointed out that departure of SI Ravinder in the aforesaid FIR No.192/19 was duly recorded vide DD No.06 dated 13.01.2021 and arrival was recorded vide DD No.10 dated 13.01.2021 about 8:30PM. The claim of the petitioner that he was lifted prior to conduct of raid, as such, is vehemently opposed. It is further submitted that conduct of proceedings in respect of receipt of secret information and apprehension of petitioner is corroborated by DD No.11 dated 13.01.2021 as well as DD No.12 regarding departure of raiding party at 10:55PM, in the proceedings in the present case. It is also pointed out that

petitioner was earlier involved in excise case bearing FIR No.625/2002 under Section 61/1/14 Excise Act registered at PS: Sultan Puri, Delhi.

So far as the recovery and sampling of the contraband is concerned, it is submitted that each of the packets was tested with Field Testing Kit, which on the basis of physical properties was found to be heroin. It is submitted that merely because the contents of 24 packets were mixed thereafter for the purpose of obtaining the sample, it cannot be presumed that entire proceedings stand vitiated. It is urged that even in the order passed by the learned Trial Court dated 07.09.2021, it has been observed as under :-

“.....Even if for the sake of arguments, it is presumed that accused/applicant is liable for possession of one packet only, even then accused/applicant is not entitled to bail as a matter of right. 200 grams of heroin is more than small quantity but less than commercial quantity. The facts and circumstances of the present case are very different from the facts and circumstances of the cases upon which reliance has been placed by Ld. Counsel for accused/applicant. The other contentions raised by Ld. Counsel for accused/applicant are a matter of trial.....”

Reliance is further placed upon the judgments/orders passed in ***Bipin Bihari Lenka vs Narcotic Control Bureau, BAIL APPLN.3291/2021 dated 25.04.2022; Anthony Umeh vs. State, BAIL APPLN.851/2021 dated 06.07.2021; Naved Ummer Sheikh vs. Narcotic Control Bureau, BAIL APPLN.3248/2021 dated 23.11.2021 and Bobby Collin vs. Narcotic Control Bureau, BAIL APPLN.812/2021 dated 19.04.2021.***

5. I have given considered though to the contentions raised.

A contention has been raised by learned counsel for the petitioner that the petitioner has been falsely implicated in this case, after being lifted prior to the alleged recovery and reliance is placed upon Call Detail Records. At the outset, it may be observed that the defence taken by accused/petitioner needs to be duly established during the course of trial. At this stage, the stand taken on behalf of the prosecution that IO was present in connection with investigation of another FIR No.192/19, P.S. Kamla Market supported with relevant DD entries, cannot be ignored.

6. In order to appreciate the contentions raised by learned counsel for the petitioner challenging the sampling procedure adopted by the Investigating Agency, the authorities relied upon may be briefly referred.

(i) In ***Gaunter Edwin Kircher vs. State of Goa, Secretariat, Panji, Goa (supra)***, two cylindrical pieces of charas weighing 7 and 5 grams respectively were seized from the appellant by a police patrolling party and on chemical analysis of one of the pieces, it was found that the substance found was charas. The conviction made by learned Trial Court was upheld in appeal by the High Court. In an appeal before the Hon'ble Supreme Court, it was observed that the courts below erred in holding that the accused was found in possession of 12 grams of charas since only a small quantity less than 5 grams had been sent for analysis and the remaining part of the substance, which had not been sent for analysis cannot be held to be charas and, therefore, the quantity proved to have been in the possession of accused would be small quantity as provided under Section 27 of the Act and the accused should have been

given the benefit of that Section.

It may be observed that the aforesaid case is distinguishable on facts since two separate cylindrical pieces of charas weighing 7 and 5 grams respectively had been recovered and only one of the pieces had been forwarded for forensic examination and, as such, it could not be held that the other piece recovered from the possession of accused therein was also charas. The quantity recovered, as such, was proved to be less than 5 grams which fell within the meaning of small quantity for the purpose of Section 27 of the Act.

It may be observed that the aforesaid findings had been given after the conclusion of trial at the stage of appeal.

