



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

% Reserved on : 09th May, 2023

Pronounced on: 2nd June, 2023

+ **BAIL APPLN. 3805/2022**

AMINA Petitioner

Through: Mr. Rahul Sharma, Mr. Prabhash and
Mr. Vinay Duggal, Advs.

versus

STATE NCT OF DELHI Respondent

Through: Mr. Ritesh Kumar Bahri, APP for the
State with Insp. Rizwan Khan.

CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

1. This petition has been filed for seeking regular bail in FIR No.777/2022 P.S. Shastri Park under sections 21/25/29 NDPS Act. The petitioner is a lady of 31 years of age and was arrested on 27th September 2022 and has since been in judicial custody. She has no previous involvements.

Factual background

2. As per the case of the prosecution on the basis of secret information received on 26th September 2022 at about 4:00 p.m. alleging the involvement of one Salauddin, his wife Amina (the petitioner herein) and his brother Masoom



Sheikh, all residents of H No.87B, First Floor, DDA Flats, Shastri Park, Delhi being involved in sale, purchase, and possession of the contraband.

3. SI Balbir Chand after satisfying the credibility of the information apprised the ACP and pursuant to further directions, permission was given to enter, search, and seize the contraband and to arrest the accused without a warrant. Requirements of section 42 NDPS Act were fulfilled and information was lodged by SI Balbir Chand *vide* DD No.5 in the daily diary. Thereafter, a team led by the SI Balbir Chand was constituted for the raid which included the beat staff and women constables. The raid was accordingly conducted at the aforementioned premises.

4. The petitioner along with her brother-in-law Masoom Sheikh were allegedly found inside the house. They were both served notices for the search of their house which was duly acknowledged by them. According to the raiding team, when the search was being undertaken, the petitioner ran towards her bedroom, locked herself inside, and made a PCR call. She finally opened the door and a search of the room was conducted. Some black polythene bags, scissors, packing materials and transparent polythene bags were found. The black polythene bags were found containing small plastic *pudiyas* containing creamish/brownish-like substance. This was checked with the help of a Field-Testing Kit and found positive for smack/ similar narcotic substance.

5. In the presence of ACP Bhajanpura, who was called, notice under section 50 NDPS Act was served upon Amina and Masoom after apprising them of their rights. Nothing incriminating was found in their possession.



6. On counting, the number of *pudiyas* were found to be 100 in each bag in 20 such bags, therefore, a total of 2000 *pudiyas* were recovered. The contents of all the *pudiyas* were emptied in a plastic jar and the weight of the same was found to be 618g. The polythene bags along with emptied *pudiyas* and packing material, were seized *vide* seizure memos. In search of the house, cash amounting to Rs.5,87,000/- was also recovered from the wooden shelf. On inquiry about the source of the recovered cash, certain disclosure statements were made by the said accused persons, which not being admissible, do not need to be detailed here. Both the petitioner and Masoom Sheikh were arrested. The exhibits seized were deposited in the *maalkhana* and were produced before the learned Trial Court for sampling and then the samples were sent to FSL, Rohini for chemical examination.

7. However, reportedly on interrogation, Ameena disclosed that it was her husband Salauddin who used to keep drug sales proceeds in his bag which he collects from other dealers. During the further search, documents relating to a property bearing H No.87B, First Floor, DDA Flats, Shastri Park, Delhi were also found from the almirah. A perusal of documents revealed that the said property was owned by Salauddin. It was noted that during the investigation, search for co-accused Salauddin was made but he could not be traced out. P.O. proceedings against Salauddin have been commenced.

8. As per the petitioner, she was at EDM Mall at the time of the raid and coming to know of the raid at her house had in fact made a PCR call along the way and then proceeded towards her home when she was arrested. It is further noted that during the course of investigation, the petitioner had moved an



application before this Court with the prayer for issuing directions to preserve the footage of cameras installed in McDonald's, EDM Mall, Koshambi Road, Anand Vihar for 26th September, 2022 for the period 6 to 7:30 p.m. and to preserve the CDR of mobile no.9871186657 from which she had made a call at 112 regarding the illegal entry of police in her house. Pursuant to the inquiry in the matter, CDR of the said mobile number has been preserved and the nodal officer has been cited as a witness in the list. The DVR of the CCTV installed at EDM Mall, Ghaziabad was taken into possession and has been sent to FSL, Rohini to know the genuineness of the claim and the result of the same has been obtained.

