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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 31st May, 2023

+ BAIL APPLN. 71/2023

QUENTIN DECON

..... Petitioner

Through: Mr. Akshay Bhandari, Mr. Anmol Sachdeva, Advocates.

versus

CUSTOMS

..... Respondent

Through: Mr. Atul Tripathi, Senior Standing Counsel with Mr. R.K.Shah, Advocate.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present application under Section 439 of the Criminal Procedure Code, 1973 ('CrPC') seeks regular bail in Sessions Case No. 867/2021, registered by the Customs Department, under Sections 21/23/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS') pending trial before the Court of the learned Special Judge (NDPS), Dwarka Courts, South West.

2. Briefly stated, the facts of the present case, as stated in the complaint dated 22.12.2021 are as under:

- i. On 27.06.2021, officers of Customs, IGI Airport, New Delhi intercepted two accused persons namely, Sydney John-Brain O' Grady and Quentin Decon, i.e., the present applicant, who are both citizens of



the Republic of South Africa, who arrived at the airport by a flight from Doha.

- ii. After searching the beige colour checked-in trolley bag having Tag no.0157392647, carried by the present applicant, it was found that the bag contained clothes and old & used personal effects and 05 nos. of paper boxes of BOKOMO WEET-BIX wholegrain wheat Biscuits. It was further noticed that some Off-white coloured powdery substance/granules totally weighing 10000 grams (approx.) were kept inside 10 transparent plastic packets each placed inside white coloured cloth packet having circular stamp in blue colour marked with 'BLUE SAPHIRE 555 & 999 inside the circular stamp further placed inside one or two (in few cases) outer transparent plastic packet(s). Two such outer transparent plastic packets were further placed inside brown taped plastic packet. 04 such brown taped plastic packets were placed inside 04 paper boxes of BOKOMO WEET-BIX wholegrain wheat Biscuits. 02 brown taped plastic packets each containing one above mentioned outer transparent plastic packet were placed inside 01 paper box 1 of BOKOMO WEET-BIX wholegrain wheat Biscuits. The said off-white coloured powdery substance/granules weighing 10000 grams (approx.) recovered from checked-in trolley bag having Tag no. 0157392647 was suspected to be narcotic substance. On the search of the black backpack of the applicant nothing objectionable was found.
- iii. That thereafter, the total material recovered from the present applicant i.e., off white coloured powder/granules suspected to be narcotics substance, weighing 10000 grams approx. recovered from beige colour



trolley bag having tag no 0157392647 was further kept in a transparent poly bag weighing 27 grams approx, which was further kept in a plastic container weighing 480 grams approx., thus totally weighing 10500 grams approximately.

- iv. Representative samples of the recovered substance from both the accused persons were tested with the help of a Modified Narcotic Drugs detection Kit and the said substance tested positive for 'Heroin'.
- v. In their statements under Section 67 of the NDPS Act, both the accused persons including the applicant admitted to the recovery and agreed with the proceedings as recorded in the panchnama dated 27.06.2021. They admitted to their involvement in illegal trafficking of heroin in commercial quantity. The applicant stated that the contraband that he was carrying was handed over to him by one Mr. John in South Africa and that stated that he had instructions to leave the same in a specified room at Hotel Sarthak Palace, Multani Dhanda, Paharganj, New Delhi and immediately leave the place thereafter.
- vi. The applicant and co-accused Sydney John-Brain O' Grady were arrested on 27.06.2021 and have been in judicial custody since then.
- vii. The said recovered narcotic substance from both the accused persons found to be Heroin, was seized under the provisions of Section 43 and Section 43(a) the NDPS Act, 1985, read with Section 110 of the Customs Act, 1962 for violation of Section 8, 21,23 & 29 of the NDPS Act, 1985, as these were found to be liable for confiscation under Section 60 of the NDPS , Act, 1985, read with Section 111, 118 and



119 of the Customs Act, 1962, on a reasonable belief that same are brought into India illegally.