(ii) In ***Javed A Bhat vs. Union of India***, the accused was charged for being found in possession of 380 grams of hashish/charas, 85 grams of ganja, 37 grams of brown sugar/heroin, 8.4 grams of ecstasy tablets and 6 grams of cocaine.

Arguments in the aforesaid case were confined on the point of sentence in relation to possession of 380 grams hashish under Section 20(b)(ii)(B) of NDPS Act. The said charas/hashish was found in the form of cigars and flat substances but the panchnama nor the evidence reflected as to how many such substances were in the form of cigars or flats in the transparent polythene which when weighed was found to be 380 grams. Thereafter, two representative samples of 50 grams each were taken from the said packet and put into two separate polythene bags and sent for analysis. Further, as per evidence therein on record it was observed that the polythene bag sent for examination contained a

dark brown substance in the form of cylindrical sticks and flat squarish pieces and the total weight of the substance along with the polythene bag was found to be 50 grams. The witness therein took the representative sample and after analysis came to conclusion that the substance analysed by him contained charas. It was contended therein that since the prosecution did not send the entire quantity i.e. 380 grams of charas for analysis, **the remaining pieces in the form of cigars or flats cannot be presumed that they would contain charas or hashish. Reliance therein was placed upon *Gaunter Edwin Kircher (supra)* and it was held by the High Court that since the prosecution did not send all the pieces either in the form of cigars or flats for analysis but remains satisfied only by sending some of such pieces weighing about 50 grams and, therefore, applying the principles laid by the Apex Court, it was concluded that accused was found with only 50 grams of charas/hashish and not the entire quantity of 380 grams as contended by the prosecution and on failure of the prosecution to send all the cigars or flats found with the accused.**

I am of the considered opinion that the aforesaid case is also distinguishable wherein the quantity recovered was dissimilar i.e. both in the form of cigars or flats and as such the presumption could not arise that the cigars also contained charas/hashish.

(iii) In ***Basant Rai vs. State (supra)***, the appellant was caught carrying 3.5 kgs. of charas on 24.09.2003 in a polythene bag which contained similar polythene bags having black coloured substance. Accordingly, two samples of 25 grams each were made after breaking

charas from each of the eight slaps which was sent to FSL and found to be charas. It was therein contended that the sample sent to FSL is not representative of the entire quantity of allegedly recovered substance to infer that the quantity of 3.5 kgs. of charas was recovered. Reliance therein was placed upon Gaunter Edwin Kircher vs. State of Goa and Javed A Bhat vs. Union of India (supra). In para 25 of the judgment it was observed by Hon'ble Mr. Justice Suresh Kait as under:-

“25. After hearing both the learned counsel for parties and going through the Trial Court Record, I find force in the submission of learned counsel for appellant. Admittedly, the samples were drawn after breaking small pieces from 08 of the polythene bags which were allegedly kept in a green coloured bag by the appellant in his right hand. The IO prepared two samples of 25 grams each after taking a small quantity from each of the slabs.

26. Though the settled law is that if it is not practicable to send the entire quantity then sufficient quantity by way of samples from each of the packets of pieces recovered should be sent for chemical examination. Otherwise, result thereon, may be doubted.

27. For example, if the 08 packets were allegedly recovered from the appellant and only two packets were having contraband substance and rest 6 packets did not have any contraband; though all may be of the same colour, when we mix the substances of all 8 packets into one or two; then definitely, the result would be of the total quantity and not of the two pieces.

Therefore, the process adopted by the prosecution creates suspicion. In such a situation, as per settled law, the benefit thereof should go in favour of the accused. It does not matter the quantity. Proper procedure has to be followed, without that the results would be negative.”

It may be observed that aforesaid judgment was also passed at the stage of appeal and apart from the aforesaid fact the other deficiencies/inconsistencies in the prosecution version were also brought on record.

