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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 26.05.2023

Judgment pronounced on: 13.09.2023

+ **BAIL APPLN. 2879/2022 & CRL.M.A. 19629/2022**

SARVOTHAMAN GUHAN @SARVO

..... Petitioner

Through: Mr Manu Sharma, MR Abhir Datt,
Mr Abhyuday Sharma, Mr Debayan
Gangopadhyay and Mr Kartikay,
Advs.

Versus

NARCOTICS CONTROL BUREAU

..... Respondent

Through: Mr Subhash Bansal, Sr. Standing
Counsel for NCB with Mr Raghav
Bansal, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, (J)**

1. This is an application seeking grant of regular bail in NCB Case VIII/46/DZU/2021 dated 05.08.2021 under section 8 (c), 20 (b)(ii)(A), 20 (b)(ii)(B), 21(b), 22(c), 23 & 29 of the The Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act").
2. As per the prosecution, the facts of the case are:
 - A. On 04.08.2021, on the basis of information shared by NCB, Kolkata Zonal Unit, Kolkata, the Applicant was intercepted at



IGI Airport and was questioned about the case registered at NCB, KZU, Kolkata. During enquiry, he revealed about narcotic drugs kept in his Travelling Bag and upon search it resulted in recovery of 30 grams Ganja and 0.45 gram tablets of Ecstasy (MDMA), which was seized vide Panchnama dated 04.08.2021.

- B. During investigations, search at House of the applicant i.e. Flat No. 104, Tower-D-14, Supertech Eco Village-3, Greater Noida West, U.P. was conducted and it led to recovery of 1 kg of Ganja and INR Rs 15.5 lakhs which were seized vide Panchnama dated 05.08.2021.
- C. The Applicant further revealed that he was procuring drugs through Courier which used to be delivered at the address of Accused No.2/Rahul Mishra. The applicant also informed during investigation the address of his friend Rahul Mishra with the assertion of possibility of recovery of contraband. Based upon such information, a search was conducted at House of Rahul Mishra i.e. House No. 306, Ground Floor, Ashoka Enclave, Sector-35, Faridabad, Haryana and 1.05 kgs of Ganja was recovered which was seized vide Panchnama dated 05.08.2021 in the presence of independent witnesses.
- D. The applicant during enquiry had also disclosed about his other friend Accused No.3/Aashray Pandey who collected another parcel of drug from the House of Rahul Mishra and was supposed to handover said parcel to the applicant at Ambience Mall. Thereafter, based on said information, investigations led to Aashray Pandey who was intercepted at Ambience Mall Gurgaon



with a parcel having the name of Rahul Mishra R/o 306, Ashok Enclave, Sector-34, Faridabad, Haryana 121003, Ph. 9810970898. This Parcel with slip of DTDC C10403792 had 410 grams of Ganja which was seized from his possession vide Panchnama dated 05.08.2021.

- E. The Applicant tendered his voluntary statement under section 67 NDPS Act and revealed that he is involved in narcotic drug business and having ordered weed of superior quality through his known contact Ms. Tareena Bhatnagar and for this he paid Rs. 6 Lakhs to Accused No.4/Jasbir Singh. He further revealed that money was paid to Jasbir Singh through bitcoins and he was on Telegram App with a pseudonym "Optimas Prime". He also revealed that he ordered the drug parcels on the address of his friend Rahul Mishra and further disclosed his modus operandi of handling the said illegal business.
- F. The statements of Rahul Mishra and Aashray Pandey under section 67 NDPS Act were recorded. The applicant and co-accused persons, Rahul Mishra and Aashray Pandey were consequently arrested on 05.08.2021.
- G. Accused No. 4/Jasbir Singh appeared and tendered his voluntary statement under section 67 NDPS Act on 01.09.2021. The disclosure made by Jasbir Singh was regarding drug syndicate operation through Darknet and Orient Express Group on Telegram App and which involved Shradha Surana, Parichay Arora, Naman Sharma, Aslam@Chicko, Raghunath Kumar, being as active part of said illegal business of drug trafficking



whereby narcotic drugs were procured from different countries and were supplied within India.

- H. Shradha Surana tendered her voluntary statement under section 67, NDPS Act on 04.09.2021 and admitted being active in illegal drug business through Telegram App along with Jasbir Singh and other accused persons. Consequently, the accused Jasbir Singh was arrested and produced on 02.09.2021 before the Special Court. The accused Ms. Shradha Surana and accused Naman Sharma were also arrested in this case.
- I. The revelations made by Shradha Surana and Jasbir Singh led to recovery of contraband of varying quantities from various other accused persons.
3. Mr. Manu Sharma, the learned counsel for the Applicant has made the following submissions:
- A. The Respondent has heavily relied upon statements of the Applicant and co-accused persons recorded under Section 67 NDPS Act, which are inadmissible in evidence in view of the judgment of *Tofan Singh v. State of Tamil Nadu (2021) 4 SCC 1*. Additionally, he states that the same has not been corroborated in any material particulars.
- B. He states that there are no recoveries of commercial quantity from the Applicant, either in person or from his residence. He submits that without prejudice to his contentions, the first and third recovery can be attributed to the Applicant i.e., 0.45 grams ecstasy (notified as 'small quantity' under the NDPS Act), and 1kg and 30 grams of Ganja (notified as intermediate quantity'



under the NDPS Act), respectively. Consequently, the embargo of Section 37 NDPS Act is not attracted qua the Applicant.