9. As per the status report, the investigation of the case *qua* the petitioner and co-accused Masoom Sheikh has been completed and the charge-sheet has been prepared which was later filed before this Court.

10. On 17th February 2023 report from FSL was received and the exhibit was found to contain '*diacetyl-morphine, aceta-minophen, acetylcodenine, monoacetyl-morphine and tri-methoprim*'.

Submissions on behalf of the petitioner

11. As per the learned counsel for the petitioner, the petitioner has been implicated falsely in complete violation of mandatory provisions of the NDPS Act. The petitioner applied for bail but the same was rejected *vide* order dated 30th November, 2022 of the Ld. ASJ, Karkardooma Courts, North-East district. It is contended that the sampling was invalid considering that all the *pudiyas* were mixed, as per the prosecution and into a common receptacle and then a



sample was taken out. Reliance in this regard was placed on the following decisions:

a) This Court in ***Ram Bharose v. State***, Bail Appl. 1623/2022 *vide* order dated 5th August, 2022 was dealing with the recovery of contraband from polythene packets of *ganja* which were mixed up together in a *katta* and from the same a representative sample was drawn for chemical examination. It was held by this Court that *prima facie* the said drawing of sampling was not in consonance with Standing Operating Procedures (SOPs) *vide* Standing Order (SO), 1/88 dated 15th March, 1988 issued by the NCB and detailed in ***Amani Fidel Chris v. Narcotics Control Bureau***, (2020) SCC OnLine Del 2080. Relying upon the decision in ***Amani Fidel*** (supra) this Court granted bail to the accused therein.

b) In ***Laxman Thakur v. State***, (2022) SCC OnLine Del 4427 this Court was considering the procedure for the collection of samples being faulty and in violation of SO 1/88. 12 kgs of *ganja* was recovered from 6 packets which were mixed as also another 5 packets and were sealed thereafter and samples were taken subsequently. Reliance was placed on the decision of this Court in ***Basant Rai v. State***, (2012) SCC OnLine Del 3319 and ***Santini Simone v. Department of Customs***, (2020) SCC OnLine Del 2128. The Court held that as per the mandate of the Hon'ble Supreme Court in ***Union of India v. Bal Mukund***, (2009) 12 SCC 161 the SO



1/88 has been opined to be ‘*a requirement of law*’. The relevant portion of SO 1/88 which reads as under:

“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 packet/container in case of seizure of more than one package/container.”

Accordingly, it was held that the SO mandates that the transferring of contents into one packet and drawing a sample cannot be permitted. Bail was accordingly granted to the accused therein.

c) This Court in ***Shakuntla v. State***, Bail Appl. 286/2023 *vide* order dated 24th February, 2023 was dealing with the recovery of 10 packets which were opened and contents were transferred in one big bag and samples were taken thereafter. The issue of SO 1/88 was again adverted to. The Court relying upon the decision in ***Laxman Thakur*** (*supra*) held that the collection of samples was faulty and granted bail to the accused therein.

d) In ***Basant Rai v. State*** (*supra*) 8 packets recovered were mixed together and samples were drawn. This Court held that though it was settled law that it was not practicable to send the entire quantity, then sufficient quantity by way of samples from each packet recovered to be sent for chemical examination. In that matter it was held that mixing the substances of all 8 packets into one or two and drawing a



sample, would be of the total quantity and not of separate pieces, benefit therefore should have gone to the accused since proper procedure had to be followed.

12. Relying *inter alia* upon the aforementioned decisions, the learned counsel for the petitioner stated that mixing together all the *pudiyas* would make the whole procedure invalid. Further, it was contended that the petitioner was actually not at her home at that time of arrest and was at the EDM Mall of which the DVR has been obtained and forms part of the charge-sheet.