(iv) In **Ahmed Hassan Muhammed vs. The Customs (supra)**, an intelligence had been gathered that the consignment imported vide bill of entry was containing contraband substance and had been put under preventive check. The consignment-wise goods as per MAWBs were found to be packed in 30 cartons, with each consignment containing 10 cartons per MAWBs. The cartons were then opened and examined one by one MAWB wise. The cartons marked Number A-1 to A-10, pertaining to MAWB Number 07133613414 were then examined. It was noticed that one carton was found sealed using lac. All the cartons bearing numbers A-1 to A-10 were then opened and examined. The said one carton bearing lac seal was found to contain 10 plastic packages of same type of dry leaves suspected to be Dry Chat leaves and one plastic package out of these 10 plastic packages was found sealed with lac seal. It was observed by the examining officers that this could be on account of the fact that a certain

quantity would have been taken out by FSSAI officials for testing purpose. All the other Nine cartons were opened and examined and were found to contain 10 plastic packages of same type of dry leaves suspected to be Dry Chat leaves. Allegedly, total 100 such plastic packages were found which were also numbered as A-1/1, A-1/2.....A-1/10 and A-2/1, A-2/2...A-2/10 and so on till A-10/1, A-10/2,A-10/10 respectively. The same were declared as Dry Chat in the MAWB whereas in the Bill of Entry Number 9786830 dated 25.01.2019 filed for the said consignment, the goods were declared as Green Tea. The Gross weight of the 10 cartons was taken on the electronic weighing machine and it was found to be 220.360 kgs. As the packaging in respect of the consignments covered under 10 cartons pertaining to the said MAWB were the same, in order to arrive at the net quantity of the suspected Dry Chat leaves, the contents of one carton were emptied and weight of the emptied carton taken which was found to be 1.740 kgs. Thereafter, the contents in one plastic package containing Dry Chat leaves were taken out and the emptied plastic package weighed which was found to be 0.070 kgs. The total weight of the packing material in respect of the said consignment covered under MAWB No. 07133613414 was found to be 24.400 kgs. and accordingly, the net weight of suspected Dry Chat leaves was found to be 195.960 kgs.

Similar exercise was taken with respect to cartons marked B1 to B10 and C1 to C10 pertaining to other MAWBs.

Thereafter representative samples in consignments covered in each MAWB were drawn and in total six representative samples were drawn. Further, for drawal of representative samples from each consignment pertaining to MAWB No.07133613414, the Inspector took small quantity of substance i.e. dry chat leaves from each of the packages containing dry chat leaves, mixed thoroughly to make the mixture homogenous and out of these two samples, representative sample each weighing 24 grams was taken which were individually kept in press locked plastic pouches.

It was also contended that the bag containing dry leaves was tampered with by the investigating agency entrusted for investigation and that too without the knowledge of custom officials.

Giving benefit with reference to the sampling procedure after making reference to ***Basant Rai vs. State*** (supra), petitioner/accused was given benefit of bail. The observations in para 18 & 19 may be reproduced:-

“18. The fact of the present case is that prosecution has mixed all the packets and thereafter, sent to FSL for examination, which is contrary to the procedure prescribed under the law.

19. This Court is informed that the petitioner is a Somalian National resident and his Refugee Certificate issued by UNHCR (United nation High Commissioner for refugees) was valid till 20/12/2019. Hence, he has a valid document to stay

in India at the time of his arrest. He is in judicial custody since 04.02.2019. No doubt the recovered substance in the present case is of commercial quantity, however, the procedure prescribed is contrary to the dictum of this Court. This court is informed by learned counsel for the petitioner that petitioner is not a habitual offender and is not likely to get involved in any other case during bail. Thus, petitioner has qualified twin conditions of Section 37 of NDPS Act”.

7. The judgments relied upon by the prosecution may now be briefly noticed.

(i) In ***Anthony Umeh vs. State*** (supra), apart from the other contentions, it was contended that the entire alleged contraband was collected and thereafter samples were drawn in contravention of the law laid down by the Hon’ble Supreme Court and para 208 of the Standing Order No.1/89. Reliance was also placed upon the decisions reported as **AIR 2014 SC 1384 *State of Rajasthan vs. Parmanand & Anr.*; 2011 (5) SCC 123 *Ashok @ Dangra Jaiswal vs. State of M.P.*; 2018 (252) DLT 748, *Earnest @ Aik vs. State*; 2015 SCC OnLine Del. 9860/MANU/DE/1748/2015 *Edward Khimani Kamau vs. The Narcotics Control Bureau*; 2012 (191) DLT 403 *Basant Rai vs. State*; AIR 2005 SC 4248 *Amarsingh Ramjibhai Barot vs. State of Gujarat*; and *N.Ayyappan vs. State*, Bail Appln. 405/2005 decided on 21st April, 2005.**

In the aforesaid case, two African nationals were apprehended on the basis of secret information and thereafter search of one of them i.e.