- C. The learned counsel for the Applicant submits that the recovery from the residence of Accused No. 2/Rahul Mishra cannot be attributed to the Applicant as there is no evidence of any communication between the Applicant and Accused No. 2/Rahul Mishra on the date of the recovery.
- D. The recovery from Accused No. 3/Aashray Pandey also cannot be attributed to the Applicant. Though the Applicant on 05.08.2021 in his section 67 statement states that Accused No. 3 messaged him on his mobile phone while he was in custody of the Respondent, and asked the Applicant to come to Ambience Mall, Gurgaon, chats pertaining to the same are not found either in the mobile phone of the Applicant or Accused No. 3/Aashray Pandey as per the data extraction report of their mobile phones. The same clearly shows that no messages to this effect were exchanged between the Applicant and Accused No. 3 on 05.08.2021.
- E. He states that the Applicant cannot be said to have been in conspiracy with other co-accused persons. The applicant is not a member of the 'Orient Express' group on Telegram app, or any other group involved in trafficking of narcotic substances. No communication or evidence to this effect between the Applicant and any other co-accused persons except Accused No. 2/Rahul Mishra has been produced before the court. In addition, no pseudonyms have been attributed to the applicant, unlike other



co-accused persons. It is stated that the applicant has nothing to do with Accused Nos. 5 to 15. None of the co-accused persons except Accused Nos. 2, 3 and 4 have named the applicant. The Respondent has stated that illegal buying and selling of narcotics in the syndicate occurred through bitcoins and other digital currencies however, no material is shown that the Applicant sent or received any bitcoins or even possessed a bitcoin wallet.

- F. He places reliance on the judgment of the Hon'ble Supreme Court in ***Mohd. Husain Umar Kochra Etc. v. K.S. Dalipsinghji and Anr. Etc.***, (1969) 3 SCC 429 which held that the prerequisites of a general conspiracy are existence of a common design and an integrated effort by all the participants. He submits these ingredients were absent in the case of the Applicant.
- G. He states that there is delay in filing section 52A application. The recovery from Applicant's travel bag on 04.08.2021 was 0.45 grams of ecstasy and 30 grams of ganja and from his residence was 1 kg ganja on 05.08.2021. However, the application under section 52A NDPS Act for sampling was filed by the Respondent only on 16.08.2021, i.e., ten days thereafter. He submits that according to the dicta of the Apex Court in ***Union of India v. Mohanlal***, (2016) 3 SCC 379, section 52A application by the Respondent and sampling by the learned Magistrate under Section 52A NDPS Act must be done at the earliest, without any undue delay. The same has not been done at the earliest by the Respondent in the present case, and no explanation in this regard is furnished by the Respondent agency. The said application was



disposed of by Patiala House District Court only on 05.01.2022 i.e., after five months from the date of recovery. The samples were thereafter sent to FSL only on 10.01.2022. Therefore, the delay vitiates the sanctity of the recovered contraband.

- H. He further submits that there is discrepancy in the quantity of the contraband. On 05.08.2021, the recovery was 1 kg ganja from Applicant's residence which was kept in the pulanda marked 'R' and was deposited at the godown of the Respondent on 05.08.2021 and kept there till 05.01.2022. At the time of sampling under section 52A NDPS Act, the weight of the contraband was reflected as 972 grams, instead of 1 kg. The Respondent has not given any explanation for the said discrepancy rendering the recovery suspect. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in ***Rajesh Jagdamba Avasthi v. State of Goa***, (2005) 9 SCC 773.
- I. He states that there is statutory non-compliance of section 41 and 42 of the NDPS Act. On 04.08.2021, the Respondent received secret information in the morning hours (presumably) as they had located and apprehended the Applicant at 6 P.M. at the IGI airport. According to Section 41(1) NDPS Act, the Respondent can approach the learned Metropolitan Magistrate seeking warrant to carry out search and seizure operations. If there is sufficient time, which fact can be adjudged at the stage of trial, it is imperative that a judicial officer applies his mind to the requirement of such a warrant. In spite of having enough time,



the Respondent did not approach the learned Magistrate under Section 41(1) NDPS Act.

J. In addition, on 05.08.2021, Applicant's residence was searched at 02.30 A.M. which was not authorized by the Respondent under Section 41(2) NDPS Act either. The Respondent's reliance on the panchnama dated 05.08.2021 is flawed in so far as it only states that the said search was carried out as per the directions of Superintendent Sh. Dhananjay Som but was not conducted in his presence. The same can be seen from the list of witnesses to the panchnama (filed in Bail Appln. 4175 of 2021 @ Pg. 129/TCR) and their signatures thereof wherein presence of the Superintendent is not reflected. He states no document was presented to show that Respondent had obtained authorization from a qualified officer for the search conducted at the residence. In the absence of Respondent having any authorization under Section 41 NDPS Act, the only provision under which it could have conducted the search at night, is the 2nd proviso to Section 42 NDPS Act, which provides that *inter alia* a building can be searched without any authorization wherein such authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for escape of an offender. However, even in such a case, under Section 42(2) NDPS Act, the officer is required to record grounds of his belief satisfying the aforesaid condition and forward the same to his immediate superior. In the present case, the Respondent had not complied with any of the aforesaid conditions.



K. He submits that non-compliance of Section 42 NDPS Act renders the recovery doubtful. Reliance is also placed on the judgment of a co-ordinate bench of this Court dated 03.02.2023 in ***Asif Ali v. State of NCT of Delhi*** in Bail Appln. No. 647/2022 wherein the relevant paras read as under:

“11. It is pertinent to note that the alleged search of the applicant's car was conducted around 12:15 AM on 21.07.2015 and admittedly, no grounds of belief were recorded as per the second proviso to Section 42(1) of the NDPS Act. Since the grounds of belief were not recorded, the same could not have been forwarded under Section 42(2) of the NDPS Act.

...

14. ...Since, in the present case, the applicant has been in custody for more than 05 years, his case is squarely covered by the aforesaid judgment of the Hon'ble Supreme Court. A perusal of the medical records of the applicant dated 10.01.2023, shows that he suffers from post pulmonary tuberculosis sequelae with bronchiectasis causing cough, shortness of breath and hemoptysis (on and off). Even otherwise, this Court is of the opinion that prima facie noncompliance of second proviso to Section 42(1) of the NDPS Act is made out and therefore, conditions of Section 37 of the NDPS Act are satisfied in the present case.”