13. It is further contended that as per the case of the prosecution reflected in the charge-sheet, the raiding party knocked at the door of the petitioner's residence at 7:20 p.m. and the door was opened by Masoom Sheikh, the younger brother of Salauddin. The petitioner also came to the door, as per the prosecution and disclosed her name as Ameena, However, CDRs of the petitioner's mobile, which form part of the charge-sheet reveal that at 19:15:18 hours the location of the petitioner was at Guru Nanak Pura, Laxmi Nagar, Delhi and not at Shastri Park, which was her residence. Till 20:12:00 hours, the tower location is noted as "*latest tower id not exist in our data base*". At 20:12:00 hours the location of the petitioner is shown as Shastri Park Metro Station and thereafter till 20:15:46 hours near the Fish market, Buland Masjid, Shastri Park. As per the petitioner, at 19:20 hours when the raiding party supposedly reported that the petitioner was at her home, her location was not at Shastri Park. The allegation, therefore, that she ran towards her bedroom, locked herself inside, and made a PCR call, is not sustainable. Therefore, as per the petitioner, she was in fact not at her residence when the raiding party came



and was in fact coming back from EDM Mall near Ghaziabad when she came to know about the raiding party at her home and as per her, gave a call to the police. The CDR records would show that calls were made on numbers 121 and 112 from 20:13:08 hours onwards till 20:15:46 hours (about 5 calls). In fact, at 18:15:16 hours and 18:30:17 hours, her location is shown at EDM Mall, Anand Vihar, ISBT. This, according to the learned counsel for the petitioner, corroborates the petitioner's version that she was never at home when the raiding party arrived and therefore, cannot be said to be in conscious possession of the contraband and has been falsely implicated in the matter. The learned counsel for the petitioner also submits that the petitioner is a lady and has three minor children and consideration may also be given on this account.

Submissions on behalf of the State

14. Ld. APP, however, refuted these allegations by submitting that the issue of section 50 NDPS Act was not relevant since there was no recovery from the person. Further, the SOs are merely guidelines and are not mandatory and these issues are the ones that can be considered at the trial. Reliance was placed on the decision of the Hon'ble Supreme Court in *Sumit Tomar v. State of Punjab*, (2013) 1 SCC 395 where it was held that samples taken by mixing the two bags has not caused any prejudice to the accused. The learned counsel for the petitioner however distinguished the said judgment on the basis that the final decision was on the basis of collective weight and not of the mere sampling being invalid due to mixing.



15. Further, it was submitted by the Ld. APP that at best mixing 20 packets together was an irregularity and did not invalidate the whole process. Reliance was placed on the decision of the Hon'ble Supreme Court in *Union of India v. Mohd. Nawaz Khan*, (2021) 10 SCC 100 where it was held that whether the procedure laid down under the NDPS Act is complied with or not, cannot be looked at the time of grant of bail but can be decided only at the time of trial.

Analysis

16. As regards the issue of sampling at the time of seizure, it may be worthwhile to deliberate upon the various authorities often cited in this regard. The issue that arises in this matter is of defect in the sampling procedure adopted by the investigating officer at the time when recovery and seizure, in this case, is effected. While the accused submit that the procedure for the sampling of seized materials is not in accordance with the mandate of the Standing Order No. 1/88 issued by the Narcotics Control Bureau and Standing Order 1/89 issued by the Ministry of Finance, Government of India, it is contended by the prosecution that these issues are a matter of trial as also that the Standing Orders are not mandatory but directory in nature. Yet another issue that arises is whether sampling ought to be done at the time of seizure or later in accordance with provisions of section 52A NDPS Act before the Magistrate. To fully unravel these contentions, it would be apposite to appreciate and assess the Standing Order being referred to, the context and purpose for which they were issued, and the decisions of various courts in this regard.



17. The manner of drawing a sample of narcotics has been laid down in Standing Order 1/88 dated 15.03.1988 issued by the Narcotics Control Bureau. Standing Order 1/89 dated 13.06.1989, is *pari materia* with Standing Order 1/88, issued by the Department of Revenue, Ministry of Finance, Government of India. Relevant provisions of Standing Order 1/88 and Standing Order 1/89 are extracted below:

i. **Standing Order 1/88 dated 15.03.1988:**

“SECTION II- GENERAL PROCEDURE FOR SAMPLING, STORAGE ETC.

2.1 All drugs shall be properly classified, carefully, weighed and sampled on the spot of seizure.

2.2 All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witness (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.

2.3 The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in cases of opium, ganja and charas (hasish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for the duplicate sample also. The seized drugs in the packages /containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn.

2.4 In the case of Seizure of a single package/container, one sample (in duplicate) shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.



2.5 However, when the packages/containers seized together are of identical size and weight, bearing identical markings and the content of each package given identical results on color test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of 10 packages/ containers/ except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (in duplicate) may be drawn.