Agbahia Ikenna was conducted and cardboard box was found to contain heroin which weighed about 800 grams. Two samples of 5 grams each marked A & B were taken and remaining contraband was converted into a cloth parcel. The case of the prosecution was that the cardboard box was found to contain 15 packets wrapped with silver gota on gatta pieces and all the 15 packets were checked after removing the gatta and gota and in five packets it was found containing cream colour powder wrapped in gatta and both sides of the gatta were laminated with plastic. Cream colour powder from these five packets was taken out on a transparent polythene and was checked with the field testing kit which gave positive result for heroin. On weighing, it was found to be 800 grams and thus two samples of 5 grams each were taken and the remaining 790 grams heroin was also sealed in the cloth pullanda. Repelling the contentions of the petitioner, it was observed in para 10 as under:-

“10. Contention of learned counsel for the petitioner that samples should be drawn from each of the packet though merits consideration however, does not vitiate the case of the prosecution for the reason as per the prosecution all five packets were separately tested by the field testing kit and they were found to be containing heroin. After having checked from the field testing kit, the Investigating Officer mixed the contents of the five packets which turned out to be 800 grams in total out of which two samples were drawn. Once each of the packets contained heroin at best the issue would be of percentage of purity which

issue is not required to be considered at this stage.”

(ii) In ***Bipin Bihari Lenka vs Narcotic Control Bureau*** decided by this court, 106 packets were recovered from the cavity of the truck, out of which 58 were of big size and 48 were of small size. On examination of each packet, brown colour grass with leaves was found, which on being tested was found positive for Ganja. Each of the big packets was found to contain 5 Kgs. Approx and each of the small packets weighs 2 Kgs. Approx. The total quantity weighed to be 386 Kgs.

Further, 58 packets were divided in separate lots of eleven and 48 small packets in two lots. All the packets recovered from the truck were thus divided in 13 lots. Two samples of 25 grams each was drawn from each lot (after taking small substance from each packet) and in total 26 samples were drawn. The complete seizure proceedings were conducted as per panchnama dated 25.03.2020. A seizure report under Section 57 of NDPS Act was accordingly submitted to the Superintendent, NCB by Shri Manoj Kumar, Jr.IO, NCB on 25.03.2020 regarding the seizure.

It was therein contended that by collecting and mixing the contents of all the recovered packets in mixing the contents of all the recovered packets in lots and drawing samples subsequently, led to losing of the sanctity of the case property in each individual packet. Reliance is further placed on judgments passed by this Court in ***Amani Fidel Chris vs. NCB***, decided on 13.03.2020 in CrI. A. 1027/2015,

Basant Rai vs. State in Crl. A. 909/2005 and ***Satish vs. State of U.P.***,
Bail Application No.24444/2020 dated 14.10.2020.

The observations in para 11, 12 and 13 made by this court are relevant to be noticed:-

*“11. It may be noticed that in **Amani Fidel Chris vs. NCB**, decided on 13.03.2020 in Crl. A. 1027/2015, the findings were given at the stage of appeal after the trial had been concluded. The four packets containing suspicious powdery substance were found concealed in a stroller bag and IO without weighing the contents of each individual packet mixed the powder from all the four packets in one polythene bag and then drew the sample. Thus, in aforesaid circumstances, it was held that IO ought to have followed the procedure outlined in para 2.4 of Standing Order 1/89 or 1.7(a) of Standing Order 1/88 by drawing sample in duplicate from each of four packets separately and then sending the sample for testing.*

*Similarly, in **Basant Rai vs. State (supra)**, under somewhat similar circumstances accused was found carrying polythene bag containing eight smaller polythene bags having brown colour substance and IO took small pieces of charas from each packet, mixed the same and drew two sample parcels which were sent to FSL for analysis.*

*Further, it may be observed that in **Ahmed Hassan Muhammed vs. The Customs (supra)**, the case related to import of certain consignment in which the contraband was recovered*

and as such apart from the benefit on account of sampling, the contentions had been made that the involvement was alleged on the basis of conspiracy and no incriminating material was recovered from the person of the petitioner/accused therein.