- L. He states that the Respondent conducted the search in an unnatural manner rendering the recoveries unreliable as the Applicant's bag was not searched at the IGI Airport at 6 PM on 04.08.2021 when he was apprehended where independent witnesses were also present. The Applicant's bag was only searched three hours later at 9 PM at the NCB office. Thereafter, the Respondent went on to search Accused No. 2's residence at 12.30 AM on 05.08.2021 and then searched the Applicant's residence at 2.30 AM on 05.08.2021. This conduct of the Respondent – NCB renders the conduct as well as the recovery doubtful.
- M. The cash component of Rs. 15,52,300 recovered from Applicant's residence has also been explained by the Applicant. It is submitted that the Applicant's parents entered into an agreement to sell with one Manju on 03.06.2019 for sale of property situated at H. No. 186-G, Third Floor, Village Humayanpur, Arjun Nagar, New Delhi – 110029 for which they received Rs. 16,30,000 in cash between 03.06.2019 and 20.04.2020. Hence, the money was received from sale of the house and cannot be termed proceeds from sale of contraband.
- N. Lastly, he states that the Applicant is allowed to seek bail on grounds of parity as co-accused persons i.e., Accused No. 2/ Rahul Mishra, Accused No. 3/ Aashray Panday and Accused No. 4/ Jasbir Singh, Accused No. 6/ Naman Sharma and Accused No. 11/ Devesh Vasa are already released on bail.



4. Mr. Bansal, the learned senior standing counsel for the NCB has made the following submissions:

- A. He submits that the search and seizure proceedings were carried out in accordance with section 41(2) of the NDPS Act. Upon recovery of contraband from the bag of the Applicant and his disclosure statement, the NCB Team under direct supervision of a Gazetted officer, Sh. Dhananjay Som Superintendent, went to the residence of Accused No.2/Rahul Mishra at Faridabad where search and seizure took place. The same team then proceeded under the supervision of the said Superintendent to the residence of the Applicant where House Search was conducted and led to recovery of contraband which was seized in the presence of two independent witnesses who were Security Personnel of the Housing Society.
- B. It is submitted that the search proceedings at Faridabad and Greater Noida have been carried-out in continuation and under direct supervision of the Superintendent, therefore, there is no violation of Section 42 NDPS Act. Further, on 06.08.2021, in compliance of section 57 NDPS Act, the I.O. had placed the Seizure Report with complete details of arrest and seizure to his immediate official superior. Hence, there is no non-compliance of section 42 NDPS Act.
- C. The factum of association between the applicant and Accused No.2/Rahul Mishra is also corroborated from the statement of the applicant who stated he visited Goa with Rahul Mishra in last week of July, 2021 and had returned on 04.08.2021. The



contention of the applicant questioning his connection and links with co-accused persons prior to recovery of contraband stands dislodged by the Applicant's own disclosure which led to recovery of contraband from the house of Accused No.2/Rahul Mishra.

- D. He states that the contention regarding delay in filing application under section 52-A, NDPS Act is misconceived. The seizure was effected on 05.08.2021 and the seizure report was submitted on 06.08.2021. The Application under section 52-A, NDPS Act was filed by the concerned I.O. on 16.08.2021. Admittedly, in-between, there were holidays due to weekends and 15th August (Independence Day). The Application had been filed without any undue delay and no prejudice has been caused to the accused persons. Moreover, the validation procedure under section 52-A NDPS Act is just a matter of trial and the same can only be adjudged after examination of witnesses.
- E. The applicant acted-in criminal conspiracy and indulged in illicit trafficking of contraband thereby liable for offence in violation of the NDPS Act. The Applicant led to Accused No. 4/Jasbir Singh and other accused persons and is the evidence of a criminal conspiracy between the accused persons and thus, falls within the purview of Section 29 NDPS Act thereby, holding the accused persons jointly liable. As per the Complaint, the recoveries made from the Applicant leading to further recoveries and discovery of fact of involvement of other co-accused persons also lends credence to the presumption under section 35 and 54 of NDPS



Act regarding involvement of the Applicant in trafficking of commercial quantity of contraband. Therefore, the rigors of section 37 NDPS Act are applicable qua the Applicant.

F. The reliance upon the Hon'ble Supreme Court's judgment of *Tofan Singh*(*supra*) will not come to the aid of the Applicant from his culpability in the present case. Though confessional statements under section 67 NDPS Act may not be admissible but facts discovered in pursuance to the same would be admissible under section 27 of Indian Evidence Act, 1872 ("IEA").

G. The reliance of the Applicant seeking bail on grounds of parity in context to grant of bail to co-accused persons i.e. Naman Sharma, Aashray Pandey, Devesh Vasa is misplaced. The grant of bail to Aashray Pandey was premised on the basis that he was apprehended when he was on his way to deliver the parcel containing 410 grams of Ganja to Rahul Mishra and from the statements of co-accused persons also it came to light that Aashray Pandey was a consumer of Ganja and hence, had a limited role leading to grant of bail. This accused was found to be working on instructions of the present applicant. The accused, Naman Sharma had been granted bail on the basis that the said accused was at best consuming drugs which he used to buy from the sellers in the group. The accused, Devesh Vasa was also found to have been a consumer and placed an order for LSD Drugs for his personal consumption and therefore, considering the limited role attributed to him, the said accused was granted



bail. It is submitted that the role of present Applicant is more serious as he was operating as a dealer and a drug trafficker and selling drugs to other persons. It is submitted that the present Applicant is booked in 4 cases at Kolkata Zone (i.e. KZU/31, 35, 40, 43 of 2021) and another case at Delhi Zone (i.e. VIII/53/DZU/2021) registered under sections 8(c), 20, 29 of NDPS Act. The Applicant is involved in a number of offences under the NDPS Act being a habitual criminal of illegal drug trafficking.