- viii. An application u/s 52 A of NDPS Act seeking drawl of samples and disposal of seized Narcotics Drugs & Psychotropic Substances was filed before court concerned. The said application was taken up for hearing by Smt. Paridhi Gupta, Ld. MM, Dwarka Court, New Delhi for disposal on 15.07.2021. Samples were drawn before Ld. Magistrate as per details mentioned in Order dated 15.07.2021. Panchnama dated 27.06.2021 related to recovery from accused was produced before Ld. MM and the same was certified to the effect that the particulars, sealing, weight, and colour etc. of the case property are correct as mentioned in the said panchnama. All the proceedings of the said date were duly photographed and photos were duly attested/certified by Ld.MM vide order dated 26.07.2021.
- ix. That samples mark S01 & S02 along with Test Memo were sent to CRCL by Dy./Jt. Commissioner, Customs vide letter dated 23.07.2021. The samples were duly received and acknowledged in seal intact condition by the CE, CRCL vide receipt dated 23.07.2021. Further, vide report dated 08.09.2021 in respect of Sydney John-Brain O' Grady (co-accused) and the present applicant samples were opined positive for Heroin, which is a narcotic drug. Remnant samples received from CRCL were deposited in the godown vide DR No. 27673 in respect of Sydney John-Brain O' Grady (co-accused) and vide DR No. 27674 in respect of the present applicant.



3. Learned counsel appearing on behalf of the applicant seeks bail only on the ground of defect in sampling procedure adopted by the Investigating Officer at the time when the recovery and seizure made in present case. Learned counsel appearing on behalf of the applicant submitted that an application under Section 52A of the NDPS Act for drawing of samples from seized inventory of drugs was filed before the learned Trial Court. It is submitted that two *pulandas* marked P-1 and P-2 were produced. From the *pulanda* marked P-1 weighing 8.66 kg (recovered from the co-accused), two samples of 5 grams each were drawn and sealed in two zip-lock bags. From the *pulanda* marked P-2 weighing 10.70 kg (recovered from the present applicant), two samples of 5 grams each were drawn and sealed in two zip-lock bags.

4. It was argued that Investigating Officer was required to produce the 10 packets (recovered from the present applicant) as alleged in the *panchnama* for sampling proceedings and the samples were required to be drawn from each of the said 10 packets. However, to the contrary, the Investigating Officer produced the same after mixing the contents of each of those packets and samples have been drawn from the said mixture of contraband and not from each packet, which is contrary to law.

5. The learned counsel for the applicant has only raised the issue of defective sampling for the purpose of the bail application.

6. Learned counsel appearing on behalf of the applicant has placed reliance on Standing order 1/88 & 1/89 and on a notification dated 23.12.2022 issued by Ministry of Finance (Department of Revenue) in exercise of powers conferred by Section 76 read with Section 52A of the NDPS Act. Learned



counsel, relying on the aforesaid rules, has submitted that the prosecution instead of bringing all the packets before the learned Metropolitan Magistrate at the time of moving an application under Section 52A of the NDPS Act for the purpose of sampling produced the mixture of the alleged contraband contained in the ten packets recovered from the applicant.

7. In support of his submission, learned counsel appearing on behalf of the applicant placed reliance upon the following judgments:

- i. Ahmed Hassan Muhammed v. The Customs, Judgment dated 11.02.2021 in BAIL APPLN 3076/2020.
- ii. Ram Bharose v. State (Govt. of NCT of Delhi), Order dated 05.08.2022 in BAIL APPLN 1623/2022.
- iii. Laxman Thakur v. State (Govt of NCT of Delhi), Judgment dated 14.12.2022 in BAIL APPLN 3233/2022.
- iv. Samuel Okeke v. State, Judgment dated 28.09.2020 in CRL.A 915/2016.
- v. Uchenne v. The State, Order dated 10.10.2022 in BAIL APPLN 3912/2021.
- vi. Edward Khimani Kamau v. The Narcotics Control Bureau, 2015 SCC OnLine Del 3860.
- vii. Amani Fidel Chris v. Narcotics Control Bureau, 2020 SCC OnLine Del 2080.
- viii. Union of India v. Mohanlal & Anr., (2016) 3 SCC 379.
- ix. UOI v. Bal Mukund & Ors., (2009) 12 SCC 161.
- x. Sachin Kumar v. State (Govt. of NCT of Delhi), Order dated 26.04.2023 in BAIL APPLN 557/2023.



8. *Per contra*, learned counsel appearing for the Customs argued that the sampling procedure is proper and no defect can be attributed to the procedure adopted by the Investigating Officer in the aforesaid cases. It was additionally argued that the issue whether the sampling procedure was in accordance with the aforesaid standing orders or not is a matter of evidence to be appreciated at the time of trial and therefore, cannot be examined at this stage. It has been contended that the applicants have to establish prejudice caused to them on account of the alleged non-compliance with the appropriate procedure for sampling.