12. *Observations of the learned Trial Court in order dated 06.08.2021 while dismissing the application on the point of sampling may be noticed:*

*“As the recovery was from the truck which he was driving therefore, there is definite presumption u/s 35 and 54 NDPS Act against this accused at this stage, which could be rebutted during trial (**Madan Lal vs. State of HP 2003(7) SCC 465 and Mohan Lal Vs. State of Rajasthan 2015 (6) SCC 222**). The substance from each packet was tested individually and was found positive for ganja thereafter, all the 106 packets were divided into 13 lots and total 26 samples were drawn after mixing of the substance homogeneously and this procedure was found as due compliance as per mandate of judgment **Sumit Tomer Vs. State of Punjab, Crl. Appeal No.1690-1691/2012 dated 19.10.2012 (SC)**. Furthermore, Delhi High Court in a recent judgment titled **Santinu Simone Vs Department of Customs, Crl Appeal No.1088/2017 dated 05.10.2020** in paragraph 83 held that the prosecution had failed to establish that the content of each packet was separately tested however in present case prima facie the each packet were separately tested. Furthermore, any infirmity in the procedure which do not go into the root of the*

matter cannot be appreciated at this stage.”

13. *The procedure followed in the present case appears to be distinguishable as referred in the typed copy of the complaint annexed with the application. In the present case, total 58 big packets were divided in 11 lots and 48 small packets were divided in 02 lots. Two samples of 25 grams each were drawn from each lot (after taking small substance from each packet). Thus, total 26 samples were drawn. I am of the view that at this stage, it may be premature to hold that the procedure adopted for sampling vitiates the entire proceedings since the sampling was done after each of the packets tested positive for Ganja. The prejudice, if any, on account of alleged improper sampling as contended by counsel for the petitioner, can only be appropriately considered after the examination of the witnesses during the course of trial.”*

(iii) In ***Naved Ummer Sheikh vs. Narcotic Control Bureau (supra)***, the petitioner therein was apprehended at IGI Airport and from his baggage 1.6 kgs. of contraband namely methaqualone, was recovered. But the petitioner/accused during preliminary enquiry, revealed that recovered substance is methamphetamine. Samples were drawn and sent to CRCL and the sample tested positive for methamphetamine. Rejecting the contention with regard to the drawing of samples, it was observed in para 11 as under:-

“11. In the present case, the petitioner was apprehended at the airport which is evident from the travel documents. As far as the

question of violation of mandatory provisions are concerned, the same are all matter of trial and cannot be looked into at this stage. Ld. counsel for the petitioner further raised the contention with regard to the violation of mandatory circulars and procedure while drawing the samples and placed reliance on the judgment Amani Fidel (supra) but the same is also of no help to him as the procedural defect or violation of any circular would be a matter of trial and the judgment Amani Fidel (supra) is after the trial and is not on the point of bail on the above said grounds. The entire procedural defect in this regard would be tested when the evidence is led in this case and this is not the stage where any opinion can be given in favour or against the manner in drawing the samples. The recovered quantity is a commercial quantity hence bar of section 37 applies. In these circumstances, no ground for bail is made out. The bail application is, therefore dismissed.”

(iv) In **Bobby Collin vs. Narcotic Control Bureau (supra)**, the accused disclosed that he was carrying some pellets/capsules of drug in his stomach. Thereafter, he was physically examined but nothing incriminating was recovered. The petitioner was accordingly admitted in emergency surgical ward for removal of pellets/capsules. 65 pellets/capsules were passed/removed from his body. All pellets/capsules were cut open and a small amount of powder was tested separately with the help of field testing kit which tested positive for cocaine. Since all 65 pellets/capsules were of same size, packaging,

texture, colour and property, these were mixed properly and transferred into a transparent polythene bag which weighed out to be 1.32 kgs. Further, two samples of 5 grams each were drawn.