2.6 Whereafter making such lots, in the case of hashish and ganja, less than 20 packages/containers remain, and in the case of other drugs, less than 5 packages/containers remain, no bunching will be necessary and no sample need to be drawn.

2.7 If such remainders are more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such a reminder package /container.

2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample are in equal quantity is taken from a package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.”

(emphasis added)

ii. **Standing Order 1/89 dated 13.06.1989:**

“SECTION II- GENERAL PROCEDURE FOR SAMPLING, STORAGE ETC.

2.1 All drugs shall be properly classified, carefully, weighed and sampled on the spot of seizure.

2.2 All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witness



(Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.

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2.7 If such remainders are more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such a reminder package /container.



2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that representative sample are in equal quantity is taken from a package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.”

(emphasis added)

18. The Hon’ble Supreme Court in **Noor Aga v. State of Punjab**, (2008) 16 SCC 417 dealing with recovery of 1.4kg heroin from a cardboard container, considering the sanctity of Standing Order 1/89, held as under:

“87. Perseverance of original wrappers, thus, comes within the purview of the direction issued in terms of Section 3.1 of the Standing Order No. 1 of 1989. Contravention of such guidelines could not be said to be an error which in a case of this nature can conveniently be overlooked by the Court. We are not oblivious of a decision of this Court in Chief Commercial Manager, South Central Railway, Secunderabad and Ors. v. G. Ratnam and Ors (2007) 8 SCC 212 relating to disciplinary proceeding, wherein such guidelines were held not necessary to be complied with but therein also this Court stated: (SCC p.222,para 23)

23. In the cases on hand, no proceedings for commission of penal offences were proposed to be lodged against the respondents by the investigating officers.

88. In Moni Shankar v. Union of India and Anr. (2008) 3 SCC 484 , however, this Court upon noticing G. Ratnam (supra), stated the law thus:

15. It has been noticed in that judgments that Paras 704 and 705 cover the procedures and guidelines to be followed by the investigating officers, who are entrusted with the task of investigation of trap cases and departmental trap cases against the railway officials. This Court proceeded on the premise that the executive orders do not confer any legally enforceable rights on any persons and impose no legal obligation on the subordinate authorities for whose guidance they are issued.



16. We have, as noticed hereinbefore, proceeded on the assumption that the said paragraphs being executive instructions do not create any legal right but we intend to emphasise that total violation of the guidelines together with other factors could be taken into consideration for the purpose of arriving at a conclusion as to whether the department has been able to prove the charges against the delinquent official.

It was furthermore opined: (Moni Shankar case., SCC p. 493, para 23)

“23.....It may be that the said instructions were for compliance of the Vigilance Department, but substantial compliance therewith was necessary, even if the same were not imperative in character. A departmental instruction cannot totally be ignored. The Tribunal was entitled to take the same into consideration along with other materials brought on record for the purpose of arriving at a decision as to whether normal rules of natural justice had been complied with or not.”

89. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-a-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in State of Kerala and Ors. v. Kurian Abraham (P) Ltd. (2008) 3 SCC 582 following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan (2004) 10 SCC 1 held that statutory instructions are mandatory in nature.

91. Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference



against them to the effect that had such evidence been produced, the same would have gone against the prosecution.

(emphasis added)

19. The Hon'ble Supreme Court in ***Union of India v. Bal Mukund*** (*supra*) while referring to Standing Order 1/88 held as follows:

“36. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction No. 1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that PW7 had taken samples of 25 grams 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.”

(emphasis added)

20. Various decisions of this Court too have addressed this issue. In ***Basant Rai*** (*supra*) the accused was found carrying a polythene bag containing 8 smaller polythene bags having brown colour substance and the 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. While allowing the appeal of the accused, it was held as under:

“25. After hearing both the learned counsel for parties and going through the Trial Court Record, I find force in the submission of learned counsel for appellant. Admittedly, the samples were drawn after breaking small pieces from 08 of the polythene bags which were allegedly kept in a green coloured bag by the appellant in his right hand. The 10 prepared two samples of 25 grams each after taking a small quantity from each of the slabs.

26. Though the settled law is that if it is not practicable to send the entire quantity then sufficient quantity by way of samples from each of



the packets of pieces recovered should be sent for chemical examination. Otherwise, result thereon, may be doubted.'