- H. It is submitted that at the stage of bail prima facie evidence needs to be established and the same has been done as prima facie link between the Applicant and other co-accused persons is made out regarding their involvement in illicit drug trafficking.
- I. Reliance is placed on *Sambhav Parakh vs State of Chhattisgarh*, 2021 SCC OnLine Chh 469 wherein the Court observed that when commercial quantity of illicit psychotropic substance is recovered from one accused, in view of section 29 of the NDPS Act, other co-accused from whom no recovery has been made are to satisfy the rigors of section 37 NDPS Act as they are presumed to be linked in the entire operation. The quantity of contraband recovered in the instant case is of commercial quantity from other co-accused persons and as such the rigors of Section 37 of the NDPS Act are attracted qua the Applicant. The relevant para of *Sambhav Parakh (supra)* reads as under:

“24. It is also to be seen that statements of two accused



person have been recorded under Section 67 of the Act and they have named other accused persons as part of the entire operation. It is also to be kept in mind that the prosecution has filed the charge sheet for criminal conspiracy under Section 29 of the Act. Thus, all the accused persons being part of a bigger drug cartel/mafia their act cannot be examined in isolation and on stand alone basis, but the whole case has to be treated as one of peddling of commercial quantity of illicit contraband.”

- J. The learned Senior Standing Counsel further states that the role of one accused cannot be segregated from other co-accused as all the accused belong to the same group within a larger drug network. Reliance is placed on ***Union of India through NCB Lucknow v. Md. Nawaz Khan, Cri. Appeal No. 1043/2021*** wherein the Apex Court held:

“25. In line with the decision of this Court in Rattan Mallik (supra), we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act.”

- K. Lastly, it is submitted that the Applicant was dealing in commercial quantity of contraband and hence, as per section 37(1)(b)(ii) NDPS Act, there are no reasonable grounds for believing that the Applicant is prima-facie not guilty of said



offence. In view of the above, the bail application of the Applicant is vehemently opposed.

ANALYSIS

5. I have heard learned counsel for the parties.

I. No Recovery of Commercial Quantity of Contraband

6. Even assuming the best case of the Respondent – NCB, no commercial quantity of contraband has been recovered from the Applicant, either in person or from his residence. The Applicant was apprehended at the IGI Airport on 04.08.2021 where 0.45 grams ecstasy and 30 grams Ganja was recovered from him. Thereafter, on 05.08.2021, 1 kg ganja and cash amounting to Rs. 15,52,300 was recovered from the Applicant's residence. Thus, the recovery attributable to the Applicant is 0.45 grams ecstasy (small quantity) and 1 kg and 30 grams Ganja (intermediate quantity).
7. The recovery from Accused No.2/Rahul Mishra (1.050 kg of ganja) and Accused No. 3/Aashray Panday (410 grams of ganja) is not attributable to the Applicant. The Applicant named Accused No.2/Rahul Mishra as well as Accused No. 3/Aashray Panday in his section 67 statement however, the recoveries from them cannot be attributed to the Applicant since there is no material or any communication between the Applicant and Accused No. 2/Rahul Mishra on the date of the recovery.



8. The Applicant on 05.08.2021 in his section 67 statement said that Accused No. 3/Aashray Pandey messaged the Applicant while he was in the custody of the Respondent, asking him to come to Ambience Mall, Gurgaon to collect 410 grams of ganja. However, no chats/messages pertaining to the same have been found in either of their mobile as per the mobile phone data extraction report of the Applicant as well as Accused No. 3's mobile phones. The same shows that no messages to this effect were exchanged between the Applicant and Accused No. 3 on 05.08.2021. Thus, recovery from Accused No. 3 is not attributable to the Applicant.
9. Even assuming NCB's argument that recoveries from Accused No.2/Rahul Mishra (1.050 kg of ganja) and Accused No. 3/Aashray Panday (410 grams of ganja) are attributable to the Applicant, then also the quantity of contraband recovered does not cross the threshold of commercial quantity in order to invoke the jurisdiction of section 37 NDPS Act.
10. Since there is no recovery of commercial quantity of contraband from the Applicant, the rigors of section 37 NDPS Act are not applicable to the Applicant. In addition, the applicant in the complaint has not been arraigned under section 19, 24, 27-A of the NDPS Act.
11. The Respondent – NCB states that the Applicant and co-accused persons are inextricably linked and cannot be segregated. NCB has contended that according to the dicta in *Sambhav Parakh (supra)*, the recoveries from co-accused persons is attributable to the Applicant by virtue of section 29 NDPS Act as the Applicant is intrinsically linked to the co-accused persons.



12. In my view, the contention of the NCB in this regard is misplaced in so far as the Respondent – NCB has not established the offence of criminal conspiracy under section 29 NDPS Act qua the Applicant.
13. The judgment of *Sambhav Parakh (supra)* is distinguishable in so far as apart from section 67 statements of three co-accused persons, there is nothing linking the Applicant with the other co-accused persons to establish a common design or integrated effort. I have dealt with the same under the heading ‘Mis-joinder of Charges’ in subsequent paragraphs.
14. Reliance on *Md. Nawaz (supra)* is misplaced in so far as the applicant therein was apprehended in the car with the contraband. However, in the case at hand, all co-accused are separate and have isolated instances of recovery therefore, the level of scrutiny under section 37 NDPS Act is not attracted qua the Applicant.
15. As regards non-compliance of statutory provisions: -

II. Delay in filing Section 52A NDPS Act Application

16. The learned counsel for the Applicant states that there is an undue delay of 10 days in filing the application under section 52-A NDPS Act as the recovery from the travel bag of the Applicant was made on 04.08.2021 and from his residence on 05.08.2021 but the application under section 52-A NDPS Act was only filed on 16.08.2021.
17. In the present case, the Respondent NCB has furnished reasons for the delay in sending the sample to FSL. As per the Respondent, the delay was caused primarily due to non-working days on account of



weekends and Independence Day. The seizure report was prepared on 06.08.2021 itself, however, the reasons furnished by the Respondent NCB for the said delay are not acceptable. Assuming non-working days on account of weekend and Independence Day caused a hindrance in submitting the application under section 52-A NDPS Act, even then the NCB took more than a week to file the said application which is merely a clerical formality that should not take so much time. The delay caused is a procedural lapse on the part of the Respondent agency, which renders the sample, suspect.