9. In support of his submission, learned counsel appearing on behalf of the Customs placed reliance upon the following judgments:

- i. Bipin Bihari Lenka v. Narcotic Control Bureau, Judgment dated 25.04.2022 in BAIL APPLN. 3291/2021.
- ii. Sumit Tomar v. The State of Punjab passed by the Hon'ble Supreme Court on 19.10.2012 in Criminal Appeal nos. 1690-91 of 2012.
- iii. State of Madhya Pradesh v. Kajad passed by the Hon'ble Supreme Court on 06.09.2001 in Criminal Appeal no. 907 of 2001.
- iv. Union of India v. Rattan Mallik @ Habul passed by the Hon'ble Supreme Court on 23.01.2009 in Criminal Appeal no. 137 of 2009.

10. Heard learned counsel for the parties and perused the record.

11. The procedure which comes into effect after arrest and seizure is contained in Section 52 and 57 of the NDPS Act. The Hon'ble Supreme Court, in **State of Punjab v. Balbir Singh (1994) 3 SCC 299** has held as under:



“24. Sections 52 and 57 come into operation after the arrest and seizure under the Act. Somewhat similar provisions are also there in the CrPC. If there is any violation of these provisions, then the Court has to examine the effect of the same. In that context while determining whether the provisions of the Act to be followed after the arrest or search are directory or mandatory, it will have to be kept in mind that the provisions of a statute creating public duties are generally speaking directory. **The provisions of these two sections contain certain procedural instructions for strict compliance by the officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. Therefore it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice. The officers, however, cannot totally ignore these provisions and if there is no proper explanation for non-compliance or where the officers totally ignore the provisions then that will definitely have an adverse effect on the prosecution case and the courts have to appreciate the evidence and the merits of the case bearing these aspects in view. However, a mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution.**

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25....(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.”

(emphasis supplied)

12. It is pertinent to note that Section 52A of the NDPS Act was added by 1989 Amending Act with effect from 29.05.1989. Section 52 A of the NDPS Act provides as under:



“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].”

(emphasis supplied)



It is pertinent to note that the language of the aforesaid provision signifies its applicability with regard to disposal of seized drugs, i.e., at a stage after recovery and seizure.

13. Power of the Central Government to make rules under Section 52 and Section 52A are provided for in Section 76 of the NDPS Act which provides as under:

“76. Power of Central Government to make rules.—

(1) Subject to the other provisions of this Act, the Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—..”

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(de) the disposal of all articles or things confiscated under this Act.

(df) the drawing of samples and testing and analysis of such samples”

(emphasis supplied)

14. It is pertinent to point out that the Standing Order No. 1/88, dated 15.03.1988 was issued by the department under the provisions of Section 52 of the NDPS Act. In exercise of powers conferred by Section 52A(1) of the NDPS Act, Government of India, Ministry of Finance, Department of Revenue issued a standing order No. 1/1989 dated 13.06.1989. Subsequently, in exercise of powers conferred by Section 76 read with Section 52A of the NDPS Act, Government of India, Ministry of Finance, Department of Revenue, has issued another notification dated 23.12.2022. So far as the notification dated 23.12.2022 is concerned, the same has been issued under the powers conferred by Section 76 read with Section 52A of the NDPS Act. The Rules dated 23.12.2022 would be applicable both in the case of sampling



and thereafter disposal of the seized narcotic drugs. However, with regard to sampling of the contraband in the present case, the same was seized on 27.06.2021 and therefore, the rules dated 23.12.2022 would not be applicable in the facts of this case.

15. The issue with regard to defect in sampling was for the first time dealt with by the Hon'ble Supreme Court, in **Gaunter Edwin Kircher v. State of Goa, (1933) 3 SCC 145** was dealing with a case of conviction under Section 20(b)(ii) of the NDPS Act. The appellant in the said case was found in possession of 2 pieces of *charas* that weighed 7 and 5 gms respectively. Out of the 2 pieces, one piece of 5 gms was sent for chemical analysis, however, the piece weighing 7 gms was neither sent nor a sample thereof was taken and sent for chemical analysis. In this factual background, the Hon'ble Supreme Court held that since there was no chemical analysis for the other piece weighing 7 gms, either wholly or a part of it as a sample, the appellant cannot be convicted for the other cylindrical piece, weighing 7 gms. It was further noted that since the quantity for which test was conducted, was less than 5 gms, the same came within the meaning of small quantity for the purpose of Section 27 of the NDPS Act and in that case, conviction was modified from Section 20(b)(i) to Section 27 of the NDPS Act.