27. For example, if the 08 packets were allegedly recovered from the appellant and only two packets were having contraband substance and rest 6 packets did not have any contraband; though all may be of the same colour, when we mix the substances of all 8 packets into one or two; then definitely, the result would be of the total quantity and not of the two pieces. Therefore, the process adopted by the prosecution creates suspicion. In such a situation, as per settled law, the benefit thereof should go in favour of the accused. It does not matter the quantity. Proper procedure has to be followed, without that the results would be negative."

(emphasis added)

21. In *Santini Simone v. Department of Customs*, 2020 SCC OnLine Del 2128 this Court acquitted the accused observing that the instructions contained in Standing Order No. 1/89 was not followed and it held as under:

"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.

67. The entire purpose of drawing a sample and testing the same is to establish the composition of the substance from which the sample is drawn. Keeping this object in view, it must be ensured that the sample is a true representative of the substance recovered, before it can be assumed that the composition of the sample is the same as that of the recovered substances....

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...

Since the prosecution has failed to establish that the sample drawn by PW-4, which was sent for chemical examination, is a true representative of the entire substance recovered, it has failed to establish that the substance allegedly recovered was charas. The appellant is, therefore, liable to be acquitted for the offence for which he was charged and convicted by the Trial Court.”

(emphasis added)

22. Finally, in *Amani Fidel Chris* (supra) this Court also traversed the entire canvas, and acquitted the accused, observing as under:

“32. In the opinion of this court, the procedure adopted by the respondent in the present case for drawing samples neither conforms to the procedure prescribed under Section 52A of NDPS Act nor under the Standing Orders. At the cost of repetition, the respondent neither filed



any application before the Magistrate for drawing the samples under his supervision nor followed the procedure of drawing a representative sample outlined in paras 2.4 or 2.5 read with 2.8 of the Standing Order 1/89.

33. Resultantly, this court is of the view that the samples sent to the CRCL were not the representative samples. Besides, by mixing the contents of all the 4 packets before drawing any sample not only the sanctity of the case property in the individual packet was lost but also the evidence as to how much each individual packet weighed. In reaching the aforesaid conclusion, I also draw support from the decisions in *Shajahan v. Inspector of Excise (DB)* reported as 2019 SCC OnLine Ker 3685 *Kulwinder Kumar v. State of Punjab*, reported as 2018 SCC OnLine P&H 1754 and *Santosh Kumar v. The State of Bihar* passed in Criminal Appeal (SJ) No.158/2016 decided on 30.08.2019.”

(emphasis added)

23. More recently, a Coordinate Bench of this Court in ***Laxman Thakur*** (*supra*) 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.”

(emphasis added)

24. On the issue of these Standing Order being not mandatory, as contended by the State, reference is sometimes made to ***Gurbax Singh v. State of Haryana***, (2001) 3 SCC 28 where the Supreme Court observed while



acquitting the accused that Section 52 of NDPS Act is directory but held that the provisions cannot be ignored by the Investigating Officer, it was held as under:

9. ... In our view, there is much substance in this submission. It is true that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, IO cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In the present case, IO has admitted that seal which was affixed on the muddamal article was handed over to the witness PW 1 and was kept with him for 10 days. He has also admitted that the muddamal parcels were not sealed by the officer in charge of the police station as required under Section 55 of the NDPS Act. The prosecution has not led any evidence whether the chemical analyser received the sample with proper intact seals. It creates a doubt whether the same sample were sent to the chemical analyser. Further, it is apparent that the IO has not followed the procedure prescribed under Section 57 of the NDPS Act of making full report of all particulars of arrest and seizure to his immediate superior officer. The conduct of panch witness is unusual as he offered himself to be a witness for search and seizure despite being not asked by the IO, particularly when he did not know that the substance was poppy husk, but came to know about it only after being informed by the police. Further, it is the say of the Panch witness that muddamal seal used by the PSI was a wooden seal. As against this, it is the say of PW 2 SI/IO that it was a brass seal. On the basis of the aforesaid evidence and faulty investigation by the prosecution, in our view, it would not be safe to convict the appellant for a serious offence of possessing poppy husk.”