18. The contraband was seized on 05.08.2021 and the seizure report was filed on 16.08.2021. Merely making bald averments that it was a weekend and Independence Day will not suffice. According to the calendar for the year of 2021, 8th and 15th of August 2021, being two Sundays, were the only holidays, rest were working days. As valuable rights of the Applicant are at stake, the prosecution must show alacrity. NCB is a department dedicated to narcotics and once a full department is only dealing with narcotics, it does not lie upon the Respondent – NCB to say that 10 days is a reasonable time.

19. I have already held in BAIL APPLN. 253/2023 **Kashif v. NCB** (2023:DHC:3438) that reasonable time should be in the proximity of 72 hours. The relevant paras in **Kashif (supra)** read as under:

“23. The reason for strict time frame and collection of sample has been elucidated by a coordinate bench of this court in the judgment of Rishi Dev @ Onkar Singh v. State (2008:DHC:1513) in CRLA.



No.757/2000 decided on 01.05.2008 wherein it was observed as under:

“8....The above passage shows that there is a time limit of 72hours stipulated by the Narcotics Control Bureau for a seized sample to be deposited with the Chemical Examiner for testing. This rule is salutary because any attempt at tampering with the sample recovered from the accused can have fatal consequences to the case of the prosecution. Strict compliance has to be insisted upon in such an event.

... ..

*19. This Court is unable to agree with the approach adopted by the trial court, especially its observations highlighted above. The record of the case should contain entry in writing about the sample being sent for testing within the time specified by the Narcotic Control Bureau. A strict compliance of this requirement has to be insisted upon. The reason is this. The sample that is kept in a police malkhana, under the seals of the police officers themselves, is still definitely under the control of those police officers. There is every possibility that the samples could be tampered and again re-sealed by the very same officers by again affixing their seals. It is to prevent this from happening that earlier the sample is sent for testing to the CFSL the better.”
(emphasis supplied)*

24. Hence, I am of the view that non-compliance of section 52A within a reasonable time gives rise to the apprehension that sample could



have been tampered with and in case of a wrongly drawn sample, the benefit of doubt has to accrue to the accused. The prosecuting agency has to prove at the time of trial that the sample was immune from tampering.

....

27. The application for sample collection under section 52A is not a technical application wherein elaborate reasons, principles of law or detailed facts are required. It is more of a clerical application and should mandatorily be made within a reasonable time under section 52A NDPS. The application has to be moved at the earliest and in case, the same has not been moved, the reasons for delay must be explained by the authorities.

Reasonable time under section 52A

28. What is reasonable time depends on the facts and circumstances of each case. However, it cannot be the intention of the legislature that an application for sample collection can be moved at the whims and fancies of the prosecuting agency. Therefore, taking cue from the Standing Order 1/88, it is desirable that the application under 52A should be made within 72 hours or near about the said time frame.”

20.Hence, on this reason alone, the applicant is entitled to bail. Nevertheless, there are other reasons which persuade me to allow the present application.



III. Discrepancy in Quantity of Contraband Recovered

21. There is a discrepancy in the quantity of the contraband recovered from the Applicant on 05.08.2021 and the quantity reflected at the time of sampling under Section 52A NDPS Act.
22. As per the panchnama, on 05.08.2021, *Ganja* weighing 1 kg was recovered from the Applicant's residence. The said contraband was kept in a Pulinda marked 'R' and deposited at the godown of Respondent – NCB on 05.08.2021 and was kept there till 05.01.2022. At the time of sampling of the contraband substance for the purpose of section 52A NDPS Act, the weight of the *Ganja* was reflected as 972 grams, instead of 1 kg.
23. The Hon'ble Supreme Court in ***Rajesh Jagdamba Avasthi (supra)*** has observed :

“12. However, there appears to be substance in the other submissions urged on behalf of the appellant, namely, that the weight of the substance sealed in two envelopes was found to be different from the weight of the substance received by the laboratory as deposed to by PW 1. It is not disputed that from the shoe on the right foot 100 gm of charas was recovered, which was sealed in envelope A. According to PW 1, the Junior Scientific Officer, when that envelope was opened and the substance weighed it was found to be 98.16 gm. Similarly, from the shoe on the left foot 115 gm of charas was recovered which was packed and sealed in envelope B. But only 82.54 gm of the substance was found in envelope B when the same was opened by PW 1. A similar



submission was urged before the High Court and the High Court also found that this discrepancy could not be explained by the prosecution. The High Court observed that there was no doubt that envelope B which was said to contain 115 gm of charas was found to contain only 82.54 gm of charas and this could not be considered to be a minor discrepancy. However, the High Court was of the view that even if this sample contained in envelope B was not considered against the appellant on account of discrepancy in the weight, since there was no material discrepancy in the weight of the charas found in the other envelope A, the case against the appellant stood established on the basis of the charas recovered, packed and sealed in envelope A.

13. It, therefore, concluded that the appellant could be held guilty for unauthorised possession of 98.16 gm of charas found in envelope A, if not for the total quantity of 180.70 gm as charged.

14. We do not find it possible to uphold this finding of the High Court. The appellant was charged of having been found in possession of charas weighing 180.70 gm. The charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by the Junior Scientific Officer, PW 1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy.



Learned counsel rightly submitted before us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope A ignoring the quantity of charas found in envelope B. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the recovery proceeding is considerably eroded if it is found that the quantity actually found by PW 1 was less than the quantity sealed and sent to him. As he rightly emphasised, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for chemical analysis to PW 1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful.”