16. The Hon'ble Supreme Court, in **Union of India v. Bal Mukund & Ors., (2009) 12 SCC 161**, while considering an appeal against a judgment of acquittal observed as under:

“**36.** There is another aspect of the matter which cannot also be lost sight of. Standing Instruction 1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that PW 7 had taken samples of 25 gm each from all the five



bags and then mixed them and sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement in law.

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38. Furthermore, we are dealing with a judgment of acquittal. The High Court, for good and sufficient reasons, had arrived at findings of fact both with regard to voluntariness of the purported confessions made by the respondents as also compliance with the mandatory statutory provisions vis-à-vis directions issued by the Central Government in making search, seizure as also taking of samples for the purpose of chemical examination having been doubted, we do not see any reason why we should take a contrary view as it is well known that the appellate court would not interfere with a judgment of acquittal only because another view is possible. On the other hand, if two views are possible, it is trite, the appellate court shall not interfere. (See *Animireddy Venkata Ramana v. Public Prosecutor, High Court of A.P.* [(2008) 5 SCC 368 : (2008) 2 SCC (Cri) 600])”

The aforesaid judgment does not alter or set aside the ratio in the judgment of **Balbir Singh (supra)**. It is pertinent to note that the judgment in **Bal Mukund (supra)** was rendered in an appeal against acquittal, i.e., after completion of trial and therefore, the effect of non-compliance of the statutory provisions was examined in favour of the accused.

17. A co-ordinate bench of this Court in **Santini Simone v. Department of Customs, 2020 SCC OnLine Del 2128**, in an appeal against conviction under Section 20(b)(ii)(c) and 23(c) of the NDPS Act, examined the aforesaid issue. It was observed that the ratio laid down by the Hon’ble Supreme Court in **Bal Mukund (supra)** was binding. It was held as under:

“54. The next aspect to be examined relates to the testing conducted on the spot and drawing of samples from the *charas* allegedly recovered from the appellant’s trunk. The question to be addressed is whether the samples drawn were representative of the substance recovered from the appellant’s



baggage. The controversy to be addressed is, essentially, three-fold. The first relates to whether the procedure for drawing samples allegedly followed by the complainant is permissible. Second, whether the substance in all the four pouches was tested prior to it being kept together. Third, whether the contents of the four packets were properly mixed to form a homogeneous mixture and the samples were drawn from the same.

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63. Concededly, in the present case the instructions contained in Standing Order No. 1/89, was not followed.

64. In *Khet Singh v. Union of India*, (2002) 4 SCC 380, the Supreme Court had, in the context of similar instructions issued (Standing Order 1/88) by the NCB, New Delhi, held that the same were to be followed by the Officer-in-charge of the investigation of crimes falling within the purview of the NDPS Act. The Court held that even though the said instructions did not have the force of law, they were intended to guide the officers to ensure that a fair procedure is adopted in the investigation.

65. In a subsequent decision, in the case of *State of Punjab v. Makhan Chand*, (2004) 3 SCC 453, the Supreme Court held that Section 52A(1) of the NDPS Act did not empower the Central Government to lay down the procedure for search of an accused. But, a subsequent decision rendered by the Supreme Court on 31.03.2009, in *Union of India v. Bal Mukund* (supra), the Supreme Court observed that Standing Instructions No. 1/88, which required samples of adequate quantity be drawn, had not been followed and the same was referred to as “a requirement in law”.

66. The decision in the case of *Bal Mukund* (supra) which was rendered by a Bench of three Judges, is binding. It also cannot be disputed that even if the said instructions are not considered as binding, they lay down a procedure which the Investigation Officers are required to follow in the interest of ensuring that the samples drawn truly represent the composition of the substance recovered.”