The contention was raised on behalf of the petitioner/accused that the samples were not individually drawn from 65 pellets/capsules and the sample sent to CRCL were not the representative samples of contraband from each pellet/capsule. Reliance was also placed upon ***Amani Fidel vs. Narcotic Control Bureau, Crl.A.1027/2015 decided on 13.03.2020*** by the High Court as well as instruction 1/88 dated 15.03.88 of Narcotic Control Bureau. Reference was also made to Standing Orders 1/89 dated 13.06.89 issued under sub-section 1 of Section 52A of NDPS Act. Further, reliance was placed upon ***Union of India vs. Bal Mukund & Ors., (2009) 12 SCC 161*** and ***Noor Aga vs. State of Punjab & Anr., (2008) 16 SCC 417*** wherein Standing Order No.1/88 had been referred and sanctity of Standing Order No.1/89 was considered. The contention regarding alleged improper sampling did not find favour and it was observed in para 28 as under:-

“28. Pertinently, the petitioner has approached this Court when only one prosecution witness remains to be examined and trial is at the fag end. During the course of hearing, learned counsel sailed this Court through examination and cross-examination of witnesses PW-3 and PW-10 to point out various infirmities in the prosecution case. Prosecution evidence is yet to be concluded and testimonies of other witnesses are not before this Court, hence, it would not be worthwhile to scrutinize the statements of

these two witnesses in piecemeal. Furthermore, in what way and manner the prosecution failed to follow the procedure prescribed under the Act, can be established by the petitioner during his evidence in defence. The pleas so urged before this Court can also be agitated before the trial court at the time of final arguments.”

8. It may be observed that the proposition of sending entire quantity seized for chemical analysis may not be practicable in several cases. The drug peddlers and suppliers appear to be adopting the unique and novel methodology to escape law, by carrying large number of smaller packets which later on, is challenged on the ground of improper sampling during investigation. In ***Gaunter Edwin Kircher vs. State of Goa***, it was *prima facie* established by the accused that the recovered substance consisted two separate forms but only a part of the same which was a flat substance and not in the form of cigars was forwarded. As such, benefit was extended at the stage of appeal since no finding could be given that other part of the alleged recovered substance, which was not forwarded for examination could be presumed to be a narcotic substance. However, the factual position in the present case is distinct.

Though the burden always remains on the prosecution to prove that the quantity possessed by accused was heroin, beyond reasonable doubt but it cannot be ignored that the petitioner is yet to come up with any explanation during trial as to what was allegedly contained in the similarly packed smaller packets which on preliminary testing by the Investigating Agency tested positive for heroin. *Prima facie* the substance recovered in

different packets was of similar texture, colour and tested positive on field testing. The circumstances under which the sampling procedure could not be followed as per the mandate, needs to be duly considered after the evidence has been led on record and the FSL expert is examined. Considering the limitations for grant of bail referred in Section 37(1)(b)(ii) for offences punishable under Sections 19, 24 or 27A and also for offences involving a commercial quantity, there must exist 'reasonable grounds to believe' at this stage that the person is not guilty of such an offence. In my considered opinion, there does not exist reasonable grounds at this stage to give a finding that the entire proceedings stand vitiated because of the alleged sampling procedure adopted by the Investigating Agency. The procedural deficiency in sampling, as contended by learned counsel for the petitioner, can be considered only after the evidence is led on record. The observations of learned Trial Court in order dated 07.09.2021 are also relevant in this regard.

“.....Even if for the sake of arguments, it is presumed that accused/applicant is liable for possession of one packet only, even then accused/applicant is not entitled to bail as a matter of right. 200 grams of heroin is more than small quantity but less than commercial quantity. The facts and circumstances of the present case are very different from the facts and circumstances of the cases upon which reliance has been placed by Ld. Counsel for accused/applicant. The other contentions raised by Ld. Counsel for accused/applicant are a matter of trial.....”

For the foregoing reasons, no grounds for bail are made out, at this stage.

The application is accordingly dismissed.

(ANOOP KUMAR MENDIRATTA)
JUDGE

AUGUST 03, 2022/SD