24. This Court has categorically already held in **Kadir v. State Govt. of NCT of Delhi** in BAIL APPLN. 553/2023:

“8. The judgment of Mohd. Ramzan (supra) is squarely applicable to the facts of the present case. The Coordinate Bench in Mohd. Ramzan (supra) has relied upon the judgment of the Hon’ble Supreme Court in Rajesh Jagdamba Avasthi v. State of Goa reported in 2005 (1) Apex Criminal Judgment 240 and has held that the discrepancy in the weight of the samples seized under Section 52 A of NDPS Act and the report of the FSL erodes the credibility of the recovery proceedings.



9. I am of the view that the discrepancy in the weight of the sample goes to the root of the matter and questions the actual seizure itself. The prosecution has not been able to explain this discrepancy at this stage. It erodes the credibility of the recovery proceedings.”

25.The Respondent – NCB has not furnished any explanation with regards to the discrepancy and the same must be construed in favor of the Applicant in the present case. Such discrepancy in quantity of recovery of the contraband at the time of seizure and sampling vitiates the sanctity of the recovery proceedings and renders the recovery doubtful.

IV. Non-Compliance of Section 41 And 42 NDPS Act

26.The next procedural deviation is with regard to non-compliance of section 41 and 42 NDPS Act.

27.Section 41(1) NDPS Act reads as under:

“41. Power to issue warrant and authorization –

(1) A Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under this Act, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance or controlled



substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed....

(2) Any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including the para-military forces or the armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government if he has reason to believe from personal knowledge or information given by any person and taken in writing that any person has committed an offence punishable under this Act or that any narcotic drug or psychotropic substance or controlled substance in respect of which any offence under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy or a



constable to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest such a person or search a building, conveyance or place.

(3) The officer to whom a warrant under sub-section (1) is addressed and the officer who authorised the arrest or search or the officer who is so authorised under sub-section (2) shall have all the powers of an officer acting under section 42.]

28. Section 42 of the NDPS Act reads as under:

“42. Power of entry, search, seizure and arrest without warrant or authorisation.— (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any



illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

[Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:



Provided further that] if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.”

29. Section 41(1) makes it clear that that if there is sufficient time, the judicial officer has to apply his mind to the requirement of a warrant. The facts of the present case seem to suggest that the Respondent had sufficient time to approach the Magistrate for issuance of warrant of arrest. Despite the same, the Respondent – NCB did not approach the learned Magistrate under Section 41(1) NDPS Act.

30. There is nothing on record to show that the Respondent – NCB received secret information in late afternoon or evening. The Applicant was apprehended at IGI Airport at 6 PM on 04.08.2021. As per Section 41(1) NDPS Act, the Respondent – NCB was supposed to approach the learned Metropolitan Magistrate seeking warrant to conduct search and seizure operations. The same was not done by the Respondent – NCB despite having sufficient time. Additionally, no document has been provided to show that authorization was obtained



from a qualified officer for search conducted at the Applicant's residence.

31. Furthermore, there is non-compliance of section 41(2) NDPS Act as the search of the Applicant's residence on 05.08.2021 at 2.30 AM was not authorized by the Respondent – NCB under section 41(1) NDPS Act. The panchnama dated 05.08.2021 records that the search was conducted under the directions of Superintendent Sh. Dhananjay Som but was not conducted in his presence. The same is corroborated by the list of witnesses to the panchnama which does not include the signature of the Superintendent (filed in Bail Appln. 4175 of 2021 @ Pg. 129/TCR).
32. In view of non-compliance of Section 41 NDPS Act, the Respondent – NCB was supposed to conduct the search at night in terms of the 2nd proviso to Section 42 NDPS Act which states that a building can be searched *sans* authorization so as to prevent the offender from escaping or affording an opportunity for concealment of evidence. The same can be done by the officer after recording grounds of his belief satisfying the aforesaid condition and forwarding the same to his immediate superior officer under section 42(2) NDPS Act. In the present case, the same has not been carried out by the concerned officer and hence, is a violation of section 42(2) NDPS Act.
33. Support is sought from the judgment of the Apex Court viz., ***Abdul Rashid Ibrahim Mansuri v. State of Gujarat***, (2000) 2 SCC 513 wherein it was observed as under:



“17. A two-Judge Bench of this Court has considered the said question along with other questions in State of Punjab v. Balbir Singh [(1994) 3 SCC 299 : 1994 SCC (Cri) 634] . In para 25 of that judgment the conclusions were laid down, of which what is relevant for this case regarding Section 42(1) is the following: (SCC p. 321, para 25)

“25. (2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under



proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.”

... ..

23. In this case non-recording of the vital information collected by the police at the first instance can be counted as a circumstance in favour of the appellant. Next is that even the information which PW 2 recollected from memory is capable of helping the accused because it indicates that the real culprits would have utilised the services of an autorickshaw driver to transport the gunny bags and it is not necessary that the autorickshaw driver should have been told in advance that the gunny bags contained such offensive substance. The possibility is just the other way round that the said culprits would not have disclosed that information to the autorickshaw driver unless it is shown that he had entered into a criminal conspiracy with the other main culprits to transport the contraband. The prosecution did not adduce any evidence to show any such connivance between the appellant and the real culprits. There is nothing even to suggest that those culprits and the appellant were close to each other, or even known to each other earlier. Yet another circumstance discernible from the evidence in this case is that the police had actually arrayed two other persons as the real



culprits and made all endeavour to arrest them, but they absconded themselves and escaped from the reach of the police.”

34.Hence, I am of the view that non-compliance of section 41 and 42 NDPS Act renders the recovery doubtful.