Thereafter, in *Santini Simone* (supra), the Court proceeded to examine the evidence that was recorded in the said case and after a detailed and thorough examination of the evidence, and especially the testimony of the seizing officer discussed in paragraphs 69, 70, 71, 72 and 73, finally came to the conclusion which is as under:



“74. In view of the above, this Court is unable to accept that the prosecution has established that the contents of each of the four packets that were allegedly recovered, were tested and found to be *charas* prior to the contents of the said packets being placed together.”

18. At this stage, it is pertinent to note that the aforesaid judgments, i.e., **Bal Mukund (*supra*)** and **Santini Simone (*supra*)**, as also the other judgments relied upon by learned counsel for the applicant, i.e, **Basant Rai v. State, 2012 (13) DRJ 471; Edward Khimani Kamau v. The Narcotics Control Bureau, 2015 SCC OnLine Del 3860; Charlse Howell @ Abel Kon v. NCB, 2018 SCC OnLine Del 10564** and **Amani Fidel Chris v. Narcotics Control Bureau, 2020 SCC OnLine Del 2080** have all been rendered in appeals, after completion of trial.

19. In **Ahmed Hassan Muhammed v. The Customs, 2021 SCC OnLine Del 486**, a coordinate bench of this Court granted bail to the applicant therein, *inter-alia*, on the ground that proper procedure for sampling was not followed. It was held as under:

“17. In *Basant Rai case* [*Basant Rai v. State* 2012 SCC OnLine Del 3319] , while dealing with a case where accused was found carrying a polythene bag containing 8 similar polythene bags having brown colour substance and investigating officer took small pieces of charas from each packet, mixed the same and drew two sample parcels which were sent to FSL for analysis, I had allowed the appeal while holding 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 8 of the polythene bags which were allegedly kept in a green coloured bag by the appellant in his right hand. The 10 prepared two samples of 25 gm 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 8 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.”

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 4-2-2019. 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.

20. Keeping in view the aforesaid fact, I am of the view that petitioner deserves bail. Accordingly, petitioner is directed to be released on bail forthwith on his furnishing personal bond in the sum of Rs 25,000 with one surety in the like amount, to the satisfaction of the trial court.”

20. Further, *vide* order dated 05.08.2022 passed in BAIL APPLN. 1623/2022 titled **Ram Bharose v. State (Govt. of NCT of Delhi)**, another coordinate bench of this Court, in a case where all the contents of the recovered contraband were mixed together before samples were drawn, while



relying on **Amani Fidel Chris** (*supra*) observed that the procedure adopted was not in consonance with standing order 1/88. It was held as under:

“Prima facie, the said drawing of the samples as per the contents of the FIR does not appear to be in consonance with the Standing Operating Procedure in Standing Order 1/88 dated 15.3.1988 issued by the NCB.....In the facts and circumstances of the instant case, the applicant is allowed to be released on bail...”

21. Similarly, in **Laxman Thakur v. State (Govt. of NCT of Delhi), 2022 SCC OnLine Del 4427**, a coordinate bench of this Court has held as under:

“**11.** The standing order 1/88 mandates that the transferring of content of all packets into one and then drawing a sample from the mixture is not permitted.

12. I am of the view that in the present case, the instructions in 1/88 has not been followed and the sample has been drawn after mixing the contents of various packets into one container. The same has caused serious prejudice to the case of the applicant. Since the collection of sample itself is faulty, the rigours of Section 37 of the NDPS Act will not be applicable.”

22. On the other hand, a coordinate bench of this Court in **Bipin Bihari Lenka v. Narcotics Control Bureau, 2022 SCC OnLine Del 1160** rejected the bail application and observed that alleged prejudice caused to the applicant on account of non-compliance of sampling procedure would have to be established during the course of trial. It was held as under:

“**23.** Similarly, in *Basant Rai v. State* [*Basant Rai v. State*, 2012 SCC OnLine Del 3319] , 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.

24. Further, it may be observed that in *Ahmed Hassan Muhammed v. Customs [Supdt. and Remembrancer of Legal Affairs v. Anil Kumar Bhunja]*, (1979) 4 SCC 274 : 1979 SCC (Cri) 1038



: AIR 1980 SC 52] , 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.