(emphasis added)

25. The apparent conflict in the manner of drawing a sample as provided in Section 52A(2)(c) of NDPS Act and the Standing Order 1/89 came to be



considered by the Hon'ble Supreme Court in *Union of India v. Mohanlal*, (2016) 3 SCC 379 where it was held as under:

“31. To sum up we direct as under:

31.1. No sooner the seizure of any narcotic drugs and psychotropic and controlled substances and conveyances is effected, the same shall be forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53 of the Act. The officer concerned shall then approach the Magistrate with an application under Section 52-A(2) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A, as discussed by us in the body of this judgment under the heading “seizure and sampling”. The sampling shall be done under the supervision of the Magistrate as discussed in Paras 15 to 19 of this order...”

(emphasis added)

26. Reference must also be made to the decision of the Hon'ble Supreme Court in *State of Punjab v. Balbir Singh*, (1994) 3 SCC 299 where it 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.

(emphasis added)

27. From a careful assessment of the decisions cited above and the perusal of the Standing Orders, this Court is of the considered opinion that the Standing Orders have to serve a certain purpose having been issued by the Narcotics Control Bureau, Government of India and cannot be rendered optional for compliance to the investigating agencies. The procedures prescribed in the said orders are based upon a certain logic which ought to be respected, or else it would be a worthless piece of paper. Notwithstanding that Courts in the decisions cited above have accepted it as a mandatory directive [refer to **Noor Aga** (*supra*), **Bal Mukund** (*supra*), **Basant Rai** (*supra*) **Santini Simone** (*supra*) and finally **Amani Fidel** (*supra*)], even the Hon'ble Supreme Court while taking a view that Section 52 & Section 57 NDPS were directory in **Gurbax Singh** (*supra*) said that "*the IO cannot totally ignore these provisions*". Even **Balbair Singh** (*supra*) states that non-compliance does not render the trial initiate "*the officers, however, cannot totally ignore these provisions*". Therefore, in this Court's view, the Standing Orders ought to be respected by the investigating agencies and non-compliance of those Standing Orders may naturally invoke a reasonable doubt relating to the process of sampling which is



the most critical procedure to be carried out in order to ascertain the nature of the substance and its quantity. In fact, the Field Officers Handbook issued by the Narcotics Control Bureau for Drug Law Enforcement also reiterates these procedures prescribed under the Standing Orders.

28. As a side-wind, it is worth mentioning that post the decision in *Mohanlal* (*supra*), the discussion has also veered towards whether the sampling has to be done mandatorily before the Magistrate in compliance of Section 52A NDPS Act. Recently, a Coordinate Bench of this Court in *Kashif v. Narcotics Control Bureau*, 2023 SCC OnLine Del 2881 while granting relief to the accused has taken the view that the compliance of Section 52A is mandatory and cannot be delayed or ignored. Moreover, there is a recent Standing Order issued dated 23rd December 2022 by the Ministry of Finance in exercise of powers conferred by Section 76 r/w Section 52 A of NDPS Act wherein procedure for seizure and storage of seized material and sampling and disposal has been provided in detail and which directs sampling to be done in front of the magistrate. Therefore, as per this view, the sampling ought to be done in compliance of Section 52A and not at the time of seizure. However, this has not been the scope of the discussion during the arguments addressed by the learned counsels in this matter and therefore is not being deliberated in detail. The only purpose why this is being adverted to, is to emphasize that in this case the samples were drawn at the time of seizure and that too not in compliance with the Standing Orders.

29. The adherence to strict process under the NDPS Act has certain important function and purpose. The Hon'ble Supreme Court has often



reemphasized that considering the provisions of the NDPS Act are stringent in nature and provide twin conditions as a threshold for granting bail under Section 37 of the Act, compliance by the investigating agencies has to be necessarily precise and not *ad hoc* or half-hearted or truncated in nature.

30. The lack of compliance of these provisions necessarily imports an element of “doubt”, moreover a “reasonable doubt”. This, therefore will segway into the issue of proving guilt, considering that the guilt of any accused has to be proved beyond reasonable doubt. It would therefore not be enough to contend, as is done by the prosecution that issues of non-compliance were to be considered at the time of trial and what prejudice is caused to the accused, had to be shown by the accused. Even if that may be so, if such non-compliance provides reasonable ground for acquittal of an accused [depending on the nature of the evidence led, as it was in the case of *Amani Fidel (supra)*], *a fortiori* at the stage of granting bail, it would be even more important to consider this possibility, even if it is just a possibility. At the stage of granting bail, the accused is still not proved as guilty and is under trial and therefore deserves the benefit of doubt.