V. Unnatural Conduct

35.The recoveries are also rendered suspect in view of the unnatural conduct of the Respondent – NCB. The Applicant was apprehended at 6 PM on 04.08.2021 at IGI Airport. However, his bag was only searched after 3 hours at 9 PM at the NCB Office and not at the airport where independent witnesses were available aplenty. This casts a doubt on the recovery of 04.08.2021. Thereafter, the Respondent – NCB proceeded to search the residence of Accused No.2/Rahul Mishra at 12.30 AM on 05.08.2021 and then went on to search the Applicant’s residence at 2.30 AM on 05.08.2021. No reasons have been given by the Respondent – NCB for the said conduct on their behalf. Such unnatural conduct of the Respondent – NCB renders the recovery suspect and doubtful.

36.There is no explanation given by the Respondent – NCB as to why the bag of the Applicant was not searched at the airport in the presence of independent witness but was searched at the NCB office. Further, no reason has been provided by the Respondent – NCB as to why the



applicant's residence was searched at 2.30 AM after searching the house of co-accused, Rahul Mishra.

37.If an accused is apprehended in a public place, suspected of carrying contraband, the endeavour of the prosecuting agency in such a case should always be to search the accused for contraband at that public place itself where large numbers of independent witnesses are available. This lends considerable credibility to the search and seizure proceedings and inspires confidence regarding transparency of the said process.

38.In the present case, admittedly, the applicant was apprehended and arrested by the Respondent – NCB (who had secret information qua the Applicant, suspecting him of carrying contraband) at the IGI Airport. The normal and correct course of conduct expected of a prosecuting agency is to have searched the Applicant at the IGI Airport itself and seize the sample in the presence of independent witnesses. However, the Respondent – NCB has deviated from this course of conduct that casts a doubt on the recoveries of 04.08.2021 and 05.08.2021.

VI. Mis-joinder of Charges

39.The Applicant was not involved in general conspiracy with other co-accused persons. There is nothing on record to show that the Applicant was a member of the Telegram group 'Orient Express' or any other group where buying and selling of narcotic substances was taking place. No pseudonym has been assigned belonging to the



Applicant in the Telegram group 'Orient Express'. In fact, no connection between the Applicant and other co-accused persons has been alleged except with Accused No. 2, 3 and 4 who named the Applicant in their respective section 67 statements. The co-accused persons i.e., Accused No. 2, 3 and 4 have already been granted bail.

40. There is no communication, or any prima-facie material presented before this Court linking the Applicant and other co-accused persons except Accused No. 2/Rahul Mishra.
41. The Respondent – NCB has alleged that trafficking of narcotic substances in the syndicate occurred through bitcoins and other digital currencies but there is no evidence produced before this Court showing that the Applicant sent or received any bitcoins or had a bitcoin wallet. Therefore, in view of the same, the Applicant cannot be said to have been involved in a general conspiracy of drug syndicate with other co-accused persons.
42. The Applicant neither had any knowledge of the drug syndicate being operated by co-accused persons nor had any connection with the co-accused persons involved in the drug syndicate. Hence, the allegation of the Respondent – NCB to state that the Applicant was part of the general conspiracy with co-accused persons is misplaced.
43. Reliance in this regard is placed on the Hon'ble Supreme Court's judgment in *State (NCT of Delhi) v. Navjot Sandhu*, (2005) 11 SCC 600 wherein it was observed as under:

"100. Lord Bridge in R. v. Anderson [(1985) 2 All ER 961 : 1986 AC 27 : (1985) 3 WLR 268 (HL)] aptly said that the evidence



from which a jury may infer a criminal conspiracy is almost invariably to be found in the conduct of the parties. In Daniel Youth v. R. [AIR 1945 PC 140 : 1945 All LJ 269] the Privy Council warned that in a joint trial care must be taken to separate the admissible evidence against each accused and the judicial mind should not be allowed to be influenced by evidence admissible only against others. “A co-defendant in a conspiracy trial”, observed Jackson, J. (US p. 454), “occupies an uneasy seat” and

“it is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together”.

(Vide Alvin Krulewitch v. United States of America [93 L Ed 790 : 336 US 440 (1949)] .)

In Nalini case [(1999) 5 SCC 253 : 1999 SCC (Cri) 691] Wadhwa, J. pointed out, at p. 517 of SCC, the need to guard against prejudice being caused to the accused on account of joint trial with other conspirators. The learned Judge observed that: (SCC p. 517, para 583)

“There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused



charged with the offence of conspiracy.”

The pertinent observation of Judge Hand in U.S. v. Falcone [109 F 2d 579 (2nd Cir, 1940)] was referred to: (SCC p. 511, para 572)

“The distinction is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders.”

At para 518, Wadhwa, J., pointed out that the criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. The learned Judge then set out the legal position regarding the criminal liability of the persons accused of the conspiracy as follows: (SCC p. 518, para 583)

“One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.”

44. Further, the Apex court in **Mohd. Husain Umar Kochra (supra)** held that the pre-requisites of conspiracy require a common design and



integrated effort by all members, which is not the case with the Applicant here. The relevant paras read as under:

“15. As to the second question the contention was that the evidence disclosed a number of separate conspiracies and that the charge of general conspiracy was not proved. Criminal conspiracy as defined in Section 120-A of the IPC is an agreement by two or more persons to do or cause to be done an illegal act or an act which is not done by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons



cooperate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only. The cases illustrate the distinction between a single general conspiracy and a number of unrelated conspiracies. In S.K. Khetwani v. State of Maharashtra [(1967) 1 SCR 595] and S. Swaminathan v. State of Madras [AIR 1957 SC 340] the Court found a single general conspiracy while in R. v. Griffiths [(1962) 2 All ER 448] the Court found a number of unrelated, separate, conspiracies.”

45.A perusal of above shows that there was no common design or integrated effort by the Applicant in conspiracy with other co-accused persons.