25. Observations of the learned trial court in order dated 6-8-2021 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 under Sections 35 and 54 of the NDPS Act against this accused at this stage, which could be rebutted during trial (*Madan Lal v. State of H.P.* [*Madan Lal v. State of H.P.*, (2003) 7 SCC 465 : 2003 SCC (Cri) 1664] and *Mohan Lal v. State of Rajasthan* [*Mohan Lal v. State of Rajasthan*, (2015) 6 SCC 222 : (2015) 3 SCC (Cri) 881]). 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 Tomar v. State of Punjab* [*Sumit Tomar v. State of Punjab*, (2013) 1 SCC 395 : (2013) 1 SCC (Cri) 514] . Furthermore, Delhi High Court in a recent judgment titled *Santinu Simone v. Deptt. of Customs* [*Santinu Simone v. Deptt. of Customs*, 2020 SCC OnLine Del 2128] in para 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.”

26. 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 2 lots. Two samples of 25 g 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.

27. In the facts and circumstances and considering the connecting evidence on record, wherein the contraband has been recovered from private vehicle driven by the petitioner, I am of the considered opinion that no grounds for grant of bail are made out in the light of twin conditions laid down in Section 37 of the NDPS Act.”

23. Similarly, *vide* order dated 03.08.2022 passed in BAIL APPLN. 3508/2021 titled **Shailender v. State NCT of Delhi**, a coordinate bench denied bail to the applicant therein by holding that the procedural lapse has to be determined during the course of the trial and not in a proceeding for grant of bail. In **Shailender (supra)**, after discussing various judgments passed by coordinate benches of this Court on the issue of sampling procedure, it was held as under:

“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 BAIL APPLN No.3508/2021 Page 21 of 22



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.”

24. Another co-ordinate bench of this Court, in **Arvind Yadav v. Govt. of NCT of Delhi Through Standing Counsel, 2021 SCC OnLine Del 3619**, while dismissing an application for bail, held as under:

“**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.”

25. Further, *vide* order dated 15.03.2023 passed in BAIL APPLN. 3054/2022 titled **Sunny v. State (Govt. of NCT of Delhi)**, a coordinate bench of this Court, while relying upon **Arvind Yadav (supra)** denied bail to the applicant therein and held as under:

“8. Thus, admittedly there was confusion in the procedure of drawing samples and per Arvind Yadav (supra) even if samples were drawn at the spot would not vitiate the trial, hence any violation thereof could never be the sole basis for grant of bail. Such discrepancy in rules was even noted by the Hon’ble Supreme Court in Mohan lal (supra) and accordingly fresh Rules were notified vide gazette notification dated 23.12.2022, thus the compliance of Standing Order 01/1989 prior to the notification (supra) perse would not be a ground to grant bail. Hence purely on this ground, I am not inclined to grant bail to the petitioner.”

26. The Hon’ble Supreme Court in **Supdt., Narcotics Control Bureau, Chennai v. R. Paulsamy, (2000) 9 SCC 549** held as under:-

“6. In the light of Section 37 of the Act no accused can be released on bail when the application is opposed by the Public Prosecutor unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Sections 52 and 57 have been pre-judged by the learned Single Judge at the stage of consideration for bail. The minimum which learned Single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned Single Judge during bail stage



regarding the compliance with the formalities mentioned in those two sections.

7. We may also observe that learned Single Judge has not recorded a finding in terms of Section 37 of the Act which is sine qua non for granting bail to an accused involved in the offence under the Act.”

27. As noted above, the Hon’ble Supreme Court, in **Balbair Singh (supra)** observed that the provision of Section 52 of the NDPS Act is directory in nature. It was further held that non-compliance of the said provision, in itself, cannot render the actions of the investigating officers as null and void. It would have to be demonstrated that in the facts and circumstances of a particular case, whether such non-compliance caused prejudice to the accused and resulted in failure of justice. It was further held that if there is no proper explanation for non-compliance, then the same will have an effect on the case of the prosecution and the Courts will have to appreciate the evidence and material placed on record in the case in order to determine the issue. Whether non-compliance of rules could be a ground for grant of bail, especially in cases involving a commercial quantity, where the twin conditions of Section 37 of the NDPS Act would required to be satisfied , will have to be examined considering the nature of violation of such standing procedure and consequences thereof.

28. It has been pointed out on behalf of the prosecution that the aforesaid standings order are more in the nature of guidelines with respect to drawl of samples and non-compliance thereof, without showing prejudice, cannot be a ground for bail, especially in cases involving commercial quantity. It has also been submitted that prejudice caused, if any, would have to be established at trial during recording of evidence and examining necessary witnesses.