31. Pursuant to appreciation of contentions of the parties as well as documents on record, this Court is of the considered opinion that the petitioner is entitled to be enlarged on bail subject to certain conditions.

32. The fact that the contraband which was seized contained in 2000 *pudiyas* 100 each in 20 bags, were all emptied together in a plastic jar, was *prima facie* not in compliance with the process envisaged under the SO 1/88 and 1/89, as



adverted to above. The procedure, in compliance with the standing orders, could have been adopted, *inter alia* to make lots of a bunch of *pudiyas* together, as envisaged in the SO. By mixing all the *pudiyas* together, the sample was not a true representative sample and the composition of the mix would therefore, would be at a serious variance. Even though these are issues which would have to be considered at the point of trial, it would still import an element of reasonable doubt in the sampling procedure undertaken.

33. Further, the CDR records *prima facie* seem to suggest that the petitioner was not present at her residence when the raid was conducted at 7:20 p.m. and despite being a point to be confirmed during trial, benefit at this stage of bail, would also have to go towards the accused.

34. This Court has taken guidance from the decision of the Hon'ble Supreme Court in *Mohd Muslim v. State (NCT of Delhi)* (2023) SCC OnLine SC 352 where it has been held by the Apex Court that at the stage of granting bail in the NDPS matter, the standard to be considered is to look at the material in a broad manner and reasonably see whether the guilt of the accused guilt may be proved. The satisfaction of the Court in this regard is only *prima facie* in nature based on reasonable reading and does not call for a meticulous examination of the materials collected during the investigation. The relevant extracts of the said decision are extracted herein below:

“20. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention



and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

21. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India v. Rattan Malik¹⁹). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.

(emphasis added)

35. In relation to the grant of bail to an NDPS accused, though for those in long custody as undertrials, the decision of the Hon'ble Supreme Court in **Satinder Kumar Antil v. CBI**, (2022) 10 SCC 51 may also be adverted to, where even while dealing with special acts including NDPS, it has been stated that the rigour as provided under s. 37 of the NDPS Act would not come in the way of cases involving the liberty of the person. Also, in **Union of India v. K.A. Najeeb**, (2021) 3 SCC 713 the Hon'ble Supreme Court held that statutory restrictions *per se* do not oust the ability of constitutional courts to grant bail on



grounds of violation of Part III of the Constitution of India.

Conclusion

36. In light of the above, on a *prima facie* assessment of the facts and circumstances, this Court is of the opinion that there are reasonable grounds to believe that the petitioner may not be guilty of the offence charged for, and further there is no material on record to show that she was likely to commit any offence while on bail. She has no previous involvements, and lives with her family including 3 minor children in Delhi.

37. Consequently, the petitioner is directed to be released on bail on furnishing a personal bond in the sum of Rs. 50,000/- with one surety of the like amount subject to the satisfaction of the Ld. Trial Court, further subject to the following conditions:

- i. Petitioner will not leave the country without prior permission of the Court.
- ii. Petitioner shall provide permanent address to the Ld. Trial Court. The petitioner shall intimate the Court by way of an affidavit and to the IO regarding any change in residential address.
- iii. Petitioner shall appear before the Court as and when the matter is taken up for hearing.
- iv. Petitioner shall join investigation as and when called by the IO concerned.
- v. Petitioner shall provide all mobile numbers to the IO concerned which shall be kept in working condition at all times and shall not



switch off or change the mobile number without prior intimation to the IO concerned. The mobile location be kept on at all times.

vi. Petitioner shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses, the complainant/victim or any member of the complainant/victim's family or tamper with the evidence of the case.

vii. Petitioner will report to the IO at PS Shastri Park every Tuesday and Saturday at 4pm to register her presence.

38. Needless to state, but any observation touching the merits of the case is purely for the purposes of deciding the question of grant of bail and shall not be construed as an expression on merits of the matter.

39. Copy of the order be sent to the Jail Superintendent for information and necessary compliance.

40. The bail application is disposed of accordingly. Pending applications (if any) are disposed of as infructuous.

41. Order be uploaded on the website of this Court.

ANISH DAYAL, J

JUNE 02, 2023/sm