VII. Explanation for recovery of Cash from Applicant's residence

46. On 05.08.2021, an amount of Rs. 15,52,300 in cash was recovered from the Applicant's residence. The Respondent – NCB has alleged that the said amount of money recovered in cash forms part of proceeds of sale of contraband. The Applicant has furnished an explanation for the money recovered from his residence. The learned counsel for the Applicant states that the Applicant's parents entered into an agreement to sell for property situated at H. No. 186-G, Third Floor, Village Humayanpur, Arjun Nagar, New Delhi - 110029 with one Ms. Manju on 03.06.2019 and as payment of the said property,



the Applicant's parents received a total sum of Rs. 16,30,000 in cash from the buyer between 03.06.2019 and 20.04.2020.

47. The Agreement to Sell and receipts in this regard have been annexed in the bail application.

48. It is also observed that apart from the Applicant's section 67 NDPS Act statement which is inadmissible in view of *Tofan Singh (supra)*, the Respondent – NCB has not produced any other material to show that the money recovered in cash from the Applicant's residence was proceeds from sale of contraband.

VIII. Grounds of Parity

49. The co-accused persons who named the Applicant namely Accused No. 2/ Rahul Mishra, Accused No. 3/ Aashray Panday and Accused No. 4/ Jasbir Singh, Accused No. 6/ Naman Sharma and Accused No. 11/ Devesh Vasa have been granted bail.

50. Accused No. 3/Aashray Panday was found to be in possession of 410 grams of *Ganja* (small quantity) which was recovered from him when he was on his way to deliver the parcel at Ambience Mall, Gurgaon. The allegation against Accused No. 4/Jasbir Singh was that he was involved in drug business through 'dark net' and ordered drugs from USA and Canada for the purposes of reselling them in India. Accused No. 6/Naman Sharma was allegedly an admin of the Telegram group 'Orient Express' and has been granted bail. Additionally, Accused No. 11/Devesh Vasa was found to be in possession of 05 blots of LSD weighing 0.05 grams (intermediate quantity).



51. In conclusion, there is no recovery of commercial quantity of contraband from the Applicant thus, the rigors of section 37 NDPS Act are not attracted in the present case. Additionally, the Applicant was not part of the conspiracy with other co-accused persons as no pseudonym or chats have been attributed to him with respect to the 'Orient Express' telegram group. Further, the recovery from the Applicant is doubtful in view of the discrepancy regarding the weight of contraband which was 1 kg at the time of seizure and 972 grams at the time of filing application under section 52A NDPS Act and also due to delay in filing section 52A NDPS Act application. The sample collection is also irregular, and no reasons have been given for not searching the bag of the Applicant at the airport. The non-compliance of section 41 and 42 NDPS Act also raises suspicion with regards to the recovery process and seized contraband. Further, the cash recovered from the residence of Applicant has been explained.
52. Additionally, the statement of the Applicant under section 67 NDPS Act does not lead to discovery of facts (as per section 27 of IEA). Section 27 of the IEA reads as under:

“Section 27. How much of information received from accused, may be proved –

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such



information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

53. The statements recorded under section 67 NDPS Act are inadmissible being hit by section 25 IEA and the only way to make such statements admissible is by way of section 27 IEA which creates an exception and allows such part of a confessional statement, being information leading to discovery of some fact not in the knowledge of the Police to be proved.
54. Section 27 IEA will not be applicable qua the Applicant as in the present case, there is no discovery of ‘fact’ based on the section 67 statement of the Applicant. At best, the Applicant in his section 67 statement has merely identified co-accused, Rahul Mishra and Aashray Pandey. Based on Rahul Mishra and Aashray Pandey’s respective section 67 statement, the contraband has been recovered from them. Therefore, there is no discovery of ‘fact’ within the purview of section 27 IEA as the Applicant has merely named and led the Respondent – NCB to the aforesaid co-accused persons.
55. All earlier cases against the Applicant are based on recoveries involving small quantities. The Applicant has stated that he is a consumer and not a seller. As per the Applicant, he was also arraigned in case arising out of NCB Case No. VIII/53/DZU/2021, however, he was discharged in the said case by the Ld. Special Judge (NDPS), Patiala House District Court, New Delhi vide Order dated 31.03.2023 passed in S.C. No. 105/2022.



56. The complaint in the present case has been filed on 31.01.2022, and the Applicant is not required for further investigation. The case is currently at the stage of arguments on charge and the evidence is likely to take a considerably long time. Further, the Applicant was arrested on 05.08.2021 and has been in custody for more than two years, in a case involving intermediate quantity. In my view, the triple test i.e., a) flight risk; b) tampering with evidence and c) influencing of witnesses can be taken care of by imposing stringent bail conditions.

57. For the aforesaid reasons, the application is allowed and the Applicant is granted bail in NCB Case VIII/46/DZU/2021 on the following terms and conditions:

- i. The Applicant shall furnish a personal bond and a surety bond in the sum of Rs. 50,000/- each, to the satisfaction of the Trial Court;
- ii. The Applicant shall appear before the Court as and when the matter is taken up for hearing;
- iii. The Applicant shall provide his mobile number to the Investigating Officer (IO) concerned, which shall be kept in working condition at all times. The Applicant shall not switch off, or change the same without prior intimation to the I.O. concerned, during the period of bail;
- iv. The Applicant shall join investigation as and when called by the I.O. concerned;
- v. In case the Applicant changes his address, he will inform the I.O. concerned and this Court also;



- vi. The Applicant shall not leave the country during the bail period and surrender his passport, if any, at the time of release before the Trial Court;
 - vii. The Applicant shall not indulge in any criminal activity during the bail period;
 - viii. The Applicant shall not communicate with or come into contact with any of the prosecution witnesses or tamper with the evidence of the case.
58. The observations made hereinabove are only for the purposes of the deciding the present bail application. They shall not have any bearing in deciding the merits of the case.
59. The application is allowed and disposed of in the aforesaid terms.

JASMEET SINGH, J

SEPTEMBER 13th, 2023/jv

Click here to check corrigendum, if any