29. In the present case, recovery from the present applicant was from his checked in luggage which on search, was found to be containing 5 boxes of weed biscuits, which further contained 10 transparent plastic packets having similar markings. The said transparent plastic packets were alleged to have contained off-white colour powdered substance, weighing about 10,000gms (10kg) which upon testing came out positive for *heroin*. It is the case of the prosecution that thereafter an application under Section 52A of the NDPS Act seeking drawl of samples was preferred before the Court of learned Metropolitan Magistrate on 15.07.2021 (recovery took place on 27.06.2021). It is pertinent to note that the aforesaid contraband was in a checked in luggage and was brought in concealed manner as pointed out hereinbefore.

30. The contention of the learned counsel appearing on behalf of the applicant was that the aforesaid sampling is defective by way of reliance on Standing order of 1/88 & 1/89, dated 15.03.1988 and 13.07.1989 respectively is misplaced.

31. It is pertinent to note that Paras 1.6 & 1.7 of the Standing Order 1/88 dated 15.03.1988, read as under:

“1.6 Quantity of different drugs required in the sample:

The quantity to be drawn in each sample for chemical test should be 5 grams in respect of all narcotic drugs and psychotropic substances except in the case of Opium, Ganja and Charas/Hashish where a quantity of 24 grams in each case is required for chemical test. The same quantities should be taken for the duplicate sample also. **The seized drugs in the packages/containers should be well mixed to make it homogeneous and representative before the sample in duplicate is drawn.**

1.7 Number of samples to be drawn in each seizure case



a) In the case of seizure of a 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/containers seized together are 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. In case of seizure of Ganja and Hashish, the packages/containers may be bunched in lots of 40 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 remain, and in case of other drugs less than 5 packages/containers remain, no bunching would be necessary and no samples need to 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 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.”

Further, Standing Order 1/89 dated 13.07.1989 in Paras 2.3, 2.4 &

2.5 provides as under:

“2.3. The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotics drugs and psychotropic substances save in the case of opium, ganja and charas (hasish were quantity of 21 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 package/ 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 color text 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 ten packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of packages/containers, one sample (in duplicate) may be drawn.”

(emphasis supplied)

In the present case contents of the ten packets were homogeneously mixed together and samples were drawn before the learned Metropolitan Magistrate.

32. In view of the aforesaid, this Court is of the opinion that the procedure adopted with respect to contraband in the present case is not defective in nature at this stage. The applicant will get ample opportunity to prove that the said recovery was defective and samples drawn were not the true representatives of the samples recovered, during the course of trial before learned Special Judge. It is pertinent to note that, the said standing orders cannot be exhaustive enough to cover all factual scenarios at the time of seizure of the contraband. Various factors like nature of contraband seized, the volume/quantity of the seizure, place of seizure, time of seizure, etc. will be relevant to determine any non- compliance thereof and effect of such non-compliance.

33. Hon’ble Supreme Court in **Balbir Singh (supra)** observed that the Investigating Officer is bound by the procedural instructions and has to follow the same, and in case of non-compliance thereof, and if no proper explanation is forthcoming, then the same would have adverse impact on the prosecution’s



case. It was further noted in the said judgment that the Courts would appreciate the evidence and merits of the case keeping these aspects in view. In the opinion of this Court, whether the samples drawn would be a true representative sample of the contraband recovered, can be answered by the chemical analyst, who analyses the sample and gives his/her opinion. Learned Special Judge during the course of the trial will have the advantage of the testimony of the chemical analyst as well as the production of contraband seized in the Court. It is pertinent to note that the case property is still there for any further analysis if so required. Therefore, it is premature at this stage to say that the samples drawn are not true representative samples of the contraband seized. In the present case, at the time of examination of case property, the learned Special Judge can satisfy himself with regard to the correctness of the procedure followed.

34. In view of the aforesaid position and circumstances, the present application is dismissed and disposed of accordingly.

35. Pending applications, if any, also stands disposed of.

36. Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case pending before the learned Trial Court.

37. Let a copy of this judgment be communicated to the concerned Jail Superintendent.

38. Order be uploaded on the website of this Court, *forthwith*.

AMIT SHARMA
JUDGE

MAY 31, 2023/bsr